

Sovereign Immunity: The King Can Do No Wrong?

by Rebecca J. Britton



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“**W**hat do you mean they’re immune?!” How many times have we all heard those words from a client who has been harmed by the negligence of a state or local government employee in North Carolina? The average North Carolinian has no idea that if she is injured as a result of the negligence of a police officer, sanitation worker, or any other governmental employee, there is a very good chance she may not have any means of recourse through our civil justice system. The average North Carolinian is also shocked when she realizes the town, city, or county she calls home may have made a conscious decision not to carry liability insurance; that sounds fine when politicians are talking about cutting budgets, but it certainly does not sit well when there is no recourse for a severely injured person or family member.

History of Sovereign Immunity

The doctrine of sovereign immunity arose from the notion that the English monarchy was sovereign and could not be liable for damage to its subjects.¹ The doctrine originated in the English case of *Russel v. Men of Devon*, which held that an unincorporated town could not be liable for damage caused by a defective bridge.²

Actually, early North Carolina decisions expressly rejected the doctrine until *Moffit v. City of Asheville*.³ In *Moffit*, the North Carolina Supreme Court held that the liability of a governmental entity for the negligence of its officers, agents, or employees depends upon the type of activity in which the entity was engaged. When the entity is “exercising the judicial discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public,” it is not liable for the negligence of its employees.⁴

Over the years, statutory and common

law have nibbled away at this ancient and antiquated doctrine. North Carolina, however, continues to recognize the common law rule, shielding governmental entities from liability except to the extent that immunity has been waived by statute.⁵ The purpose of this article is to provide a general overview of the status of governmental immunity in North Carolina.

The State Tort Claims Act

Until 1951, citizens of North Carolina had no recourse against the State for injuries or damages sustained as a result of the negligent or other acts of State employees and agencies. In 1951, the General Assembly waived the State’s immunity, in part by enacting the North Carolina Tort Claims Act.⁶ At that time, injured parties could only seek up to \$8,000 from the State for damages.⁷ Today, the maximum amount recoverable is \$500,000.⁸

The Tort Claims Act requires the North Carolina Industrial Commission to hear tort claims against “the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State.”⁹ The Commission determines whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency, or authority, under circumstances where the State of North Carolina, if it were a private person, would be liable to the claimant in accordance with the laws of North Carolina. Only actions against state departments, institutions, or state agencies are authorized.

References in the Act to “the State” mean the particular department, agency or institution of the state against which recovery is sought. The Act does not authorize actions against State employees or agents

in their individual capacities. Generally, those claims must be brought at common law in the General Courts of Justice.¹⁰

To give rise to a claim under the Act, the individual whose conduct produces the claimant's injury must have acted on behalf of a department, institution, or agency of the State. The Act has no application to injuries caused by city or county employees.¹¹

Claims must be filed with the Commission within three years after the accrual of the claim. If death results from the accident, the personal representative of the deceased must file the claim for wrongful death within two years after the death.¹² If the Commission determines there was negligence on the part of the State that was a proximate cause of the injury, and there was no contributory negligence on the part of the injured party, it will then decide on the amount of damages to be paid. The Commission is authorized by the Act to tax costs against the losing party in the same manner as costs are taxed by the superior court in civil actions.¹³

The North Carolina Industrial Commission also has jurisdiction over tort claims against any county board of education or any city board of education for claims that arise as a result of any alleged defects affecting the safe operation of school transportation vehicles, or resulting from negligent acts or omissions of drivers, transportation safety assistants, or monitors of public school buses or school transportation service vehicles.¹⁴

Local Boards of Education

By statute, any local board of education, by securing liability insurance, is authorized and empowered to waive its governmental immunity from liability for damages by death or injury to person or property caused by negligence or tort of any agent or employee acting within the scope of their authority or within the course and scope of their employment. This immunity is waived only to the extent that the board of education is indemnified by insurance.¹⁵ Beware that some boards pay the North Carolina School Board Trust for a policy that the boards may argue is not insurance under the statutes. This will require precise analysis of the version of the policy at issue. Suits against a local board of education that is insured

may be filed in any court of competent jurisdiction in this state, but only in the county of that board of education.¹⁶

Local Governments

Each county in North Carolina is a "body politic and corporate" and may sue and be sued in the name of the county.¹⁷ Cities, towns, and villages are municipal corporations that also have the capacity to sue and be sued.¹⁸ However, the doctrine of sovereign immunity bars private citizens from suing a local government in tort, with some

There is no predictability from one county or city line to the next whether a tort claim will be denied based on immunity, paid by some form of insurance, or determined by some maze of procedures and policies.

exceptions: the doctrine does not bar suits against the entity based upon violations of the North Carolina Constitution,¹⁹ nor does it bar suits brought under 42 U.S.C. §1983 for violations of the United States Constitution.²⁰

Waiving Immunity by Purchase of Insurance. A local government may waive its immunity by purchasing liability insurance or by participating in a local government risk pool. The exposure for the local government under these circumstances, however, is only to the extent of its insurance or risk pool coverage.²¹

Risk Pools. Local governments may also participate in "local government risk pools." In a risk pool, two or more local governments contract for the joint purchase of insurance or to pool retention of their risks for property losses and liability claims, and to provide for the payment of such losses or claims made against any member of the pool, on a cooperative or contract basis with one another.²² Pools must pay all claims for which each member incurs liability during each member's period of membership, except when a member has individually retained the risk, the risk is not covered, and the amount of the claim exceeds the coverage provided by the pool.²³

To the extent a local government is not insured or protected by a risk pool, it re-

tains its immunity from civil liability in its governmental capacity.²⁴ The entity is not liable for the amount of any deductible or amounts it retains. Therefore, the purchase of limited insurance coverage or excess coverage by an entity constitutes only a partial waiver of immunity.²⁵

In some cases, local governments have purchased excess insurance, exercising their discretion as to how claims are to be handled up to the amount of insurance coverage. Historically, problems have arisen when some local governments chose to set-

tle some claims, while asserting immunity in others. While a local government's attempt to negotiate a claim or pay part of a claim does not operate as a waiver of immunity, the entity must be cautious to utilize a system of adjusting or paying claims that does not violate the civil rights of its claimants.²⁶

Picking and choosing to pay certain claims and crying immunity in others similarly situated was challenged in *Dobrowolska v. Wall* on the basis of due process and equal protection.²⁷ The plaintiffs in *Dobrowolska* were two minors who were injured by a city police officer in an automobile collision. The City carried excess insurance. For amounts up to the excess coverage, the City participated in a "Local Government Excess Liability Fund, Inc." This Fund was not a risk pool. Therefore, the City was immune for amounts up to the excess coverage. However, the Fund would sometimes assert immunity but pay claims; other times, for similarly situated claimants, it would assert immunity and not pay claims.

The court of appeals overturned the trial court's entry of summary judgment for the defendant City, holding plaintiff could bring suit against defendant City under §1983 for monetary damages. The court found there were genuine issues of material fact as to whether or not the City's pol-

icy of paying some claimants and not others who were similarly situated violated plaintiffs' due process and equal protection rights due to arbitrary and capricious behavior, and whether such behavior was reasonably related to a legitimate governmental objective.²⁸

It appears from *Dobrowolska* that a local governmental entity can carry excess insurance and use a variety of means that are not considered insurance or risk pools to "adjust" claims that are below its excess coverage. It must, however, use an adequate process to adjust these claims that is not arbitrary and capricious and does not violate equal protection and due process rights.

The *Dobrowolska* case is a prime example of a festering problem in North Carolina that requires a legislative solution. Every county, city, and town in this state has its own method of dealing with its tort liability. There is no predictability from one county or city line to the next whether a tort claim will be denied based on immunity, paid by some form of insurance, or determined by some maze of procedures and policies.

The Legislative Research Commission of the General Assembly authorized a study of State tort liability and immunity during its regular session in 1999. The State Tort Liability and Immunity Study Committee met throughout the 2000 session and submitted its report to the 2001 General Assembly. The Committee recognized the inconsistency in protection offered by local governments.²⁹ Table 1 illustrates some of the Committee's findings regarding coverage for local governments across the state.³⁰

In light of *Dobrowolska*, the Committee agreed on proposed legislation that makes self-funded reserves a form of insurance for purposes of waiving immunity and makes any purchase of insurance a waiver of immunity from the first dollar of damages.³¹ The Committee's proposed House bill died, but a similar bill has passed the Senate.³² Its fate will be determined in the next legislative session.

Governmental vs. Proprietary Distinction

If a local government has not waived immunity by the purchase of insurance or participation in a risk pool, the next step in

evaluating an entity's immunity status is determining whether the function at issue was governmental or proprietary.

Proprietary Function Exception

Local governments can enjoy the cloak of immunity so long as they are performing governmental functions. Immunity does not apply, however, when the local government is engaged in a proprietary function.³³ The difficulty comes in determining what functions are proprietary and what functions are governmental.

Governmental functions are those historically performed by the government and are not ordinarily carried out by a private corporation. Law enforcement operations, operations of jails, public libraries, county fire departments, public parks, and city garbage services are basic examples of governmental functions.³⁴

When a local government engages in an activity that is commercial or chiefly for the private advantage of a compact community, it is considered proprietary.³⁵

The analysis of whether a function is

Table 1 How North Carolina Counties and Cities Handle Risk Management

Type	Number of Cities/Towns	Number of Counties	Total
Auto Liability			
Commercial Coverage (CI)	170	35	205
Pool (LP or AP)	292	54	346
Self Fund (SF)	5	2	7
Self Fund & Comm. Cov. (SF/CI)	8	4	12
No Insurance (NONE)	9	0	9
Not Known	49	5	54
<i>Total</i>	<i>533</i>	<i>100</i>	<i>633</i>
General Liability			
Commercial Coverage (CI)	192	31	223
Pool (LP or AP)	305	61	366
Self Fund (SF)	7	2	9
Self Fund & Comm. Cov. (SF/CI)	8	6	14
No Insurance (NONE)	10	0	10
Not Known	11	0	11
<i>Total</i>	<i>533</i>	<i>100</i>	<i>633</i>
Public Officials/E&O Liability			
Commercial Coverage (CI)	184	32	216
Pool (LP or AP)	248	55	303
Self Fund (SF)	5	2	7
Self Fund & Comm. Cov. (SF/CI)	8	4	12
No Insurance (NONE)	9	0	9
Not Known	79	7	86
<i>Total</i>	<i>533</i>	<i>100</i>	<i>633</i>
Law Enforcement Liability*			
Commercial Coverage (CI)	171	33	204
Pool (LP or AP)	193	52	245
Self Fund (SF)	5	3	8
Self Fund & Comm. Cov. (SF/CI)	8	3	11
No Insurance (NONE)	9	0	9
Not Known	147	9	156
<i>Total</i>	<i>533</i>	<i>100</i>	<i>633</i>

* 464 municipalities have a police force.

Note: Figures as of December 28, 2000

proprietary or governmental has taken a tortuous path in our appellate courts. In surveying the cases over the years, it frequently appears that some particular functions have at one time been found proprietary, and at other times, governmental.³⁶

While these decisions are confusing, the best approach in determining governmental versus proprietary function is to look at whether the function at issue is one historically performed by governmental entities and not ordinarily engaged in by a private corporation.³⁷ Then, look at whether or not a fee was charged. The motive for the fee at issue need not be based on profit.³⁸ Also, consider the mission of the employee at the particular time the injury occurred.³⁹

While an activity may generally be classified as a governmental function, an entity may still be liable in tort for certain phases; conversely, although classified in general as proprietary, certain phases may be considered exempt from liability.⁴⁰ Additionally, it does not follow that a particular activity will be denoted a governmental function, even if previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose. Compare *Turner v. Reidsville*,⁴¹ which held that expenditure of public funds for construction and maintenance of an airport was for a public purpose and, therefore, governmen-

tal, with *Rhodes v. Asheville*,⁴² which held that operation and maintenance of an airport was proprietary.⁴³

Also, the determination of a function as proprietary or governmental can change with time. As society changes and progresses and the concepts of the functions of government are modified, the line between classifications is not as sharply drawn.⁴⁴

By way of example, in *Roach v. City of Lenoir*, the court of appeals held that the construction and maintenance of a sewer system was governmental.⁴⁵ Eleven years later, in *Pulliam v. City of Greensboro*, the court acknowledged that over the years, an interesting pattern of public enterprise activity had emerged in North Carolina whereby sewer services, electric services, and natural gas distribution systems were being provided by privately owned public utilities in some areas.⁴⁶ With that, the court found the operation of a sewer system was proprietary in nature.

The Legislative Research Commission's Committee on State Tort Liability and Immunity also grappled with the proprietary and governmental distinction. The committee recommended that the General Assembly authorize the Commission to further study the issue of local government liability, including the issue of eliminating this distinction.⁴⁷ The fate of this distinction remains to be seen in the upcoming legislative session.

Public Officials and Public Employees

After working through the issues of waiving immunity and what function the local government was engaged in at the time of the tort, attorneys must then look at the individual actors to consider whether or not they should be named as defendants. The general rule is that public officials are immune from suit for negligence in the performance of governmental duties because such suits are essentially against the State, which has ultimate financial responsibility for the compensable conduct of its officers.⁴⁸

The position of a public officer is created by the state constitution or statutes.⁴⁹ Public officers, as opposed to employees, have been delegated a measure of power of the sovereign and are charged with the responsibility of performing public duties involving the exercise of judgment and discretion.⁵⁰ Public officers have included chief building inspectors,⁵¹ county managers,⁵² police officers,⁵³ sheriffs and deputy sheriffs,⁵⁴ coroners,⁵⁵ inspectors for the Department of Motor Vehicles,⁵⁶ and State Department of Transportation district engineers,⁵⁷ among others.

A plaintiff has a claim against an official in his or her official capacity only if the state consents or a statutory waiver applies.⁵⁸ There are exceptions to this rule, however, for conduct outside the scope of the official's authority, and for conduct that is corrupt or malicious.⁵⁹ Bad faith and

Telling the Story . . .



In 1994, Alex and Sheila Thompson of Sanford shared the same dream as many young couples—building their first home on family owned land. They hired a contractor, obtained the necessary building permits, and began construction.

Following the required periodic inspections by the Lee County building inspector and a final approval, the

Thompsons moved in. Within weeks, however, stress cracks started appearing in the foundation. Then cracks appeared at the corners of windows and along the walls. The kitchen and bathroom countertops started to pull away from the wall, and the front door became jammed, requiring a crowbar to open it.

After the first cracks appeared, the building inspector wrote a letter outlining a number of building code violations. In 1997, the Thompsons filed suit, alleging negligence by both the builder and the Lee County inspector. Lee County was dismissed in 1998 due to the public duty doctrine. The Thompsons appealed to the North Carolina Supreme Court, and in *Thompson v. Waters*, the

willful and deliberate conduct are also bases of liability and excluded from any immunity bar. The public policy protecting officials from liability for honest mistakes of judgment has little force when officials are guilty of intentional wrongdoing.⁶⁰

Public employees, as opposed to public

ment and its employees without thoroughly researching the pleading requisites.

Public Duty Doctrine

The public duty doctrine stands for the proposition that a duty to all is a duty to no one. In other words, a plaintiff cannot es-

ure to furnish police protection to specific individuals. The court held that the doctrine would apply in such circumstances unless there was a special relationship between the injured party and the local government, or the local government had created a special duty by promising protection to an individual, it was not provided, and the individual's reliance on the promise of protection was causally related to the injury suffered.⁶⁶

After *Braswell*, there was a flood of litigation. North Carolina's appellate courts decided at least twenty-one cases regarding the applicability of the defense in situations well beyond law enforcement.⁶⁷ Cases ranging from animal control officers⁶⁸ to state agencies⁶⁹ to 911 system operators asserted the doctrine as a defense.⁷⁰ The frustration of applying this doctrine is clearly apparent in Judge Wynn's dissent in *Lovelace v. City of Shelby*:

I believe that our Supreme Court should reexamine the vitality of the public duty doctrine adopted in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991). Since the pronouncement of that decision, our courts have struggled to pigeon-hole individual cases into specific narrow exceptions to reach justifiable results.⁷¹

The North Carolina Supreme Court resolved this conflict and confusion in April 2000, when it decided both *Lovelace* and

After working through the issues of waiving immunity and what function the local government was engaged in at the time of the tort, attorneys must then look at the individual actors to consider whether or not they should be named as defendants.

officials, can be liable for negligence in the performance of their duties.⁶¹ A public employee's duties are not fixed, permanent or governmental in nature; they are ministerial rather than discretionary, and the employee acts at the direction of others.⁶² While a public employee can be sued for negligence, a plaintiff must be able to show the employee owed a duty to the plaintiff. Further, suit must be brought against the public employee in an individual capacity to obtain personal liability.⁶³

The quagmire of determining the capacity of employees, their immunities, and how to plead them is beyond the scope of this article. Suffice it to say, however, no practitioner should file suit against a local govern-

ment without the essential elements of duty and breach of duty. Actionable negligence occurs only when there is a failure to exercise proper care in the performance of a legal duty a defendant owes to a plaintiff.⁶⁴ Under the doctrine, local governments are shielded from tort liability arising out of discretionary governmental actions, arguing they had no legal duty to the particular person bringing the claim.

The public duty doctrine made its debut in North Carolina in 1991 in the case of *Braswell v. Braswell*.⁶⁵ In this case, the court applied the doctrine to local law enforcement, holding that a municipality and its agents could not be held liable for fail-

court ruled that the public duty doctrine did not bar suits for negligent inspection; it sent the case back for trial. At that time, the parties engaged in extensive discovery and depositions.

In January 2002, Lee County filed another motion to dismiss based on sovereign immunity, claiming for the first time a lack of insurance coverage. Again, the case went before a judge, and again, it was dismissed. Under North Carolina's antiquated doctrine of sovereign immunity, local governments are immune from civil liability unless they choose to waive this immunity by purchasing insurance.

Legally, the Thompsons are back on appeal, this time

fighting the sovereign immunity issue. Emotionally, the case has taken a toll. Alex suffered a heart attack a year ago and believes the years of tension and stress contributed to it. Everyone in the family has contracted reflux esophagitis, which is also stress related.

Meanwhile, the cracks in their dream home continue to spread.

—by Bruce Cunningham

Thompson v. Waters.⁷² In these cases, the court declined to extend the public duty doctrine beyond the context of local law enforcement, holding *Braswell* was specifically limited to its facts. The court noted that the public duty doctrine has caused confusion in other jurisdictions, as well, and acknowledged that in some states, where sovereign immunity had been either legislatively or judicially abrogated, the courts had abandoned the public duty doctrine as a form of sovereign immunity.⁷³

The public duty doctrine, while currently limited to law enforcement, is not by any means a dead issue. It is clear that the North Carolina League of Municipalities will seek legislation to codify the public duty doctrine as a defense in tort actions brought against municipalities.⁷⁴ It will be the continuing job of the Academy and other similarly minded organizations to lobby against such legislation.

Trends

Governmental immunity is under attack daily, with the doctrine becoming weaker and its advocates becoming more creative in their defense of it. As early as 1953, the North Carolina Supreme Court noted, "the current trend of legislative policy and of judicial thought is toward the abandonment of the monarchistic doctrine of governmental immunity."⁷⁵ In *Steelman v. City of New Bern*, the court noted that the logic of the doctrine "may well be . . . unsound" and that

the reasons for its adoption have eroded.⁷⁶ Nevertheless, the court has deferred to the legislature and has declined to judicially abrogate governmental immunity.

We all need to take responsibility for breaking down this barrier to justice. Armed with the necessary tools and funding, the Academy's and others' lobbying efforts will help. Most of all, however, it will be the stories of our clients, the legislature's constituency, that will evoke compassion, compel understanding, and bring change. ■

¹ *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971).

² 2 T.R. 667, 100 Eng.Rep.R. 359 (1778).

³ See *Meares v. Wilmington*, 31 N.C. 73 (1848); *Wright v. Wilmington*, 92 N.C. 156 (1885).

⁴ *Moffit v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1855).

⁵ *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961): "The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. When statutory provision has been made for an action against the State, the procedure prescribed must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms provided by the Legislature are conditions precedent to the institution of the action."

⁶ N.C.G.S. §143-291.

⁷ N.C.G.S. §143-____ (1951); *McFarlane v. North Carolina Wildlife Resources Com.*, 244 N.C. 385, 93 S.E.2d 557 (1956).

⁸ N.C.G.S. §143-299.2. See McCabe, John, *The Kelly Crabtree Story—One Client's Efforts to Change the Law*, Trial Briefs, Sept. 2001, p. 23.

⁹ *Id.*

¹⁰ *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997); *Wirth v. Bracey*, 258 N.C. 505, 128 S.E.2d 810 (1963).

¹¹ *McBride v. North Carolina State Bd. of Educ.*, 257 N.C. 152, 125 S.E.2d 393 (1962).

¹² N.C.G.S. §143-299.

¹³ N.C.G.S. §143-291.1.

¹⁴ N.C.G.S. §143-300.1.

¹⁵ N.C.G.S. §115C-42.

¹⁶ *Id.*

¹⁷ N.C.G.S. §153A-11.

¹⁸ N.C.G.S. §160A-1(2).

¹⁹ *Corum v. University of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291-92, cert. denied, 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992)(Individual rights protected under the Declaration of Rights from violation by the State are constitutional rights. Such constitutional rights are a part of the supreme law of the State, and when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail).

²⁰ *Id.*; *Moore v. City of Creedmoor*, 345 N.C. 356, 366, 481 S.E.2d 14, 21 (1997)(local governing bodies can be sued directly under §1983 for monetary, declaratory, or injunctive relief when the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers).

²¹ N.C.G.S. § 160A-485 (1994)(waiver of immunity by purchase of insurance or participation in a risk pool by cities, towns and villages); N.C.G.S. § 153A-435 (1991)(waiver of immunity by purchase of insurance or participation in a risk pool by counties).

²² *Lyles v. City of Charlotte*, 344 N.C. 676, 679, 477 S.E.2d 150, 152 (1996), citing N.C. Gen. Stat. § 58-23-5.

²³ N.C.G.S. § 58-23-15(3).

²⁴ *Wall v. City of Raleigh*, 121 N.C.App. 351, 354, 465 S.E.2d 551, 553 (1996).

²⁵ *Jones v. Kearns*, 120 N.C.App. 301, 462 S.E.2d 245, disc. rev. denied, 336 N.C.77, 445 S.E.2d 46 (1995); *Kephart v. Pendergraph*, 131 N.C.App. 559, 567, 507 S.E.2d 915, 921 (1998).

²⁶ *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992).

²⁷ *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 N.C.App. 1, 530 S.E.2d 590 (2000), disc. rev. *improvidently allowed in part*; *appeal dismissed ex motu in part*, ___ N.C. ___, 558 S.E.2d 174 (2002).

²⁸ *Id.*

²⁹ Legis. Res. Comm'n, 2001 Gen. Assembly, 2001 Sess., State Tort Liability and Immunity (2001), p. 24.

³⁰ *Id.* at 31.

³¹ *Id.* at 25.

³² Senate Bill 742, Local Government Tort Liability.

³³ *Baker v. City of Lumberton*, 239 N.C. 401, 408, 79 S.E.2d 886, 891 (1954).

³⁴ *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 213 S.E.2d 297 (1975).

³⁵ *Id.*; *Hare v. Butler*, 99 N.C.App. 693, 698-99, 394 S.E.2d 231 (1990).

³⁶ *Compare Pulliam v. City of Greensboro*, 103 N.C.App. 748, 407 S.E.2d 567, disc. rev. denied, 330 N.C. 197, 412 S.E.2d 59 (1991)(operation of sewer system held proprietary); *Roach v. City of Lenoir*, 44 N.C.App. 608, 261 S.E.2d 299 (1980)(construction and maintenance of sewer system held governmental); *Kizer v. City of Raleigh*, 121 N.C.App. 526, 466 S.E.2d 336 (1996)(storm drain maintenance held proprietary); *Stone v. City of Fayetteville*, 3 N.C.App. 261, 164 S.E.2d 542 (1968)(maintenance of storm drainage system held governmental).

CALENDAR

May 2

Products Liability

Academy Headquarters, Raleigh

May 3

ERISA for Trial Lawyers

Academy Headquarters, Raleigh

May 10

Employment Law Roundtable

Academy Headquarters, Raleigh

May 10

Auto Torts Seminar

Sheraton at Four Seasons, Greensboro

June 7

Auto Torts (Video Replays)

Statesville, Morehead City, Charlotte, Wilmington

June 15-16

Legal Assistants Conference: Managing Medical Mayhem

Sea Trail Resort, Sunset Beach, NC

June 15

Masters in Advocacy Seminar: What Can Lawyers Learn From Actors?

Sea Trail Resort, Sunset Beach, NC

June 16-19

38th Annual Convention

Sea Trail Resort, Sunset Beach, NC

³⁷ Sides v. Cabarrus Memorial Hospital, Inc., 287 N.C. 14, 213 S.E.2d 297 (1975).
³⁸ *Id.* at 23, 213 S.E.2d at 303.
³⁹ Beach v. Town of Tarboro, 225 N.C. 26, 28, 33 S.E.2d 64, 65 (1945).
⁴⁰ Sides, comparing Woodie v. North Wilkesboro, 159 N.C. 353, 74 S.E. 924 (1912)(operation of municipal water plan held proprietary) with Klassette v. Drug Co., 227 N.C. 353, 42 S.E.2d 411 (1947) (furnishing of water to extinguish fires held governmental).
⁴¹ Turner v. Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944).
⁴² Rhodes v. Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949).
⁴³ See also, James v. Charlotte, 183 N.C. 630, 112 S.E. 423 (1922)(city engaged in governmental function when it removed garbage for its inhabitants for a fee that covered only its actual collection and disposal expenses); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972)(city engaged in proprietary functions in operating a landfill for disposal of garbage where city had contracted with county to dispose of county garbage for a fee).
⁴⁴ McCombs v. Asheboro, 6 N.C.App. 234, 170 S.E.2d 169 (1969).
⁴⁵ Roach v. City of Lenoir, 44 N.C.App. 608, 261 S.E.2d 299 (1980).
⁴⁶ Pulliam v. City of Greensboro, 103 N.C.App. 748, 407 S.E.2d 567, *disc. rev. denied*, 330 N.C. 197, 412 S.E.2d 59 (1991).
⁴⁷ Legis. Res. Comm'n at 25.
⁴⁸ Epps v. Duke University, Inc., 112 N.C.App. 198, 203, 468 S.E.2d 846, 850 (1996)(citations omitted).
⁴⁹ Reid v. Roberts, 112 N.C.App. 222, 224, 435 S.E.2d 116, 119 (1993).
⁵⁰ Wiggins v. City of Monroe, 73 N.C.App. 44, 326 S.E.2d 39, (1985), *cert. denied*, 320 N.C. 178, 358 S.E.2d 72 (1987).
⁵¹ Pigott v. City of Wilmington, 50 N.C. App. 401, 273 S.E.2d 252, *cert. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981).
⁵² *Id.*
⁵³ State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).
⁵⁴ Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489, *review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).
⁵⁵ Gilliken v. United States Fidelity & Guar. Co., 254 N.C. 247, 118 S.E.2d 606 (1961).
⁵⁶ Murray v. Justice, 96 N.C. App. 169, 385 S.E.2d 195 (1989), *review denied*, 326 N.C. 265, 389 S.E.2d 115 (1990).
⁵⁷ Reid v. Roberts, 112 N. C. App. 222, 435 S.E.2d

116, *review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993).
⁵⁸ Epps, 122 N.C.App. at 204, 468 S.E.2d at 851.
⁵⁹ Cherry v. Harris, 110 N.C.App. 478, 429 S.E.2d 771, *disc. review denied*, 335 N.C.171, 436 S.E.2d 371 (1993); Smith v. Hefner, 235 N.C.1, 68 S.E.2d 783 (1952); Aune v. University of North Carolina, 120 N.C.App. 430, 462 S.E.2d 678 (1995), *disc. review denied*, 342 N.C. 893, 467 S.E.2d 901 (1996); Jones v. Kearnes, 120 N.C.App. 301, 462 S.E.2d 245, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995).
⁶⁰ Daye and Morris, North Carolina Law of Torts, §19.43.5 at 398.
⁶¹ Coleman v. Cooper, 102 N.C.App. 650, 403 S.E.2d 577, *review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991); Harwood v. Johnson, 92 N.C.App. 306, 374 S.E.2d 401 (1988); Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).
⁶² Pigott v. City of Wilmington, 50 N.C.App. 401, 403-04, 273 S.E.2d 752, 754 (1981)(quoting 62 C.J.S. Municipal Corporations 463 (1949)).
⁶³ Meyer v. Walls, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997).
⁶⁴ Mattingly v. North Carolina Railroad Co., 253 N.C. 746, 117 S.E.2d 844 (1961).
⁶⁵ 330 N.C. 363, 410 S.E.2d 897 (1991)
⁶⁶ Braswell v. Braswell, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (quoting Coleman v. Cooper, 89 N.C.App. 188, 194, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).
⁶⁷ Brief of Amicus Curiae for N.C. Acad. of Trial Law. at 6, Thompson v. Waters, 351 N.C. 462, 526 S.E.2d 650 (No. 267PA99), *reh'g denied*, 352 N.C. 157, 544 S.E.2d 244 (2000).
⁶⁸ Prevette v. Forsyth County, 110 N.C.App. 754, 431 S.E.2d 216, *review denied*, 334 N.C. 622, 435 S.E.2d 228 (1993)(affirming trial court's granting motion to dismiss action).
⁶⁹ Hunt v. N.C. Dept. of Labor, 348 N.C. 192, 499 S.E.2d 747 (1998).
⁷⁰ Lovelace v. City of Shelby, 133 N.C.App. 408, 515 S.E.2d 722 (1999), *rev'd*, 351 N.C. 458, 526 S.E.2d 652, *reh'g denied*, 352 N.C. 157, 544 S.E.2d 225 (2000).
⁷¹ *Id.* at 414, 515 S.E.2d at 727.
⁷² Thompson v. Waters, 351 N.C. 462, 526 S.E.2d 650 (2000).
⁷³ *Id.*, 351 N.C. at 464, 526 S.E.2d at 652 (citations omitted).
⁷⁴ Legis. Res. Comm'n at 61.
⁷⁵ Lyon & Sons v. N.C. State Board of Education, 238 N.C. 24, 27, 76 S.E.2d 553, 556 (1953).
⁷⁶ Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971).



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