

## Local Government Lawyers: Take Care Asserting Governmental Immunity

When a city, county, or other unit of local government is sued for negligence or other torts, it's common practice for the unit's attorney to file a motion asking the trial court to dismiss the lawsuit based on the defense of governmental immunity. (See blog posts available [here](#) and [here](#) for an explanation of governmental immunity fundamentals.) Many local government attorneys believe that, if the trial court denies such a motion, the unit always has the right to an immediate appeal. As a recent decision by the North Carolina Court of Appeals reminds us, however, whether the unit may immediately appeal can depend on how the immunity defense is framed in the motion. This blog post aims to

- explain when a motion to dismiss that alleges governmental immunity is immediately appealable and
- identify practical steps local government lawyers should take to ensure that the right to an immediate appeal is preserved.

### Immediate Appeals from Trial Court Orders

As a general rule, the parties to a lawsuit may not immediately appeal a trial court's interlocutory orders. (An order is "interlocutory" if it does not dispose of all matters in dispute.) Two important exceptions to this rule are found in [G.S. 1-277](#), which allows a party to appeal immediately from (1) a ruling on a legal issue that affects a "substantial right" or (2) an adverse ruling that concerns the trial court's jurisdiction over the defendant or the defendant's property. There's an enormous body of case law on what constitutes a substantial right under G.S. 1-277's first prong, but in broad terms a substantial right is "one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Darroch v. Lea*, 150 N.C. App. 156, 159 (2002) (internal quotation marks omitted). The second prong of G.S. 1-277 allows immediate appeals from orders rejecting challenges to the trial court's personal jurisdiction over the defendant in a case. (More information on appeals from interlocutory orders can be found in the guide prepared by the North Carolina Bar Association and available [here](#).)

### Motions to Dismiss and Governmental Immunity

Many of the appellate court decisions on interlocutory appeals and governmental immunity stem from lawsuits in which the trial court denied a motion to dismiss (MTD) filed by the unit of local government pursuant to Rule 12(b) of the [North Carolina Rules of Civil Procedure](#). In each case, the unit argued for dismissal on one or more of the following grounds.

- *Rule 12(b)(1) Lack of Subject Matter Jurisdiction*. The unit maintained that dismissal was necessary because governmental immunity deprived the trial court of the power to

adjudicate the types of claims – ordinarily tort claims – alleged against it.

- *Rule 12(b)(2) Lack of Personal Jurisdiction.* The unit alleged that dismissal was required inasmuch as governmental immunity prevented the trial court from exercising control over the unit in the case.
- *Rule 12(b)(6) Failure to State a Claim Upon Which Relief May be Granted.* The unit asserted that dismissal was necessary because, even if the plaintiff's factual allegations were accepted as true, governmental immunity barred the plaintiff's claims against the unit.

### Immediate Appeals from Denials of MTDs Asserting Governmental Immunity

It's not hard to find appellate court decisions which flatly state that a unit may immediately appeal from an interlocutory order denying a MTD, if the MTD asserts governmental immunity. *E.g.*, *Richmond County Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586 (2013) ("This Court has consistently held that '[t]he denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable.'). Such statements have led to the widespread belief that a trial court's denial of a MTD asserting governmental immunity always triggers the right to an immediate appeal.

This belief is almost certainly wrong. In several cases involving governmental immunity, the court of appeals has conditioned the right of interlocutory appeal on whether the unit's MTD cited 12(b)(1), 12(b)(2), or 12(b)(6). Let's consider what the court has said with regard to each provision in turn, starting with 12(b)(6) and saving 12(b)(1) for last because the court's pronouncements regarding 12(b)(1) are the most complicated.

#### *Immediate Appeals and 12(b)(6) (Failure to State a Valid Claim)*

According to the court of appeals, when governmental immunity is raised in a Rule 12(b)(6) motion, the denial of the motion creates a right to appeal immediately under G.S. 1-277's "substantial right" prong. *E.g.*, *Davis v. DiBartolo*, 176 N.C. App. 142, 144 (2006). The substantial right affected is the unit's right under the doctrine of governmental immunity to be free not just from liability for the plaintiff's injuries but also from the burden of having to litigate the plaintiff's claims. As the court has explained, the value of governmental immunity to local governments would be significantly diminished if a unit that unsuccessfully asserts the immunity in a 12(b)(6) motion could be forced to proceed to trial without appellate review. *Slade v. Vernon*, 110 N.C. App. 422, 425 (1993).

#### *Immediate Appeals and 12(b)(2) (Lack of Personal Jurisdiction)*

The court of appeals has repeatedly opined that the defense of governmental immunity constitutes a challenge to the trial court's personal jurisdiction over the defendant local government. For this reason, the appellate court has treated the denial of a 12(b)(2) motion premised on governmental immunity as immediately appealable under the personal jurisdiction prong of G.S. 1-277. *Can Am.*

*S., LLC, v. State*, 234 N.C. App. 119, 123-24 (2014); *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100 (2001).

### *Immediate Appeals and 12(b)(1) (Lack of Subject Matter Jurisdiction)*

Because Rule 12(b)(1) concerns subject matter jurisdiction, not personal jurisdiction, the denial of a 12(b)(1) motion doesn't trigger a right to an immediate appeal under G.S. 1-277 unless a substantial right is affected. In *Teachy v. Coble Dairies*, the North Carolina Supreme Court appears to have concluded that the denial of a 12(b)(1) motion doesn't affect a substantial right. 306 N.C. 324 (1982). Relying on *Teachy*, the court of appeals has held that there's no immediate appeal from a trial court's denial of a 12(b)(1) motion, even when governmental immunity is in play. *Davis*, 176 N.C. App. at 144-45; *Data Gen.*, 143 N.C. App. at 100.

At first glance, the court of appeals' application of *Teachy* to immunity cases seems inconsistent with the court's treatment of 12(b)(6) motions asserting governmental immunity. How can the denial of an immunity defense affect a substantial right if raised under 12(b)(6) but not 12(b)(1)?

The same decisions in which the court of appeals has held that governmental immunity calls a trial court's personal jurisdiction into question also declare that governmental immunity doesn't present a question of subject matter jurisdiction. *E.g.*, *Data General*, 143 N.C. App. at 100 (noting that "an appeal of a [MTD] based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction"). The decisions appear to imply that governmental immunity shouldn't be viewed as affecting a substantial right when it's raised under 12(b)(1) because a 12(b)(1) motion is the wrong vehicle for asserting that defense.

The court of appeals hasn't been entirely consistent in its approach to governmental immunity and 12(b)(1) motions. As recently as 2014, the court allowed an immediate appeal from the denial of a 12(b)(1) motion that raised the defense of governmental immunity, agreeing with the defendant that the trial court's ruling had affected a substantial right. *Sandhill Amusements, Inc., v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 347-48 (2014), *rev'd on other grounds and remanded*, 368 N.C. 91 (2015) (per curiam). The last word on whether governmental immunity may be used to challenge a trial court's subject matter jurisdiction belongs, of course, to our state's supreme court, but so far it has resisted providing definitive guidance on the issue. See *Teachy*, 306 N.C. at 328 (declining to resolve "whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a [MTD] on grounds of sovereign immunity is immediately appealable").

In short then, when governmental immunity is raised in a 12(b)(2) or 12(b)(6) motion, the denial of the motion creates a right to an immediate appeal. On the other hand, if a unit of local government unsuccessfully moves for dismissal on immunity grounds solely under Rule 12(b)(1), it may find itself unable to appeal immediately. The court of appeals' recent opinion in *Murray v. University of North Carolina at Chapel Hill* illustrates how these principles work in practice. It also points to practical steps that a local government attorney should take to preserve the option for an

immediate appeal from the denial of a MTD in which governmental immunity is asserted. \_\_\_ N.C. App. \_\_\_, 782 S.E.2d 531 (2016), *aff'd*, 799 S.E.2d 612 (2017) (per curiam).

### The Murray Decision

The plaintiff in *Murray* filed a grievance under the university's Title IX policy, alleging sexual misconduct on the part of a fellow student. She subsequently filed a lawsuit against the university, alleging it had unlawfully restricted her attorney's ability to participate in the grievance proceedings. The university filed a MTD under 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a valid legal claim. The MTD didn't cite 12(b)(2), nor did it expressly mention sovereign immunity. (The term "sovereign immunity" is the proper term when the state or a state agency is the defendant; "governmental immunity" applies to units of local government.) At the hearing on the MTD, however, the university argued for dismissal under both 12(b)(1) and 12(b)(2) based on sovereign immunity. The trial court issued an order denying the MTD, and the university pursued an immediate appeal from that order.

The court of appeals held that the university wasn't entitled to an immediate appeal. As it has in other cases, the court opined that there's no right to an immediate appeal from the denial of a 12(b)(1) motion, even when sovereign immunity is at issue. It thus declined to review the trial court's denial of the university's 12(b)(1) motion.

Although the university argued for dismissal under 12(b)(2) at the MTD hearing, and a trial court's denial of a 12(b)(2) motion may be appealed immediately, the court of appeals determined that the university had not taken the procedural steps necessary to preserve an appeal on 12(b)(2) grounds. Under the [North Carolina Rules of Appellate Procedure](#), a party must obtain a ruling from the trial court in order to preserve an issue for appeal. N.C. R. App. P. 10(a)(1). In *Murray*, the trial court's order referred to 12(b)(1) and 12(b)(6) but omitted any reference to 12(b)(2), and the university didn't ask the trial court to supplement the order with a ruling on its oral 12(b)(2) motion.

The appellate court likewise rejected the university's argument that it could immediately appeal the denial of its 12(b)(6) motion. While the denial of a 12(b)(6) motion is subject to an immediate appeal if the motion asserts sovereign immunity, the university's MTD didn't expressly assert that defense. Furthermore, although the university brought up sovereign immunity at the MTD hearing, it did so only with regard to 12(b)(1) and 12(b)(2). Inasmuch as the university hadn't argued governmental immunity in connection with 12(b)(6), the court of appeals concluded that the university couldn't immediately appeal from the trial court's denial of its 12(b)(6) motion.

### Practice Tips

The court's opinion in *Murray* offers several practical takeaways for local government attorneys. To ensure that a unit may immediately appeal a trial court's denial of a MTD based on governmental immunity, the unit's attorney should

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- cite Rule 12(b)(2) and 12(b)(6) in the MTD,
- clearly assert governmental immunity in the MTD under both 12(b)(2) and 12(b)(6),
- specifically argue governmental immunity under 12(b)(2) and 12(b)(6) at the hearing on the MTD, and
- obtain a ruling from the trial court's that addresses both 12(b)(2) and 12(b)(6).