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

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This paper summarizes immunity doctrines that protect the state and local governments from lawsuits, with a particular focus on immunity for local governments. It also briefly describes some of the immunities that can shield public officials or personnel from legal claims made directly against them.

Sovereign immunity v. governmental immunity

Sovereign immunity is the state's immunity from most kinds of lawsuits unless the state consents to be sued. Governmental immunity is generally understood to be that portion of the state's sovereign immunity which extends to local governments. Both sovereign and governmental immunity derive from the English concept that the "king can do no wrong." *See Estate of Williams v. Pasquotank County Parks & Recreation Dep't*, ____ N.C. ____, 732 S.E.2d 137 (2012); *Abbot v. North Carolina Bd. of Nursing*, 177 N.C. App. 45 (2006).

Claims not barred by sovereign or governmental immunity

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. *State v. Smith*, 289 N.C. 303 (1976). If a contract turns out to be invalid, immunity may prohibit the injured party from recovering damages for the governmental body's alleged failure to honor the contract. Thus, governmental immunity barred a plaintiff from recovering for unpaid work on a fire truck because the plaintiff's agreement with the defendant municipality did not include the preaudit certification required for a valid contract under G.S. 159-28. *M Series Rebuild, LLC, v. Town of Mount Pleasant*, ____ N.C. App. ____, 730 S.E.2d 254 (2012).

Claims for violations of the North Carolina Constitution

A plaintiff may not proceed with a claim directly under the NC Constitution when an adequate alternative remedy is available. *Corum v. University of North Carolina*, 330 N.C. 761 (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 (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

preclude 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 (2009).

Claims arising under federal law

Given the complexity of the topic, a few points will have to suffice regarding lawsuits under 42 USC § 1983 for deprivation of federal rights. Although the 11th Amendment to the United States Constitution generally bars federal lawsuits against the states, local governments are not considered an arm of the state and are therefore not entitled to immunity from § 1983 actions. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (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. Other 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 were unlawful.

Sovereign immunity for tort claims against the state

The state has waived its immunity against tort claims to the extent provided by the NC 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 (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 NC Rules of Civil Procedure.

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 subject 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.

General tort principles apply to claims under the TCA. For example, contributory negligence is a complete bar to recovery. *See* G.S. 143-291(a).

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.

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.

Governmental Immunity for tort claims against local governments

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.

Much of the case law involving governmental immunity focuses on whether (1) 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.

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.

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 (1944).

Although employers are typically not liable for the intentional misconduct of their employees, it is possible for an employee to commit an intentional tort 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 pick up additional garbage. *Edwards v. Akion*, 52 N.C. App. 688 (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 (1921).

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 (1971).

Determining whether an activity is a governmental or proprietary function is difficult, and the court decisions are not always consistent. *See, e.g., Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14 (1975).

Proprietary functions include those activities which are not traditionally performed by a government agency. They tend to be activities which also are performed by the private sector, which benefit a definable category of individuals rather than the general public, and involve fees that do more than cover the cost of the activity. Operation of a golf course has been considered a proprietary function, for example. *Lowe v. City of Gastonia*, 211 N.C. 564 (1937). In *Sides* operation of a hospital was considered a proprietary function.

Governmental functions are those performed by governmental bodies for the benefit of the public at large. Examples of activities deemed to be governmental functions include the operation of traffic lights, *Hamilton v. Town of Hamlet*, 238 N.C. 741 (1953), and garbage collection, *James v. City of Charlotte*, 183 N.C. 630 (1922); *Broome v. City of Charlotte,* 208 N.C. 729 (1935). A 911 call center is a governmental function. *Wright v. Gaston County*, ____ N.C. App. ____, 698 S.E.2d 83 (2010). The courts have also described governmental functions as activities which are discretionary, political, legislative, or public in nature. *Britt v. City of Wilmington*, 236 N.C. 446 (1952). A city council's decision to construct a sewer system, for instance, is a governmental function. *See Town of Sandy Creek v. East Coast Contracting, Inc.*, 2013 WL 1573684 (N.C. App. Apr. 16, 2013).

Undertakings generally classified as governmental functions may have proprietary components and vice versa. Thus, although garbage collection within a city's territorial limits has been classified as a governmental function, the collection of garbage beyond those limits for a fee is a proprietary function. *Koontz v. City of Winston-Salem*, 280 N.C. 513 (1972). Likewise, while the decision to construct a sewer system is a governmental function, 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.*, 2013 WL 1573684 (N.C. App. Apr. 16, 2013).

The mere fact that an activity has been labeled as governmental or proprietary in a prior case is not necessarily dispositive. "[D]istinctions between governmental and proprietary functions are fluid and courts must be advertent to changes in practice." *Williams v. Pasquotank County Parks & Recreation Dep't*, ____ N.C. ____, 732 S.E.2d 137 (2012).

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

- The threshold inquiry is whether, and if so to what degree, the legislature has designated the specific activity that led to the plaintiff's injury as a governmental or proprietary function.

- If the legislature has not definitively described 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.
- If further analysis is required, the court should consider:
    - Whether the service is one traditionally provided by a governmental entity;
    - Whether a substantial fee was charged for the service; and
    - Whether the fee did more than cover the operating costs of the service provider.

The bottom line: Absent a legislative pronouncement declaring a particular activity to be a governmental function, the more the activity appears to be intended to raise revenue, the more likely it is that the activity is proprietary. Thus, though 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*, ____ N.C. App. ____, 732 S.E.2d 614 (2012).

Waiver of immunity from liability for a governmental function

Governmental immunity 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 (1983).

By statute, boards of county commissioners, city councils and local school boards waive governmental immunity 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 district'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.

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

For counties and cities, participation in a government risk pool is considered the purchase of insurance and constitutes waiver of governmental immunity 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 (1996).

The statute governing school boards is worded differently than the statutes for counties and cities, and participation in the NC 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 (1996); *Mullis v. Sechrest*, 126 N.C. App. 91 (1997), *rev'd on other grounds*, 347 N.C. 548 (1998).

Local governments often purchase supplemental insurance, and cases on waiver of immunity often depend on a close reading of the wording of the several policies and the limits of their coverage. *See, e.g., Fulford v. Jenkins*, 195 N.C. App. 403 (2009).

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 USC § 1983 for denial of the constitutional rights of due process and equal protection. *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 N.C. App. 1 (2000).

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 (1986); *Long v. City of Charlotte*, 306 N.C. 187 (1982).

Public duty doctrine

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 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 valid negligence claim.

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 (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 (2000); *Willis v. Town of Beaufort*, 143 N.C. App. 106, *disc. rev. denied*, 354 N.C. 371 (2001). In *Wood v. Guilford County*, 355 N.C. 161 (2002), however, the court held that the public duty doctrine barred the plaintiff from suing the county over the failure of private security guards to protect her from assault in the courthouse. Although the guards were not sworn officers in a law enforcement department, they were performing a functionally equivalent service.

A local agency may be serving as an agent of the state in performance of a particular function and be entitled to protection of the public duty doctrine for that specific activity. For example, a county health department is an agent of the state 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 (2008).

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. *See Multiple Claimants v. NC Dep't of Health and Human Servs., Div. of Facility Servs., Jails and Detention Servs.,* 361 N.C. 372 (2007).

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. *Smith v. Jackson County Bd. of Educ.*, 168 N.C. App. 452 (2005).

The public duty doctrine provides protection from lawsuits for governmental bodies and for officers sued in their official capacity. It is not a barrier to a lawsuit against someone in that person's individual capacity. *Murray v. County of Person*, 191 N.C. App. 575 (2008).

Claims under state law against an individual public official or employee

Public officials and employees may be sued in their official or individual capacities. 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 on the hook for any damages awarded. Governmental immunity bars an official capacity claim to the same extent it would bar the claim if the governmental body were named as the defendant. *Mullis v. Sechrest*, 347 N.C. 548 (1998).

An individual capacity claim seeks damages from the public official or employee personally. *See Williams v. Holsclaw*, 128 N.C. App. 205 (1998). While governmental immunity does not protect public officers or employees from individual capacity claims, they may be shielded by other immunities, several of which are described below.

> 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*, ____ N.C. ____, 736 S.E.2d 166 (2013).

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).

Absolute immunity for legislators and judges

Legislative immunity

Like members of the General Assembly, local elected officials enjoy absolute immunity from claims arising from their actions so long as they were (1) 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 (1996); *Scott v. Granville County*, 716 F.2d 1409 (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 (1998).

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 v. Holden*, 121 N.C. App. 779 (1996).

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 (2003).

Judicial immunity

Judges are not liable in civil actions for their judicial acts, even when done maliciously and corruptly. *Cunningham v. Dilliard*, 20 N.C. 485 (1839); *State ex rel. Jacobs v. Sherard*, 36 N.C. App. 60 (1978). The immunity applies even when the judge acts in excess of jurisdiction, but there is no immunity when the judge acts without jurisdiction at all. *Stump v. Sparkman*, 435 US 349 (1978). The immunity does not apply to purely administrative acts of the judge, such as hiring and firing employees. *Forrester v. White*, 484 U.S. 219 (1988).

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 Fidelity and Guaranty Company of Baltimore, Maryland,* 254 N.C. 247 (1961); a clerk of court acting as judge of probate, *Martin v. Badgett*, 149 N.C. App. 667, 2002 WL 485187 (2002) (unpublished); or members of a licensing board hearing a complaint, *Mazzucco v. North Carolina Board of Medical Examiners*, 31 N.C. App. 47 (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 thus 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 v. City of High Point*, 159 N.C. App. 229 (2003).

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 (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. *See, e.g., Baker v. Smith*, ____ N.C. App. ____, 737 S.E.2d 144 (2012).

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 performance of their duties. *Pigott v. City of Wilmington*, 50 N.C. App. 401 (1981); *Gunter v. Anders*, 114 N.C. App. 61 (1994). Public employees, on the other hand, perform ministerial functions involving little or no discretion. *Meyer v. Walls*, 347 N.C. 97 (1997).

Elected board members are public officials, *Town of Old Fort v. Harmon*, 219 N.C. 241 (1941); as are chiefs of police and police officers, *State v. Hord*, 264 N.C. 149 (1965); sheriffs and their deputies, *Messick v. Catawba County*, 110 N.C. App. 707 (1993); the county director of social services, *Hare v. Butler*, 99 N.C. App. 693 (1990); the chief building inspector, *Pigott v. City of Wilmington*, 50 N.C. App. 401 (1981); superintendents and principals, *Gunter v. Anders*, 114 N.C. App. 61 (1994); and jailors and assistant jailors, *Baker v. Smith*, ____ N.C. App. ____, 737 S.E.2d 144 (2012).

Teachers are public employees, not public officials, and are not entitled to public official immunity, *Mullis v. Sechrest*, 126 N.C. App 91 (1997), *rev'd on other grounds*, 347 N.C. 548 (1998); *Daniels v. City of Morganton*, 125 N.C. App. 47 (1997). Other examples of public employees include street sweepers, *Miller v. Jones*, 224 N.C. 783 (1944); social workers, *Hare v. Butler*, 99 N.C. App. 693 (1990); and emergency medical technicians, *Fraley v. Griffin*, ____ N.C. App. ____, 720 S.E.2d 694 (2011).

Statutory immunities

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

- 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 NC 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.
- 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.
- 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).

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 schools).

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 the same categories of 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.