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

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I. Introduction. This section 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.

II. 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 limited portion of the state’s sovereign immunity which extends to local governments. Both forms of immunity derive 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).

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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). If a contract turns out to be invalid, immunity may prohibit the injured party from recovering damages for the government’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, 260 (2012).

B. Claims for Violations of the North Carolina Constitution. A plaintiff may not proceed with a claim directly under the North Carolina Constitution 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 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, 340-41 (2009).

C. Claims Arising Under Federal Law. 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. 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 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 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.

B. **Applicable Principles.** General tort principles apply to claims under the TCA. For example, contributory negligence is 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 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.

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 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

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 held liable for one employee’s sexual harassment of another 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 a governmental or proprietary function is difficult, and the court decisions 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 include those activities which are not traditionally performed by government agencies. 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, 566 (1937). In Sides operation of a hospital was deemed a proprietary function. 287 N.C. at 25-26. The court classified the operation of a civic center as a proprietary function in 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. Examples of activities deemed to be governmental functions include the operation of traffic lights, Hamilton v. Town of Hamlet, 238 N.C. 741, 742 (1953), and garbage collection, James v. City of Charlotte, 183 N.C. 630, 632-33 (1922); Broome v. City of Charlotte, 208 N.C. 729, 731 (1935). A 911 call center is a governmental function. Wright v. Gaston County, 205 N.C. App. 600, 605-06 (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, 450 (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., ___ N.C. App. ___, ___, 741 S.E.2d 673, 675 (2013).

c. **Distinguishing Proprietary v. Governmental.** 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, 529-30 (1972). Selling water from a municipal or county-owned water system for private consumption is a proprietary function, but a local government acts in a governmental capacity when it supplies water for extinguishing fires. Bynum v. Wilson County, ___ N.C. App. ___, No. COA12–779, 2013 WL 2991049, *10 (N.C. App. June 18, 2013). 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, ___ N.C. App. at ___, 741 S.E.2d at 677.

d. **Special Rule for Injuries on Government Property.** When a plaintiff complains of an injury that occurred on local government property, the purpose of the plaintiff’s visit determines which activity must be classified as proprietary or governmental. In Bynum the county argued that governmental immunity barred claims arising from the decedent’s fall inside a building leased by the county because the operation of a county office building is a governmental function. The court held that governmental immunity did not preclude the claims inasmuch as (1) the decedent had visited the building to pay his water bill and (2) the operation of a county water system for private consumption is a proprietary function. Bynum, ___ N.C. App. at ___, 2013 WL 2991049, at *7-9.

e. **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 governmental and proprietary 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 legislature has designated the specific activity that led to the plaintiff’s injury as a governmental or proprietary function.

ii. **Nature of the Undertaking.** 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.

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. 366 N.C. at 200-03.

iv. **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, 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, ____ N.C. App. ____ 732 S.E.2d 614, 620 (2012).

VI. **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, 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 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.

B. **Cities with Population 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 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.

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 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

D. **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 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).

**VII. 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. 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.

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). 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. Wood, 355 N.C. at 167-69.

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
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. Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 461 (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.

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

A. Suits in Official or Individual Capacity. 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 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. 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). 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.

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).


   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, 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


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 v. Smith, ____ N.C. App. ____ (2012).


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 have 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 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 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. 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?

Critical Question: Was the specific activity that produced the injury a governmental or proprietary function?

Has the legislature said that the activity is governmental?

Yes

Governmental Function

Has the Government waived immunity by purchasing liability insurance?

Yes

No

Immunity bars claim

Government liable to extent of insurance coverage

No

Answer the following:

1) Is this something traditionally done by government?
2) Was a substantial fee charged?
3) Did the fee cover more than costs?

Any other combination of answers

It depends. But the more the activity appears to be intended to raise money, the more likely it is to be proprietary

Yes to (1) — No to (2) & (3)

No to (1) & Yes to (2) & (3)

Proprietary Function

Government liable, no limit on damages

No

Is the activity something that could only be done by government?

Yes

No

& (3)