

Pleading Waiver of Governmental Immunity: What's Enough?

In lawsuits against units of local government, the general rule is that the trial court must throw out the plaintiff's claims if the unit raises the defense of governmental immunity and the complaint fails to allege a waiver of that immunity. This blog post looks at how detailed a waiver allegation must be for a complaint to survive an assertion of governmental immunity.

The Concept of Waiver

As I've explained in prior blog posts ([here](#), [here](#), and [here](#)), the defense of governmental immunity protects cities, counties, and other units of local government from civil liability for negligence and other claims – though not constitutional claims – that arise from the performance of governmental functions. The courts have recognized that a unit may waive this immunity through any of the three actions described in the next section. Essentially, by acting in any of those ways, a unit consents to be sued for any civil claims that fall within the scope of the waiver.

Means and Scope of Waiver

A unit of local government may waive governmental immunity (agree to be sued) by

- engaging in a proprietary activity,
- purchasing liability insurance, or
- entering into a valid contract.

Fuller v. Wake County, ____ N.C. App. ____, 802 S.E.2d 106, 113 (2017).

The extent to which the unit exposes itself to civil liability varies depending on the means of waiver.

Proprietary activity

Many local government undertakings are not governmental but proprietary in nature, such as a city's ownership and maintenance of a golf course. *Lowe v. City of Gastonia*, 211 N.C. 564, 566 (1937). (For a detailed examination of the case law distinguishing between governmental and proprietary functions, see [here](#) and [here](#).) In most respects, a unit of local government sued for harms caused by a proprietary activity is liable for the negligence or intentional wrongdoing of its officers or employees to the same extent as a private employer. *But see Long v. City of Charlotte*, 306 N.C. 187, 208 (1982) (holding that punitive damages may not be awarded against a local government unless they are expressly authorized by statute).

Liability insurance

By purchasing liability insurance, a unit waives its immunity against tort claims arising from governmental functions, but only for those claims covered by the policy and only up to the policy limits. [G.S. 115C-42](#) (school boards); [153A-435](#) (counties); [160A-485](#) (cities). In one case, for example, the court held that the unit hadn't waived immunity as to the plaintiff's wrongful discharge claim because (1) the claim concerned the sheriff's decision to fire the plaintiff and (2) the unit's liability policy excluded claims between law enforcement officers. *Phillips v. Gray*, 163 N.C. App. 52, 56-57 (2004). In another case, the unit's liability policy excluded claims under \$250,000. The plaintiff sought \$73,000 in damages, leading the court to hold that no waiver as to the plaintiff's claim had occurred. *Mclver v. Smith*, 134 N.C. App. 583, 590 (1999).

Valid contract. By entering into a valid contract, a unit waives governmental immunity as to causes of action under the contract. In particular, the unit agrees to be sued for a breach of its contractual obligations. *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 102-03 (2001). It also consents to a declaratory judgment action that seeks "to ascertain the rights and obligations owed under [the] contract." *Atl. Coast Conference v. Univ. of Md.*, 230 N.C. App. 429, 442 (2013).

General Pleading Requirement

Our state's appellate courts have repeatedly explained that, "to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity." *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 38 (2005) (internal quotation marks omitted). See also *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418 (2002) ("In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity.").

If no allegation of waiver is present, "the complaint fails to state a cause of action." *Wray v. City of Greensboro*, ____ N.C. ____, 802 S.E.2d 894, 899 (2017). In other words, if the complaint in a lawsuit against a unit of local government fails to allege waiver, and the unit properly asserts governmental immunity in a motion to dismiss or motion for summary judgment, the trial court must throw out any claims subject to the unit's immunity defense. Its ruling in favor of the unit will be upheld on appeal, even if the record contains evidence of waiver. *Clark v. Burke Cnty.*, 117 N.C. App. 85, 88-89 (1994); *Gunter v. Anders*, 115 N.C. App. 331, 337 (1994). See also *Fabrikant*, 174 N.C. App. at 39 ("Based on *Clark* and *Gunter*, we are limited to reviewing the complaint and its attachments to determine whether plaintiffs have alleged sufficient facts to establish a waiver by the State defendants of sovereign immunity.").

Adequate Waiver Allegations

So how does the trial court go about determining whether a complaint sufficiently alleges a waiver of governmental immunity? It shouldn't base its decision on whether the word "waiver" appears in the complaint. According to both the North Carolina Supreme Court and the North Carolina Court of Appeals, no particular language is necessary to allege a waiver of governmental immunity.

Wray, ____ N.C. at ____, ____, 802 S.E.2d at 899; *Fullwood v. Barnes*, ____ N.C. App. ____, ____, 792 S.E.2d 545, 550 (2016).

The proper test is whether the complaint alleges facts that, if true, establish the existence of a waiver. Appellate cases discussing the different waiver mechanisms indicate that this standard isn't hard to meet.

Alleging waiver by proprietary function

No express allegation of waiver is required when the undertaking alleged to have caused the plaintiff's injury constitutes a proprietary function. *Town of Sandy Creek v. East Coast Contracting, Inc.*, 226 N.C. App. 576, 577 (2013). Why not? Because a claim based on a proprietary function necessarily concerns an incident for which the unit doesn't enjoy governmental immunity. In *Sandy Creek*, for example, the defendant city argued that governmental immunity shielded it from claims that its negligent supervision of a contractor had resulted in damage to a nearby town's streets. No explicit allegation of waiver was required, the appellate court said, because the city's handling of its business relationship with the contractor amounted to a proprietary function.

Alleging waiver by purchase of insurance

A plaintiff can satisfy the waiver pleading requirement through a bare allegation that the defendant unit has liability coverage applicable to the plaintiff's claims. The allegation does not have to name the insurance provider or say anything about the policy limits. In one case, the complaint merely alleged: "Upon information and belief, [the town] maintain[s], and at all times relevant to this claim maintained, liability insurance affording coverage to this action." *Anderson v. Town of Andrews*, 127 N.C. App. 599, 600 (1997). The court of appeals deemed the allegation sufficient to assert a waiver of immunity through the purchase of liability insurance, in part because the allegation afforded the town adequate notice of the basis for the plaintiffs' claim, notwithstanding the omission of the word "waiver."

Alleging waiver by contract

Simply by alleging that a unit of local government has entered into a valid contract, a complaint effectively asserts that the unit has waived immunity as to actions on the contract. *Wray*, ____ N.C. at ____, 802 S.E.2d at 899 ("[A] waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim.").

In *Wray*, the plaintiff sued his former employer over costs he had incurred defending himself in several lawsuits arising from his tenure as chief of police. The complaint alleged that the unit was obligated to reimburse the plaintiff under a policy it had adopted concerning civil claims against the unit's officers and employees. Describing the plaintiff's claim as one "sounding in contract," the North Carolina Supreme Court held that the complaint "sufficiently allege[d] that the City ha[d]

consented to be sued to the extent of any such contract.” *Id.* at ____, 801 S.E.2d at 901. Consequently, the complaint’s allegations were “adequate to raise a waiver of governmental immunity.” *Id.*

The supreme court took pains to note that its ruling “express[ed] no opinion on the merits of the plaintiff’s contract action.” *Wray*, ____ N.C. at ____, 802 S.E.2d at 900. The case was sent back to the trial court for it to determine whether the unit actually had a contractual obligation to reimburse the plaintiff.

The high court’s comment about the limited nature of its ruling brings up an important point relevant to all three categories of waiver allegations. Even if a complaint succeeds in pleading a waiver, governmental immunity might ultimately defeat the plaintiff’s claims anyway. If, for instance, the plaintiff relies on the proprietary nature of the activity to establish a waiver, and the evidence leads the court to classify the undertaking as governmental – perhaps because it didn’t generate significant revenue for the unit – the plaintiff may find his or her claims barred by governmental immunity. Similarly, an allegation that a unit has waived immunity through the purchase of liability insurance can be overcome by evidence that the unit lacks such insurance or that its policy doesn’t cover the precise claims or amounts at issue. And, finally, if an alleged contract turns out to have been invalid, the complaint’s assertion of validity won’t stop the unit from invoking governmental immunity to torpedo the plaintiff’s contract claims.