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LOCAL GOVERNMENTS AND THE PUBLIC DUTY DOCTRINE AFTER *WOOD V. GUILFORD COUNTY*

ANITA R. BROWN-GRAHAM

This Article reviews the evolution of the public duty doctrine in North Carolina tort law, culminating with its application in Wood v. Guilford County. It addresses the anomalies, inconsistencies, and ironies surrounding the doctrine, many of which were ignored by the Wood decision, and questions the doctrine's continued viability in North Carolina. After analyzing the legal and policy arguments in favor of and against retaining the doctrine, the author concludes that the state courts should continue to provide the defense to local governments.

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Fictional features and fairy-tale distinctions are common in the law of local government liability. Yet even among the unwieldy rules of public liability, the North Carolina courts' application of the public duty doctrine stands out as problematic. Commonly referred to as "the duty to all, duty to none" rule,¹ this judicially crafted doctrine declares that a local government is under no duty to protect any specific individual from the wrongful acts of a third person absent a "special duty" of protection or a "special relationship" between the claimant and local government.² While fairly straightforward in theory, the public duty doctrine's fifteen-year history in North Carolina's courts has been full of twists and turns.

The Supreme Court of North Carolina authored its latest, though surely not last, chapter in the doctrine's evolution when it decided *Wood v. Guilford County*³ in 2002. Shelley Austin Wood was criminally assaulted in a restroom at the Guilford County Courthouse in High Point, North Carolina, her place of employment.⁴ After the assault, she filed a complaint against her employer Guilford County (the "County") and Burns International Security ("Burns"), the private firm under contract with the County to provide security for

1. See *Clouse v. Arizona*, 16 P.3d 757, 767 (Ariz. 2001); *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986); accord *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976) (referring to "the duty to all, duty to none"); *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 203, 499 S.E.2d 747, 753 (1998) (Orr, J., dissenting) ("A duty to all is a duty to none.").

2. See *Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 901-02 (1991) (citing *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6 (1988)).

While this policy is a necessary and reasonable limit on liability, exceptions exist to prevent inevitable inequities to certain individuals. There are two generally recognized exceptions to the public duty doctrine: (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."

Id.

3. 355 N.C. 161, 558 S.E.2d 490 (2002).

4. *Id.* at 162, 558 S.E.2d at 492.

the courthouse.⁵ The complaint alleged that the County and Burns were negligent in failing to adequately protect Ms. Wood from the assault and attempted rape.⁶ Claiming fidelity to its prior decisions, the Supreme Court of North Carolina held that the public duty doctrine applied to bar the action against the County.⁷ With little evocative discussion, the court reasoned that the public duty doctrine applies whenever general police functions are implicated without facts to suggest a special duty or special relationship.⁸ The court's brief and formulaic opinion belied the difficulty of the underlying issues; the court missed an opportunity to clarify and justify the public duty doctrine, improve the predictability of public liability, and explicitly balance the twin public policy concerns of private compensation and governmental protection.

This Article considers the *Wood* decision and its implications for North Carolina's local governments. Part I chronicles the evolution of the public duty doctrine, with a particular focus on the Supreme Court of North Carolina's six principal public duty doctrine decisions preceding *Wood*.⁹ Part II briefly details the facts of *Wood*, the decisions by the lower courts, and the opinion of the Supreme Court of North Carolina. It points out some of the anomalies, inconsistencies and ironies surrounding the doctrine, all of which were ignored by the *Wood* decision. Part III analyzes the threshold issue of whether judicial application of the public duty doctrine contravenes legislative abrogation of governmental immunity and surmises that it does not. Part IV argues that the doctrine, as presently applied, may add little substantive protection beyond that already afforded by governmental immunity or traditional negligence law; nonetheless, it provides significant procedural benefits to local governments. In the final analysis, the Article concludes that, despite the confusion surrounding the doctrine, public policy considerations weigh in favor of retaining the defense for North Carolina's local governments.

5. *Id.* at 163, 558 S.E.2d at 492-93.

6. *Id.* at 163, 558 S.E.2d at 493. The plaintiff also claimed that, as an employee of the courthouse, she was a third party beneficiary of the contract between the County and Burns. *Id.*

7. *Id.* at 169-70, 558 S.E.2d at 496-97.

8. *Id.* at 170, 558 S.E.2d at 497.

9. *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000); *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000); *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999); *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998); *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991).

I. THE EVOLUTION OF THE PUBLIC DUTY DOCTRINE IN NORTH CAROLINA

A. *The Doctrine's Humble Beginnings: Braswell*

Cooley's treatise on the law of torts offers this frequently quoted statement of the public duty doctrine:

In order that a public officer shall be liable to an individual in tort, it is necessary that the officer shall have violated some legal duty owing by him to such individual, as a result of which violation the individual has suffered damage. For the mere failure of an officer to perform a public duty owing by him to the public at large, as for example, the duty of a legislator to act honestly, or of an executive officer to enforce the law, no action lies by an individual.¹⁰

The doctrine evolved to protect governments and their employees from liability for negligence in failing to protect a citizen from the harmful conduct of a third party.¹¹ A party seeking to recover damages under the common law of negligence must establish a legal duty, a breach of that duty, and an injury proximately caused by the breach.¹² By holding that, as a matter of law, the government has no legal duty to protect the individual citizen, the public duty doctrine serves to negate one of the essential elements of a plaintiff's case.

The United States Supreme Court first recognized the public duty doctrine in 1855.¹³ However, the doctrine was unknown in North Carolina law until 1988 when the court of appeals applied it for the

10. THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TORTS § 60, at 144 (Revised student's ed. 1930).

11. See *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991) ("For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits"); ANITA R. BROWN-GRAHAM, A PRACTICAL GUIDE TO THE LIABILITY OF NORTH CAROLINA CITIES AND COUNTIES, 2-9 (University of North Carolina at Chapel Hill Institute of Government 1999) ("There are circumstances in which a unit of local government has no legal duty to protect an individual citizen from harm caused by a third person.").

12. See *Kientz v. Carlton*, 245 N.C. 236, 240, 96 S.E.2d 14, 17 (1957).

13. See *South v. Maryland*, 59 U.S. (18 How.) 396 (1855). In *South*, the plaintiff sued the sheriff alleging that the sheriff negligently failed to protect him from a mob. *Id.* at 398. The Court held that the sheriff's duty as conservator of the peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only." *Id.* at 403.

first time in *Coleman v. Cooper*¹⁴ to absolve a local government from liability for failing to protect two young girls who were murdered by their father.¹⁵ Three years later, in *Braswell v. Braswell*,¹⁶ the Supreme Court of North Carolina affirmed that the doctrine protected local governments from tort liability “for the failure to furnish police protection to specific individuals.”¹⁷

Braswell involved allegations that a sheriff negligently failed to provide police protection for a woman who was fatally shot by her estranged husband, a deputy sheriff.¹⁸ The sheriff had assured Mrs. Braswell that “he would see she got back and forth to work safely . . . [and] that his men would be keeping an eye on her.”¹⁹ Her well-being was short-lived, however. Mr. Braswell killed his wife while she was running an errand during her lunch period.²⁰ The supreme court used the public duty doctrine to shield the county from liability for the sheriff’s failure to protect her.²¹ According to the court:

The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-

14. 89 N.C. App. 188, 366 S.E.2d 2 (1988) (citing *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981); *Evett v. City of Inverness*, 224 So. 2d 365 (Fla. Dist. Ct. App. 1969); *Keane v. City of Chicago*, 240 N.E.2d 321 (Ill. App. Ct. 1968); *Food Fair v. City of Evansville*, 272 N.E.2d 871 (Ind. Ct. App. 1971); *Evers v. Westerberg*, 38 N.E.2d 751 (N.Y. 1972); *Chambers-Castanes v. King County*, 669 P.2d 451 (Wash. 1983)).

15. *Coleman*, 89 N.C. App. at 192–94, 366 S.E.2d at 5–6. The court of appeals determined that the public duty doctrine applied to bar a wrongful death suit against the police department, the city, the county, and Kathy Cooper, a county social worker, for the death of two young girls at the hands of their father. *Id.* at 194–95, 366 S.E.2d at 7. Cooper assured the girls’ mother that the police would provide protection from the father for the girls, if needed. *Id.* at 190, 366 S.E.2d at 4. The court held that the police department owed no specific duty to protect the girls and the facts of the case did not support a finding of either exception to the public duty doctrine: special relationship or special duty. *Id.* at 194–95, 366 S.E.2d at 7. Although the police interviewed the two young victims to substantiate a claim of sexual abuse against the father, the girls were merely potential witnesses who would likely be called by the State at the time of trial. *Id.* at 195, 366 S.E.2d at 7. The city’s police department had no policy of providing police protection to potential witnesses in a criminal case and the law did not require otherwise. *Id.* Therefore, there was no special relationship between the police and the girls. The evidence also failed to support a finding of a special duty. *Id.* at 194, 366 S.E.2d at 7. The officer in charge of the case did not tell the mother or the girls that any kind of protection would be afforded to them. *Id.* Although the social worker made some general assurances and the officer was aware of prior acts of violence by the father, the girls said they were not afraid of their father. *Id.* Thus, there appeared to be neither specific assurances by the police nor detrimental reliance by the girls. *Id.*

16. 330 N.C. 363, 410 S.E.2d 897 (1991).

17. *Id.* at 370, 410 S.E.2d at 901.

18. *Id.* at 369–70, 410 S.E.2d at 901.

19. *Id.*

20. *Id.* at 369, 410 S.E.2d at 901.

21. *Id.* at 372, 410 S.E.2d at 902.

executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and [would do so] without predictable limits.²²

Absent special circumstances constituting exceptions to the public duty doctrine, the sheriff's department was under no duty to protect Mrs. Braswell from her husband.²³ The court stated:

There are two generally recognized exceptions to the public duty doctrine: (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."²⁴

The court found no facts to suggest a special relationship between Mrs. Braswell and the sheriff's department and turned its attention, therefore, to whether the sheriff's remarks created a special duty to protect Mrs. Braswell.²⁵ The court suggested the remarks made by the sheriff to Mrs. Braswell "were general words of comfort and assurance, commonly offered by law enforcement officers in situations involving domestic problems, and that such promises were merely gratuitous and hence not sufficient to constitute an actual promise of safety."²⁶ Moreover, Mrs. Braswell was killed while on a midday errand, not while traveling to and from work, "and hence was outside the scope of protection arguably promised."²⁷ Thus, there was no special duty.

For nine years the public duty doctrine evolved exclusively and

22. *Id.* at 370-71, 410 S.E.2d at 901 (quoting *Riss v. City of New York*, 240 N.E.2d 860-61 (N.Y. 1968)).

23. *Id.* at 371, 410 S.E.2d at 902 (citing *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6 (1988)).

24. *Id.*

25. *Id.* at 372, 410 S.E.2d at 901-02.

26. *Id.* at 371-72, 410 S.E.2d at 902. The court did acknowledge that the promise of protection to Mrs. Braswell as she traveled to and from work arguably could have been specific enough to create a special duty exception to the public duty doctrine. *Id.* at 372, 410 S.E.2d at 902.

27. *Id.*

actively in the North Carolina Court of Appeals. By 2000, it emerged as a basis for protecting cities and counties from liability in a variety of situations extending beyond police protection.²⁸ The doctrine appeared in cases involving building inspection,²⁹ land use planning,³⁰ taxicab permitting,³¹ animal control,³² and fire protection.³³ Without intervention by the Supreme Court of North Carolina, it appeared there would be little limitation placed on the doctrine.³⁴

28. See, e.g., *Simmons v. City of Hickory*, 126 N.C. App. 821, 823, 487 S.E.2d 583, 585 (1997) (holding that the public duty doctrine applied to bar a claim against the city for its failure to find construction defects while inspecting homes and issuing building permits); *Davis v. Messer*, 119 N.C. App. 44, 55–56, 457 S.E.2d 902, 909–10 (1995) (holding that the public duty doctrine could be invoked in a claim against a fire chief, fire department, town, and county for negligence in their failure to complete their effort to extinguish a fire in the plaintiff's home, but finding them liable because the special duty exception applied); *Sinning v. Clark*, 119 N.C. App. 515, 518–19, 459 S.E.2d 71, 73–74, (1995) (applying the public duty doctrine to bar a claim against a municipality, the city building inspector, and the city code administrator for gross negligence in the inspection of a home); *Prevette v. Forsyth County*, 110 N.C. App. 754, 758, 431 S.E.2d 216, 218 (1993) (applying the public duty doctrine to bar a wrongful death claim against the county, the director of the county animal control shelter, and his employee for failing to protect the plaintiff from dogs which the defendants knew were dangerous); *Lynn v. Overlook Dev.*, 98 N.C. App. 75, 78, 389 S.E.2d 609, 611–12 (1990) (applying the public duty doctrine to bar liability of a city and the city building inspector for negligence in inspecting the plaintiff's condominium). But see *Isenhour v. Hutto*, 129 N.C. App. 596, 600, 501 S.E.2d 78, 81 (1998), *aff'd on other grounds*, 350 N.C. 601, 517 S.E.2d 121 (1999) (denying a city the protection of the public duty doctrine where "the relevant relationship was one between a crossing guard and an elementary school student. . . . [because] a crossing guard's primary function is to ensure the safety of a specific individual—each child who comes to the crossing guard seeking to cross the street"). The court of appeals also applied the doctrine to bar a claim against the Department of Correction, a state agency. See *Humphries v. N.C. Dep't of Correction*, 124 N.C. App. 545, 548, 479 S.E.2d 27, 28 (1996).

29. See *Sinning*, 119 N.C. App. at 518–19, 459 S.E.2d at 73–74; *Lynn*, 98 N.C. App. at 78, 389 S.E.2d at 612 (applying the public duty doctrine to negligent building inspection).

30. See *Derwort v. Polk County*, 129 N.C. App. 789, 792, 501 S.E.2d 379, 381 (1998) (applying the public duty doctrine to a county's supervision of subdivision control ordinances).

31. See *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 442 S.E.2d 75 (1994) (applying the doctrine to claims against a city and several police officers for failure to properly investigate the credentials of a taxi permit applicant).

32. See *Prevette*, 110 N.C. App. at 758, 431 S.E.2d at 218 (applying the doctrine to protect an animal control shelter and its employees from liability for failing to protect a citizen from dangerous dogs).

33. See *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995) (holding the public duty doctrine may be invoked as a town's defense to a claim for negligent fire protection services).

34. It is possible that the court of appeals may have limited or abolished the public duty doctrine if the judges believed they had the authority to do so. See *Hull v. Oldham*, 104 N.C. App. 29, 36, 407 S.E.2d 611, 615 (1991) (refusing to abolish the public duty doctrine and stating that a court of appeals panel may not overrule a prior decision of a different panel unless it has been overturned by a higher court). The results in *Hull* were particularly harsh. In this case, the court held that the public duty doctrine barred suit

B. The Public Duty Doctrine Anew: Stone and Hunt

Ten years after the introduction of the public duty doctrine into North Carolina law, the state supreme court appeared to sanction the lower courts' engorgement of the doctrine when it further broadened the doctrine's parameters. In *Stone v. North Carolina Department of Labor*³⁵ the court considered whether the public duty doctrine applied to claims brought against state agencies under the North Carolina Tort Claims Act.³⁶ Former employees and representatives of individuals who died in a fire at a food products plant brought a lawsuit alleging the State negligently failed to perform statutorily required occupational safety inspections.³⁷ The employees could not escape the fire "because the exits in the plant were unmarked, blocked, and inaccessible."³⁸ After the fire, the North Carolina Department of Labor (the "Department") and its Occupational Safety and Health Division conducted their first and only inspection in the plant's eleven-year history of operation. As a result of this inspection, the Department issued eighty-three citations against the plant for safety violations.³⁹

The plaintiffs argued that section 95-4 of the General Statutes of

against a sheriff for failing to respond to calls advising that a mentally disturbed man carrying a gun was threatening family members. *Id.* at 33, 407 S.E.2d at 613. The sheriff and his deputies also misinformed the family of involuntary commitment procedures. The man later went on a public shooting spree resulting in the death of three people. *Id.* at 33-34, 407 S.E.2d at 613-14. The court stated there was no special duty to the victims because there was never a promise made to the victims; the sheriffs had contact only with the relatives of the killer. *Id.* at 37, 407 S.E.2d at 615. There could be no special relationship between the victims and the police because the complaint did not allege any relationship between the victims and the police. *Id.* Interestingly, the majority opinion of *Hull* was authored by Judge Orr, later Justice Orr, who has argued vigorously against any expansion of the doctrine in the Supreme Court of North Carolina. See *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 484, 495 S.E.2d 711, 717 (1998) (Orr, J., dissenting).

35. 347 N.C. 473, 495 S.E.2d 711 (1998).

36. N.C. GEN. STAT. §§ 143-291 to 300.1 (1993) (amended 1994) (providing for suits against state agencies). The case was properly brought against the Department of Labor under the North Carolina Tort Claims Act, which was enacted in 1951 to partially waive the State's sovereign immunity by allowing actions to be brought against the State in cases where its employees are negligent in the course of their employment. *Stone*, 347 N.C. at 485, 495 S.E.2d at 718 (Orr, J., dissenting). Before the enactment of the Tort Claim Act, the State enjoyed complete tort immunity under the doctrine of sovereign immunity. *Id.* (Orr, J., dissenting). The court of appeals previously answered this question of application to state agencies in the affirmative. See *Humphries v. N.C. Dep't of Corr.*, 124 N.C. App. 545, 479 S.E.2d 27 (1996) (holding the public duty doctrine barred a claim against the Department of Correction under the North Carolina Tort Claims Act alleging negligence in the government's supervision of a probationer under electronic house arrest).

37. *Stone*, 347 N.C. at 476-77, 495 S.E.2d at 713.

38. *Id.* at 477, 495 S.E.2d at 713.

39. *Id.*

North Carolina, “which describes the authority, power, and duties of the Commissioner of Labor,” imposed a duty upon the defendants to inspect North Carolina workplaces and that the breach of this duty gave rise to the plaintiff’s action for negligence under the Tort Claims Act.⁴⁰ Although the defendants conceded that they had a statutory obligation to inspect workplaces in North Carolina, they argued that the duty was for the benefit of the public, not the individual plaintiffs.⁴¹

The plaintiffs responded that the Tort Claims Act precluded consideration of the common law public duty doctrine for two reasons. First, the Tort Claims Act required the State to be held liable in instances when a private person would be liable to claimants under North Carolina law.⁴² Second, the public duty doctrine applied only to claims against local governments for failure to prevent crimes.⁴³

The court began its inquiry by examining the legislative intent behind the Tort Claims Act, stating: “In construing the Tort Claims Act . . . [the] primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished.”⁴⁴ The court looked to the plain meaning of the statute and acknowledged that the State is liable under circumstances in which a private person would be liable.⁴⁵ Still, the court reasoned that the plain meaning was less than determinative in the case at hand because “[p]rivate persons do not possess public duties.”⁴⁶ Only governmental entities possess the authority to enact and enforce laws. The court explained, “[if] the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*.”⁴⁷

The *Stone* court also looked to rules of statutory construction for

40. *Id.*

41. *Id.* at 477, 495 S.E.2d at 714.

42. *Id.* at 478, 495 S.E.2d at 714; N.C. GEN. STAT. §§ 143-291 to 300.1 (1993) (amended 1994).

43. *Stone*, 347 N.C. at 480, 495 S.E.2d at 715.

44. *Id.* at 478, 495 S.E.2d at 714 (quoting *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)).

45. *Id.*

46. *Id.*

47. *Id.* at 478, 495 S.E.2d at 714 (citing *Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky. 1979)). *Grogan* recognized that if a State could be legally liable for neglecting to enforce laws and regulations establishing safety standards for construction and use of buildings, the State’s *status* as a governmental entity “would be the only basis *for* holding a city or state liable, because only a governmental entity possesses the authority to enact and enforce laws” for public safety. *Grogan*, 577 S.W.2d at 6.

guidance, particularly those rules mandating that the “derogation of sovereign immunity” and “[s]tatutes in derogation of the common law” should be strictly construed.⁴⁸ Applying these rules, the court determined that absent clear legislative expression to the contrary, it would construe the Tort Claims Act as incorporating common law rules of negligence, including the common law public duty doctrine.⁴⁹

Although conceding *Braswell* involved the application of the public duty doctrine to local governments in their local law enforcement duties, the court noted the many lower court decisions that expanded the doctrine to include non-police protection cases.⁵⁰ The court further noted that the policies underlying recognition of the public duty doctrine in *Braswell* were sub judice:

Just as we recognized the limited resources of law enforcement in *Braswell*, we recognize the limited resources of defendants here. Just as we there “refuse[d] to judicially impose an overwhelming burden of liability [on law enforcement] for failure to prevent every criminal act” . . . we now refuse to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer’s negligence that results in injuries or deaths to employees. “[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.”⁵¹

The court thereby proclaimed that although it had “not heretofore applied the doctrine to a state agency or to a governmental function other than law enforcement,” it would do so now.⁵²

The plaintiffs alleged the existence of neither a special duty owed them by the Department nor a special relationship with the Department.⁵³ They could not have done otherwise. The Department made no specific promises to protect the plaintiffs upon which they had relied to their detriment; thus, a special duty could not have existed. Moreover, no basis for claiming a special relationship existed.⁵⁴ The court found, therefore, no exception applied to bar the

48. *Stone*, 347 N.C. at 479, 495 S.E.2d at 714–15.

49. *Id.* at 479, 495 S.E.2d at 715.

50. *Id.* at 480–81, 495 S.E.2d, 711, 715–16; *see supra* notes 28–33.

51. *Id.* at 481, 495 S.E.2d at 716 (citations omitted).

52. *Id.*

53. *Id.* at 483, 495 S.E.2d at 717.

54. *See Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991); Coleman

doctrine.⁵⁵

Joined by Justice Frye, Justice Orr authored a forceful dissent in *Stone*, in which he accused the majority of using “acrobatic reasoning”⁵⁶ by applying “a limited and obscure common law concept, the public duty doctrine, which has traditionally applied only to municipalities and their law enforcement responsibilities,” and expanding the doctrine to effectively eviscerate the Tort Claims Act.⁵⁷ The dissenters argued four reasons why the public duty doctrine should not be used to protect the State from liability for its negligent failure to inspect workplaces as required under North Carolina law.⁵⁸ First, the dissent seized upon the absence of supreme court precedent to support extending the doctrine beyond the facts of *Braswell*, a suit against a municipality for failure to provide police protections.⁵⁹ Second, the dissent looked to the intent and language of the Tort Claims Act. They argued that the court should not use the public duty doctrine to grant the State immunity when the legislature, in enacting the Tort Claims Act, sought to remove such immunity by making the State liable for its wrongdoings.⁶⁰ The dissent argued, “[i]f the language concerning treatment like a private person had been intended to mean what the majority says it means, i.e., that the State receives [common law] immunity, the Act would have no purpose” because the State was immune prior to the enactment of the Act.⁶¹ Third, the dissent rejected the argument that the Tort Claims Act incorporated common law, including the public duty doctrine, because the public duty doctrine was not the common law of North Carolina in 1951.⁶² Finally, the dissent also rejected the majority’s concern for imposing unreasonable liability burdens on the government, pointing out that damages are capped under the Tort Claims Act,⁶³ and concluding “the majority’s fear of an ‘overwhelming burden of liability’ has already been directly addressed by the General Assembly, which has chosen, in its

v. Cooper, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6 (1988) (discussing the special duty and special relationship exceptions to the public duty doctrine).

55. *Stone*, 347 N.C. at 483, 495 S.E.2d at 717.

56. *Id.* at 486, 495 S.E.2d at 719 (Orr, J., dissenting).

57. *Id.* at 484, 495 S.E.2d at 717 (Orr, J., dissenting).

58. *Id.* at 485–88, 495 S.E.2d at 718–20 (Orr, J., dissenting).

59. *Id.* at 485, 495 S.E.2d at 718 (Orr, J., dissenting).

60. *Id.* at 486, 495 S.E.2d at 719 (Orr, J., dissenting).

61. *Id.*

62. *See id.* at 487, 495 S.E.2d at 719 (Orr, J., dissenting).

63. *Id.*

legislative capacity, to limit liability as it deemed necessary.”⁶⁴

In *Hunt v. North Carolina Department of Labor*,⁶⁵ decided on the heels of *Stone*, the court considered whether the public duty doctrine barred a claim against the Department of Labor (the “Department”) by an eleven-year old who suffered severe injuries to his abdominal area when his seat belt tightened during a go-kart ride at an amusement park.⁶⁶ The complaint alleged the Department employee, who inspected the carts shortly before the accident, negligently informed the owner that only lap belts needed to be installed on the go-karts when, in fact, three-point shoulder-type harnesses were required under Department regulations.⁶⁷ Relying on the reasoning of *Stone*, the supreme court noted that, “having determined . . . that the public duty doctrine can apply to actions against state agencies brought under the Tort Claims Act, we must determine applicability of the public duty doctrine to [the specific facts of] this case.”⁶⁸ The court of appeals went on to hold that the North Carolina Administrative Code imposed a duty on the Department to inspect amusement devices to ensure compliance with the Administrative Code and the Amusement Device Act, and concluded that a breach of that duty could give rise to an action for negligence.⁶⁹ The majority of justices on the supreme court disagreed.⁷⁰ After reviewing the statute imposing a duty on the Department to inspect amusement devices, the supreme court determined that the legislature did not intend to impose a duty to safeguard each individual go-kart customer.⁷¹ To hold otherwise, said the court, would be “tantamount to imposing liability on defendant in this case solely for inspecting the go-karts and not discovering them to be in violation of the Code.”⁷²

64. *Id.* at 487–88; 495 S.E.2d at 720 (Orr, J., dissenting).

65. 348 N.C. 192, 499 S.E.2d 747 (1998), *rev'g* 125 N.C. App. 293, 480 S.E.2d 413 (1997).

66. *Id.* at 194, 499 S.E.2d at 748.

67. *Id.* at 195, 499 S.E.2d at 748. The plaintiff contended the Department had a duty under the Amusement Device Safety Act. *Id.* (citing N.C. GEN. STAT. §§ 95-111.1 to 111.18 (1997)). In addition, the plaintiff also claimed the defendant breached its duty under the rules and regulations of the Administrative Code by failing to inform the amusement park's manager that shoulder straps, as well as seat belts, must be mounted on the go-karts. *Id.* (citing N.C. ADMIN. CODE tit. 13, r. 15.0429(a)(3)(B) (May 1992)).

68. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747, 749 (1998).

69. *Hunt v. N.C. Dep't of Labor*, 125 N.C. App. 293, 297, 480 S.E.2d 413, 416 (1997) (citing N.C. ADMIN. CODE tit. 13, r. 15.0405 (May 1992)).

70. *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751.

71. *Id.* at 197, 499 S.E.2d at 750.

72. *Id.* at 198–99, 499 S.E.2d at 751. Interestingly, before *Hunt*, the supreme court applied the public duty doctrine only to cases involving nonfeasance. *See supra* notes 16–27 and 35–55. Nonfeasance is defined as “‘passive inaction or a failure to take steps to

As in *Stone*, Justice Orr, joined by Justice Frye, vigorously dissented. The dissenters pointed to the provisions of the Amusement Device Safety Act, including section 95-111.18 of the General Statutes of North Carolina,⁷³ which reads in pertinent part: "This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected."⁷⁴ Concluding that the legislature intended to create a duty to specific individuals under the provisions, the dissenters contended:

The practical effect of the majority opinion . . . sends a chilling message regarding the State's lack of accountability for its negligent conduct and resulting injuries to innocent third parties. Regardless of the fact that the legislature has imposed a duty on the State either directly through legislation or indirectly through administrative rule, regardless of the evidence of negligence by the State in carrying out such duties, regardless of the severity of injury to an innocent third party or parties, and regardless of the fact that the legislature has removed state immunity from suit under the Tort Claims Act, the majority holds that the public duty doctrine allows the State to escape liability for its negligence, and injured parties are thus left with no means of recovery against the State. This was clearly not the law before *Stone*, nor should it be now.⁷⁵

C. *The Beginning of the End?: Isenhour, Lovelace, and Thompson*

After broadening the doctrine in *Hunt* and *Stone*, the Supreme Court of North Carolina applied the brakes to the public duty doctrine,⁷⁶ evidencing sympathy, if not solidarity, with a growing

protect [another] . . . from harm," while misfeasance has been defined as "'active misconduct working positive injury to others.'" DAVID A. LOGAN & WAYNE A. LOGAN, NORTH CAROLINA TORTS 8 (1996) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 56, at 373 (5th ed. 1984)). *Hunt* could well be described as a misfeasance case because of the active negligence of the inspector in giving the amusement park operator erroneous advice regarding the appropriate safety device required. As such, the misfeasance/nonfeasance distinction provided a basis for rejecting the public duty doctrine in *Hunt*. However, neither the majority nor dissent spoke to that issue. Thus, it appears that the *Hunt* court not only extended the type of defendant covered by the public duty doctrine, but it also extended the type of harm covered.

73. *Hunt*, 348 N.C. at 201, 499 S.E.2d at 752 (Orr, J., dissenting) (citing N.C. GEN. STAT. § 95-111.18 (1997)).

74. § 95-111.18.

75. *Hunt*, 348 N.C. at 200, 499 S.E.2d at 751-52 (Orr, J., dissenting) (citing *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998)).

76. See *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000); see also *Willis v. Town of Beaufort*, 143 N.C. App. 106, 107, 544 S.E.2d 600, 602 (2001) (noting the

national hostility against the doctrine.⁷⁷ The court's initial notice of retreat came in *Isenhour v. Hutto*,⁷⁸ when the court concluded the public duty doctrine did not shield a city and school crossing guard from liability for a child's death as a result of the guard's negligence in directing the child to cross the street.⁷⁹ In rejecting the application of the doctrine, the court reasoned there was a "meaningful distinction between application of the public duty doctrine to the actions of local law enforcement, as in *Braswell* . . . and the application of the doctrine to the actions of a school crossing guard."⁸⁰ The court noted, for example, "[t]he city, by providing school crossing guards, ha[d] undertaken an affirmative, but limited, duty to protect certain children, at certain times, in certain places [Thus, t]he rationale underlying the public duty doctrine [was] simply inapplicable to the allegations" of the school guard's negligence.⁸¹ While refusing to apply the public duty doctrine to the facts of the case before it, the court stopped short, however, of limiting the doctrine's general applicability.⁸²

The court was less restrained in its two subsequent public duty doctrine cases. In *Lovelace v. City of Shelby*,⁸³ the court confronted the public duty doctrine in a case involving fire protection, an activity to which the lower courts previously applied the doctrine.⁸⁴ A police

supreme court limited the public duty doctrine in *Lovelace v. City of Shelby* thereby overruling court of appeals's the extension of the doctrine to the municipal provision of fire protection service).

77. See *Ezell v. Cockrell*, 902 S.W.2d 394, 398–99 (1995) (noting the trend away from the public duty doctrine); see also *Adams v. State*, 555 P.2d 235 (Alaska 1976) (abolishing the public duty doctrine in Alaska); *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982) (abolishing the public duty doctrine in Arizona); *Jean W. v. Commonwealth*, 610 N.E.2d 305, 307 (Mass. 1993) (abolishing the public duty doctrine in Massachusetts); *Brennen v. County of Eugene*, 591 P.2d 719, 724 (Or. 1979) (abolishing the public duty doctrine in Oregon). But see, e.g., *City of Rome v. Jordon*, 426 S.E.2d 351, 358 (Ga. 1993) (embracing the public duty doctrine in Georgia); *Tipton v. Town of Tabor*, 567 N.W.2d 351, 358 (S.D. 1997) (embracing the public duty doctrine in South Dakota).

78. 350 N.C. 601, 517 S.E.2d 121 (1999).

79. *Id.* at 607–08, 517 S.E.2d at 126.

80. *Id.*

81. *Id.* (noting that the application of the doctrine prevents excessive liability of government agencies).

82. *Id.*

83. 351 N.C. 458, 526 S.E.2d 652 (2000).

84. See *Davis v. Messer*, 119 N.C. App. 44, 57, 457 S.E.2d 902, 910 (1995). In *Davis*, homeowners brought a negligence action against the fire chief, fire department, town and county when their home was destroyed by fire. The fire department dispatched a response team, which departed for the plaintiffs' residence. *Id.* at 49, 457 S.E.2d 902, 905. When the firefighters were in sight of the plaintiffs' home, however, they realized that the burning residence was outside of their service area, and were told to turn around and return to the fire station. *Id.* The firefighters returned to the station despite a mutual aid

department employee serving as the operator to the 911 emergency number received calls reporting that a residence was on fire.⁸⁵ The operator indicated that an emergency response would be forthcoming.⁸⁶ However, she delayed dispatching the fire department for six minutes after she received the calls.⁸⁷ Consequently, the fire department did not arrive at the scene until at least ten minutes after the 911 calls were made, although the house was located only 1.1 miles from the fire station.⁸⁸ A child died in the house fire after the calls to 911 but before the fire department's arrival.⁸⁹ The complaint alleged that the operator's conduct breached a special duty and promise of protection and was causally related to the child's death.⁹⁰

A superior court judge denied the city's claim that the public duty doctrine applied to bar liability.⁹¹ The court of appeals reversed and remanded.⁹² Reviewing this decision, the supreme court acknowledged in a remarkably cursory fashion that it had extended the public duty doctrine vis-à-vis state agencies in *Hunt* and *Stone*, but observed it "never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public."⁹³ The court offered two conclusory bases for limiting the doctrine's application to local governments. First, it pointed out that *Braswell* involved law enforcement engaged in the exercise of general duties to protect the public.⁹⁴ Second, the court noted this limitation to law enforcement was consistent with the origin of the public duty doctrine in the United States.⁹⁵

On the same day the court issued the decision in *Lovelace*, it also ruled that the public duty doctrine did not bar a homeowner's claim

agreement authorizing them to provide fire protection in the jurisdiction of the plaintiffs' home. *Id.* The court of appeals held that the public duty doctrine applied in the case, but the plaintiffs alleged facts sufficient to establish the special duty exception. *Id.* at 57, 457 S.E.2d 902, 910. The dispatcher made a specific promise to the plaintiffs that fire protection was forthcoming, and they relied on that promise to their detriment. *Id.* at 56, 457 S.E.2d 902, 909–10.

85. *Lovelace v. City of Shelby*, 153 N.C. App. 378, 380, 570 S.E.2d 136, 137–38 (2002).

86. *Lovelace v. City of Shelby*, 133 N.C. App. 408, 409, 515 S.E.2d 722, 723 (1999).

87. *Lovelace*, 351 N.C. at 460, 526 S.E.2d at 654.

88. *Id.*

89. *Id.*

90. *Id.* at 459, 526 S.E.2d at 653.

91. *Id.* at 458, 526 S.E.2d at 653.

92. *Lovelace v. City of Shelby*, 133 N.C. App. 408, 515 S.E.2d 722 (1999).

93. *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654.

94. *Id.* (citing *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991)).

95. *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 653 (citing *South v. Md. ex rel. Pottle*, 59 U.S. (18 How.) 396 (1956)).

against a county for alleged negligence in inspecting a home and issuing a permit.⁹⁶ The plaintiffs in *Thompson v. Waters*⁹⁷ alleged county building inspectors were grossly negligent in issuing a permit for construction of a building with several structural defects, in violation of the North Carolina State Building Code and good building practice.⁹⁸ The plaintiffs' outrage was exacerbated when two weeks after the completion of construction, they received a report from the county department of inspection outlining the numerous structural defects and building code violations of the residence and requiring remedial measures.⁹⁹ Again the court confronted a situation in which the lower courts previously applied the public duty doctrine.¹⁰⁰ The court, however, reiterated its position as set out in *Lovelace*—it had never “applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement.”¹⁰¹ As in *Lovelace*, the court denied application of the doctrine.

After *Lovelace* and *Thompson*, the apparent state of the public duty doctrine stood as follows: State agencies could successfully assert the public duty doctrine as a defense in cases involving the failure to inspect. Local governments such as cities and counties, however, could only use the doctrine to bar liability in cases involving law enforcement departments exercising general duties to protect the general public.¹⁰²

II. WOOD V. GUILFORD COUNTY

The decisions of the Supreme Court of North Carolina in *Lovelace* and *Thompson* appeared to forecast that the court would jealously guard the application of the public duty doctrine, at least in its application to local governments. Surprisingly, the court's next encounter with the doctrine belied both the forecast and the difficulty of the doctrine's application.

Wood v. Guilford County presented the Supreme Court of North

96. *Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000).

97. 351 N.C. 462, 526 S.E.2d 650 (2000).

98. *Id.* at 463, 526 S.E.2d at 650–51.

99. *Id.* at 463, 526 S.E.2d at 651.

100. *See Lynn v. Overlook Dev.*, 98 N.C. App. 75, 78, 389 S.E.2d 609, 612 (1990) (applying the public duty doctrine to bar a claim for negligent building inspection).

101. *Thompson*, 351 N.C. at 465, 526 S.E.2d at 652.

102. *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 653 (2000). Moreover, the doctrine applied to protect state agencies even in cases involving misfeasance. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 195, 499 S.E.2d 747, 748 (1998). There was no indication that local governments would be afforded similar latitude.

Carolina with a jeweled opportunity to address the specific doctrinal conflict festering in its own precedent and the generally disoriented state of the law surrounding the public duty doctrine. Significant questions loomed over *Wood*. The first issue was whether there was any justification for the court's differing application of the public duty doctrine depending on whether the defendant was the State of North Carolina, as in *Stone* and *Hunt*, or a local government entity, as in *Lovelace* and *Thompson*. The second question concerned the potential inconsistency between the application of a judicially created public duty doctrine and the North Carolina General Assembly's legislative derogation of sovereign or governmental immunity. The third question was whether the public duty doctrine provides liability protection to local governments beyond that provided by immunity laws and ordinary principles of negligence law. Rather than directly addressing and resolving these questions, the court in *Wood* attempted to craft an opinion purportedly consistent with all of its earlier opinions. The glaring failures of the attempt invite criticism.

A. *Facts and Procedural History*

In *Wood v. Guilford County*,¹⁰³ Shelley Austin Wood brought suit against her employer, Guilford County, after she was assaulted in the county courthouse.¹⁰⁴ Guilford County contended at the trial court level that governmental immunity and the public duty doctrine stood as complete bars to recovery for Ms. Wood's claim.¹⁰⁵ The county moved to dismiss the complaint for failure to state a claim for relief as required by the North Carolina Rules of Civil Procedure.¹⁰⁶ The trial court denied the motion, applying neither the public duty doctrine nor governmental immunity.¹⁰⁷ The county filed an interlocutory appeal from the trial court's denial of its motion to the North Carolina Court of Appeals.¹⁰⁸

The primary issue considered on appeal was whether the public duty doctrine barred Ms. Wood's claim against the county.¹⁰⁹ The

103. 355 N.C. 161, 558 S.E.2d 490 (2002).

104. See *supra* notes 3–5 and accompanying text.

105. *Wood*, 355 N.C. at 163, 558 S.E.2d at 493. A detailed explanation of the relationship between the public duty doctrine and governmental immunity follows *infra* Part III.

106. *Id.* (citing N.C. R. Civ. P. 12(b)(6)).

107. *Id.*; see *infra* notes 137–147 and accompanying text for further discussion of governmental immunity.

108. *Wood*, 355 N.C. at 163, 558 S.E.2d at 493.

109. *Wood v. Guilford County*, 143 N.C. App. 507, 510, 546 S.E.2d 641, 644 (2001). The court determined the county waived governmental immunity by requiring Burns to

court of appeals acknowledged that “[g]enerally, a municipality and its agents ‘act[] for the benefit of the general public when exercising [their] police powers, and therefore cannot be held liable for negligence or gross negligence’ in failing to furnish police protection to specific individuals.”¹¹⁰ The court held, however, that the county “was not acting in a law enforcement capacity or exercising its general duty to protect the public by providing security to the Courthouse, but was acting as owner and operator of the Courthouse.”¹¹¹ The judges on the appellate panel appeared to be faithfully upholding the supreme court’s decisions in *Lovelace* and *Thompson* that limited the doctrine, as applied to local governments, to “law enforcement departments when they are exercising their general duty to protect the public.”¹¹² The county appealed this holding to the supreme court.

B. *Decision of the Supreme Court of North Carolina*

The Supreme Court of North Carolina found the strict fidelity of the court of appeals to *Lovelace* and *Thompson* neither admirable nor necessary and reversed. It held that the public duty doctrine did protect Guilford County from liability for its alleged failure to guard its courthouse employee from a criminal assault.¹¹³ The court characterized the lower court’s reading of the law as “an overly literal reading of the limitations . . . placed on the public duty doctrine as applied to local governments in *Lovelace* and an overly narrow interpretation of the doctrine . . . as articulated in *Braswell*.”¹¹⁴ Searching for an outcome consistent “with the conceptual underpinnings of the public duty doctrine,” the court found three related bases for holding that the public duty doctrine applied in the case.¹¹⁵ First, the court determined that a county provides court security services as part of its general police functions, rather than as

purchase an indemnification insurance policy. *Id.*

110. *Id.* at 511, 546 S.E.2d at 645 (quoting *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 337, 511 S.E.2d 41, 42 (1999), *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999)).

111. *Id.* at 512, 546 S.E.2d at 645. The court noted that pursuant to section 7A-302 of the General Statutes of North Carolina, the county was under a statutory duty to provide “‘courtrooms, office space . . . and related judicial facilities.’” *Id.* (quoting N.C. GEN. STAT. § 7A-302 (1999)).

112. *Wood*, 143 N.C. App. at 512, 546 S.E.2d at 645 (citing *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000)); *see also Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000) (limiting the doctrine to law enforcement departments engaged in police protection of the public).

113. *Wood*, 355 N.C. at 169, 558 S.E.2d at 496.

114. *Id.* at 168, 558 S.E.2d 496.

115. *Id.* at 167, 558 S.E.2d at 495.

the owner and operator of a building.¹¹⁶ Second, the court held that “the test of whether the public duty doctrine applies is a functional one and includes consideration of the nature of the duty assumed by the local governmental defendant.”¹¹⁷ And third, the court made it clear that a county may receive the benefit of the public duty doctrine when it contracts with a private entity to provide security services instead of providing the services directly.¹¹⁸ These three rather unremarkable suppositions led to a decision that, while correct, belied the complexity of the issues before the court.

The supreme court rejected the court of appeals ruling that the public duty doctrine was inapplicable because *Wood* involved neither a law enforcement department nor police protection as seemingly required by *Lovelace* and *Thompson*.¹¹⁹ Although the plaintiff argued that “the hired security guards were not sworn public officers with the full panoply of authority reserved to those in law enforcement (i.e., the power to arrest, to investigate crimes, to operate the County jail, to enforce safety statutes, and to serve warrants and civil court documents),”¹²⁰ the supreme court rebuffed any focus on these factors out of concern that doing so might result in an “overly narrow” perspective of precedent.¹²¹

The court next turned its attention to “the nature of the duty assumed by the local government defendant.”¹²² Observing that the nature of the duty to provide space for judicial activity “render[ed] the County an involuntary landlord by requiring it to provide ‘courtrooms, office space . . . and related judicial facilities’ for the state’s judicial system,”¹²³ the court held the protective services provided at the courthouse through the county’s contract with Burns, the security company, were analogous to the police protections provided to the general public by local government law enforcement.¹²⁴ The court found the duty to provide police protection or more general protective services (as provided by Burns)

116. *Id.* at 168–69, 558 S.E.2d at 496 (“[T]he protective services provided at the courthouse through the County’s contract with Burns Security are analogous to the police protection provided to the general public in *Braswell*.”).

117. *Id.* at 168, 558 S.E.2d at 496.

118. *See id.*

119. *Id.* at 167–68, 558 S.E.2d at 495–96.

120. *Id.* at 167, 558 S.E.2d at 495 (acknowledging that it “previously delineated the boundaries of the public duty doctrine for local governments to the provision of police protection”).

121. *Id.*

122. *Id.*

123. *Id.* at 167, 558 S.E.2d at 495 (quoting N.C. GEN. STAT. § 7A-302 (2001)).

124. *Id.* at 168, 558 S.E.2d at 496.

extended to the public at large, “including those members of the public who worked at the courthouse,” but did not inure to any specific individual.¹²⁵ Comparing the county’s duty to protect Ms. Wood to the crossing guard’s limited duty to the school child in *Isenhour*,¹²⁶ the court determined protection that extended all day, to an entire courthouse, encompassed all people entering the building, and included general safeguarding from multiple hazards presented precisely the type of “overwhelming burden of liability on governmental agencies with limited resources” that the public duty doctrine seeks to prevent.¹²⁷ As such, the court held that, given the scope of protection the County provided through Burns in terms of time, place, intended beneficiaries and purpose, the county owed no specific duty to Ms. Wood.¹²⁸

The court observed that Ms. Wood’s complaint failed to allege either the existence of a special relationship or special duty, the two recognized exceptions to the public duty doctrine.¹²⁹ Indeed, the court insinuated that neither exception was really at issue given the facts of the case. Examining each exception in turn, the court determined that Ms. Wood’s status as a courthouse employee did not create a special relationship, and there was no evidence in the record to suggest that the County assumed a special duty to her by making any promises to protect her against third-party criminal assaults or that any statute imposed a special duty.¹³⁰

While addressing exceptions that were not at issue, the *Wood* court ignored the important questions looming over the doctrine. Notably, the court made no attempt to provide a justification for the differing scopes of the public duty doctrine based on whether the defendant was a local government or a state agency.¹³¹ It simply reiterated that for local governments, the doctrine would not be expanded “beyond agencies other than local law enforcement departments exercising their general duty to protect the public.”¹³²

125. *Id.* at 169, 558 S.E.2d at 496.

126. *Isenhour v. Hutto*, 350 N.C. 601, 607, 517 S.E.2d 121, 126 (1999) (finding a duty “to protect certain children, at certain times, in certain places”); *see supra* notes 78–81 and accompanying text.

127. *Wood*, 355 N.C. at 169, 558 S.E.2d at 496.

128. *Id.*

129. *Id.* at 170, 558 S.E.2d at 497.

130. *Id.* at 169–70; 558 S.E.2d at 497. The court also rejected the argument that by hiring a security firm, the County created a special duty to courthouse tenants and their employees. *Id.*

131. *See Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) (setting forth the parameters of the public duty doctrine for local governments).

132. *Wood*, 355 N.C. at 166–67, 558 S.E.2d at 495 (citing *Thompson v. Waters*, 351 N.C.

Nor did the court seek to provide prospective litigants with any guidance on additional local government services that were “analogous to police protection to the general public.”¹³³ Indeed, by leaving that language open to interpretation by the lower courts, the supreme court may have inadvertently expanded the applicability of the doctrine despite the valiant efforts to restrict it in *Lovelace* and *Thompson*.

Moreover, in *Stone* and *Hunt*, the court considered and resolved, albeit unconvincingly, the relationship between sovereign immunity for the State and the public duty doctrine.¹³⁴ It had yet to speak to the relationship between governmental immunity and the doctrine, however. Still, the *Wood* court failed to consider whether the legislature’s abrogation of governmental immunity was consistent with the public duty doctrine. Also absent from the court’s analysis was any consideration of the more fundamental questions surrounding the doctrine: What is the real value of the doctrine to defendants such as Guilford County? Does it provide needed liability protections or needless confusion? The remainder of this Article addresses the questions of whether judicial application of the public duty doctrine contradicts legislative abrogation of governmental immunity and whether other persuasive reasons exist to support either the abolition or retention of the doctrine for local governments.

III. THE PUBLIC DUTY DOCTRINE AND THE WAIVER OF SOVEREIGN OR GOVERNMENTAL IMMUNITY

A. *Sovereign and Governmental Immunity in Context*

The dissenting justices in *Stone* and *Hunt* criticize the majority’s expansion of the public duty doctrine to the State and its agencies on the ground that the doctrine serves to eviscerate the legislature’s

462, 464–65, 526 S.E.2d 650, 651–52 (2000); *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654).

133. *Wood*, 355 N.C. at 167, 558 S.E.2d at 495.

134. *Hunt v. N.C. Dep’t of Labor*, 348 N.C. 192, 196, 499 S.E.2d 747, 751 (1998); *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 483, 495 S.E.2d 711, 717 (1998); see also Scott J. Borth, Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 547–52 (1983) (pointing out that the first state to abolish sovereign immunity was also the first state to adopt the public duty doctrine and that as other states abrogated sovereign immunity the doctrine gained broader support); Suzanne M. Dardis, Note, *Gleason v. Peters, Resurrection of Sovereign Immunity*, 43 S.D. L. REV. 706, 728–30 (1998) (arguing that application of the public duty doctrine by the judiciary contravenes legislative attempts to waive sovereign immunity).

abrogation of sovereign immunity.¹³⁵ A similar criticism has been leveled at the doctrine's protection of local governments.¹³⁶ To appreciate fully the significance of the criticism, one must first address the greater issues of sovereign and governmental immunity under North Carolina law.

The State of North Carolina is shielded from tort claims by the doctrine of sovereign immunity.¹³⁷ As political subdivisions of the State, local governments have governmental immunity, a limited extension of sovereign immunity.¹³⁸ Both sovereign and governmental immunity rest on public policy considerations, which suggest the State should not be forced to answer a lawsuit under the very claims that it created.¹³⁹ Accordingly, a court will not enforce these claims without the consent of the State.¹⁴⁰

North Carolina, through the General Assembly, has consented to claims against the State and its agencies, with some important limitations, by partially abrogating sovereign immunity.¹⁴¹ The Tort Claims Act, codified in section 143-291 of the General Statutes of North Carolina, provides:

The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State

135. *Hunt*, 348 N.C. at 200, 499 S.E.2d at 752 (Orr, J., dissenting); *Stone*, 347 N.C. at 484, 495 S.E.2d at 717 (Orr, J., dissenting).

136. Frank Swindell, Note, *Municipal Liability for Negligent Inspections in Sinning v. Clark: A "Hollow" Victory for the Public Duty Doctrine*, 18 CAMPBELL L. REV. 241 (1996) (considering the connection between governmental immunity and the public duty doctrine).

137. *Corum v. Univ. of N.C.*, 330 N.C. 761, 789, 413 S.E.2d 276, 293-94 (1992), *cert. denied*, 506 U.S. 985 (1992) (recognizing the states enjoy sovereign immunity). See generally 1 WILLIAM BLACKSTONE COMMENTARIES 237-45 (Wayne Morrison ed., 2001) (discussing English common law of sovereign immunity).

138. See *BROWN-GRAHAM*, *supra* note 11, at 3-7. See, e.g., *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 213 S.E.2d 297 (1975) (holding that community hospitals are not immune from liability because they perform a proprietary function rather than a governmental function); *Hamilton v. Town of Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953) (holding that municipal governments have governmental immunity from liability "in the exercise of police power, or judicial, discretionary, or legislative authority . . . and when discharging a duty imposed solely for the public benefit").

139. See *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850) ("No maxim is thought to be better established, or more universally assented to, than that which ordained that a sovereign . . . cannot *ex delicto* be amenable to its own creatures or agents . . . [without] permission on the part of the sovereign.").

140. *Id.*

141. There is a statutory cap on damages under the Tort Claims Act. See N.C. GEN. STAT. § 143-291(a) (2001) (allowing claims against the State that would otherwise be covered by sovereign immunity).

while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.¹⁴²

The State has authorized, but not required, its local governments to waive the immunity that protects them from liability for governmental activities.¹⁴³ If a local government chooses to purchase liability insurance, it waives its immunity to the extent of its insurance coverage.¹⁴⁴

Governmental activities are those that are “discretionary, political, legislative or public in nature and performed for the public good in behalf of the State.”¹⁴⁵ On the other hand, proprietary activities, for which there is no immunity, are “commercial or chiefly for the private advantage of the compact community.”¹⁴⁶ Since local

142. *Id.* § 143-291(a) (2001).

143. *See id.* § 153A-435(a) (2001) (allowing counties to procure insurance and limiting liability for counties); § 160A-485(a) (allowing municipalities to procure insurance and limiting liability for municipalities).

144. *Id.*

145. *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942).

146. *Id.* Courts typically look to the following factors in determining whether a particular activity is governmental or proprietary in nature. First, courts have held activities historically performed by the government rather than by private corporations to be governmental functions. *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 23, 213 S.E.2d 297, 303 (1975). *See, e.g., Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972) (discussing the administration of sanitation programs); *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967) (discussing condemnation of property); *Siebold v. Kinston-Lenoir County Pub. Library*, 264 N.C. 360, 141 S.E.2d 519 (1965) (explaining the operation of libraries is governmental); *Denning v. Goldsboro Gas Co.*, 246 N.C. 541, 98 S.E.2d 910 (1957) (examining the grant of franchises); *N.C. ex rel. Hayes v. Billings*, 240 N.C. 78, 81 S.E.2d 150 (1954) (discussing the operation of county jails); *Hamilton v. Town of Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953) (examining the operation and maintenance of traffic lights); *Lewis v. Hunter*, 212 N.C. 504, 193 S.E. 814 (1937) (discussing driving a police car); *Cathey v. City of Charlotte*, 197 N.C. 309, 148 S.E. 426 (1929) (examining the use of a police or fire alarm); *Howland v. City of Asheville*, 174 N.C. 749, 94 S.E. 524 (1917) (discussing furnishing water to firefighters); *James v. City of Charlotte*, 183 N.C. 630, 112 S.E.2d 423 (1900) (examining the administration of sanitation programs); *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142 (1993) (finding the administration of social services programs to be governmental in nature); *Orange County v. Heath*, 14 N.C. App. 44, 187 S.E.2d 345 (1972), *aff'd*, 282 N.C. 292, 192 S.E.2d 308 (1972) (noting that enforcement of zoning regulations is governmental in nature); *Stone v. City of Fayetteville*, 3 N.C. App. 261, 164 S.E.2d 542 (1968) (discussing storm drainage maintenance).

Second, activities that are proprietary typically involve a monetary charge of some sort. *See, e.g., Sides*, 287 N.C. at 203, 213 S.E.2d at 303 (discussing the operation of a county hospital); *Koontz*, 280 N.C. 513, 186 S.E.2d 897 (examining the maintenance of a landfill by fee); *Foust v. City of Durham*, 239 N.C. 306, 79 S.E.2d 519 (1954) (discussing water distribution for profit); *Rice v. City of Lumberton*, 235 N.C. 227, 69 S.E.2d 543 (1952) (examining the distribution of electricity for profit); *Rhodes v. City of Asheville*,

governmental units enjoy no immunity for harms resulting from proprietary acts,¹⁴⁷ the purchase of insurance has no effect on liability exposure for proprietary acts.

B. The Contradiction Between the Application of the Public Duty Doctrine and the Abrogation of Sovereign Immunity

If anything emerges with clarity in the law of public liability, it is the principle that “[w]aiver of sovereign immunity may not be lightly inferred and state statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.”¹⁴⁸ The majority opinions of *Hunt* and *Stone* purport to invoke this principle, but this invocation is highly problematic because it appears to conflict with the clear intent of the North Carolina General Assembly in enacting the Tort Claims Act.¹⁴⁹ As the dissenting justices in *Hunt* and *Stone* impressively argue, the effect of the public duty doctrine is to bar liability in cases in which the legislature has declared liability may exist.¹⁵⁰ For this reason, the dissenters argue the doctrine is

230 N.C. 134, 52 S.E.2d 371 (1949) (discussing the operation of an airport) and *Lowe v. City of Gastonia*, 211 N.C. 564, 191 S.E. 7 (1937) (examining the operation of a municipal golf course).

The fact that a fee is charged does not necessarily mean, however, that the activity is proprietary. Services that are governmental based on other considerations are not made proprietary merely because a cost of the service is charged to a recipient. *Casey v. Wake County*, 45 N.C. App. 522, 263 S.E.2d 360 (1980). If the local government is charging fees to the extent that a profit is being made, however, the court will consider such profit strong evidence that the activity is proprietary. See *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231 (1990); *Waters v. Biesecker*, 60 N.C. App. 253, 255, 298 S.E.2d 746, 747 (1983), *aff'd* 309 N.C. 165, 305 S.E.2d 539 (1983) (“[a]lthough the term ‘proprietary’ denotes a profit motive, profit motive is not essential to the determination that a function by a governmental body is proprietary”).

Third, when a municipality engages in a public enterprise essentially for the benefit of its compact community, it is acting within its proprietary nature. Any activity of a municipality that is commercial or performed chiefly for the private advantage of the compact community is a proprietary function. An example is the operation of off-street parking facilities. See *Britt v. City of Wilmington*, 236 N.C. 446, 73 S.E.2d 289 (1952).

Finally, a local government activity may be of such benefit to the State that public policy requires that it be classified as governmental even though citizens of the municipality benefit more from the activity than do citizens of the state in general. An example is sewerage, which is considered a governmental function in recognition of statewide public health concerns. See *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969).

147. See *Millar*, 222 N.C. at 341, 23 S.E.2d at 44.

148. *Kennedy v. Haywood County*, ___ N.C. App. ___, ___, 581 S.E.2d 119, 120 (2003) (citing *Guthrie v. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983)).

149. See *Hunt v. N.C. Dep’t of Labor*, 348 N.C. 192, 196, 499 S.E.2d 747, 749 (1998); *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 715 (1998).

150. See *Hunt*, 348 N.C. at 200, 499 S.E.2d at 751–52 (Orr, J., dissenting); *Stone*, 347 N.C. at 486–87, 495 S.E.2d at 719 (Orr, J., dissenting).

inconsistent with the legislative abrogation of sovereign immunity through the Tort Claims Act.¹⁵¹ This argument finds judicial support from a growing number of courts in other jurisdictions. Viewing the doctrine “as an operation of sovereign immunity under a new identity,”¹⁵² these courts have determined that the public duty doctrine should not survive legislative abolition of sovereign immunity.¹⁵³

The 1976 landmark case of *Adams v. State*¹⁵⁴ provides the earliest record of a state court’s rejection of the public duty doctrine.¹⁵⁵ In *Adams*, the Supreme Court of Alaska criticized the doctrine as reinstituting immunity for the State against the clear mandate of the legislature.¹⁵⁶ Similarly, in *Ryan v. State*,¹⁵⁷ the Supreme Court of Arizona rejected the doctrine as a “bright new word-package” that operated to reinstate sovereign immunity.¹⁵⁸

The Massachusetts courts, too, rejected a judicially created public duty doctrine in the face of legislative abrogation of sovereign immunity.¹⁵⁹ The reasoning of that state’s highest court is particularly compelling. In 1978, the Massachusetts legislature partially waived the Commonwealth’s sovereign immunity by enacting the Massachusetts Tort Claims Act (“MTCA”).¹⁶⁰ With language very similar to that found in North Carolina’s Tort Claims Act, the MTCA provides that:

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the

151. See *Hunt*, 348 N.C. at 200, 499 S.E.2d at 751–52 (Orr, J., dissenting); *Stone*, 347 N.C. at 486, 495 S.E.2d at 719 (Orr, J., dissenting).

152. *Hudson v. Town of Montpelier*, 638 A.2d 561, 566 (Vt. 1993) (noting that the doctrine recently “has been rejected or abolished by most courts that have considered it”); see also *Jean W. v. Commonwealth*, 610 N.E.2d 305, 312 (Mass. 1993) (Liacos, C.J., concurring) (noting that the “trend has been to abolish the [public duty] rule”); see also *Dardis*, *supra* note 134, at 728–30 (arguing the inconsistency of the public duty doctrine with legislative abrogation of sovereign immunity); *Swindell*, *supra* note 136, at 248–50 (considering the connection between sovereign immunity and the public duty doctrine).

153. See *Hunt*, 348 N.C. at 196, 499 S.E.2d at 749; *Stone*, 347 N.C. at 479, 495 S.E.2d at 715.

154. 555 P.2d 235 (Alaska 1976).

155. *Id.* at 241–42 (abolishing the judicially enforced public duty doctrine in favor of the statutory scheme of governmental liability).

156. *Id.*

157. 656 P.2d 597 (Ariz. 1982).

158. *Id.* at 598.

159. *Jean W. v. Commonwealth*, 610 N.E.2d 305, 316 (Mass. 1993) (Liacos, C.J., concurring).

160. Massachusetts Tort Claims Act, MASS. GEN. LAWS ch. 25F § 2 (1978).

scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances.¹⁶¹

In 1993, in *Jean W. v. Commonwealth*,¹⁶² the Supreme Judicial Court of Massachusetts held the public duty rule was inconsistent with the Massachusetts Tort Claims Act.¹⁶³ “In addition to the confusion engendered by the inconsistent application of the public duty rule, the [Chief Justice’s concurring opinion] likened the rule’s comprehensiveness to the ‘antiquated and outmoded concepts of sovereign immunity’ that the court and legislature had shed”¹⁶⁴ If the Massachusetts legislature intended for public employees to be treated in the same way as private individuals, as indicated by the MTCA, then, reasoned the court, the public duty doctrine had to be eliminated.¹⁶⁵ The court invited the Massachusetts legislature to codify the public duty rule if it so desired, making clear that it would not continue to apply the doctrine without word from the legislature.

North Carolina’s legislature has not codified or otherwise recognized the public duty doctrine, and the courts need not seek advice from the General Assembly to clarify the relationship between sovereign immunity and the public duty doctrine.¹⁶⁶ However, the Supreme Court of North Carolina might consider following the Massachusetts court’s lead by asking the legislature for guidance. The North Carolina legislature might in turn join the Massachusetts legislature in accepting the invitation to codify the public duty doctrine.¹⁶⁷ If so, the North Carolina courts would no longer need to resort to the “acrobatic reasoning” of *Hunt* and *Stone* to conclude against the tide of most state courts that have recently considered the

161. Compare MASS. ANN. LAWS ch. 258, § 2 (Law. Co-op. 1992) (noting the liability of public employers), with N.C. GEN. STAT. § 143-291(a) (2001) (providing for state tort liability).

162. 610 N.E.2d 305 (Mass. 1993).

163. *Id.* at 307 (Liacos, C.J., concurring).

164. Kevin M. Barry, *Brum v. Town of Dartmouth and the Public Duty Rule: Navigating an Interpretive Quagmire*, 41 B.C. L. REV. 383, 407 (2000) (quoting *Jean W. v. Commonwealth*, 610 N.E.2d 305, 307 (Mass. 1993) (Liacos, C.J., concurring)).

165. *Jean W.*, 610 N.E.2d at 312.

166. See *Steelman v. City of New Bern*, 279 N.C. 589, 594–95, 184 S.E.2d 239, 242–43 (1971) (indicating that the court would not modify or repeal a doctrine of immunity that has been recognized as the public policy of the state by the General Assembly).

167. See Joseph W. Glannon, *Liability for “Public Duties” Under the Tort Claims Act: The Legislature Reconsiders the Public Duty Rule*, 79 MASS L. REV. 17, 21 (1994) (explaining the Massachusetts legislature accepted the invitation and amended the Massachusetts Tort Claims Act in 1993 to protect public employees from liability in situations previously covered by the common law public duty rule).

continued validity of the public duty doctrine.¹⁶⁸ If the North Carolina legislature were to codify or recognize the public duty doctrine, there would be no question that in North Carolina the public duty doctrine is consistent with legislative derogation of sovereign immunity. In the face of a legislative or even judicial determination that continued application of the public duty doctrine is not consistent with legislative abrogation of sovereign immunity, the question remains, however, whether this conclusion would also bar the defense for local governments in North Carolina.

C. *Reconciling the Public Duty Doctrine with Governmental Immunity*

Commentators have argued that the public duty doctrine's application to local governments conflicts with the North Carolina General Assembly's waiver of governmental immunity.¹⁶⁹ The argument is analogous to the rejection of the public duty doctrine for state agencies in the face of the Tort Claims Act. However, it finds no similar support in law or reason.¹⁷⁰ To start, the North Carolina legislature has not sought to waive governmental immunity. The legislature has provided, instead, that local governments may, if they so choose, waive governmental immunity through the purchase of liability insurance. More particularly, the applicable statutes authorize a city or county to insure itself and any of its officers, agents, and employees against liability and to require governing boards to determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased.¹⁷¹ "Absent waiver, governmental immunity still provides an absolute defense to

168. See *supra* notes 56–64 and accompanying text.

169. Swindell, *supra* note 136, at 241–45; see also Note, *Tort Law—The Public Duty Doctrine: Should it Apply in the Face of Legislative Abrogation of Sovereign Immunity?*—Coleman v. Cooper, 12 CAMPBELL L. REV. 503, 503–04 (1990) (noting the conflict between the North Carolina legislature and courts regarding governmental immunity).

170. The courts inadvertently have contributed to this argument by carelessly suggesting that the public duty doctrine is a function of governmental immunity. See *Block v. Person*, 141 N.C. App. 273, 540 S.E.2d 415 (2000) (indicating that a defendant asserted "governmental immunity from suit through the public duty doctrine"). If this function existed, then a waiver of governmental immunity would necessarily constitute a waiver of the public duty doctrine. Thus, judicial application of the doctrine would be inconsistent with a local legislature's decision to waive governmental immunity. Since no court, however, has explicitly tied a waiver of governmental immunity to a waiver of the public duty doctrine, one can only assume that the courts do not mean what they say.

171. N.C. GEN. STAT. § 153A-435(a) (2001) (allowing counties to procure insurance); *id.* § 160A-485(a)–(b) (allowing municipalities to procure insurance).

municipalities against tort liability.”¹⁷² As such, any argument that the public duty doctrine is inconsistent with a waiver of governmental immunity must rest on the local government’s decision to waive the immunity rather than the State’s provision of the option to waive the immunity. Those who conclude that a state statute authorizing a waiver of immunity through the purchase of liability insurance is inconsistent with the public duty doctrine appear to assume that the statute operates as a conditional waiver of immunity—that is, immunity is waived unless the entity fails to purchase insurance.¹⁷³ A more reasonable reading of North Carolina’s governmental immunity waiver statutes suggests they be considered a permissive waiver—that is, the legislature has delegated the discretion to waive governmental immunity to local governments under prescribed circumstances.

Moreover, the dissent in *Stone* sets out four convincing reasons to support the contention that the doctrine is inconsistent with sovereign immunity. None applies to suggest local waiver of governmental immunity eviscerates the public duty doctrine. First, unlike the waiver for the State of North Carolina and its agencies, there is no language in section 153A-435(a) or section 160A-485(a) of the General Statutes of North Carolina to suggest that the legislature intended for local governments to be liable as “if a private person.”¹⁷⁴ Thus, the language upon which the dissent in *Hunt* and *Stone* seize to so persuasively argue for the abrogation of the public duty doctrine for state agencies is not at issue for local governments.¹⁷⁵ Second, the court has maintained for over two decades that the doctrine applies to local governments, even in the face of local waiver of governmental immunity. In fact, the dissent in *Stone* appears to argue for limiting the doctrine to “municipalities and their law enforcement responsibilities” even in the face of governmental immunity.¹⁷⁶ Third, local governments are not protected from astronomical damage awards by a statutory cap on damages. Instead, damages are limited

172. Swindell, *supra* note 136, at 165.

173. See, e.g., Dardis, *supra* note 134, at 728 (arguing the application of the public duty doctrine by the judiciary contravenes legislative attempts to waive sovereign immunity); Swindell, *supra* note 136, at 241–45 (considering the connection between governmental immunity and the public duty doctrine).

174. See N.C. GEN. STAT. § 153A-435(a) (providing for waiver of governmental immunity by the purchase of insurance); *id.* § 160A-485(a) (same); cf. *id.* § 143-291(a) (providing that the State may be held liable in limited circumstances as if it were a private person).

175. *Hunt v. N.C. Dep’t of Labor*, 348 N.C. 192, 200, 499 S.E.2d 747, 751–52 (1998) (Orr, J., dissenting); *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 484, 495 S.E.2d 711, 717 (1998) (Orr, J., dissenting).

176. *Stone*, 347 N.C. at 484, 495 S.E.2d at 717 (Orr, J., dissenting).

by the extent of insurance coverage. The effect, then, of abrogating the public duty doctrine when local governments waive governmental immunity would be to discourage the purchase of liability insurance—a result that stands in direct contradiction to the legislature’s authorization. Finally, the *Stone* dissent argues that the public duty doctrine was not the common law of the state prior to the enactment of the Tort Claims Act and waiver of sovereign immunity.¹⁷⁷ However, the doctrine has been the common law of this state since 1988.¹⁷⁸ By the very reasoning of the *Stone* dissent, therefore, local governments currently waiving their governmental immunity through the purchase of liability insurance should be able to factor current common law into their assessment of liability exposure.

IV. A MATTER MOSTLY OF INCONSEQUENCE FOR LOCAL GOVERNMENTS?

A. *Duplicating Governmental Immunity*

While some have questioned the harmony between the public duty doctrine and a waiver of governmental immunity, others have questioned the need for the public duty doctrine’s protections in cases in which governmental immunity has not been waived.¹⁷⁹ Specifically, courts have raised questions about the value of the doctrine given the broader protections available under governmental immunity.¹⁸⁰ Recognizing the complex and confusing state of the law surrounding the public duty doctrine, these courts suggested that its continued

177. *Id.* at 487, 495 S.E.2d at 719 (Orr, J., dissenting).

178. *Braswell v. Braswell*, 330 N.C. 363, 370–71, 410 S.E.2d 897, 901 (1991).

179. *See, e.g., Beaudrie v. Henderson*, 631 N.W.2d 308, 315 (Mich. 2001) (Cavanaugh, J., concurring) (recognizing that the need for the doctrine might be undermined by an expanded governmental immunity statute but continuing to apply the doctrine in police protections cases); *Hudson v. E. Montpelier*, 638 A.2d 561, 568 (Vt. 1993) (declining to adopt the confusing and inconsistent public duty doctrine as a means of limiting liability of government employees already protected by immunity). *See generally* Emily Hammond, Note, *Government Liability When Cyclists Hit the Road: Same Roads, Same Rights, Different Rules*, 35 GA. L. REV. 1051, 1068 (2001) (illustrating similar outcomes under the public duty doctrine and governmental immunity); Grant P.H. Shuman, Note, *Common Law Tort Immunity for State Officials in West Virginia After the Parkulo v. West Virginia Board of Probation Decision*, 103 W. VA. L. REV. 261, 284 (2000) (recognizing that the public duty doctrine achieves the same result as governmental immunity).

180. *See, e.g., Beaudrie*, 631 N.W.2d at 315 (“[T]he need for an expanded application of the public duty doctrine has been undermined by the protections afforded governmental employees by our state’s broad governmental immunity statute.”); *Hudson*, 638 A.2d at 568 (questioning whether the doctrine limits “the liability of government employees who are already protected to some extent by the doctrine of qualified official immunity”).

viability should be evaluated in light of the value of its protections.¹⁸¹

As the dissents point out in *Hunt* and *Stone*, the effect of the doctrine is highly and consistently determinative of liability for the State of North Carolina and its agencies because it bars liability even in cases for which the state Tort Claims Act has authorized liability. The value of the doctrine to local governments, however, turns on whether the local government has waived its governmental immunity.¹⁸² In cases in which governmental immunity has not been waived, the public duty doctrine provides no additional liability protection to that already afforded local governments by governmental immunity. Law enforcement has long been deemed a governmental activity and unless the local government waives its immunity through the purchase of insurance, it cannot be held liable for harm caused to citizens.¹⁸³ Thus, Guilford County could not have

181. *Id.*

182. This Article focuses on the public duty doctrine's applicability to governmental entities. It is true, however, that the doctrine is also available to individual public servants and, in such cases, the status of the defendant determines the utility of the doctrine. In North Carolina, different standards of liability apply to public servants deemed to be public officers than to public servants deemed to be public employees. *Harwood v. Johnson*, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404 (1988), *aff'd in part, rev'd in part on other grounds*, 326 N.C. 231, 388 S.E.2d 439 (1990). A public officer is shielded from liability for injuries arising from the exercise of a discretionary act while engaged in a governmental activity, unless the officer acted with malice, for corrupt reasons, or outside the scope of his or her official duties. *Id.* (quoting *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985)). Public employees, on the other hand, may be held liable for mere negligence. *Id.* As a result of the insulation from personal liability afforded public officers, the distinction between officers and employees is an important one.

Sworn law enforcement officers are public officers. *See State v. Hord*, 264 N.C. 149, 156–57, 141 S.E.2d 241, 246 (1965). Employees not bound by the police officer oath of duty to protect and serve the public are typically deemed employees. *See Lewis v. Hunter*, 212 N.C. 504, 509, 193 S.E.2d 814, 817 (1937) (finding police department personnel who operate radios to be employees). If the public duty doctrine is to be limited to local governments in negligence cases arising out of law enforcement engagement in police protection, public officer immunity should almost always apply to protect sworn officers. *See Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 406, 442 S.E.2d 75, 79 (1994) (establishing that the public duty doctrine applies to claims of negligence but not intentional torts). This would be true even in cases involving allegations of malice based on grossly negligent, reckless or wanton misconduct. *See Robinette v. Barriger*, 116 N.C. App. 197, 203, 447 S.E.2d 498, 502 (1994) (holding that allegations of reckless indifference are insufficient to overcome public official immunity); *Reid v. Roberts*, 112 N.C. App. 222, 225, 435 S.E.2d 116, 120 (1993) (holding that a claim of gross negligence is not sufficient to overcome public official immunity to survive motion to dismiss). *But see Givens v. Sellars*, 273 N.C. 44, 49–50, 159 S.E.2d 530, 535 (1968) (suggesting allegations of reckless indifference may be sufficient to overcome public official immunity). The doctrine would not apply, however, to protect public employees of law enforcement departments. *Lewis*, 212 N.C. at 509, 193 S.E.2d at 817.

183. The *Wood* court did not reach the issue of whether governmental immunity

been held liable for Ms. Wood's injuries unless it consented to such liability by waiving its immunity.

However, under current law, if Guilford County waived its governmental immunity, the public duty doctrine would still act as a bar to liability. The public duty doctrine could be criticized, therefore, as imposing an effective bar to recovery by citizens in situations in which local policymakers have determined that their local government entity should be held liable and have taken affirmative steps to provide a resource base for recovery. It is more likely the case, however, that local policymakers factor the public duty doctrine's protections into their on-going decisions to waive governmental immunity. Without the doctrine's protections, these policymakers would probably resort to the more expansive protections of governmental immunity by not purchasing liability insurance. In this way, the doctrine may have both significant value to local governments and benefits for prospective plaintiffs.

B. Applying a Traditional Negligence Framework

Courts have articulated concern about the needless confusion in the law of public duty doctrine and have maintained that the conduct it seeks to protect is better served by traditional tort principles.¹⁸⁴ Indeed, even courts that have retained the doctrine for limited purposes, such as the Michigan Supreme Court, have noted, "a traditional common-law duty analysis provides a far more familiar

protected Guilford County from liability because consideration of governmental immunity would have been appropriate only if the public duty had been found to be inapplicable. If the court found that the public duty doctrine did not apply, it would have followed the course of inquiry of the court of appeals and determined first, whether the County engaged in a governmental activity and second, if so, whether the County waived its governmental immunity. Law enforcement has long been deemed a governmental activity in North Carolina. *See Lewis*, 212 N.C. 504, 509, 193 S.E. 814, 817 (1937). The County waived its governmental immunity through the indemnification insurance purchased by Burns, the security company. *Wood v. Guilford County*, 143 N.C. App. 507, 512-13, 546 S.E.2d 641, 645-46 (2001).

184. *Leake v. Cain*, 720 P.2d 152, 158 (Colo. 1986) (reasoning that the underlying purposes of the public duty rule are "better served by the application of conventional tort principles and the protection afforded by statutes governing sovereign immunity than by a rule that precludes a finding of an actionable duty on the basis of the defendant's status as a public entity"); *see Adams v. State*, 555 P.2d 235 (Alaska 1976); *Ryan v. State*, 656 P.2d 616 (Ariz. 1982); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); *Scheer v. Bd. of County Comm'rs*, 687 P.2d 728 (N.M. 1984); *Brennen v. City of Eugene*, 591 P.2d 719 (Or. 1979); *Coffey v. City of Milwaukee*, 247 N.W.2d 132 (Wis. 1976). *But see Jean W. v. Commonwealth*, 610 N.E.2d 305, 315 (Mass. 1993) (Liacos, C.J., concurring) (cautioning that abolition of the public duty rule would not be an analytical panacea, since many of the same conflicting considerations would reemerge in the causation element of the plaintiffs' tort claims).

and workable framework for determining whether a public employee owes a tort-enforceable duty in a given case.”¹⁸⁵ Under a common law analysis, tort law imposes a duty upon everyone to use reasonable care when an action creates a foreseeable risk of harm to some person or class of persons.¹⁸⁶ Thus, in the absence of governmental immunity, in *Wood v. Guilford County*, the County would be liable under a traditional negligence framework only if Ms. Wood could show a duty of reasonable care, breach of that duty, causation and damages.¹⁸⁷ These traditional requirements of negligence liability impose formidable obstacles for a plaintiff, such as Ms. Wood, seeking to impose liability on a local government for failure to prevent the criminal act of a third person.

It appears Ms. Wood could not have surmounted the first obstacle—the requirement of a duty. The *Wood* court characterized the case as one of misfeasance, specifically the failure to provide police protection.¹⁸⁸ In the absence of actual or constructive notice of danger, there is no duty to protect others against the criminal acts of a third person.¹⁸⁹ The test for determining whether a duty to safeguard others from the criminal acts of a third person would be imposed on a proprietor turns on foreseeability.¹⁹⁰ If the County had no reason to foresee the danger to Ms. Wood and she could point to no other basis for imposing a duty, the county could not be liable for failing to

185. *Beaudrie*, 631 N.W.2d at 315 (Cavanaugh, J., concurring).

186. See Mark McLean Myers, Comment, *A Unified Approach to State and Municipal Tort Liability in Washington*, 59 WASH. L. REV. 533, 539 (1984) (contrasting traditional tort duty analysis focusing on foreseeability with public duty doctrine’s requirement of a special relationship).

187. See CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 16.20 (2d ed. 1999) (setting forth the general elements for a prima facie negligence cause of action under North Carolina law); Stephanie M. Bonnett, Comment, *Holsten v. Massey: The Co-existence of the Public Duty Doctrine and the Governmental Tort Claims and Insurance Reform Act*, 100 W. VA. L. REV. 243, 266 (1997) (“[T]he mere existence of a duty does not give rise to liability: There must be a breach, proximate cause, and damages.”).

188. *Wood v. Guilford County*, 355 N.C. 161, 167–69, 558 S.E.2d 490, 495–96 (2002).

189. *Miller v. B.H.B. Enters., Inc.*, 152 N.C. App. 532, 541, 568 S.E.2d 219, 225 (2002) (emphasis omitted) (citing *Murrow v. Daniels*, 321 N.C. 494, 500, 364 S.E.2d 392, 397 (1988)) (holding that “a proprietor of a public business establishment has a duty to exercise reasonable or ordinary care to protect his patrons from intentional injuries by third persons, if he has reason to know that such acts are likely to occur”). The same facts often present problems for plaintiffs seeking demonstrative causation. See *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981) (“It is usually held that [criminal acts of third persons] cannot be reasonably foreseen by the owner [of property], and therefore constitute an independent, intervening cause absolving the owner of liability.”).

190. *Murrow*, 321 N.C. at 501, 364 S.E.2d at 397.

protect her. Recent case law suggests that to demonstrate foreseeability an employee seeking to hold an employer liable for the criminal activity of a third person should “present evidence of significant criminal activity on the premises to show that the security methods assured by [the] defendant were inadequate.”¹⁹¹ The facts in *Wood* did not suggest prior criminal activity or that the security being provided was unreasonable as a matter of law. Indeed, the best evidence that Ms. Wood would not have been able to make a showing of foreseeability against the county is the fact that she was unable to do so against Burns, the private security company. The trial court entered an order for summary judgment in favor of Burns in June 1999 on grounds that included a finding that the plaintiff failed to establish that she was owed a duty by Burns.¹⁹²

Given the outcome of Ms. Wood’s claim against Burns, one might question the advantages of analyzing the case under the public duty doctrine rather than under traditional tort principles. The primary advantages lie in the procedure rather than the outcome of a negligence case. The applicability of the public duty doctrine is a question of law to be raised at the pleading stage of a case. Issues of foreseeability and proximate cause, on the other hand, are usually reserved for the jury.¹⁹³ Moreover, a local government defendant may immediately appeal a lower court’s rejection of the public duty doctrine as a bar to liability. This is unusual. Typically, where the lower court’s order does not dispose of the case, no appeal is available.¹⁹⁴ However, an appeal may be heard “if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.”¹⁹⁵ North Carolina’s courts have held

191. *Williams v. Smith*, 149 N.C. App. 855, 859, 561 S.E.2d 921, 924 (2002) (citing *Connelly v. Family Inns of Am., Inc.*, 141 N.C. App. 583, 586–89, 540 S.E.2d 38, 41–42 (2000)). *But see* *Sawyer v. Carter*, 71 N.C. App. 556, 561, 322 S.E.2d 813, 817 (1984) (stating that “evidence pertaining to the foreseeability of criminal attack shall not be limited to prior criminal acts occurring on the premises”).

192. Order Granting Summary Judgment at 1, *Wood v. Guilford County*, No. 99 CVS 1686 (Guilford County Super Ct. Apr. 5, 2002) (considering the briefs and arguments of all parties and determining that there were no remaining genuine issues of material fact and Burns was entitled to summary judgment as a matter of law) (on file with the North Carolina Law Review).

193. *Swain v. Preston Falls E.*, __ N.C. App. __, __, 576 S.E.2d 699, 702 (2003) (indicating that issues of negligence are “ordinarily questions for the jury and are rarely appropriate for summary judgment”).

194. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (recognizing the appeals court usually will not hear an interlocutory appeal, but rather will allow the lower court to determine the entire controversy).

195. *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996) (citations omitted); *see* N.C. GEN. STAT. § 1-277 (1996).

that an order denying a motion to dismiss grounded on the defense of the public duty doctrine affects a substantial right and is immediately appealable.¹⁹⁶ The significance of the procedural right to immediate appeal should not be underestimated. That right, as well as the likelihood of resolving the case at the pleading stages, render the public duty doctrine a more efficient way for local governments to resolve tort cases.

V. THE COMPETING PUBLIC POLICY GOALS AT WORK

At the heart of the debate over the continued viability of the public duty doctrine lies a set of competing public policy justifications. In abolishing the public duty doctrine, some state courts have cited the need to compensate injured plaintiffs, hold governments financially accountable for wrongdoing and modernize confusing and antiquated concepts of immunity.¹⁹⁷ On the other hand, courts seeking justifications for retaining the doctrine have cited the need to achieve parity between governmental and private tortfeasors, the differing responsibilities between the public and private sectors, and the availability of alternate recourse to civil liability for wrongdoings.¹⁹⁸ Any meaningful justification for the continued viability of the public duty doctrine in North Carolina will depend on the courts' willingness to focus on and balance all of the competing policies.

The need to achieve parity between governmental and private tortfeasors is the primary policy justification cited for embracing the doctrine.¹⁹⁹ Courts are reluctant to hold governments liable for activities that are not required of the private sector. The "rule has been found to be effective in recognizing and protecting the limited resources of law enforcement . . . [by circumventing] the speculative effect of a state's unlimited, excessive liability due to the failure to provide police protection."²⁰⁰ The majority of justices of the Supreme Court of North Carolina rely heavily on this justification in *Hunt* and

196. *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996), *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996); *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77 (1994).

197. See Bonnett, *supra* note 187, at 265 (setting forth the policy rationale).

198. See *infra* notes 199–208 and accompanying text.

199. See R. Perry Sentell, Jr., *Statutes in Derogation of the Common Law: In the Georgia Supreme Court*, 51 MERCER L. REV. 73, 77 (1999).

200. Dardis, *supra* note 134, at 720–21 (citing *Parker v. Turner*, 122 N.C. App. 381, 383, 469 S.E.2d 569, 571 (1996)); see also *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991) (lamenting the unpredictability of liability exposure resulting from the imposition of a duty of police protection for specific persons).

Stone.²⁰¹ They argue that unlike public agencies, private persons are required to inspect neither go-karts nor work places and therefore could not be held liable for the failure to do either.²⁰² Thus, the justices conclude that in order to leave private and public persons on equal footing, public agencies must be protected from potential liability while engaged in these exclusively public activities.²⁰³ According to other public duty doctrine proponents, any other result would leave public treasuries vulnerable to depletion.²⁰⁴

Paradoxically, the secondary justification is the inherent nonparity between the two sectors—namely, government's need to exercise discretion without the pressures of potential tort liability.²⁰⁵ Judges have been explicit in their concern that "individuals, juries and courts are ill-equipped to judge governmental decisions as to how particular community resources should be or should have been allocated to protect individual members of the public."²⁰⁶ To subject local officials to inappropriate second-guessing could well compromise their efficacy, as governmental officials could become more concerned about liability than carrying out their duties.

A third, albeit less frequently cited, reason to favor the public duty doctrine is the existence of alternate means to civil liability, such as elections and referendums, which can be used to hold governments accountable.²⁰⁷ These options for recourse are not available to an injured party when the wrongdoer is a private person. Examples of other mechanisms whereby individual officials and their employees may be held accountable for dereliction of duty include internal disciplinary proceedings and formal criminal prosecutions.²⁰⁸ The practicality of pursuing these mechanisms and their usefulness to an individual who has been injured by government conduct are questionable, however.

On the other side of the debate are those who are increasingly skeptical about treating government tortfeasors differently than

201. See *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 199, 499 S.E.2d 747, 751 (1998); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, 716 (1998).

202. *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751; *Stone*, 347 N.C. at 473, 495 S.E.2d at 716.

203. *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751; *Stone*, 347 N.C. at 473, 495 S.E.2d at 716.

204. See, e.g., *Ryan v. State*, 656 P.2d 597, 598 (Ariz. 1982) (noting the argument by the State of Arizona that the public duty doctrine serves to protect the treasury).

205. See Bonnett, *supra* note 187, at 249.

206. *Ezell v. Cockrell*, 902 S.W.2d 394, 398 (Tenn. 1995) (citing *Morgan v. District of Columbia*, 468 A.2d 1306, 1311 (D.C. 1983)).

207. See John Cameron McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505, 509 n.18 (1987).

208. *Id.*

private individuals. These skeptics argue that a “government should be responsible in damages to any plaintiff injured by one of its employees acting within the scope of his employment and that damages should be viewed as simply the cost of administration.”²⁰⁹ As the dissent in *Hunt* points out, the practical effect of allowing a government “to escape liability for its negligence [is that] . . . injured parties are . . . left with no means of recovery.”²¹⁰ Detractors of the doctrine note a government entity may be “more suited to bear the cost [of injury than an individual plaintiff] because the costs can be allocated to the public through taxation.”²¹¹

In response to the argument that denying governments the doctrine as a defense to liability would result in limitless liability, these detractors point out that local governments may act to limit their liability through the purchase of liability insurance.²¹² The argument has some merit. It is probably unreasonable to suggest that governments will either cease to provide services or become bankrupted due to their unlimited liability for providing core functions, such as court facilities. North Carolina’s local governments were able to manage adequately their risk of liability exposure prior to 1988 when the public duty doctrine became an available defense, and there is no reason to believe they could not do likewise today.²¹³

Additionally, several courts have determined the law surrounding the public duty doctrine is more complex, confusing and unpredictable than the law of ordinary negligence.²¹⁴ In North Carolina, the supreme court has sought to substantially narrow the scope of the doctrine for local governments by limiting application to law enforcement engaged in police protection.²¹⁵ However,

209. See Bonnett, *supra* note 187, at 265.

210. *Hunt v. N.C. Dep’t of Labor*, 348 N.C. 192, 200, 499 S.E.2d 747, 751–52 (1998) (Orr, J., dissenting) (citing *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998)).

211. See Bonnett, *supra* note 187, at 265.

212. *Brennen v. City of Eugene*, 591 P.2d 719, 723 (Or. 1979).

213. The author is unaware of any North Carolina local government to be bankrupted by a civil judgment. See also Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2024 (“[A]s an empirical matter, it is not clear that government liability does in fact lead to increased damages.”).

214. See *Beaudrie v. Henderson*, 631 N.W.2d 308, 315 (Mich. 2001). (Cavanaugh, J., concurring); see also *Doucette v. Town of Bristol*, 635 A.2d 1387, 1390 (N.H. 1993) (noting the doctrine is speculative and the cause of “legal confusion, tortured analyses and inequitable results”).

215. See *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) (limiting the application of the public duty doctrine). But see *Wood v. Guilford County*, 355 N.C. 161, 168, 558 S.E.2d 490, 496 (2002) (rejecting “an overly literal reading of the limitations . . . placed on the public duty doctrine as applied to local governments in

considerable confusion continues to plague the doctrine. A good example of the convolution inherent in the doctrine is the fact that local governments are entitled to a lesser protection under the public duty doctrine than the State. The supreme court has yet to explain explicitly why this is so. One wonders whether it is at all possible for the court to construct an intellectually defensible basis for limiting the doctrine to law enforcement for local governments but applying it to safety inspections for the State.²¹⁶ The court's apparent policy rationale for the differing application of the doctrine is certainly not defensible. In *Thompson*, the court denies a local government protection under the public duty doctrine for negligence in inspecting buildings under the state Building Code.²¹⁷ Under the present scheme in North Carolina, local governments are required to carry out building inspection functions on behalf of the State. *Stone* and *Hunt* make clear that when the State engages in these types of functions directly, it is entitled to protection under the public duty doctrine.²¹⁸ However, when it delegates the duty to a local government, the doctrine does not apply. This distinction is untenable, especially in light of *Wood*. There, the fact that the local government had delegated to a private security company its duty to provide police protection was held to be immaterial to the doctrine's applicability. Indeed, the court proclaimed that it was "the nature of the duty assumed" that determined the doctrine's applicability.²¹⁹ Perhaps the inability to reconcile such doctrinal inconsistencies and the generally confusing state of the law surrounding the public duty doctrine may one day tempt the supreme court to adjust the doctrine.²²⁰ However,

Lovelace, and an overly narrow interpretation of the doctrine itself as articulated in *Braswell*").

216. No other jurisdiction appears to have embraced the distinction. The only case found that considered different standards was *Doucette v. Town of Bristol*, which indicated the public duty doctrine was introduced but never applied in New Hampshire state law. 635 A.2d 1387, 1390 (N.H. 1993). *Doucette* suggests municipalities, in contrast to the state and private citizens, are to be given more protection under the public duty rule. See *id.* This observation is in direct contrast to North Carolina law, which allows the state more protection than local governments under the public duty doctrine.

217. *Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000).

218. See *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998) (applying doctrine to a claim against the State for negligence in inspection of an amusement park ride); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 481, 495 S.E.2d 711, 716 (1998) (applying the doctrine to a claim against the State for failure to inspect workplace).

219. *Wood v. Guilford County*, 355 N.C. 161, 168, 558 S.E.2d 490, 496 (2002).

220. In *Nelson v. Freeland*, for example, the court examined the advantages and disadvantages of abolishing the trichotomy of differing standards of liability based on whether an injured person was an invitee, licensee or trespasser and concluded that

given the doctrine's significant, albeit diminished, benefits to local governments,²²¹ confusion, by itself, is not compelling enough to warrant abolishing the doctrine.

A final argument for abolishing the public duty doctrine as a defense for North Carolina's local governments proffers that "the drastic social and economic changes that have taken place since the public duty doctrine's birth in the nineteenth century warrant that it follow the doctrine of sovereign immunity into the 'dustheap of history.'"²²² Ironically, it is this very argument that provides the strongest reason for retaining the doctrine as a defense for local governments. No court in North Carolina has suggested that the doctrine no longer reflects the state's mores—an indication allegedly present in the states that have rejected the doctrine.²²³ Absent a

abolition of the differing standards would bring clarity to a confusing area of the law. 349 N.C. 615, 631–32, 507 S.E.2d 882, 892 (1998). The court noted three disadvantages to abolishing the traditional common law: first, possible jury abuse of the reasonable care standards; second, the unfair burden on landowners who would be forced to maintain expensive insurance policies; and third, creating an unpredictable legal system. *Id.* at 624–25, 507 S.E.2d at 888. These arguments mirror concerns raised in favor of retaining the public duty doctrine, including juror competence to judge governmental decisions; the unreasonable cost to governments of increased liability exposure; and the need to maintain predictability regarding public versus private liability. *See infra* notes 198–208 and accompanying text. The *Nelson* court rejected all three arguments against modernizing the law of premises liability. *Nelson*, 349 N.C. at 624–25, 507 S.E.2d at 888. The court pointed out that juries have applied the reasonable care standard for years in other negligence areas. *Id.* Courts have repeated that landowners are not "absolute insurer[s] against all injuries" sustained on their premises. *Id.* The common law rules are less predictable and stable than the standard of reasonableness required in ordinary negligence cases. *Id.* at 631, 507 S.E.2d at 889–90; *see also* Phillip John Strach, *Too Far, Too Fast? The North Carolina Supreme Court Eliminates the Common Law Distinction Between Invitees and Licensees in Nelson v. Freeland*, 77 N.C. L. REV. 2377, 2382 (1999) (explaining the development of the new classification scheme in North Carolina). The *Nelson* court then set forth the advantages of abolishing the common law scheme. *Nelson*, 349 N.C. at 625–31, 507 S.E.2d at 888–92. The court explained that the trichotomy was created at a time when "it was desirable to provide free reign to a landowner to use and exploit his land." *Id.* at 626, 507 S.E.2d at 889. The court noted this thinking was "outdated" and did not reflect modern society's "'mores and humanitarian values.'" *Id.* at 629, 507 S.E.2d at 890 (quoting *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968)). The court acknowledged the "complex, confusing, and unpredictable state of law" created by the doctrine and its many exceptions and sub classifications. *Id.* at 627, 507 S.E.2d at 889. Finally, the court pointed to the "unfair and unjust results" caused by the common law system's tendency to deflect attention away from the "issue of whether the landowner acted reasonably under the circumstances." *Id.* at 631, 507 S.E.2d at 890.

221. *See supra* Part IV.

222. Shelly K. Speer, *The Public Duty Doctrine and Municipal Liability for Negligent Administration of Zoning Codes*, 20 SEATTLE U. L. REV. 803, 803 (1997) (citing John Cameron McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505, 529 (1987)).

223. *See Adams v. State*, 555 P.2d 235, 244 (Alaska 1976); *Ryan v. State*, 656 P.2d 616,

finding that the public policy of the state no longer embraces immunity for local governments, North Carolina's courts should not bring an end to the public duty doctrine.

The significant benefits of the public duty doctrine outweigh the negative results of its application. In balancing all of the competing policy rationales, however, courts that have recently considered and yet retained the public duty doctrine correctly concede that the strength of the policies weighing in favor of abolition require that the doctrine be applied sparingly.²²⁴ This limitation usually placed on the doctrine is the one North Carolina imposed in *Lovelace* and *Thompson*: application only in police protection cases.²²⁵ The limitation recognizes that while "a defendant's status . . . alone . . . [should] not preclude liability," in most circumstances, "'[p]olice officers must work in unusual circumstances. They deserve unusual protection.'" ²²⁶ Given the origin of the doctrine nationally and in North Carolina, the limitation appears to be reasonable and meaningful.²²⁷ The North Carolina courts, however, must develop a lucid and legitimate framework around this limitation, if it is to represent a respectable balancing of the public policy concerns that favor governmental liability with those that favor immunity.

CONCLUSION

In *Wood*, the Supreme Court of North Carolina failed to address any of the important lingering doctrinal issues surrounding the public

617–18 (Ariz. 1982); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022–23 (Fla. 1979); *Wilson v. Nepstad*, 282 N.W.2d 664, 671 (Iowa 1979); *Schear v. Bd. of County Comm'rs*, 687 P.2d 728, 733 (N.M. 1984); *Brennen v. City of Eugene*, 591 P.2d 719, 724 (Or. 1979); *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 138–39 (Wis. 1976). See, e.g., *Leake v. Cain*, 720 P.2d 152, 158 (Colo. 1986) (finding the public duty doctrine inconsistent with the legislative intent behind sovereign immunity waiver).

224. See, e.g., *Beaudrie v. Henderson*, 631 N.W.2d 308, 319 (Mich. 2001) (Cavanaugh, J., concurring) (limiting the doctrine's applicability); *Hamilton v. Cannon*, 482 S.E.2d 370, 372 (Ga. 1997) (limiting the public duty doctrine's application to the police protection context).

225. See *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000); *Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000).

226. *Beaudrie*, 631 N.W.2d at 316 (quoting *White v. Beasley*, 552 N.W.2d 1 (Mich. 1996)).

227. *Wood* suggests that it may turn out to be a difficult limitation to apply in practice. See *Wood v. Guilford County*, 355 N.C. 161, 168–69, 558 S.E.2d 490, 496 (2002) (expanding the limitation to include undefined activities analogous to police protections); see also *Rowe v. Coffey*, 515 S.E.2d 375, 381 (Ga. 1999) (Hunstein, J., dissenting) (criticizing the majority for effectively eviscerating the police protection limitation by expanding it to include a sheriff's deputy's decision against the necessity of a road barricade during a torrential rainstorm).

duty doctrine or to reconcile the different holdings of *Braswell*, *Lovelace* and *Thompson* in comparison to *Stone* and *Hunt*. Instead, the court sought blindly to cling to the doctrine. The result further obscured what was already a complex area of the law and raised questions about the viability of the doctrine. The court missed an opportunity to contribute badly needed principle to the law of public liability and justify the correct, albeit insubstantial, holding of the case.