Coates' Canons Blog: Governmental Immunity for Local Government Buildings: What Are the Current Rules?

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As I have previously explained here and here, governmental immunity bars tort claims (negligence, assault, trespass, etc.) against cities and counties for personal injuries or property damage caused by the carelessness or intentional wrongdoing of their personnel in the performance of governmental functions. When the harm to a plaintiff stems from the performance of a proprietary function, however, governmental immunity does not apply, and the local government is subject to liability on the same basis as a private employer. Recently, in *Bynum v. Wilson County*, the North Carolina Supreme Court had to decide whether governmental immunity bars tort claims arising from an individual's fall at a county building used for both governmental and proprietary functions. This blog post takes a quick look at the history of the governmental/proprietary distinction and analyzes the impact of *Bynum* on local government liability for injuries caused by unsafe premises.

Governmental v. Proprietary Distinction

The supreme court first recognized the need to distinguish between governmental and proprietary functions for liability purposes in *Moffit v. City of Asheville*, 103 N.C. 237 (1889). It subsequently distinguished the two types of functions as follows: Governmental functions are activities which are "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State," while proprietary functions are undertakings which are "commercial or chiefly for the private advantage of the compact community." *Millar v. Town of Wilson*, 222 N.C. 340, 341 (1942).

Our courts have applied this standard in a long line of cases involving various kinds of local government activities, holding for instance that operating traffic lights or 911 call centers is a governmental function but operating a municipal golf course is not. In many instances, though, the courts have found it difficult to apply the standard to particular kinds of undertakings. Indeed, the supreme court observed long ago that this difficulty has "resulted in irreconcilable splits of authority and confusion as to what functions are governmental [or] proprietary." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528 (1972). The splits in authority and rampant confusion led the court to try its hand at refining the standard in *Estate of Williams v. Pasquotank County*, 366 N.C. 195 (2012).

The*Williams* Test

The *Williams* case arose from a county's operation of public park named "Fun Junktion." The complaint alleged that a young man had drowned in the "Swimming Hole" – an area of Fun Junktion rented to private parties – due to the county's negligence. The county moved to have the case thrown out, arguing that governmental immunity barred the lawsuit. The trial court denied the motion, and the North Carolina Court of Appeals affirmed its order.

The supreme court vacated the court of appeals' ruling upon finding that the governmental immunity claim had been analyzed incorrectly. In so doing, it set forth a three-part test that judges should use when deciding whether an activity is governmental or proprietary:

- Whether, and if so to what degree, the legislature has designated the specific activity that led to the plaintiff's injury as a governmental or proprietary function.
- Whether the undertaking is one that only a governmental agency could perform.
- Consideration of additional factors relevant to governmental/proprietary determinations:
    - Whether the service is one traditionally provided by government;
    - Whether a substantial fee was charged for the service; and
    - Whether the fee did more than cover the operating costs of the service provider.

366 N.C. at 200-03.

When the legislature has designated an activity as governmental or proprietary, its determination usually controls, and there is ordinarily no need to consider the other parts of the *Williams* test. Likewise, when an activity is one that only the government can undertake, it is necessarily a governmental function, and the local government is entitled to governmental immunity. The first two parts of the *Williams* test are of limited value, however, inasmuch as they rarely apply. The terms "governmental function" and "proprietary function" do not appear often in our statutes. Moreover, as *Williams* indicates, a general statutory pronouncement that an undertaking is a governmental function might not be enough to trigger governmental immunity. It has to be clear from the statute's text that the law encompasses the specific conduct or omission alleged to have produced the plaintiff's injury. (We must await future cases for insight into just how on-point a statute must be to dictate the availability of governmental immunity in a given case.)

The second part of the *Williams* test is not very helpful thanks to the widespread privatization of services once offered exclusively by governments. As the supreme court remarked in *Williams*, "it is increasingly difficult to identify services that can only be rendered by a governmental entity." *Id.* at 202.

The upshot of all this seems to be that judges will frequently have to resort to the third part of the *Williams* test to make governmental/proprietary distinctions. Yet the supreme court in *Williams* also cautioned against relying too heavily on the additional factors in part three since "distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice." *Id.* at 203. Thus, it is possible for a lower court to go wrong even if no statute governs its determination, the activity in question is not one only a government can perform, and the court applies the additional factors listed in *Williams* to the best of its ability. For what it is worth, I think that, the more an activity appears to be designed to raise revenue, the more likely a court is to be upheld on appeal if it classifies the undertaking as a proprietary function. Similarly, rulings that categorize activities undertaken with no apparent profit motive as governmental functions stand a decent chance of being upheld.

Premises Liability of Local Governments Historically

The liability of a city or county for injuries attributable to unsafe conditions on its property has historically depended on whether the property was being used for a governmental or a proprietary function. For example, in *Seibold v. Kinston-Lenoir County Public Library*, 264 N.C. 360, 361 (1965), the supreme court held that governmental immunity barred the plaintiff from recovering damages for injuries sustained in a fall on a county library's steps because "[t]he operation of a public library is a governmental function" akin to "the operation of a fire department, . . . a fogging machine to eradicate mosquitos, . . . a police force, or . . . public schools." On the other hand, in *Aaser v. City of Charlotte*, 265 N.C. 493, 497 (1965), the court declared that the use of a city-owned coliseum to generate revenue for the city is a proprietary function and "the liability of the city . . . to [a] plaintiff for injury, due to an unsafe condition of the premises, is the same as that of a private person or corporation."

Nothing about *Williams* inherently contradicts this traditional approach. In the context of premises liability, *Williams* should be understood to provide the test a court must use to evaluate whether activities conducted on local government property are governmental or proprietary.

Bynumv. Wilson County

The defendant county in *Bynum* leased a building from a private development company. It used the building to house a number of departments. The planning department, the water department, the finance department, the human resources department, and the county manager all had offices in the building. The building also contained the meeting room for the county's board of commissioners.

On April 15, 2008, Mr. James Bynum visited the county's office building to pay his water bill. After leaving the water department, he fell while walking down the building's front steps. He suffered serious injuries, including paralysis in his legs and right arm, and he later died, allegedly due to injuries sustained in the fall.

Mr. Bynum filed suit against the county prior to his death, alleging that the county had been negligent by failing, among other things, to inspect, maintain, and repair the steps and to install a required handrail. Following Mr. Bynum's death, the

estate's administratrix took steps to add a wrongful death claim to the original lawsuit.

The county filed a motion asserting that the lawsuit was barred by governmental immunity. The trial court denied the motion, and the county appealed to the court of appeals. In an opinion upholding the trial court's ruling, the court of appeals held that the county was not entitled to a ruling in its favor on the question of governmental immunity because: (1) the supreme court has held that the operation of a water system that sells water for private consumption is a proprietary activity; (2) Mr. Bynum was at the county building for the purpose of paying his water bill; and (3) the lawsuit alleged that Mr. Bynum's injuries resulted from the county's negligence. *Bynum v. Wilson County*, 746 S.E.2d 296, 304-05 (2013). Although the court of appeals cited *Williams* in its discussion of governmental immunity, it did not attempt to apply the case's three-part test for distinguishing governmental from proprietary functions.

The*Bynum* Opinion

All seven justices of the North Carolina Supreme Court voted to reverse the court of appeals, but for reasons explained in their concurrence, three of the justices did not join the majority opinion. According to the majority, the court of appeals' approach in *Bynum* would erroneously base the availability of governmental immunity on a plaintiff's reason for visiting a city or county facility. This standard, the majority explained, is at odds with the *Williams* test, "which mandates that the analysis should center upon the governmental act or service that was allegedly done in a negligent manner." 758 S.E.2d at 646. In *Bynum* it was not the county's operation of a water utility that allegedly caused injury; rather, it was the failure to keep the office building in good repair. The key question, then, was whether the county's maintenance of the building constituted a governmental or a proprietary function.

Taking the *Williams* test's first two parts in reverse order, the majority concluded that upkeep of the building was a governmental function because the building was used for discretionary, legislative, and public functions that only the county could perform. The majority listed some of the departments housed in the building, all of which except for the water department performed what were unquestionably governmental functions. Case law establishes, for example, that inspection departments engage in activities covered by governmental immunity. *E.g., Bullard v. Wake County*, 729 S.E.2d 686, 694 (2012). And of course, a board of commissioners performs a governmental function whenever it conducts its meetings.

The majority further determined that the General Assembly has designated the locating, supervising, and maintaining of county buildings as governmental functions, at least with regard to county buildings that serve discretionary, legislative, or public activities. In support of this conclusion, the court cited statutes including G.S. 153A-169, which requires the board of commissioners to supervise the maintenance, repair, and use of all county property. Having found that the county's maintenance of the building qualified as a governmental function under the first two parts of the *Williams* test, the court did not proceed to third part.

The*Bynum* Concurrence

The three concurring justices agreed with the result reached by the majority but felt compelled to highlight perceived problems with the majority's reasoning. Their chief concern was that the majority would be interpreted to have created "a categorical rule barring any premises liability claims against counties or municipalities for harms that occur on government property." *Bynum*, 758 S.E.2d at 647. Such a rule, they argued, would be at odds with the court's many precedents demonstrating that a case-by-case inquiry is required to decide whether tort claims arising from unsafe property conditions are barred by governmental immunity.

Initial Reflections on*Bynum*

It seems fairly clear to me that the *Bynum* majority did not intend to prohibit all premises liability claims against cities and counties. In the first place, the majority opinion nowhere states that the upkeep of local government property is always a governmental function. Instead, it holds that a county – and, by implication, a city – performs a governmental function when it locates, supervises, or maintains "buildings that provide [discretionary, legislative, and public] functions." *Id.* A local government building devoted entirely to proprietary functions would not fall into this category. I have little doubt that, had Mr. Bynum fallen on the steps of a building occupied solely by Wilson County's water department, the court would have classified maintenance of the property as a proprietary activity.

The use of precedent in the majority opinion bolsters my view. For example, the opinion approvingly cites *Seibold*, wherein, as noted above, the outcome turned not on the county's ownership of the property, but on the property's use as a public library. It seems unlikely that the *Bynum* majority would have relied on *Seibold* as authority for its decision if it had fundamentally disagreed with the case's rationale. Furthermore, the majority opinion cites *Williams* extensively without so much as hinting that Pasquotank County was entitled to governmental immunity simply because the injury in that case took place on county land.

My reading of the majority opinion in *Bynum* has left me with a couple of unanswered questions:

- What if Mr. Bynum had fallen in the water department's office instead of in a common area? I suspect the outcome would have been the same. The supreme court reversed the court of appeals because its approach would have made governmental immunity decisions contingent on the reason for a plaintiff's presence at a local government facility. Making the availability of governmental immunity depend upon where an injury occurs in a multi-use building would create much the same problem.
- What if a preponderance of local government departments housed in a multi-use building perform proprietary functions? Suppose, for example, that in *Bynum* the inspections department had an office in the building but the other offices were occupied by public enterprises pursuing proprietary functions. My gut reaction is that the court would not have regarded upkeep of the building as a governmental activity, but I have little more than gut reaction on my side. The *Bynum* majority did go to the trouble more than once of listing the many departments housed in the county's building, and almost all of the departments listed performed governmental functions. This suggests to me that a local government cannot avoid liability for unsafe conditions merely by locating a department that undertakes governmental functions in a facility devoted primarily to proprietary activities.

Conclusion

The *Bynum* case reminds us that (1) the *Williams* test must be used to distinguish governmental from proprietary functions and (2) local government liability for unsafe property conditions hinges on the use to which property is put. When a city or county building is used for both governmental and proprietary functions, governmental immunity may bar a plaintiff's personal injury claims even though the plaintiff went to the building to visit a department engaged in proprietary activities.

[Note: Cities and counties may waive governmental immunity through the purchase of liability insurance or participation in a local government risk pool, but only to the extent of coverage. G.S. 153A-435; 160A-485. Obviously, a court does not have to worry about classifying an activity as governmental or proprietary if the plaintiff's claims are covered by the local government's liability policy.]

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