

**UNDERSTANDING SOVEREIGN AND GOVERNMENTAL IMMUNITY:  
TIPS AND TECHNIQUES FOR THEORIES OF LIABILITY**

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by Carlos E. Mahoney  
Glenn, Mills, Fisher & Mahoney, P.A.  
400 West Main Street, Suite 709  
Durham, North Carolina 27701  
(919) 683-2135  
[www.gmfm-law.com](http://www.gmfm-law.com)  
[cmahoney@gmfm-law.com](mailto:cmahoney@gmfm-law.com)

**I. INTRODUCTION.**

Sovereign and governmental immunity protect state and local government from suit unless the governmental entity has consented to be sued or waived its immunity.

This manuscript will give you an overview of sovereign immunity and governmental immunity and how immunity can be waived. The manuscript will also discuss the State Tort Claims Act, the distinctions between governmental and proprietary functions, and alternative theories of liability.

**II. THE ORIGIN OF SOVEREIGN IMMUNITY.**

The doctrine of sovereign immunity was first adopted by the North Carolina Supreme Court in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1885). The doctrine is based on the English feudal concept that “the king could do no wrong” and thus could not be liable for damage to his subjects. *Steelman v. City of New Bern*, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971).

Sovereign immunity was originally not part of North Carolina’s common law and early cases expressly rejected it. However, since the *Moffitt* decision, the doctrine has been firmly established in North Carolina law and has been recognized by the General Assembly as the public policy of the State. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). The North Carolina Supreme Court has made it clear that any modification or repeal of “sovereign immunity should come from the General Assembly, not this Court.” *Steelman*, 279 N.C. at 595, 184 S.E.2d at 243.

### **III. THE DIFFERENCES BETWEEN SOVEREIGN IMMUNITY AND GOVERNMENTAL IMMUNITY.**

Sovereign immunity and governmental immunity are often used in an interchangeable manner. Although the doctrines are similar, they are not identical. Sovereign immunity applies to the State and its agencies while governmental immunity applies to local governmental entities, like cities, counties, and school boards. *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 335 fn. 3, 678 S.E.2d 351, 353 fn. 3 (2009).

Under the doctrine of sovereign immunity, “[t]he State has absolute immunity in tort actions without regard to whether it is performing a governmental or proprietary function....” *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983).

In contrast, governmental immunity shields local government from tort liability in the performance of governmental functions, but not proprietary ones. *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 545 S.E.2d 243,104-05, 248-49 (2001). The distinctions between governmental and proprietary functions will be discussed *infra* at pp. 18-27.

### **IV. HOW ARE SOVEREIGN AND GOVERNMENTAL IMMUNITY WAIVED?**

#### **A. Immunity Can Be Waived By Contract.**

Sovereign and governmental immunity can be waived when state or local government enters into a valid contract with a private party. By entering into a valid contract, the government “implicitly consents to be sued for damages on the contract in the event it breaches the contract.” *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976); *see Data General Corp. v. County of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001). The theory is that:

The State is liable only upon contracts authorized by law. When it enters into a contract it does so voluntarily and authorizes its liability. Furthermore, the State may, with a fair degree of accuracy, estimate the extent of its liability for a breach of contract. On the other hand, the State never authorizes a tort, and the extent of tort liability for wrongful death and personal injuries is never predictable. With no limits on liability jury verdicts could conceivably impose an unanticipated strain upon the State's budget.

*Smith*, 289 N.C. at 322, 222 S.E.2d at 425. The government’s waiver of immunity in a contract action extends to the contracting party as well as intended third-party beneficiaries. *Carl v. State*, 192 N.C. App. 544, 665 S.E.2d 787 (2008).

A waiver will not exist under equitable theories such as *quantum meruit* or estoppel. In addition, the contract must be *valid* in order for a suit to be permitted against the government. *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998); *L&S Leasing, Inc. v. City of Winston-*

*Salem*, 122 N.C. App. 619, 471 S.E.2d 118 (1996).

Once a waiver by contract is established, the State is subject to suit in the General Court of Justice. *Smith*, 289 N.C. at 330, 222 S.E.2d at 429. Local government is also subject to a breach of contract suit in the General Court of Justice.

## **B. Immunity Can Be Waived by Statute.**

A waiver of sovereign or governmental immunity as to tort liability “must be established by the General Assembly.” *Wood v. North Carolina State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001); *see Galligan v. Town of Chapel Hill*, 276 N.C. 172, 171 S.E.2d 427 (1970). A waiver may not be lightly inferred by the courts and statutes waiving sovereign or governmental immunity must be strictly construed. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983) (analyzing the State Tort Claims Act); *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 348 S.E.2d 524 (1986) (analyzing N.C. Gen. Stat. § 115C-42). The legislature, not the courts, must determine “those instances in which the sovereign waives its traditional immunity.” *Corum v. University of North Carolina*, 330 N.C. 761, 785, 413 S.E.2d 276, 291 (1992).

The North Carolina Supreme Court has said that:

The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body. The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body.

*Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972). In the absence of a clear statutory waiver, the State and local government will retain its immunity from suit.<sup>1</sup> *See e.g. Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992) (city did not waive its immunity through a municipal risk management corporation that was neither insurance nor a local governmental risk pool). Furthermore, equitable principles cannot waive sovereign or governmental immunity or prevent the government from asserting it as an affirmative defense. *Wood*, 147 N.C. App. at 347, 556 S.E.2d at 45; *Blackwelder*, 332 N.C. at 324, 420 S.E.2d at 436; *Jones v. City of Durham*, 183 N.C. App. 57, 64-65, 643 S.E.2d 631, 636 (2007).

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<sup>1</sup> Under certain circumstances, a clear statutory waiver of immunity may extend to derivative claims. *See North Carolina Ins. Guaranty Assoc. v. The Board of Trustees of Guilford Tech. Coll.*, No. 470PA07, 2010 WL 1492654 (April 15, 2010) (the waiver of sovereign immunity in the Workers’ Compensation Act applies to the provisions of the Insurance Guaranty Association Act involving workers’ compensation insurance); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982) (the waiver of sovereign immunity in the State Tort Claims Act applies to third-party claims for indemnity or contribution against the State).

## V. THE STATE TORT CLAIMS ACT.

The State Tort Claims Act, G.S. § 143-291, *et seq.*, partially waives the State's sovereign immunity. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). The Act allows a party to hold the State liable for claims of:

negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury, and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted....

N.C. Gen. Stat. § 143-291(a) (2009). The Act waives the State's immunity for all types of negligence including claims for willful, wanton, and reckless conduct. *Collins v. North Carolina Parole Comm'n*, 344 N.C. 179, 183, 473 S.E.2d 1, 2 (1996). However, the Act does not permit any recovery for intentional injuries. *Fennell v. North Carolina Dep't of Crime Control and Pub. Safety*, 145 N.C. App. 584, 551 S.E.2d 486 (2001). Furthermore, the State has not waived its immunity in any statute as to intentional torts. *Mazzucco v. North Carolina Bd. of Medical Examiners*, 31 N.C. App. 47, 228 S.E.2d 529 (1976) (defamation claim barred by immunity); *DeMurry v. North Carolina Dep't of Correction*, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 374 (2009) (conversion claim barred by immunity).

Permissible causes of action under the State Tort Claims Act include:

- Negligent discharge of a firearm, *Lowe v. Dep't of Motor Vehicles*, 244 N.C. 353, 93 S.E.2d 448 (1956) (officer tripped while approaching a motorist with his gun drawn); *Braswell v. N.C. A&T State Univ.*, 5 N.C. App. 1, 168 S.E.2d 24 (1969) (security officer fired his gun downward in order to disperse a crowd);
- Unintentional use of excessive force, *Jackson v. N.C. Dep't of Crime Control and Pub. Safety*, 97 N.C. App. 425, 388 S.E.2d 770 (1990) (during an arrest); *Burt v. North Carolina Dep't of Corrections*, No. COA04-60, 2004 WL 2940893 (2004) (unpublished) (while restraining an inmate);
- Gross negligence during a police chase, *Bray v. North Carolina Dep't of Crime Control and Public Safety*, 151 N.C. App. 281, 564 S.E.2d 910 (2002);
- Medical malpractice at a state hospital, *Alt v. John Umstead Hosp.*, 183 N.C. App. 177, 644 S.E.2d 369 (2007);
- Failure by a mental health institution to exercise reasonable care in its control over a patient who has been involuntarily committed for a mental illness so as to prevent harm to third parties, *Davis v. North Carolina Dep't of Human Res.*, 121 N.C. App. 105, 465 S.E.2d 2 (1995) (holding that this type of claim is not subject

to the medical malpractice laws);

- Failure to properly respond to allegations of sexual harassment by a state employee, *Gonzales v. North Carolina State Univ.*, 189, N.C. App. 740, 659 S.E.2d 9 (2008);
- Failure by a prison to use reasonable care to protect an inmate from reasonably foreseeable harm, *Taylor v. North Carolina Dep't of Correction*, 88 N.C. App. 446, 363 S.E.2d 868 (1988);<sup>2</sup>
- Premises liability at a state facility, *Cherney v. North Carolina Zoological Park*, 362 N.C. 223, 657 S.E.2d 352 (2008) (a ficus tree fell in a state zoo); *Hummel v. University of North Carolina*, 156 N.C. App. 108, 576 S.E.2d 124 (2003) (a cable on a weight machine came loose at the UNC student recreation center);
- Failure by state agency to properly inspect county jail for compliance with minimum standards for fire safety, *Multiple Claimants v. North Carolina Dep't of Health and Human Servs.*, 361 N.C. 372, 646 S.E.2d 356 (2007) (observing that DHHS had a statutory duty to inspect the jail for the protection of the inmates);
- Negligent misrepresentation in the calculation of a State employee's retirement benefits, *Stallings v. North Carolina Dep't of the State Treasurer*, No. COA08-165, 2008 WL 5221554 (2008) (unpublished).

The State Tort Claims Act applies to tort claims against “the State Board of Education, the Board of Transportation, and all other departments, institutions, and agencies of the State.” N.C. Gen. Stat. § 143-291(a). The State Tort Claims Act also applies to tort claims against community colleges, technical colleges, and the North Carolina High School Athletic Association, Inc. N.C. Gen. Stat. § 143-291©. North Carolina case law has further expanded the scope of the Act to include:

- Medical malpractice claims against physicians working as independent contractors at state prisons, *Medley v. North Carolina Dep't of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992) (observing that the State has a nondelegable duty to provide adequate medical services to inmates);

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<sup>2</sup> An inmate who is injured while working for the State cannot bring a lawsuit against the State under the State Tort Claims Act. The inmate's remedy is limited to the North Carolina Workers' Compensation Act. *Richardson v. North Carolina Dep't of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996). This principle also applies to a wrongful death suit filed by an inmate's estate. *Blackmon v. North Carolina Dep't of Correction*, 343 N.C. 259, 470 S.E.2d 8 (1996).

- Vicarious liability assessed against the Department of Health and Human Services as a result of the:
  - a. Negligent placement of children in foster homes by a county department of social services, *Vaughan v. North Carolina Dep't of Human Res.*, 296 N.C. 683, 252 S.E.2d 792 (1979);<sup>3</sup>
  - b. Failure by a county department of social services to investigate reports of child abuse and to take affirmative steps to protect the abused child, *Gammons v. North Carolina Dep't of Human Res.*, 344 N.C. 51, 472 S.E.2d 722 (1996), *Whitaker v. N.C. Dep't of Human Res.*, 121 N.C. App. 602, 468 S.E.2d 404 (1996);
- Vicarious liability assessed against the Department of Environment and Natural Resources as a result of the negligent inspection of soil conditions by a county health department prior to the issuance of an improvement permit, *Watts v. North Carolina Dep't of Environment and Natural Res.*, 182 N.C. App. 178, 641 S.E.2d 811 (2007).

The North Carolina Industrial Commission generally has jurisdiction over claims subject to the State Tort Claims Act. N.C. Gen. Stat. § 143-291(a). However, the General Court of Justice has jurisdiction over the State of North Carolina when the State is impleaded as a third-party under Rule 14 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. §1A-1, Rule 14©; *see Haas v. Caldwell Systems, Inc.*, 98 N.C. App. 679, 392 S.E.2d 110 (1990). The General Court of Justice also has jurisdiction over claims asserted against State employees or agents in their individual capacity.<sup>4</sup> *Meyers v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). As a result a claim may be filed in the Industrial Commission against the State as the principal and in the General Court of Justice against the State's agent. *Id.*, 347 N.C. at 108, 489 S.E.2d at 886 (*citing Wirth v. Bracey*, 258 N.C. 505, 507-08, 128 S.E.2d 810, 813 (1963)).

Although public official immunity may apply to a claim against a State employee or agent in his individual capacity, it will not apply to a claim against the State under the State Tort Claims Act. *Patrick v. North Carolina Dep't of Health and Human Servs.*, 192 N.C. App. 713, 666 S.E.2d 171 (2008). Public official immunity is discussed in greater detail *infra* at pp. 15-16.

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<sup>3</sup> The negligence of a foster parent cannot be imputed to the State. *Creel v. North Carolina Dep't of Health and Human Servs.* 152 N.C. App. 200, 566 S.E.2d 832 (2002).

<sup>4</sup> Under certain circumstances, the State may defend and indemnify State employees, medical contractors, and local health department sanitarians in an individual capacity suit. *See* N.C. Gen. Stat. § 143-300.2, *et seq.*

Finally, for claims arising on or after October 1, 2008, the scope of the public duty doctrine has been limited under the Act to:

- (1) The alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer, or
- (2) The alleged negligent failure of an officer, employee, involuntary servant, or agent of the State to perform a health or safety inspection required by statute.

The public duty doctrine will not apply:

- (1) When a special relationship exists between the claimant and the officer, employee, involuntary servant, or agent of the State,
- (2) The State has created a special duty to the claimant and the claimant's reliance on that duty is causally related to his/her injury, or
- (3) Where the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

N.C. Gen. Stat. § 143-299.1A.

## **VI. PRACTICE AND PROCEDURE UNDER THE STATE TORT CLAIMS ACT.**

### **A. Pleadings.**

A claim under the State Tort Claims Act is commenced by filing with the Industrial Commission a Form T-1 Affidavit, entitled "Claim for Damages Under Tort Claims Act," plus the appropriate filing fee. N.C. Gen. Stat. § 143-297; Rule T202 of the Tort Claim Rules. A Form T-1 Affidavit may either incorporate or be substituted by a traditional complaint. However, the complaint must be verified by the claimant. Rule T103(2). A civil summons is not required.

The Form T-1 Affidavit requires the plaintiff to name the State agency against which the claim is asserted and the State employee whose negligence gives rise to the claim. In practice, the plaintiff may not know the name of the agency or employee. In order to accommodate claimants, Rule T205(7) states that:

Motions to dismiss or for summary judgment for the defendant on the ground that plaintiff has failed to specifically name the individual officer, agent, employee or involuntary servant whose alleged negligence gave rise to the claim, or failure to properly name the department or agency of the State with whom such person was employed, *shall be ruled upon following discovery.*

If the Form T-1 Affidavit was deficient at the time of filing, it should be amended once the name of the agency and/or the name of the negligent employee (s) are learned during discovery.

After the claim has been docketed, the Industrial Commission will send a copy of the Form T-1 Affidavit to the Attorney General's Office. The State agency must then file an answer or other pleading within 30 days of receiving the Affidavit and must allege all affirmative defenses. N.C. Gen. Stat. § 143-297.

If the State fails to answer or otherwise plead, then an entry of default may be issued. Although the State may not counter the plaintiff's evidence after a default has been issued, the plaintiff must establish "his claim or right to relief by the evidence." N.C. Gen. Stat. § 1A-1, Rule 55(f). The plaintiff must present sufficient evidence to establish the State's liability and the Deputy Commission must make findings of fact and conclusions of law based upon the proffered evidence. *Parker v. Dep't of Trans.*, 122 N.C. App. 279, 468 S.E.2d 589 (1996).

## **B. Discovery.**

The North Carolina Rules of Civil Procedure apply to claims under the State Tort Claims Act, to the extent that the Rules are consistent with the Act. In the event of an inconsistency, the State Tort Claims Act and Tort Claim Rules control. Rule T201. Rule 9(j) certifications are required under the Act. If the State files a motion to dismiss a medical malpractice case involving a prisoner, all discovery is stayed until the Deputy Commissioner issues a decision. In order to issue a decision the Deputy Commissioner must:

- (a) Hold a recorded telephonic hearing for the purpose of determining
  - (1) whether a claim for medical malpractice has been stated;
  - (2) whether expert testimony is necessary for the plaintiff to prevail;
  - (3) if expert testimony is deemed necessary, whether the plaintiff will be able to produce testimony on the applicable standard of care.
- (b) Issue an order requiring the parties, within 30 days, to submit medical records applicable to the claim.

Rule T201(2).

Discovery disputes sometimes arise with the State. Most disputes are resolved through the issuance of protective orders allowing the State to produce documents subject to confidentiality requirements. In the event that a dispute cannot be resolved, the Industrial Commission is a "court" for purposes of ordering the disclosure of records under North Carolina General Statutes. *Jane Doe v. Swannanoa Valley Youth Development*, 163 N.C. App. 136, 592 S.E.2d 715 (2004). In addition, the Commission may impose Rule 37 sanctions upon the State

for failing to comply with discovery orders. *Williams v. North Carolina Dep't of Correction*, 120 N.C. App. 356, 462 S.E.2d 545 (1995).

Motions should be sent to the Commissioner or Deputy Commissioner assigned to the case. If an assignment has not been made, a motion should be directed to the Executive Secretary of the Industrial Commission or the person designated by the Chair, if known. Rule T205(1). All motions must state “with particularity the grounds on which it is based, the relief sought, and a brief statement of the opposing party’s position, if known.” Rule T205(2). Upon receiving a motion, the responding party has 10 days to file and serve a response in opposition to the motion. Rule T205(4). The Industrial Commission is authorized to rule upon motions without a hearing. Rule T205(5). Motions may be set for hearing before a Commissioner or Deputy Commission upon request by a party or the Commission’s discretion. Rule T205(8). Hearings may be held by telephone or in person, usually at a local courthouse.

### **C. Hearings before a Deputy Commissioner.**

The Industrial Commission is empowered to order a hearing *sua sponte*. Rule T205(1). In practice, this rarely occurs. A request for hearing may be filed in order to notify the Commission that a case is ready for hearing. The request will then move the case to the active hearing docket which will, hopefully, result in the matter being promptly scheduled.

Before the hearing, the Commission will schedule a pre-trial conference to address: (1) ways to simplify the hearing, (2) the need for additional discovery, (3) settlement prospects, and (4) any outstanding motions. If the case cannot be settled, a hearing will occur.

The Industrial Commission will give the parties at least 30 days’ advance notice of the hearing. The hearing will occur “in a location deemed convenient to witnesses and the Industrial Commission and conducive to an early and just resolution of disputed issues.” Rule T206(2). If the plaintiff is an inmate, the hearing must occur in a prison facility “agreed upon by the Industrial Commission and the Attorney General’s office,” or by telephone or video-conference according to Industrial Commission procedures. Rule T206(3).

Prior to the hearing, the attorneys should complete a pretrial agreement. The agreement is similar to a pre-trial order under Rule 7 of the General Rules of Practice. It should contain a list of (1) stipulations, (2) issues, (3) witnesses, (4) and exhibits.

The hearing is very similar to a civil bench trial. An opening statement will be allowed and then the parties will be permitted to call witnesses and offer evidence. At the close of the evidence, the Deputy Commissioner will ask the parties whether they wish to submit additional evidence. If no further evidence is required, the case will be closed and the parties will be ordered to file a brief along with a proposed decision. The Deputy Commissioner will then issue a final decision and order which will be mailed to the parties.

#### **D. Settlement or Judgment.**

A judgment against the State may not include pre-judgment interest or post-judgment interest. *McGee v. North Carolina Dep't of Revenue*, 135 N.C. App. 319, 520 S.E.2d 84 (1999). Court costs may be “taxed against the losing party in the same amount and the same manner as costs are taxed in the General Court of Justice.” N.C. Gen. Stat. § 143-291.2. Attorney’s fees may be awarded to the plaintiff under:

1. N.C. Gen. Stat. § 6-21.1 if the judgment for recovery is \$10,000 or less, *Karp v. University of North Carolina*, 88 N.C. App. 282, 362 S.E.2d 825 (1987); or,
2. N.C. Gen. Stat. § 6-19.1, if the State asserted, without substantial justification or a showing of special circumstances, an unsuccessful counterclaim, *Sprinkle v. N.C. Wildlife Res. Comm’n*, 165 N.C. App. 721, 600 S.E.2d 473 (2004).

A settlement or judgment against the State under the STCA may not exceed \$1,000,000 “to all claimants on account of injury and damage to any one person arising out of any one occurrence....” N.C. Gen. Stat. § 143-299.2. The purchase of insurance in excess of the STCA limits will not further waive the State’s sovereign immunity. *Wood v. North Carolina State Univ.*, 147 N.C. App. 336, 556 S.E.2d 38 (2001).

In limited circumstances, the payment of a settlement or judgment may be made by a commercial liability insurance company (i.e. Traveler’s Insurance Company insures State motor vehicles). In most circumstances, the payment will come from the State agency liable for the claim. See N.C. Gen. Stat. § 143-299.4. If the amount of the settlement or judgment is substantial, payment may be delayed. Any delays in payment raise a political issue, not a legal one, because a private party may not execute upon State property. In addition, the federal courts cannot force the State to satisfy a settlement or judgment for money. *In re Secretary of the Dep’t of Crime Control and Pub. Safety*, 7 F.3d 1140 (4<sup>th</sup> Cir. 1993).

Claims that do not involve minors may be settled by the Attorney General’s Office for \$25,000 or less without the approval of the Industrial Commission. Claims involving minors and settlements that exceed \$25,000 require Commission review and approval.

## VI. OTHER STATUTES WHICH WAIVE THE STATE'S IMMUNITY.

Other statutes which waive the State's sovereign immunity include:

1. G.S. § 97-7 - Workers' compensation claims, to be litigated before the Industrial Commission;
2. G.S. § 126-84, *et seq* - Whistleblower claims by State employees, to be litigated in the General Court of Justice;
3. G.S. § 126-34.1 - Various employment claims by State employees, such as discrimination or workplace harassment on account of an employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition, to be initially litigated as a contested case in the Office of Administrative Hearings; and,
4. G.S. § 143-300.35 - Claims by State employees under the Fair Labor Standards Act, Age Discrimination in Employment Act, Family and Medical Leave Act, and Americans with Disabilities Act, to be litigated in the General Court of Justice or Federal courts.<sup>5</sup>

Finally, in contrast to local government, there is no statute authorizing the State to waive its immunity through the purchase of liability insurance. *Wood v. North Carolina State Univ.*, 147 N.C. App. 336, 556 S.E.2d 38 (2001). As a result, a State agency's purchase of liability insurance will not waive the State's sovereign immunity and will not subject it to suit in the General Court of Justice. *Green v. Kearney*, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 755 (2010).

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<sup>5</sup> This statute waives the State's Eleventh Amendment immunity rather than traditional common law immunity.

## VII. STATUTES WHICH WAIVE LOCAL GOVERNMENTAL IMMUNITY.

A local government entity has no power or authority to waive its immunity, except as allowed by statute. *Stephenson v. City of Raleigh*, 232 N.C. 42, 59 S.E.2d 195 (1950). Presently, the following entities are authorized by statute to waive their immunity:

- a. Cities and towns - G.S. §160A-485: By the purchase of liability insurance, participation in a local governmental risk pool under G.S. §58-23-1, *et seq.*, or the use of a funded reserve coupled with the adoption of a resolution designating the funded reserve to be the same as the purchase of insurance under this section.<sup>6</sup>
- b. Counties - G.S. §153A-435: By the purchase of liability insurance, participation in a local governmental risk pool under G.S. §58-23-1, *et seq.*, or the use of a funded reserve coupled with the adoption of a resolution designating the funded reserve to be the same as the purchase of insurance under this section.<sup>7</sup>
- c. Regional Public Transportation Authority - G.S. § 160A-627: \$20,000,000 waiver required through liability insurance or participation in a local governmental risk pool, subject to the limitations in G.S. § 160A-626.
- d. Local boards of education (excluding school bus claims) - G.S. §115C-42: By the purchase of liability insurance only. *Mullis v. Sechrest*, 126 N.C. App. 91, 484 S.E.2d 423 (1997), *reversed on other grounds*, 347 N.C. 548, 495 S.E.2d 712 (1998) (local boards of education are not eligible by statute to participate in local governmental risk pools); *Lucas v. Swain County Bd. of Educ.*, 154 N.C. App. 357, 573 S.E.2d 538 (2002) (a school board's participation in the North Carolina School Board Trust does not waive its immunity).
- e. School bus claims against local boards of education - G.S. § 143-300.1: School bus claims must be litigated in the Industrial Commission under the State Tort Claims Act. *Stacy v. Merrill*, 191 N.C. App. 131, 664 S.E.2d 565 (2008).

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<sup>6</sup> Effective October 1, 2009, a city with a population of 500,000 or more may waive its immunity from tort liability by passing "a resolution expressing the intent of the city to waive its sovereign immunity" pursuant to the State Tort Claims Act. Upon passing a resolution, the city will be subject to certain modifications and limitations not present in the Act. N.C. Gen. Stat. § 160A-485.5.

<sup>7</sup> The county may waive the immunity of the sheriff and his deputies by purchasing insurance for the sheriff's office under G.S. § 153A-435. *Myers v. Bryant*, 188 N.C. App. 585, 655 S.E.2d 882 (2008).

- f. Mental health authorities - G.S. §122C-152: By the purchase of liability insurance.
- g. Agents and employees of the board of trustees for a community college - G.S. §115D-24: By the purchase of liability insurance. However, negligence claims against community colleges are subject to the State Tort Claims Act.
- h. Sheriff, clerk of superior court, register of deeds, surveyor, coroner, county treasurer - G.S. §58-76-5: By a public official bond, provided that the surety is joined as a named defendant in the action.

A lawsuit subject to governmental immunity must allege that the municipality waived its immunity. Otherwise, the plaintiff has failed to state a claim for relief. *Gunter v. Anders*, 115 N.C. App. 331, 444 S.E.2d 685 (1994); *Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000). In addition, an adverse ruling on the defense of governmental immunity is an adjudication on the merits subject to *res judicata*. *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 188 N.C. App. 441, 656 S.E.2d 307 (2008).

## **VIII. ANALYZING THE EXTENT TO WHICH AN INSURANCE POLICY WAIVES GOVERNMENTAL IMMUNITY.**

### **A. Municipal Insurance Policies Must Be Interpreted Under Standard Rules of Construction Applicable to Traditional Insurance Policies.**

A local governmental entity does not waive its immunity by merely purchasing liability insurance. Rather, the purchase of insurance waives governmental immunity to the extent that the government “is indemnified by the insurance contract from liability for the acts alleged.” *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992). The analysis of a municipal insurance policy and a local governmental risk pool policy “are subject to the same standard rules of construction as traditional insurance policies issued by insurance companies to their customers.” *Washington Housing Auth. v. North Carolina Housing Authorities Risk Retention Pool*, 130 N.C. App. 279, 282, 502 S.E.2d 626, 629 (1998); see *Dawes v. Nash County*, 357 N.C. 442, 584 S.E.2d 760 (2003). These rules of construction include:

- An insurance policy is a contract between the parties which must be construed and enforced according to its terms. *City of Greenville v. Haywood*, 130 N.C. App. 271, 274, 502 S.E.2d 430, 433 (1998).
- The court must use the definitions given in the policy to determine the meaning of words contained in the policy. *Durham City Bd. of Educ. v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453 (1993).
- Any ambiguity in the insurance policy must be strictly construed in favor of the insured. *City of Greenville*, 130 N.C. App. at 275, 502 S.E.2d at 433 (citing

*Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981)).

- Whenever an ambiguity exists, the policy must be interpreted in a manner which gives, but never takes away, coverage. *Washington Housing Auth.*, 130 N.C. App. at 281, 502 S.E.2d at 628 (quoting *Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 186, 190, 314 S.E.2d 552, 555 (1986)).
- “Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy.” *Maddox*, 303 N.C. at 650, 280 S.E.2d at 908.
- The words in an insurance policy must be construed with reference to the purpose of the entire policy. *Durham City Bd. of Educ.*, 109 N.C. App. at 160, 426 S.E.2d at 455.

If liability insurance coverage exists, then the municipality has waived its immunity. If coverage does not exist, then the municipality retains its immunity.

Governmental immunity issues involving insurance coverage are often litigated at the summary judgment stage. However, they also may be litigated following a verdict outside the presence of the jury. When a verdict is returned awarding damages to a plaintiff in excess of the government’s insurance limits, the presiding judge is required to reduce the award to the maximum policy limits before entering judgment. N.C. Gen. Stat. § 160A-485(c); N.C. Gen. Stat. § 153A-435(b). The same process applies when determining whether the judgment should include pre-judgment or post-judgment interest. *Bynum v. Nash-Rocky Mount Bd. of Educ.*, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 880 (2009).

## **B. Self-Insured Retention Policies.**

Municipalities sometimes purchase liability policies which are subject to a self-insured retention (SIR) which will typically preserve the defense of governmental immunity, i.e. \$1,000,000 liability coverage subject to a \$100,000 SIR. However, unlike a fixed deductible, all defense costs (including attorney’s fees) are applied toward the SIR so that the liability insurer’s obligation to indemnify is accelerated as defense costs are incurred. For example, a municipality will have no immunity if it expends \$100,000 in defense costs on a policy with a \$100,000 SIR. See, *Kephart by Tutwiler v. Pendergraph*, 131 N.C. App. 559, 507 S.E.2d 915 (1998), *Cunningham v. Riley*, 169 N.C. App. 600, 611 S.E.2d 423 (2005). As a result, partial summary judgment on the issue of governmental immunity is rarely appropriate when a liability policy is subject to an SIR. *Kephart* at 568-70, 507 S.E.2d at 921-22, *Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 464 S.E.2d 299 (1995).

### **C. Non-Waiver of Governmental Immunity Endorsements and Exclusions.**

More municipalities are obtaining insurance policies and risk pool policies which contain a non-waiver of governmental immunity endorsement or exclusion. The endorsement or exclusionary language will state either that the policy “does not waive the insured’s sovereign or governmental immunity” or that the coverage does not apply to any claim “as to which the insured is entitled to sovereign or governmental immunity.” These provisions will be enforced under the standard rules of construction and will lead to a finding that the policy does not waive governmental immunity. *See Patrick v. Wake County Dep’t of Human Serv.*, 188 N.C. App. 592, 655 S.E.2d 920 (2008) (holding that the county did not waive its immunity when the insurance policy was limited to occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable).

### **D. Individual Capacity Claims and Public Official Immunity.**

Insurance policies with a non-waiver of governmental immunity endorsement or exclusion often provide coverage for individual capacity claims. Governmental immunity is not a defense to an individual capacity suit.

In order to pursue an individual capacity claim, the complaint must contain allegations regarding the capacity in which the individual has been sued and indicate in the prayer for relief whether the plaintiff seeks to recover damages from the employee individually or as an agent of the governmental entity. The caption of the complaint should also indicate whether the government employee or agent has been sued in his official capacity or individual capacity. *Mullis v. Sechrest*, 347 N.C. 548, 495 S.E.2d 721 (1998). If the complaint does not clearly show that an individual capacity suit has been filed, the courts will construe the lawsuit to be against the individual defendant in his official capacity, which is merely another way of pleading an action against the government. *Reid*, 137 N.C. App. at 172, 527 S.E.2d at 90.

An individual capacity suit may involve the doctrine of public official immunity, also known as “public officers’ immunity” or “official immunity.” Public official immunity is an affirmative defense available to a public officer or official. It is different from sovereign or governmental immunity, which only applies to official capacity claims against the government. *Epps v. Duke Univ.*, 122 N.C. App. 198, 202-06, 468 S.E.2d 846, 850-52. The North Carolina Supreme Court has described public official immunity in the following manner:

It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.

*Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952). “As long as a public officer lawfully

exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.” *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). In the context of public official immunity, malice is given the following definition:

A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. *Givens v. Sellars*, 273 N.C. 44, 159 S.E.2d 530 (1968). “An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.” *Id.* at 50, 159 S.E.2d at 535 (quoting *Everett v. Receivers*, 121 N.C. 519, 27 S.E. 991 (1897)).

*Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890-91 (1984). “The exceptions to official immunity have expanded over the years, with bad faith and willful and deliberate conduct now operating as additional common law bases for liability.” *Epps*, 122 N.C. App. at 204, 468 S.E.2d at 851 (citing *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1993); *Dickens v. Thorne*, 110 N.C. App. 39, 44-45, 429 S.E.2d 176, 179-80 (1993); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985)).

Police officers, fire chiefs, school principals, public health directors, and animal control officers are examples of public officials. *Gunter v. Anders*, 115 N.C. App. 331, 441 S.E.2d 685 (1994); *Willis v. Town of Beaufort*, 143 N.C. App. 106, 544 S.E.2d 600 (2001); *Satorre v. New Hanover County Bd. of Comm’rs*, 165 N.C. App. 173, 598 S.E.2d 142 (2004); *Kitchin v. Halifax County*, 192 N.C. App. 559, 665 S.E.2d 760 (2008).

In contrast, a public employee can be sued in his/her individual capacity for all torts, including mere negligence. Public employees include school teachers and crossing guards. *Daniel v. City of Morganton*, 125 N.C. App. 47, 479 S.E.2d 263 (1997), *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999); *Farrell v. Transylvania County Bd. of Educ.*, \_\_\_ N.C. App. \_\_\_, 682 S.E.2d 224 (2009).

The basic distinctions between a public official and a public employee are that: (1) a public official holds a public office created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion while public employees perform ministerial duties. *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127.

#### **E. Availability of Uninsured or Underinsured Motorist Coverage.**

A claim for uninsured or underinsured motorist coverage can be pursued if a motor vehicle claim against the government is either fully or partially barred by governmental immunity. *Williams v. Holsclaw*, 128 N.C. App. 205, 495 S.E.2d 166, *affirmed*, 349 N.C. 225, 504 S.E.2d 784 (1998), *North Carolina Farm Bureau Mut. Ins. Co. v. Knudsen*, 109 N.C. App. 114, 426 S.E.2d 88 (1993).

**IX. SOVEREIGN AND GOVERNMENTAL IMMUNITY DO NOT APPLY TO CLAIMS UNDER THE STATE CONSTITUTION.**

In the absence of an adequate state remedy, a party has a direct cause of action against the government for the violation of his constitutional rights under the North Carolina Constitution. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). A tort claim that is barred by sovereign or governmental immunity is not an adequate state remedy. As a result, a claim barred by immunity may be subject to redress in a direct cause of action against state or local government under the Declaration of Rights to the North Carolina Constitution.<sup>8</sup> *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009).

The defenses of sovereign and governmental immunity are not available to a cause of action under the State Constitution. *Corum*, 330 N.C. at 785-86, 413 S.E.2d at 291-92.

A local governmental entity violates a party's substantive due process and equal protection rights under the United States and North Carolina Constitutions when it denies a claim and asserts governmental immunity in a discriminatory or arbitrary and capricious way. Under those circumstances, an action may be filed against the government under the State Constitution and/or pursuant to 42 U.S.C. § 1983. *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). In order to establish a constitutional violation, a party must show that: (1) he was treated differently than similarly situated claimants, or (2) that the determination to deny the claim and assert governmental immunity had no rational relation to a valid state objective. *Jones v. City of Durham*, 183 N.C. App. 57, 643 S.E.2d 631 (2007). A procedural due process claim will not exist because a party does not have a constitutionally protected property right to pursue a lawsuit against or to recover from a municipality that has not waived its immunity. *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259 (2005).

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<sup>8</sup> A *Corum* claim is limited to claims asserting a violation of the Declaration of Rights and does not extend to other provisions of the North Carolina Constitution. *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 660 S.E.2d 662 (2008).

## X. GOVERNMENTAL VERSUS PROPRIETARY FUNCTIONS.

A municipality is only entitled to governmental immunity when it is engaged in a governmental function. Thus, the first inquiry in a case against the government should be whether the party was injured or damaged by the performance of a governmental function or a proprietary one.

Local government has immunity for acts committed in its governmental capacity, but when it engages in proprietary activity, it becomes subject to liability in tort just like a private corporation. *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951); *Evans v. Housing Authority of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004). This issue must be analyzed in light of the activity that the municipal employee or agent was performing at the time of the incident giving rise to the claim. *Beach v. Town of Tarboro*, 225 N.C. 26, 33 S.E.2d 64 (1945); *Childs v. Johnson*, 155 N.C. App. 381, 573 S.E.2d 662 (2002).

Any governmental action “which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.” *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942). “Charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary.” *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235 (1990). Nevertheless, actual profit is not the test, and a municipality will not lose its immunity solely because it engaged in an activity which made a profit. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 522, 186 S.E.2d 897, 903-04 (1972) (quoting, *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969)).

Our Supreme Court has distinguished the two classes of activity in the following manner:

When a municipality is acting ‘in behalf of the State’ in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it [the governmental activity] must be for a public purpose or a public use.

So then, generally speaking the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and ‘private’ when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality.

*Britt v. City of Wilmington*, 236 N.C. 446, 450-51, 763 S.E.2d 289, 293 (1952).

**A. FACTORS TO CONSIDER IN EVALUATING WHETHER A TORT WAS COMMITTED IN THE PERFORMANCE OF A GOVERNMENTAL FUNCTION OR A PROPRIETARY ONE**

Some activities are clearly governmental (i.e. law enforcement work) or proprietary in nature (i.e. operation of a municipal airport for profit). There are also many activities which cannot be easily classified. While “[t]he case law defining governmental and proprietary powers as relating to municipal corporations is consistent and clearly stated in this and other jurisdictions ..... [the] application of these flexible propositions of law to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.” *Koontz*, 280 N.C. at 528, 186 S.E.2d at 907. Typically, the resolution of this issue will depend on a case by case analysis of the facts.

In examining the facts of a particular case, our appellate courts have considered whether the governmental activity is:

- Traditionally provided by municipal government, *Britt*, 236 N.C. at 451, 73 S.E.2d at 293; *McIver v. Smith*, 134 N.C. App. 583, 586, 518 S.E.2d 522, 525 (1999); *Pierson v. Cumberland County Civic Center Comm’n*, 141 N.C. App. 628, 632, 540 S.E.2d 810, 813 (2000);
- Performed also by private business, *Britt*, 236 N.C. at 451, 73 S.E.2d at 293; *Hickman by Womble v. Fuqua*, 108 N.C. App. 80, 83, 422 S.E.2d 449, 451 (1992);
- A public enterprise under G.S. 160A-311, *et seq.* in which the municipality sets rates for services and competes with private business, *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567 (1991);
- Dependent upon the continued payment of service charges, *Id.*;
- Profitable to the municipality, *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695, 698 (1885);
- Accompanied by a fee or charge which generates either incidental income, *Rich v. City of Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972), or substantial revenue to offset operational costs, *Glenn v. City of Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957);
- Directed in part toward individuals who reside outside the territorial limits of the municipality; *Smith v. City of Winston-Salem*, 247 N.C. 349, 100 S.E.2d 835 (1957);

- Directed toward a compact segment of the community, *Carter v. City of Greensboro*, 249 N.C. 328, 106 S.E.2d 564 (1959);
- Specifically authorized by statute,<sup>9</sup> *Evans v. Housing Auth. of the City of Raleigh*, 359 N.C. 50, 602 S.E.2d 668 (2004), and thus inherently political, legislative, and to be performed for the public good, *Crosby v. City of Gastonia*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 143695 (W.D.N.C. 2010); or,
- Subject to an exception to the traditional rule, *infra* at pp. 26-27.

## **B. EXAMPLES OF GOVERNMENTAL FUNCTIONS**

The North Carolina courts have determined the following activities to be governmental in nature and subject to sovereign immunity:

### **1. Police powers**

- Performing law enforcement duties, *McIlhenney v. City of Wilmington*, 127 N.C. 146, 37 S.E. 187 (1900); *Croom v. Town of Burgaw*, 259 N.C. 60, 129 S.E.2d 586 (1963); *Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245 (1995).
- Using a police car for the purpose of repairing a police radio, *Lewis v. Hunter*, 212 N.C. 504, 193 S.E. 814 (1937).
- Installing, maintaining, and timing the traffic control signals at an intersection, *Hamilton v. Town of Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953); *Rappe v. Carr*, 4 N.C. App. 497, 167 S.E.2d 48 (1969); *Sisk v. City of Greensboro*, 183 N.C. App. 657, 645 S.E.2d 176 (2007).
- Collecting taxes, including coins from on-street parking meters, *Wall v. City of Raleigh*, 121 N.C. App. 351, 465 S.E.2d 51 (1996).
- Collecting parking fines and late fees imposed for parking violations, *City of Greensboro v. Morse*, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 505 (2009).
- Erecting and maintaining a jail, *State ex rel. Hayes v. Billings*, 240 N.C. 78, 81 S.E.2d 150 (1954).

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<sup>9</sup> However, the determination as to whether an activity is a governmental or proprietary function must be made by the judiciary, not the legislature, and a legislative declaration that an activity is governmental will not be binding upon the courts. *Rhodes v. City of Asheville*, 230 N.C. 759, 53 S.E.2d 313 (1949).

- Operating a courthouse, *Satorre v. New Hanover County Bd. of Comm'rs*, 165 N.C. App. 173, 598 S.E.2d 142 (2004).

## **2. Fire protection**

- Organizing, maintaining, and operating a fire department, *Peterson v. City of Wilmington*, 130 N.C. 76, 40 S.E. 853 (1902); *Harrington v. Town of Greenville*, 159 N.C. 632, 75 S.E. 849 (1912); *Willis v. Town of Beaufort*, 143 N.C. App. 106, 544 S.E.2d 600 (2001).
- Responding to a fire call, *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993).
- Extinguishing a fire, *Klassette v. Liggett Drug Co.*, 227 N.C. 353, 42 S.E.2d 411 (1947).
- Maintaining a fire hydrant for use by the fire department, *Howland v. City of Asheville*, 174 N.C. 749, 94 S.E. 524 (1917).
- Erecting and maintaining telephone and telegraph poles and lines for a police and fire alarm system, *Cathey v. City of Charlotte*, 197 N.C. 309, 148 S.E. 426 (1929).

## **3. Public health and welfare**

- Using a fire hydrant to clean the streets, *Parks-Belk Co. v. City of Concord*, 194 N.C. 134, 138 S.E. 599 (1927).
- Maintaining a free public sewer system which causes personal injury or death,<sup>10</sup> *Metz v. City of Asheville*, 150 N.C. 748, 64 S.E. 881 (1909), or constructing and operating a sewage system which causes injury while charging a fee to cover the costs of operating, managing, and repairing the system, *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969).
- Constructing and maintaining a public storm drain which causes injury or death, *Stone v. City of Fayetteville*, 3 N.C. App. 261, 164 S.E.2d 542 (1968).
- Unclogging private storm water drains, *Biggers v. John Hancock Mut. Life Ins.*

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<sup>10</sup> However, if the sewer system causes damage to property, a lawsuit is permissible against the municipality under the theories that the government's actions created a nuisance and constituted a taking of property, *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913), *McCombs*, but not under a theory of negligence, *Roach v. City of Lenoir*, 44 N.C. App. 608, 261 S.E.2d 299 (1980).

Co., 127 N.C. App. 199, 487 S.E.2d 829 (1997).

- Maintaining a street lighting system, *Beach v. Town of Tarboro*, 225 N.C. 26, 33 S.E.2d 64 (1945).
- Transmitting electricity for street lighting purposes only, *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971).
- Contributing 10% of the funds to a railroad crossing improvement that was initiated by the State and to be completed by State and railroad employees only, *Wilkerson v. Norfolk Southern Railway Co.*, 151 N.C. App. 332, 566 S.E.2d 104 (2002).
- Failing to enforce a health ordinance, *Hull v. Town of Roxboro*, 142 N.C. 453, 55 S.E.351 (1906), or temporarily suspending an ordinance prohibiting the use of firecrackers within the city limits, *Hill v. Alderman of City of Charlotte*, 72 N.C. 55 (1875).
- Approving or denying a septic tank permit, *Tabor v. County of Orange*, 156 N.C. App. 88, 575 S.E.2d 540 (2003).
- Operating a chemical fogging machine on a street or highway for the purpose of destroying insects in the interest of public health, *Clark v. Scheld*, 253 N.C. 732, 117 S.E.2d 838 (1961), *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967).
- Operating a municipal ambulance service while charging a fee to defray the costs, *McIver v. Smith*, 134 N.C. App. 583, 518 S.E.2d 522 (1999).
- Performing social service duties, *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231 (1990).
- Constructing and operating a housing authority for low or moderate income tenants under G.S. §157-1, *et seq.*, *Evans v. Housing Authority of the City of Raleigh*, 359 N.C. 50, 602 S.E.2d 668 (2004).

#### **4. Sanitation**

- Using a city truck to gather and remove garbage for a charge which covered the municipality's actual expenses, *James v. City of Charlotte*, 183 N.C. 630, 112 S.E. 423 (1922).
- Collecting, removing, and disposing of garbage within city limits, including the operation of a landfill for the purpose of disposing garbage collected within the city limits, *Koontz v. City of Winston-Salem*, 280 N.C. 513, 520-21, 186 S.E.2d

897, 903 (1972), *Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000).

- Driving a city truck for the purpose of collecting and removing prunings from shrubbery and trees, *Stephenson v. City of Raleigh*, 232 N.C. 42, 59 S.E.2d 195 (1950).
- Maintaining and using an incinerator to burn trash and garbage within city limits, *Scales v. City of Winston-Salem*, 189 N.C. 469, 127 S.E. 543 (1925).

## **5. Education**

- Operating a public library, *Seibold v. Kinston-Lenoir County Public Library*, 264 N.C. 360, 141 S.E.2d 519 (1965).
- Transporting by bus students to and from school, *Benton v. Board of Educ. of Cumberland County*, 201 N.C. 653, 161 S.E. 96 (1931); *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 529 S.E.2d 458 (2000).
- Operating a voluntary after-school enrichment program, *Schmidt v. Breeden*, 134 N.C. App. 248, 517 S.E.2d 171 (1999).
- Levying a school construction fee on developers and home builders. *Durham Land Owners' Assoc. v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200 (2006).

## **6. Parks and recreation**

- Maintaining a park and playground, even if incidental income (less than 1% of operating costs) was generated from the operation of a kiddie-train at the park, *Rich v. City of Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972).
- Sponsoring a free tennis clinic as part of a municipality's parks and recreations program, *Hickman by Womble v. Fuqua*, 108 N.C. App. 80, 422 S.E.2d 449 (1992).
- Operating a basketball game involving middle school teams at which a \$1-2 admission price is charged, *Willett v. Chatham County Bd. of Educ.*, 176 N.C. App. 268, 625 S.E.2d 900 (2006).

## **7. Employee Benefits**

- Funding a municipal pension fund, *Crosby v. City of Gastonia*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 143695 (W.D.N.C. 2010).

## C. EXAMPLES OF PROPRIETARY FUNCTIONS

The North Carolina courts have determined the following activities to be proprietary or private in nature and therefore not subject to sovereign immunity:

### 1. Revenue-generating activity

- Grading streets, cleansing sewers, and maintaining a wharf from which the municipality derived a profit, *Moffitt v. City of Asheville*, 103 N.C. 237, 9 S.E. 695, 697 (1889).
- Operating a housing project for a limited class of tenants which generated substantial financial returns for the municipality under a contract with the federal government, *Carter v. City of Greensboro*, 249 N.C. 328, 106 S.E.2d 564 (1959).
- Operating a lawnmower in a public park which contained an amusement area that generated net revenue for the municipality, *Glenn v. City of Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957).
- Accumulating methane gas at a city landfill which generated revenue and offset costs by 9.39% as a result of allowing garbage from outside the city limits to be collected and deposited at the landfill by private collectors licensed by the county, *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972).

### 2. Public enterprise

- Operating and maintaining a municipal sewer system which charges fees to customers as a “public enterprise” under G.S. §160A-311, *et seq.*, *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567 (1991); *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 562 S.E.2d 75 (2002); *Harrison v. City of Sanford*, 177 N.C. App. 116, 627 S.E.2d 672 (2006).
- Operating a commercial electric light plant, *Terrell v. Washington*, 158 N.C. 281, 73 S.E. 888 (1912).
- Supplying electricity for purchase by a private company, *Rice v. City of Lumberton*, 235 N.C. 227, 69 S.E.2d 543 (1952), or by individual consumers, *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967).
- Operating a commercial waterworks plant, *Woodie v. Town of North Wilkesboro*, 159 N.C. 353, 74 S.E. 924 (1912), and a municipal water works system for the sale of water for private consumption, *Foust v. City of Durham*, 239 N.C. 306, 79 S.E.2d 519 (1954), *Faw v. Town of Wilkesboro*, 253 N.C. 406, 117 S.E.2d 14 (1960); *Mosseller v. City of Asheville*, 267 N.C. 104, 147 S.E.2d 558 (1966).

- Selling water, *Jones v. Town of Angier*, 181 N.C. App. 121, 638 S.E.2d 607 (2007).
- Operating a dam in order to divert water for sale, *Bowling v. City of Oxford*, 267 N.C. 552, 148 S.E.2d 624 (1966).

### **3. Non-traditional activity**

- Owning and maintaining a municipal golf course, *Lowe v. City of Gastonia*, 211 N.C. 564, 191 S.E. 7 (1937).
- Constructing, operating, and maintaining a municipal airport, *Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E.2d 371 (1949); *Piedmont Aviation, Inc. v. Raleigh-Durham Airport*, 288 N.C. 98, 215 S.E.2d 552 (1975).
- Constructing, maintaining, and operating a public hospital, *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 213 S.E.2d 297 (1975); *Odom v. Lane*, 161 N.C. App. 534, 588 S.E.2d 548 (2003).
- Operating a municipal arena or civic center for holding exhibitions and athletic events which generate revenue, *Aaser v. City of Charlotte*, 265 N.C. 494, 497, 144 S.E.2d 610, 613 (1965); *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).
- Leasing a municipal arena to the promoter of an athletic event while operating refreshment stands in the corridors of the building for the sale of items to the patrons of the event, *Pierson v. Cumberland County Civic Center Comm'n*, 141 N.C. App. 628, 540 S.E.2d 810 (2000).
- Constructing and operating an ABC store, *Waters v. Biesecker*, 60 N.C. App. 253, 289 S.E.2d 746, *affirmed*, 309 N.C. 165, 305 S.E.2d 539 (1983).

### **4. Private activity**

- Conducting business relationships with contractors and sub-contractors, *City of Gastonia v. Balfour Beatty Constr. Corp., Inc.*, 222 F.Supp.2d 771 (W.D.N.C. 2002).
- Driving a municipal vehicle for the personal use of a public official or employee, *Childs v. Johnson*, 155 N.C. App. 381, 573 S.E.2d 662 (2002).

## **D. EXCEPTIONS TO THE TRADITIONAL RULE**

In addition, there are several exceptions to the traditional rule that municipalities have immunity for torts committed in the performance of a governmental function. These exceptions include the following:

### **1. Municipal streets and sidewalks**

- Constructing and maintaining in a reasonably safe condition the streets and sidewalks of a municipality, *Millar v. Town of Wilson*, 222 N.C. 340, 23 S.E.2d 42 (1942)(Observing that this exception is “illogical”); *Hunt v. City of High Point*, 226 N.C. 74, 36 S.E.2d 694 (1946); *Eakes v. City of Durham*, 125 N.C. App. 551, 481 S.E.2d 403 (1997).
- Constructing and maintaining all bridges, dangerous pits, embankments, dangerous walls, and other perilous places and things very near and adjoining the municipal streets by proper railings, barriers, lighting, or other reasonably necessary signals for the protection of the public, *Hunt*, 226 N.C. at 77-78, 36 S.E.2d at 696-97; *Willis v. City of New Bern*, 191 N.C. 507, 132 S.E. 286 (1926).

### **2. Nuisance and Taking of Property**

- Establishing and maintaining a nuisance which causes appreciable damage to the property of a private owner, *Guilford Realty and Ins. Co. v. Blythe Brothers Co.*, 260 N.C. 69, 78, 131 S.E.2d 900, 907 (1963)(Observing that this exception is based on the theory that the nuisance constitutes a taking or appropriation of property); *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913).
- Operating a sewer disposal system which causes property damage to a private owner, whether by polluted land, water, or air, *Wagner v. Town of Conover*, 200 N.C. 82, 156 S.E. 167 (1930).
- Negligently maintaining a storm drainage system which causes property damage to a private owner, *Kizer v. City of Raleigh*, 121 N.C. App. 526, 466 S.E.2d 336 (1996).
- Failing to exercise due care in the upkeep of drains and culverts built by a third party, but adopted, controlled, or managed by the municipality as part of its drainage system, thereby causing property damage, *Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on rehearing*, 271 N.C. 224, 155 S.E.2d 543 (1967); *Hooper v. City of Wilmington*, 42 N.C. App. 548, 257 S.E.2d 142 (1979); *Howell v. City of Lumberton*, 144 N.C. App. 695, 548 S.E.2d 835 (2001).

- Damaging private property while attempting to abate a nuisance, *Rhyne v. Town of Mount Holly*, 251 N.C. 521, 112 S.E.2d 40 (1960).

## **XI. CONCLUSION**

The doctrine of sovereign/governmental immunity can be a confusing and complicated area of law. It can also be an unfair and inequitable doctrine. However, the legislature is unlikely to abolish sovereign or governmental immunity during the foreseeable future. Therefore, before representing a client with a claim against the government you need to understand the intricacies of the law. By successfully avoiding the immunity defense, you can help your clients obtain just compensation when they are injured or damaged by the government.