

BASICS OF LOCAL GOVERNMENT LIABILITY AND IMMUNITY IN NORTH CAROLINA

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Federal law

This paper does not address issues related to lawsuits under 42 USC § 1983 for deprivation of federal constitutional or statutory rights. Although the 11th amendment bars federal lawsuits against states, local governments are not considered an arm of the state and are not entitled to immunity from § 1983 actions. *Monell v. NY City Dept. of Social Services*, 436 US 658 (1978). Local governments may be sued for federal constitutional violations traceable to their official policies or customs. Individual local government officers and employees also may be sued under § 1983. Legislative and judicial immunity is available to local public officials exercising those functions. Other public officials may have a qualified immunity/good faith defense which means they are subject to payment of monetary damages only if they knew or should have known that their acts were unlawful. The qualified immunity applies only to public officials, not public employees (the distinction is discussed below in connection with immunity from state tort claims).

The distinction between sovereign immunity and governmental immunity in claims brought under state law

Sovereign immunity is the state's immunity from a lawsuit of any kind unless the state consents to be sued.

Governmental immunity is distinct from sovereign immunity. Governmental immunity applies to local governments, sovereign immunity to the state and its agencies. *Meyer v. Walls*, 347 NC 97 (1997). Governmental immunity is immunity from tort liability only and is based not on sovereign immunity and the "king can do no wrong" concept but instead is based on the policy decision that governmental agencies should not have to pay money damages. See *Moody v. State Prison*, 128 NC 12 (1901).

Court decisions often use the terms interchangeably and treat sovereign immunity and governmental immunity as the same.

The case law is not always consistent on whether sovereign immunity extends to local governments. Some cases suggest it has been waived by enactment of the statutes governing counties (GS 153A-11), cities (GS 160A-11) and public schools (GS 115C-40), all of which refer to those units of government as corporate bodies and say that their governing boards may sue and be sued. See, e.g., *Smith v. State*, 289 NC 303 (1976), and *Meares v. Brunswick County*, 615 F Supp 14 (EDNC 1985). Other cases apply sovereign immunity to local governments without

discussion of those statutes. See, e.g., *Eastway Wrecker Service, Inc., v. City of Charlotte*, 165 NC App 639 (2004), and *Data General Corp. v. County of Durham*, 143 NC App 97 (2001).

Irrespective of sovereign immunity, governmental immunity clearly applies to local governments and may be used as a defense to tort claims, subject to the rules described below.

Claims under state law against the governmental body itself

An action against a government official in that person's official capacity is the same as an action against the governmental body itself. *Meyer v. Walls*, 347 NC 97 (1997).

Breach of contract

There is no immunity from a claim for breach of contract; by entering the contract the governmental body waives immunity and consents to be sued for damages for breach of the contract. *State v. Smith*, 289 NC 303 (1976).

Violation of state constitutional rights

An action may be brought directly under the State Constitution when there is no other adequate state remedy for the violation. *Corum v. University of North Carolina*, 330 NC 761 (1992). While the governmental body may be liable for damages for a claim brought directly under the State Constitution, there is no action for monetary damages against a defendant sued in the person's individual capacity.

The adequacy of the remedy must be realistic in order to bar the constitutional claim. Thus, the existence of a common law action for negligence did not bar constitutional claims against the local board based on the same conduct, because the negligence claim was not a realistic remedy, it could be pursued only if the board had purchased insurance and thereby waived its immunity, and the board had not done so. *Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 NC 334 (2009).

Governmental immunity is not applicable to constitutional violations. *Sale v. Highway Commission*, 242 NC 612 (1955) (taking of property without just compensation); *Corum* (denial of free speech).

Tort claims (for either an intentional tort such as assault or for negligence) against a governmental body for acts or omissions of governmental officials or employees (acting within the scope of employment)

Liability for a proprietary function

If the injury to the plaintiff arises from the governmental employee's performance of a proprietary function, there is no immunity and the

governmental body may be sued for damages. *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 NC 14 (1975).

Determining whether an activity is a governmental or proprietary function is difficult, and the court decisions are not always consistent. See *Sides v. Cabarrus Memorial Hospital*.

Proprietary functions include those activities which are not traditionally performed by a government agency. They tend to be activities which also are performed by the private sector, which benefit a definable category of individuals rather than the general public, and for which a fee is charged. Operation of a golf course would be considered a proprietary function, for example. *Lowe v. Gastonia*, 211 NC 564 (1937). In *Sides* operation of a hospital was considered a proprietary function. The notion of what is proprietary and what is governmental changes over time.

Immunity for a governmental function

If the injury to the plaintiff arises from the government employee's performance of a governmental function, the local government is immune from liability unless it has waived its immunity. *Steelman v. City of New Bern*, 279 NC 589 (1971).

Governmental functions are those traditionally performed by governmental bodies for the benefit of the public at large. As already mentioned, the distinction between proprietary and governmental functions is not always easy to define. Simple examples of governmental functions include the operation of traffic lights, *Hamilton v. Hamlet*, 238 NC 741 (1953), and garbage collection, *James v. Charlotte*, 183 NC 630 (1922); *Broome v. City of Charlotte*, 208 NC 729 (1935). A 911 call center is a governmental function. *Wright v. Gaston County*, 698 SE2d 83 (NC App 2010).

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. NC State Ports Authority*, 307 NC 522 (1983).

By statute, boards of county commissioners, city councils and school boards waive governmental immunity by the purchase of insurance, up to the amount of the insurance. The statute for counties is GS 153A-435; for cities is GS 160A-485; and for school boards is GS 115C-42.

A separate statute, GS 160A-485.5 allows cities with a population of 500,000 or more — Charlotte is the only city to qualify — to waive immunity and become subject to the state Tort Claims Act. Claims are

heard in the local superior court rather than at the Industrial Commission. Charlotte has elected to use the GS 160A-485.5 option.

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

The statute governing school boards is worded differently than the statutes for counties and cities, and participation in the NC School Boards Trust or a governmental risk pool is not considered a waiver of immunity. *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 NC App 435 (1996); *Mullis v. Sechrest*, 126 NC App 91 (1997), *rev'd on other grounds*, 347 NC 548 (1998).

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

Public duty doctrine

Even if a local government has waived immunity through the purchase of insurance, the public duty doctrine may bar recovery. The public duty doctrine says that a governmental body is not liable when law enforcement officers fail to protect an individual from harm. Although the local government may undertake to protect the public at large, the duty of protection does not extend to individuals. With no legal duty to protect the individual, there can be no negligence from the failure to protect.

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 NC 458 (2000); *Wood v. Guilford County*, 355 NC 161 (2002). 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 NC App 759 (2000); *Willis v. Town of Beaufort*, 143 NC App 106, *disc. rev. denied*, 354 NC 371 (2001).

A local agency may be serving as an agent for 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 Dep't 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 NC App 575 (2008).

An exception to the public duty doctrine, giving rise to liability, is when the law enforcement agency has made an actual promise to protect an individual or when a special relationship has been created in which such protection is expected. See *Multiple Claimants v. NC Dep't of Health and Human Services, Div. of Facility Services, Jails and Detention Services*, 361 NC 372 (2007).

Even with respect to law enforcement, the public duty doctrine is limited in scope. It is a barrier to lawsuits for failure of the law enforcement agency to protect the plaintiff from harm by third parties, but not a barrier to lawsuits for harm caused directly by the agency. It is a barrier to liability for negligence claims, but does not bar liability for intentional torts. It is a barrier to liability for discretionary actions that involve the active weighing of safety interests, but does not bar lawsuits based on failure to comply with mandatory, ministerial requirements. *Smith v. Jackson County Board of Education*, 168 NC App 452 (2005).

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

Dobrowolska claims

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

Punitive damages

Punitive damages are not allowed against a governmental body unless specifically authorized by statute. *Jackson v. Housing Authority of City of High Point*, 316 NC 259 (1986); *Long v. City of Charlotte*, 306 NC 187 (1982).

Claims under state law against an individual government official or employee

While governmental immunity protects a governmental body from being held liable for an injury caused by one of its officers or employees, it does not protect the public officer or employee from being held liable individually. *Meyer v. Walls*, 347 NC 97 (1997). Other forms of immunity may protect individuals, however.

The caption of a pleading should indicate whether a person is being sued in the person's official or individual capacity. When the caption or other parts of the pleading fail to specify the capacity in which the person is being sued, the court looks to the relief

sought. Injunctive relief indicates the person is being sued in their official capacity. If the relief sought is monetary damages, the court looks to whether the plaintiff is seeking the payment from the government or from the individual defendant's own pocket. *Mullis v. Sechrest*, 347 NC 548 (1998).

Absolute immunity for legislators and judges

Legislative immunity

Local elected officials, when acting in their legislative capacity, are entitled to the same immunity as legislators, so long as their acts are not illegal acts. *Vereen v. Holden*, 121 NC App 779 (1996); *Scott v. Granville County*, 716 F2d 1409 (4th Cir 1983).

Judicial immunity

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

Judicial immunity applies to non-judges when they are acting in a judicial or quasi-judicial capacity, such as a coroner conducting an inquest, *Gillikin v. United States Fidelity and Guaranty Company of Baltimore, Maryland*, 254 NC 247 (1961); a clerk of court acting as judge of probate, *Martin v. Badgett*, 149 NC App 667, 2002 WL 485187 (2002) (unpublished); or members of a licensing board hearing a complaint, *Mazzucco v. North Carolina Board of Medical Examiners*, 31 NC App 47 (1976).

Boards of county commissioners, city councils and school boards hold a number of different kinds of hearings which would be considered quasi-judicial.

Qualified immunity for public officials

A public official sued individually is not subject to liability unless the official's actions were malicious, corrupt or outside the scope of official duties. *Epps v. Duke University*, 122 NC App 198 (1996).

The qualified immunity applies only to public officials, not to public employees. Generally public officials occupy offices created by statute, take an oath of office, and exercise discretion in performance of their duties. *Pigott v. City of Wilmington*, 50 NC App 401 (1981); *Gunter v. Anders*, 114 NC App 61 (1994).

Elected board members are public officials, *Town of Old Fort v. Harmon*, 219 NC 241 (1941); as are chiefs of police and police officers, *State v. Hord*, 264 NC 149 (1965); the county director of social services, *Hare v. Butler*, 99 NC App 693 (1990); the chief building inspector, *Pigott v. City of Wilmington*, 50 NC App 401 (1981); and superintendents and principals, *Gunter v. Anders*, 114 NC App 61 (1994).

Teachers are public employees, not public officials, and are not entitled to qualified immunity, *Mullis v. Sechrest*, 126 NC App 91 (1997), *rev'd on other grounds*, 347 NC 548 (1998); *Daniels v. City of Morganton*, 125 NC App 47 (1997). Other examples of public employees include street sweepers, *Miller v. Jones*, 224 NC 783 (1944); and social workers, *Hare v. Butler*, 99 NC App 693 (1990).

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 in the scope of employment. The statutes are GS 153A-97 for counties, GS 160A-167 for cities, and GS 115C-43 for public schools. The officers and employees to whom a county or city's defense may extend are listed in GS 153A-97 and 160A-167, but the list in the latter statute is longer than in the former.

The same statutes allow, but do not require, boards of county commissioners, city councils and school boards to pay civil judgments entered against the same categories of current and former board members, officers and employees. The boards are required to adopt uniform standards stating when such claims will be paid. For school boards, the uniform standards also are to state when the board will pay for the defense of claims.

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