
Coates' Canons Blog: Tort Liability for Negligent Housing Inspection Resulting in Injury?

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Like other local governments, the Town of Hapless has adopted a minimum housing code pursuant to G.S. 160A-443 (for more on minimum housing codes, see Tyler Mulligan's book here). In March of this year the town's inspection department received numerous complaints about the condition of four rental houses owned by Deathtrap Properties, LLC. In response to the complaints, Homer Simpson, the department's overworked and absentminded housing inspector, conducted a preliminary investigation which revealed significant code violations at each house. It was not until several weeks later, however, that Simpson sat down to prepare the written charges and hearing notice G.S 160A-443 required him to serve on Deathtrap before taking further action. By then Simpson remembered only three of the four houses, and nothing in his incomplete and practically illegible notes reminded him of his visit to the fourth. Accordingly, just three houses were referenced in the charges served on Deathtrap and at the hearing conducted by Simpson. Following the hearing, Simpson found the three houses unfit for human habitation and ordered Deathtrap to bring them into compliance with the housing code within 90 days. Deathtrap completed the necessary repairs to the three houses in record time but made no effort to correct the fourth house's deficiencies.

Bill and Barbara Gripe leased the fourth house from Deathtrap. Shortly after Deathtrap completed the repairs ordered by Simpson, Mr. Gripe fell through a rotten spot in the fourth house's kitchen floor, breaking one of his legs and seriously injuring his back. Deathtrap subsequently went out of business. The Gripes have now filed a lawsuit in superior court naming the town and Simpson as defendants. The lawsuit seeks monetary compensation from the town and from Simpson personally for Mr. Gripe's pain and suffering and for medical expenses and lost wages. It alleges that Mr. Gripe was injured due to Simpson's negligent handling of the complaints against Deathtrap and that the town is vicariously liable for the negligence of its employee.

Are the town and Simpson liable for the harm to the Gripes?

The answer to this question is probably no, thanks to the legal doctrines of governmental immunity and public official immunity.

Governmental immunity likely applies to the claims against the town

In North Carolina employers are generally liable for the conduct of employees acting within the scope of their duties. Simpson unquestionably acted in his capacity as a housing inspector when he responded – albeit inadequately – to the complaints against Deathtrap. Yet because Simpson works for a local government, his employer enjoys legal defenses not shared by private employers. The most important of these defenses is governmental immunity.

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 misconduct of their personnel in the performance of governmental functions. If the harm arises from the performance of proprietary functions, governmental immunity doesn't apply, and the local government is subject to liability on essentially the same basis as private employers. Moreover, state law permits local governments to waive governmental immunity by purchasing liability insurance, though as explained here, immunity is waived only to the extent of coverage.

It can be difficult to tell whether a particular activity is a governmental or proprietary function in the absence of a court case designating the undertaking as one or the other. The standards the courts have articulated for distinguishing between governmental and proprietary functions are descriptive but not always very helpful. Governmental functions are said to be those performed by governmental bodies for the benefit of the public at large, such as the operation of traffic lights or a 911 call center. Some activities are obviously governmental in nature. The legislative actions of a governing board – like a town council's vote to construct a sewer system – are governmental functions. Likewise, an activity is a governmental

function when expressly labeled as such by statute.

Proprietary functions have been defined in part as activities not traditionally undertaken by government agencies. They tend to be activities which are also performed by the private sector, which benefit a definable category of individuals rather than the general public, and which make a profit. The courts have said, for instance, that the operation of a golf course or a civic center is a proprietary function.

There is good reason to conclude that housing inspectors perform governmental functions when they investigate alleged code violations and prepare for and conduct hearings to determine whether dwellings are suitable for human habitation. In authorizing cities and counties to adopt and enforce minimum housing codes, the General Assembly has proclaimed that the occupation of residences unfit for human habitation is “inimical to the welfare and dangerous and injurious to the health, safety and morals of the people of this State.” G.S. 160A-441. This pronouncement reflects the legislature’s judgment that minimum housing codes benefit the public at-large, not just the individuals who live in or near a particular structure. Additionally, like many other activities classified as governmental functions, housing code enforcement is an activity traditionally performed by local governments.

Decisions by the North Carolina Court of Appeals further support the view that the investigation and resolution of housing code violations are governmental functions. In *Bullard v. Wake County*, 729 S.E.2d 686 (2012), property owners discovered major structural defects in their new house after the county’s inspection department issued a certificate of occupancy declaring that all known building code violations had been corrected. The owners sued the county alleging negligent inspection and misrepresentation by building inspectors, but the court of appeals held that governmental immunity prevented the owners from pursuing their negligence claims. It’s hard to imagine that, having classified building inspections as a governmental function, the court would rule that the enforcement of housing codes is proprietary in nature. Indeed, such a ruling might conflict with *Patterson v. City of Gastonia*, 725 S.E.2d 82 (2012), wherein the court upheld the use of governmental immunity to block tort claims against a city for the demolition of dwellings whose owners had failed to bring them into compliance with the housing code. It seems reasonable to assume that, if the demolition of property for housing code violations is a governmental function, the investigatory and procedural steps an enforcement officer must take prior to demolition involve governmental functions as well.

The superior court should conclude that Simpson was performing governmental functions when he investigated the complaints against Deathtrap and negligently failed to take additional action concerning the house leased by the Gripes. Governmental immunity prevents the Gripes from proceeding against the town unless the town has purchased liability coverage applicable to their claims.

Simpson is entitled to public official immunity

Governmental immunity protects local governments; it doesn’t bar claims against public servants as individuals. The general rule in North Carolina is that government personnel may be held personally liable for their on-the-job negligence or deliberate misconduct. The doctrine of public official immunity, however, shields “public officials” but not “public employees” from liability for tort claims, unless the officials act beyond the scope of their duties or maliciously or corruptly. Whether an individual qualifies as a public official in the context of a tort claim has little to do with how the person is categorized in other circumstances. Thus, the courts have classified principals as public officials and teachers as public employees for purposes of public official immunity, even though both are employees of their local school boards.

As with attempts to distinguish governmental from proprietary functions, it isn’t always easy to tell whether a person should be regarded as a public official or public employee. The courts typically regard individuals as public officials if their positions originate in the state constitution or statute, their duties require the use of discretion, and they exercise some portion of the state’s sovereign power. Personnel who perform tasks involving little or no discretion are considered public employees. Examples of public officials include elected officials, chiefs of police and police officers, sheriffs and their deputies, and county directors of social services. Street sweepers and emergency medical technicians are a few of the public servants who have been classified as public employees by the courts.

Public official immunity has come up in lawsuits against building inspectors. In *Pigott v. City of Wilmington*, 50 N.C. App. 401 (1981), the court of appeals ruled that a chief building inspector qualifies as a public official because the position is created by statute and the chief building inspector uses discretion and exercises a portion of the state’s sovereign power. The court held in a later case that public official immunity extends to subordinate building inspectors because they too

occupy positions created by statute and perform duties involving the exercise of discretion and the sovereign power of the state. *McCoy v. Coker*, 174 N.C. App. 311 (2005).

The same reasoning that led the court to classify building inspectors as public officials in *Pigott* and *McCoy* should prompt the superior court to find that Simpson is a public official. His position as a housing inspector was created by G.S. 160A-411, the very statute cited in *Pigott* and *McCoy*. The investigation of alleged housing code violations requires discretion comparable to that used during building code inspections. Furthermore, Simpson also wields a portion of the state's sovereign power. He has the authority, for instance, to deem residential property unfit for human habitation and to order the owner to repair, remove, or demolish it. The court of appeals has recognized the similarities between building inspectors and housing inspectors in an unpublished decision holding that housing inspectors qualify as public officials. *Al-Nasra v. Cleveland County*, 691 S.E.2d 132 (2010) (unpublished). Although unpublished decisions bind neither the court of appeals nor trial courts in future cases, judges often look to them for guidance.

The Gripes allege that Simpson acted negligently, not maliciously or corruptly, when he failed to address the housing code violations at the fourth Deathtrap house. Because Simpson is a public official, public official immunity shields him from the Gripes' attempt to hold him financially responsible for their damages.

This post was previously published on the School of Government's Community Economic Development blog.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-443
- www.sog.unc.edu/publications/books/housing-codes-repair-and-maintenance-using-general-police-power-and-minimum-housing-statutes-prevent
- canons.sog.unc.edu/?p=7126
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-441
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-411
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