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## Searching for Limits on a Municipality's Retention of Governmental Immunity: *Lyles v. City of Charlotte*

On August 5, 1990, a Charlotte police officer, Milus Terry Lyles, was transporting a prisoner in his police car.<sup>1</sup> Even though Officer Lyles had handcuffed the prisoner and searched him for weapons,<sup>2</sup> the prisoner managed to get control of a pistol hidden on his person and shoot Officer Lyles twice in the back.<sup>3</sup> Officer Lyles was wearing a bullet-proof vest, so the shots did not enter his back; however, he did lose control of the car.<sup>4</sup> After the car crashed into a parked dump truck,<sup>5</sup> Officer Lyles left the car to call for assistance on his portable radio as he had been trained to do.<sup>6</sup> When the portable radio did not work, he approached the car to use the radio located inside of it.<sup>7</sup> The prisoner, still in possession of the gun, shot Officer Lyles to death.<sup>8</sup>

In *Lyles v. City of Charlotte*,<sup>9</sup> Officer Lyles's wife brought a wrongful death action against the City of Charlotte (the "City") for her husband's death.<sup>10</sup> The City raised governmental immunity as an affirmative defense.<sup>11</sup> However, the City participated in a risk-

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1. See *Lyles v. City of Charlotte*, 344 N.C. 676, 677-78, 477 S.E.2d 150, 151 (1996). Officer Lyles and his partner had responded to a call involving a domestic dispute and arrested the prisoner at the scene of the dispute. See *Lyles v. City of Charlotte*, 120 N.C. App. 96, 97, 461 S.E.2d 347, 348 (1995), *rev'd*, 344 N.C. 676, 477 S.E.2d 150 (1996). Officer Lyles's partner drove away in a separate vehicle. See *id.*

2. See *Lyles*, 120 N.C. App. at 97, 461 S.E.2d at 348.

3. See *Lyles*, 344 N.C. at 678, 477 S.E.2d at 151.

4. See *id.* at 678, 477 S.E.2d at 151-52.

5. See *Lyles*, 120 N.C. App. at 97, 461 S.E.2d at 348.

6. See *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152. Officer Lyles crouched down behind the vehicle, pressed the emergency button on the radio, and requested assistance. See *Lyles*, 120 N.C. App. at 97, 461 S.E.2d at 348. Officer Lyles thought that he would receive a clear channel of communication with other officers by using the emergency button. See *id.* However, Officer Lyles's call for assistance was not sent to other officers and he did not receive a response. See *id.*

7. See *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152. The attempt by Officer Lyles to return to the front of his car in order to use his squad car radio was "[i]n conformity with his training." *Lyles*, 120 N.C. App. at 97, 461 S.E.2d at 348.

8. See *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152. The prisoner shot Officer Lyles as Lyles passed the left rear window of the police car. See *Lyles*, 120 N.C. App. at 97, 461 S.E.2d at 348-49.

9. 344 N.C. 676, 477 S.E.2d 150 (1996).

10. See *id.* at 677, 477 S.E.2d at 151.

11. See *Lyles*, 120 N.C. App. at 98, 461 S.E.2d at 349. With this defense of

management program and also had a liability insurance policy,<sup>12</sup> which was significant because a North Carolina statute provides that a city that participates in a local government risk pool or that has liability insurance to cover an incident has waived its governmental immunity.<sup>13</sup> The North Carolina Court of Appeals held that the City had waived its governmental immunity because its risk-management program fell within the statutory definition of a local government risk pool.<sup>14</sup> The North Carolina Supreme Court reversed the court of appeals and held that the City had not waived its governmental immunity.<sup>15</sup> According to the supreme court, the City's participation in the risk-management program did not constitute joining a local government risk pool and the City's liability insurance did not cover the allegations by Lyles.<sup>16</sup>

While federal and state governments historically have received absolute immunity from liability, the scope of the doctrine of municipal immunity gradually has been limited by statute and by judicial decision.<sup>17</sup> For instance, "virtually every state that has retained sovereign immunity has limited municipal tort immunity to the extent that municipal actions can be categorized as proprietary functions."<sup>18</sup> Several states, including North Carolina,<sup>19</sup> have statutes

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governmental, or sovereign, immunity, the City moved for judgment on the pleadings, or, in the alternative, summary judgment. See *Lyles*, 344 N.C. at 677, 477 S.E.2d at 151. Sovereign immunity is "[a] judicial doctrine which precludes bringing suit against the government without its consent." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

12. See *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152.

13. See N.C. GEN. STAT. § 160A-485 (1994); see also *infra* note 119 and accompanying text (quoting this statute). Several states provide for the waiver of governmental immunity in the presence of liability insurance. See, e.g., IOWA CODE ANN. § 670.7 (West Supp. 1997); MINN. STAT. ANN. § 466.06 (West 1994); MISS. CODE ANN. § 11-46-16 (Supp. 1996); MO. ANN. STAT. § 537.610 (West Supp. 1997); S.D. CODIFIED LAWS § 21-32A-1 (Michie 1987); VT. STAT. ANN. tit. 29, § 1403 (Supp. 1996).

14. See *Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 349.

15. See *Lyles*, 344 N.C. at 681-82, 477 S.E.2d at 153-54. The supreme court subsequently denied a petition for rehearing filed by Officer Lyles's widow. See *Lyles v. City of Charlotte*, 345 N.C. 355, 483 S.E.2d 170 (1997).

16. See *Lyles*, 344 N.C. at 681-82, 477 S.E.2d at 153-54. Throughout this Note, "Lyles" will refer to Debra Kay Lyles, the wife of Officer Milus Terry Lyles.

17. See Deborah L. Markowitz, *Municipal Liability for Negligent Inspection and Failure to Enforce Safety Codes*, 15 HAMLINE J. PUB. L. & POL'Y 181, 185 (1994). Only a minority of states have retained "the traditional doctrine of complete immunity." *Id.*

18. *Id.* at 185-86. The North Carolina Supreme Court has stated that municipal corporations act in a proprietary function when they "are acting . . . in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage." *Moffitt v. City of Asheville*, 103 N.C. 191, 203, 9 S.E. 695, 697 (1889); see also EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 53.29, at 338 (3d ed. rev. 1993) ("To be proprietary in nature, an activity must be conducted primarily for the purpose of producing a pecuniary

providing for the waiver of governmental immunity by local governments to the extent that the local government has liability insurance to cover the claim.<sup>20</sup> Additionally, in North Carolina, a city's participation in a statutory local government risk pool is deemed the equivalent of purchasing insurance.<sup>21</sup> While other states authorize participation in local government risk pools, such participation is not always considered a waiver of governmental immunity.<sup>22</sup> Thus, one commentator has noted that "[w]ith its explicit assertion that risk pools are to be treated as insurance, North Carolina has moved to the forefront in risk-management interpretation."<sup>23</sup> North Carolina's position on the waiver of governmental immunity was the focus of the North Carolina Supreme Court's decision in *Lyles*.

This Note first discusses the facts of *Lyles*, the decisions of the lower courts, and the opinion of the North Carolina Supreme Court.<sup>24</sup> Next, the Note examines the history of governmental immunity and how it may be waived in North Carolina.<sup>25</sup> The Note then analyzes the influence of this history on *Lyles* and how the decision conforms to and differs from past cases.<sup>26</sup> Finally, the Note considers reasons a city might waive governmental immunity as well as arguments supporting and disfavoring the abolition of the doctrine completely.<sup>27</sup>

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profit and must not normally be supported by taxes or fees."'). "Examples of proprietary functions [according to North Carolina courts] include the operation of a waterworks system for sale of water for private consumption, the operation of an airport, and the operation of an arena for the holding of exhibitions and athletic events." Patti Owen Harper, *Statutory Waiver of Municipal Immunity upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis*, 4 CAMPBELL L. REV. 41, 49 (1981) (footnotes omitted); see also *infra* notes 103-09 and accompanying text (discussing the adoption of the governmental/proprietary distinction in North Carolina).

19. See N.C. GEN. STAT. § 160A-485 (1994); see also *infra* note 119 (quoting this statute).

20. See *supra* note 13 (listing state statutes that provide for the waiver of governmental immunity in the presence of liability insurance).

21. See N.C. GEN. STAT. § 160A-485(a).

22. See, e.g., *Morgan v. City of Ruleville*, 627 So.2d 275, 281 (Miss. 1993) (holding that a city's participation in the Mississippi Municipal Liability Plan constituted self-insurance, but did not waive its sovereign immunity); *City of Laramie v. Facer*, 814 P.2d 268, 271 (Wyo. 1991) (holding that participation in a statewide risk-management program was not the equivalent of purchasing insurance and was not a waiver of governmental immunity).

23. Tamara D. Coffey, Comment, *Waiving Local Government Immunity in North Carolina: Risk Management Programs Are Insurance*, 27 WAKE FOREST L. REV. 709, 731 (1992).

24. See *infra* notes 28-98 and accompanying text.

25. See *infra* notes 99-201 and accompanying text.

26. See *infra* notes 202-77 and accompanying text.

27. See *infra* notes 278-313 and accompanying text.

At the time of the incident involving Officer Lyles, the City of Charlotte had an insurance policy with General Reinsurance Corporation.<sup>28</sup> The policy covered employees' claims arising out of " 'bodily injury by accident or bodily injury by disease,' " but did not provide coverage for " 'bodily injury intentionally caused or aggravated by or at the direction of the Insured.' " <sup>29</sup> Additionally, the City of Charlotte participated in a risk-management program with the Charlotte-Mecklenburg Board of Education and Mecklenburg County.<sup>30</sup> The three entities entered into an agreement that created a Division of Insurance and Risk Management ("DIRM") "to handle liability claims asserted against" them.<sup>31</sup> The DIRM maintained a separate trust account for each entity and each entity was required to deposit funds into its account to pay claims against it.<sup>32</sup> The first \$500,000 of any claim against an entity was to come from the entity's own account.<sup>33</sup> If a judgment was entered for more than \$500,000 and the entity did not have sufficient funds to pay it, then "the entity [could] use funds that one of the other entities ha[d] in the DIRM in excess of \$500,000,"<sup>34</sup> but had to repay with interest any funds that it borrowed from the other entities' accounts.<sup>35</sup>

Debra Kay Lyles, the wife of the murdered officer and the administrator of his estate, brought an action for the wrongful death of her husband against both the City of Charlotte and the manufacturer of the portable radio.<sup>36</sup> Lyles alleged that the City and the manufacturer "intentionally instructed her [husband] to use the portable radio in a certain way, knowing that if used that way, the radio would not function and that there was a substantial certainty that this improper use would result in the death or serious injury of an officer."<sup>37</sup> The City raised sovereign or governmental immunity as

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28. See *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152. The policy covered claims for more than \$250,000, but not exceeding \$1,250,000. See *id.*

29. *Id.* (quoting the insurance policy).

30. See *id.*

31. *Id.*

32. See *id.*

33. See *id.*

34. *Id.* The DIRM would not pay claims in excess of \$1,000,000. See *id.*

35. See *id.*

36. See *id.* at 677-78, 477 S.E.2d at 151. Although the supreme court did not review the claim against the manufacturer of the radio, the appellate court acknowledged Lyles's claims against it. See *Lyles v. City of Charlotte*, 120 N.C. App. 96, 97-98, 461 S.E.2d 347, 359 (1995), *rev'd*, 344 N.C. 676, 477 S.E.2d 150 (1996).

37. *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152.

an affirmative defense, asserting that it was not subject to suit.<sup>38</sup> Based on this defense, the City moved for a judgment on the pleadings, or alternatively, for summary judgment.<sup>39</sup> The superior court denied both motions.<sup>40</sup> On appeal, the North Carolina Court of Appeals affirmed the judgment of the superior court,<sup>41</sup> holding that the City was participating in a local government risk pool and thereby had waived governmental immunity.<sup>42</sup>

The North Carolina Supreme Court, in a four-to-three decision, reversed the court of appeals and granted the City's motion for summary judgment.<sup>43</sup> Justice Webb, writing for the court, began by noting the two ways in which a city may waive its sovereign immunity for civil liability in tort.<sup>44</sup> Under § 160A-485 of the North Carolina General Statutes,<sup>45</sup> a city waives governmental immunity by participating in a statutory local government risk pool<sup>46</sup> or by purchasing liability insurance.<sup>47</sup> Although Lyles asserted that the City had participated in a local government risk pool under the terms of the statute,<sup>48</sup> the court disagreed and held that the City's participation

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38. See *Lyles*, 120 N.C. App. at 98, 461 S.E.2d at 349.

39. See *Lyles*, 344 N.C. at 677, 477 S.E.2d at 151.

40. See *id.* at 678, 477 S.E.2d at 152.

41. See *id.* For the opinion of the court of appeals, see *Lyles v. City of Charlotte*, 120 N.C. App. 96, 461 S.E.2d 347 (1995), *rev'd*, 344 N.C. 676, 477 S.E.2d 150 (1996).

42. See *Lyles*, 120 N.C. App. at 106, 461 S.E.2d at 353-54. The court of appeals reasoned that the ability of an entity to use funds that one of the other entities had in the DIRM, despite the obligation to repay, provided a "mechanism by which participants [could] 'pool retention of their risks for property losses and liability claims and ... provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another.'" *Id.* at 106, 461 S.E.2d at 353 (quoting N.C. GEN. STAT. § 58-23-5 (1994)).

43. See *Lyles*, 344 N.C. at 682, 477 S.E.2d at 154.

44. See *id.* at 679, 477 S.E.2d at 152.

45. N.C. GEN. STAT. § 160A-485 (1994).

46. See N.C. GEN. STAT. § 58-23. These pools are established pursuant to Article 23, Chapter 58 of the North Carolina General Statutes. See *id.* The court quoted §§ 58-23-5 and 58-23-15(3), which govern the establishment of local government risk pools. See *Lyles*, 344 N.C. at 679, 477 S.E.2d at 152; see also *infra* notes 173-74 and accompanying text (quoting the same statutory sections).

47. See N.C. GEN. STAT. § 160A-485; *Lyles*, 344 N.C. at 679, 477 S.E.2d at 152.

48. See *Lyles*, 344 N.C. at 679-80, 477 S.E.2d at 152-53. Lyles argued that because the City has the right, in certain circumstances, to use funds contributed by the other entities for the payment of claims, the entities had pooled retention of their risks for liability and provided for the payment of such claims made against any member of the pool on a cooperative or contract basis.

*Id.* at 679, 477 S.E.2d at 152-53. Even though the City had to repay funds it borrowed from another entity, Lyles contended that the agreement was in essence a local government risk pool that met the statutory requirements. See *id.* at 679-80, 477 S.E.2d at 152-53. This argument was the basis of the holding of the court of appeals. See *Lyles v.*

in the DIRM did not constitute joining a local government risk pool.<sup>49</sup>

To support this holding, the court first noted that the Charlotte-Mecklenburg Board of Education did not meet the statutory definition of "local government" and therefore could not, under the terms of the statute, join a local government risk pool.<sup>50</sup> The court did not determine the effect on the agreement of the Board of Education's inability to join a statutory local government risk pool.<sup>51</sup> Irrespective of whether the Board of Education's participation had any effect, the court still concluded that the agreement did not constitute a risk pool.<sup>52</sup> The court had little precedent to guide it, as only one case, *Blackwelder v. City of Winston-Salem*,<sup>53</sup> had "interpret[ed] the statute as to what constitutes a local government risk pool."<sup>54</sup>

Regardless of the Board of Education issue, the court determined that the City's agreement did not entail sufficient risk-sharing to create a local government risk pool.<sup>55</sup> Noting that § 58-23-15 of the North Carolina General Statutes requires that the risk pool pay all claims for which an entity is liable,<sup>56</sup> the court stated that "the pool has [not] paid a claim if it is reimbursed for it."<sup>57</sup> Additionally, § 58-23-5 of the North Carolina General Statutes states that risk pools may be formed by local governments "to pool retention of their risks for ... liability claims."<sup>58</sup> The court interpreted this language to require the local governments to consolidate their funds into one pool for the payment of claims,

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City of Charlotte, 120 N.C. App. 96, 105-06, 461 S.E.2d 347, 353-54 (1995), *rev'd*, 344 N.C. 676, 477 S.E.2d 150 (1996). Lyles also argued that the City waived its immunity by purchasing liability insurance. See *infra* notes 64-73 (discussing the issue of liability insurance).

49. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 153.

50. See *id.* at 680, 477 S.E.2d at 153. Under Article 23 of Chapter 58 of the North Carolina General Statutes, "'local government' means any county, city, or housing authority located in [North Carolina]." N.C. GEN. STAT. § 58-23-1.

51. See *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153. The court expressly declined to determine the effect that a non-eligible entity, specifically the Board, would have on the otherwise eligible local government risk pool. See *id.* Instead, the court determined that the agreement did not constitute a statutory local government risk pool. See *id.*

52. See *id.*

53. 332 N.C. 319, 420 S.E.2d 432 (1992).

54. *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153. *Blackwelder* held that a local government risk pool requires at least two local governments. See *Blackwelder*, 332 N.C. at 322, 420 S.E.2d at 434. For a discussion of *Blackwelder*, see *infra* notes 177-88 and accompanying text.

55. See *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153.

56. See N.C. GEN. STAT. § 58-23-15 (1994).

57. *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153.

58. N.C. GEN. STAT. § 58-23-5.

which was not done in the City's agreement.<sup>59</sup> Finally, the court found no evidence that the entities involved in the present agreement had met the statutory requirements<sup>60</sup> for organizing a local government risk pool.<sup>61</sup> The court noted that this failure to comply with statutory requirements, although not determinative, "should be given some weight."<sup>62</sup> Based on this statutory interpretation, the court held that the City did not join a local government risk pool and thus had not waived its governmental immunity in that regard.<sup>63</sup>

Lyles also argued that her husband's death was accidental and that the City had waived its immunity to the extent that it had liability insurance to cover the claim.<sup>64</sup> The court noted that the policy covered "claims for bodily injury of City employees by accident and exclude[d] coverage for 'bodily injury intentionally caused or aggravated by or at the direction of the Insured.'" <sup>65</sup> However, Lyles brought the action pursuant to the exception to the exclusivity provision of the Workers' Compensation Act created in *Woodson v. Rowland*,<sup>66</sup> "alleging that the [City] knew or should have

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59. See *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153.

60. See N.C. GEN. STAT. § 58-23; see also *infra* notes 173-74 (quoting certain provisions of Article 23 of Chapter 58 that mention some of these statutory requirements). For example, parties seeking to join a local government risk pool must give the Commissioner of Insurance of North Carolina 30 days written notice of their intent to organize and operate a local government risk pool. See N.C. GEN. STAT. § 58-23-5. The parties also must meet requirements regarding the creation of a board of trustees and for the operation of the pools. See *id.* § 58-23-10. In addition, there are requirements pertaining to provisions that must be included in the risk pool agreement, see *id.* § 58-23-15, and to the financial monitoring and evaluation of the risk pools, see *id.* § 58-23-26.

61. See *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153.

62. *Id.* at 680-81, 477 S.E.2d at 153. If the City did not meet the statutory requirements for joining a local government risk pool, "its payment of government funds to settle tort claims to which governmental immunity applies would appear to be ultra vires." *Id.* at 686, 477 S.E.2d at 156 (Frye, J., dissenting). Ultra vires describes "[a]n act performed without any authority to act on [the] subject." BLACK'S LAW DICTIONARY 1522 (6th ed. 1990). The majority declined to address the issue of whether it was ultra vires for the City to create the DIRM, because that issue was not raised by the parties. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 153. The court then refuted the dissent's argument that the DIRM was a local government risk pool because it would be ultra vires otherwise. See *id.* at 681, 477 S.E.2d at 153; see also *infra* notes 79-85 and accompanying text (discussing the dissent's presumption that the City complied with the statutory requirements so the that risk pool would not be ultra vires).

63. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 153.

64. See *id.* The City's policy covered claims in excess of \$250,000, but not more than \$1,250,000. See *id.*

65. *Id.* (quoting the insurance policy).

66. 329 N.C. 330, 407 S.E.2d 222 (1991). In *Woodson*, the North Carolina Supreme Court held that an employee may pursue a civil action against an employer "when [the]



known that its action in instructing its officers how to use the radios was substantially certain to cause the death or serious injury of an officer."<sup>67</sup> In response to this allegation, the City argued that Lyles had asserted a claim that was not covered by the insurance policy because the policy covered only accidental injuries and expressly excluded intentional injuries of the type alleged by Lyles.<sup>68</sup>

The North Carolina Supreme Court agreed with the City, holding that "when [Lyles] alleged the City's action was substantially certain to cause an injury, she alleged the occurrence was not accidental"<sup>69</sup> and therefore removed the claim from insurance coverage.<sup>70</sup> The court distinguished its previous decision in *Woodson*, in which it held that facts asserted in a civil action that demonstrate substantial certainty of injury may nevertheless also allow a workers' compensation claim on an accident theory.<sup>71</sup> The court explained that because Lyles did not bring a workers' compensation claim, she could not rely on the provisions of the Workers' Compensation Act to determine whether her claim was based on an accident.<sup>72</sup> Because the court determined that the City was not participating in a local governmental risk pool and did not have liability insurance to cover Lyles's claim, it held that the City had not waived its governmental immunity and therefore that summary judgment for the City was appropriate.<sup>73</sup>

In a dissenting opinion, Justice Frye disagreed with the majority on both the local government risk pool and the liability insurance issues.<sup>74</sup> Although Justice Frye acknowledged that the City's agreement with Mecklenburg County and the Charlotte-Mecklenburg Board of Education may not have met the statutory requirements for a local government risk pool, he argued that the

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employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and [the] employee is injured or killed by that misconduct." *Id.* at 340-41, 407 S.E.2d at 228; see *infra* notes 149-61 and accompanying text (analyzing *Woodson*). If Lyles had a *Woodson* claim, then worker's compensation would not be her exclusive remedy. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 154.

67. *Lyles*, 344 N.C. at 681, 477 S.E.2d at 154. The court did not decide whether Lyles had a *Woodson* claim because the issue was not raised on appeal. See *id.* However, for the purpose of analysis, the court assumed that Lyles had a valid *Woodson* claim. See *id.*

68. See *id.*

69. *Id.* at 682, 477 S.E.2d at 154 (citing *North Carolina Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 709, 412 S.E.2d 318, 325 (1992)).

70. See *id.*

71. See *id.*

72. See *id.*

73. See *id.*

74. See *id.* (Frye, J., dissenting). Chief Justice Mitchell and Justice Lake joined Justice Frye's dissenting opinion. See *id.* at 689, 477 S.E.2d at 158 (Frye, J., dissenting).

agreement in this case was essentially a risk pool and that the City had consequently waived its governmental immunity.<sup>75</sup> The dissent supported its position with policy considerations:

Under such a scheme, the decision of the local government officials is not reviewable, and the awards to injured parties may be distributed on an arbitrary basis without any opportunity for the injured party to have the decision of the local government reviewed by the courts. *Even the State of North Carolina does not have such unbridled discretion.*<sup>76</sup>

After reviewing the relevant statutes and the court's prior decision in *Blackwelder v. City of Winston-Salem*,<sup>77</sup> the dissent then criticized the *Lyles* majority and the *Blackwelder* court for implicitly assuming that a city could enter a government risk-management program not authorized by statute.<sup>78</sup>

The dissent suggested that risk-management programs other than those allowed by statute may be ultra vires:<sup>79</sup> "[A] municipality must have a legal obligation to make a payment in order to distribute governmental funds."<sup>80</sup> "[T]o the extent a municipality retains its sovereign immunity, it has no authority to pay [a] claim against it."<sup>81</sup> The dissent noted that municipalities can exercise only the power given to them by the legislature,<sup>82</sup> and questioned the City's authority to "negotiate, settle, and pay tort claims against it under the risk-management program."<sup>83</sup> According to the dissent, the City had either waived its governmental immunity by participating in the risk-management program, "or its payment of governmental funds to settle tort claims . . . would appear to be ultra vires."<sup>84</sup> The dissent presumed that the City, to avoid actions that might be ultra vires, had complied with the statutes in establishing the risk-management program and concluded that the City's participation in the program

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75. See *id.* at 684, 477 S.E.2d at 155 (Frye, J., dissenting).

76. *Id.* (Frye, J., dissenting).

77. 332 N.C. 319, 420 S.E.2d 432 (1992); see *supra* note 54 (discussing *Blackwelder*'s holding); *infra* notes 177-88 and accompanying text (analyzing *Blackwelder* in more detail).

78. See *Lyles*, 344 N.C. at 685, 477 S.E.2d at 156 (Frye, J., dissenting).

79. See *id.* (Frye, J., dissenting); *supra* note 62 (defining ultra vires).

80. *Lyles*, 344 N.C. at 685, 477 S.E.2d at 156 (Frye, J., dissenting) (citing *Leete v. County of Warren*, 341 N.C. 116, 120-21, 462 S.E.2d 476, 479 (1995)).

81. *Id.* at 686, 477 S.E.2d at 156 (Frye, J., dissenting).

82. See *id.* (Frye, J., dissenting) (citing *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994)).

83. *Id.* (Frye, J., dissenting).

84. *Id.* (Frye, J., dissenting).

waived its governmental immunity.<sup>85</sup>

Justice Frye next addressed the issue of whether the City's liability insurance covered Lyles's claim, such that governmental immunity had been waived.<sup>86</sup> The dissent disagreed with the majority, which had relied on *North Carolina Farm Bureau Mutual Insurance Co. v. Stox*<sup>87</sup> to hold that Lyles's claim was excluded from insurance coverage because she alleged that "the City's action was substantially certain to cause injury."<sup>88</sup> First, the dissent distinguished *Stox* because that case did not involve a *Woodson* claim.<sup>89</sup> Also, contrary to the majority's opinion, the dissent stated that *Stox* suggested that the City's liability insurance would cover the claim in *Lyles* because the insurance policy in *Stox* contained an exclusion similar to the one at issue in *Lyles* and the *Stox* court found the exclusion to be inapplicable when the injury was an unexpected result of an intentional act.<sup>90</sup> Quoting *Stox*, the dissent pointed out that "it is the resulting injury, not merely the volitional act, which must be intended for [the] exclusion to apply."<sup>91</sup> Thus, the exclusion provision in the City's insurance policy should not have applied to Lyles's claim.<sup>92</sup>

Second, the dissent noted that *Woodson* does not require actual intent to harm "for an employer's conduct to be actionable in tort and not protected by the exclusivity provisions of worker's compensation."<sup>93</sup> In order to be liable, an employer in a *Woodson* action only has to engage intentionally in conduct that is substantially

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85. See *id.* (Frye, J., dissenting).

86. See *id.* (Frye, J., dissenting).

87. 330 N.C. 697, 412 S.E.2d 318 (1992); see also *infra* notes 135-48 and accompanying text (discussing *Stox*).

88. *Lyles*, 344 N.C. at 686, 477 S.E.2d at 157 (Frye, J., dissenting).

89. See *id.* (Frye, J., dissenting). *Stox* involved a claim under a homeowner's insurance policy by a co-employee of the insured for injuries caused by the insured at their place of employment. See *Stox*, 330 N.C. at 699, 412 S.E.2d at 320. The *Lyles* dissent also noted that the court has never addressed whether a *Woodson* claim is covered by liability insurance. See *Lyles*, 344 N.C. at 686-87, 477 S.E.2d at 157 (Frye, J., dissenting).

90. See *Lyles*, 344 N.C. at 687, 477 S.E.2d at 157 (Frye, J., dissenting). The insurance policy in *Stox* excluded claims for "bodily injury . . . which is expected or intended by the insured." *Id.* (Frye, J., dissenting) (omission in original) (quoting *Stox*, 330 N.C. at 703, 412 S.E.2d at 322 (quoting the insurance policy)).

91. *Id.* (Frye, J., dissenting) (quoting *Stox*, 330 N.C. at 703-04, 412 S.E.2d at 322).

92. See *id.* at 688, 477 S.E.2d at 157 (Frye, J., dissenting). The court noted there were no allegations that Lyles "believes or contends that the police department did anything with the intent to injure or to kill Mr. Lyles or anyone else." *Id.* (Frye, J., dissenting).

93. *Id.* (Frye, J., dissenting) (quoting *Woodson v. Rowland*, 329 N.C. 330, 344, 407 S.E.2d 222, 230 (1991)).

certain to result in serious injury or death.<sup>94</sup> This level of conduct is “ ‘so egregious as to be tantamount to an intentional tort.’ ”<sup>95</sup> The dissent criticized the court for drawing an untenable line between intentional torts and egregious conduct that is tantamount to an intentional tort<sup>96</sup> and determined that conduct on the substantial-certainty side of this line should not be excluded under the City’s insurance policy.<sup>97</sup> The dissent asserted that the City had waived its governmental immunity by participating in a local government risk pool and by purchasing insurance that covered Lyles’s claim, and therefore the City’s motion for summary judgment should have been denied.<sup>98</sup>

Sovereign (or governmental) immunity is “[a] judicial doctrine which precludes bringing suit against the government without its consent.”<sup>99</sup> The doctrine possibly originated in Roman law and has significant roots in England.<sup>100</sup> Although the United States Supreme Court adopted the doctrine of sovereign immunity for the federal government in the early nineteenth century,<sup>101</sup> subsequent North Carolina Supreme Court decisions refused to adopt the doctrine for municipalities.<sup>102</sup>

In 1889, however, the North Carolina Supreme Court applied the doctrine to claims against municipalities, at least in part, in *Moffitt v. City of Asheville*.<sup>103</sup> In *Moffitt*, a prisoner brought an action against the City of Asheville seeking damages for physical illness

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94. See *id.* at 688, 477 S.E.2d at 158 (Frye, J., dissenting) (citing *Owens v. W.K. Deal Printing, Inc.*, 339 N.C. 603, 604, 453 S.E.2d 160, 161 (1995)).

95. *Id.* (Frye, J., dissenting) (quoting *Owens*, 339 N.C. at 604, 453 S.E.2d at 161 (quoting *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993))).

96. See *id.* (Frye, J., dissenting).

97. See *id.* at 689, 477 S.E.2d at 158 (Frye, J., dissenting).

98. See *id.* at 686, 477 S.E.2d at 156 (Frye, J., dissenting).

99. BLACK’S LAW DICTIONARY 1396 (6th ed. 1990).

100. See Harper, *supra* note 18, at 44-45. For a detailed discussion of the doctrine’s historical development, see *id. passim*, and Beecher Reynolds Gray, Comment, *Local Government Sovereign Immunity: The Need for Reform*, 18 WAKE FOREST L. REV. 43, 44 (1982).

101. See *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264, 303 (1821).

102. See *Wright v. City of Wilmington*, 92 N.C. 156 (1885); *Meares v. Commissioners of Wilmington*, 31 N.C. (9 Ired.) 61, 73 (1848) (per curiam). An English court first applied the doctrine to claims against a municipality in 1788. See Gray, *supra* note 100, at 44 (citing *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788)). However, this decision occurred after North Carolina already had adopted English common law as it existed prior to the Declaration of Independence in 1776. See Harper, *supra* note 18, at 46. Section 4-1 of the North Carolina General Statutes authorized adoption of English common law. See N.C. GEN. STAT. § 4-1 (1986).

103. 103 N.C. 191, 9 S.E. 695 (1889).

caused by his confinement in the city's prison without adequate heat and blankets on a cold night.<sup>104</sup> The court had to decide whether the City of Asheville could be found liable for the prisoner's injuries, or whether governmental immunity for municipalities should be adopted.<sup>105</sup> The court began its analysis by noting the two capacities in which a city may act—it may act for its own benefit as a private corporation or it may exercise governmental duties as conferred by its charter.<sup>106</sup> The court used this distinction to expound two rules governing the application of governmental immunity to a given situation. The first rule stated that when a municipal corporation acts in a "ministerial or corporate character in the management of property for [its] own benefit, or in the exercise of powers, assumed voluntarily for [its] own advantage," the municipal corporation is "impliedly liable for damage caused by the negligence of officers or agents, subject to their control" even if the municipality receives a general benefit from the activity.<sup>107</sup> The second rule adopted by the court stated that if a city or town is "exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public," then the city or town will not be found liable "for the negligence of its officers, though acting under color of office" unless a statute explicitly, or by necessary implication, provides that the city or town may be held liable for damages resulting from such negligence.<sup>108</sup> Thus, in *Moffitt*, the state supreme court extended sovereign immunity to municipalities acting in a governmental capacity and denied it to municipalities acting for proprietary purposes.<sup>109</sup>

The municipal immunity rules from *Moffitt* remained unchallenged until 1950,<sup>110</sup> when the doctrine withstood a significant attack in *Stephenson v. City of Raleigh*.<sup>111</sup> Stephenson sued the City

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104. See *id.* at 192, 9 S.E. at 696.

105. See *id.* at 203, 9 S.E. at 697.

106. See *id.*

107. *Id.*

108. *Id.*

109. See *id.* at 203-04, 9 S.E. at 697. The court found that a city's construction and supervision of prisons is a governmental function and that, as a general rule, counties and towns cannot be found liable for injuries to prisoners "caused by the neglect of their respective jailers, policemen or guards who may have immediate charge and custody of them, and of which the governing officials of the corporation had no notice." *Id.* at 206, 9 S.E. at 699. For examples of proprietary functions, see *infra* note 279.

110. See Harper, *supra* note 18, at 48-49 ("From *Moffitt* to the present time, North Carolina courts have continued to extend sovereign immunity to governmental functions and to deny it to proprietary functions.").

111. 232 N.C. 42, 59 S.E.2d 195 (1950).

of Raleigh for the death of her husband as a result of injuries he sustained in a collision with a city truck that was collecting trimmings from trees and bushes along city streets.<sup>112</sup> The *Stephenson* court concluded that this service was a governmental function and therefore governmental immunity applied.<sup>113</sup> Because the City of Raleigh had liability insurance that indemnified it for liability due to accidents involving its vehicles,<sup>114</sup> *Stephenson* argued that immunity had been waived.<sup>115</sup> The court rejected this argument and held that, absent express statutory authority, a municipality's purchase of liability insurance does not constitute a waiver of its governmental immunity.<sup>116</sup>

In 1951, one year after the decision in *Stephenson*, the North Carolina General Assembly enacted a statute which provided that a city waives its sovereign immunity for liability resulting from the negligent operation of motor vehicles when it obtains liability insurance.<sup>117</sup> This statute has evolved over the years<sup>118</sup> and currently is embodied in § 160A-485 of the North Carolina General Statutes.<sup>119</sup>

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112. See *id.* at 43, 59 S.E.2d at 196.

113. See *id.* at 46, 59 S.E.2d at 198-99.

114. See *id.* at 44-45, 59 S.E.2d at 197.

115. See *id.* at 45, 59 S.E.2d at 198.

116. See *id.* at 47, 59 S.E.2d at 199.

117. See Act of Apr. 14, 1951, ch. 1015, 1951 N.C. Sess. Laws 1007 (codified as amended at N.C. GEN. STAT. § 160A-485 (1994)); see also Harper, *supra* note 18, at 54-55 (discussing important features of the statute).

118. See Harper, *supra* note 18, at 54-56 (discussing the evolution of N.C. GEN. STAT. § 160A-485 through 1981).

119. See N.C. GEN. STAT. § 160A-485. The relevant portions state:

(a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statutes Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

....

(c) Any plaintiff may maintain a tort claim against a city insured under this section in any court of competent jurisdiction. As to any such claim, to the extent that the city is insured against such claim pursuant to this section, governmental immunity shall be no defense. . . . No judgment may be entered against a city in excess of its insurance policy limits on any tort claim for which it would have been immune but for the purchase of liability insurance pursuant to this section.

*Id.* In addition to providing for the waiver of immunities by cities, North Carolina has a similar statute providing for the waiver of immunity by counties. See N.C. GEN. STAT.

This section authorizes a city to waive its immunity from civil liability by purchasing insurance.<sup>120</sup> Under the statute, a city's participation in a local government risk pool pursuant to Article 23 of Chapter 58 of the North Carolina General Statutes is equivalent to the purchase of insurance under § 160A-485.<sup>121</sup> However, a city's immunity is waived only to the extent that the city "is indemnified by the insurance contract from tort liability."<sup>122</sup> In addition, the purchase of liability insurance alone is sufficient to waive immunity, but a city may not waive its immunity by any action other than purchasing insurance.<sup>123</sup> The statute also states explicitly that governmental immunity is not a defense "to the extent that the city is insured against [tort] claims."<sup>124</sup> However, "[n]o judgment may be entered against a city in excess of its insurance policy limits on any tort claim for which it would have been immune but for the purchase of liability insurance pursuant to this section."<sup>125</sup>

Because the statute clearly indicates that a city's immunity is waived to the extent that the city is indemnified by its insurance contract,<sup>126</sup> the key issue is whether the insurance contract covers the alleged incident, which sometimes requires the court to interpret provisions in the contract. The following cases illustrate interpretations of insurance policies by the North Carolina courts and how these interpretations are relevant to a court's determination in municipal immunity cases of whether a city's policy provides coverage for an injury.

In *Commercial Union Insurance Co. v. Mauldin*,<sup>127</sup> an insurance company sought a declaration against the estate of a murder victim that the homeowner's insurance policy did not cover liability arising

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§ 153A-435 (1991).

120. See N.C. GEN. STAT. § 160A-485(a).

121. See *id.*

122. *Id.*

123. See *id.*

124. *Id.* § 160A-485(c).

125. *Id.*

126. See *id.* § 160A-485; see also *Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246 (1995) (holding the City of Winston-Salem not liable for damages less than \$250,000 when the City's insurance policy covered only damages exceeding \$250,000); *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73-74, 415 S.E.2d 91, 92-93 (1992) (holding a town not liable because it had no insurance coverage for the acts of employees damaging plaintiff's real and personal property while removing allegedly "junked" vehicles from plaintiff's premises); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49-52, 326 S.E.2d 39, 43-44 (1985) (holding a city liable because it was indemnified by its insurance policy for damages to plaintiff's house as occasioned by an order by the city's chief building inspector to demolish it).

127. 62 N.C. App. 461, 303 S.E.2d 214 (1983).

out of the shooting of the decedent by the insured.<sup>128</sup> The insured's wife and the decedent were in a vehicle, and the insured shot a pistol into the car with the intent to kill his wife but without a specific intent to kill the decedent.<sup>129</sup> The homeowner's policy did not apply "to bodily injury or property damage which is either expected or intended from the standpoint of the insured."<sup>130</sup>

In determining whether the insured's act fell within the exclusion, the North Carolina Court of Appeals asserted that there was little ambiguity in the contractual language: "The sentence obviously means that the policy is excluding from coverage bodily injury caused by the insured's intentional acts, determining whether the act is intentional from the insured's point of view."<sup>131</sup> Despite the insured's stipulation that he intended to kill his wife and not the decedent, the court held that the insured was not covered by the policy because he pled guilty to second degree murder.<sup>132</sup> Noting that second degree murder will always consist of a general intent to commit the act, but not necessarily the specific intent to achieve a purpose or desired result,<sup>133</sup> the court held that the insured's admission of general intent, by pleading guilty to second degree murder, excluded him from coverage under the insurance policy.<sup>134</sup>

The North Carolina Supreme Court interpreted a similar provision in *North Carolina Farm Bureau Mutual Insurance Co. v. Stox*.<sup>135</sup> In *Stox*, the insurance company sought a declaratory judgment regarding whether an incident involving one of its policyholders was covered by the policyholder's homeowner's insurance policy.<sup>136</sup> The policy excluded medical payments to others as a result of "bodily injury or property damage" that "is expected or intended by the insured."<sup>137</sup> The insured, an employee of a shoe store, pushed Stox, one of his co-employees at work, and

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128. See *id.* at 461, 303 S.E.2d at 215.

129. See *id.* The insured later pled guilty to assault with a deadly weapon with intent to kill his wife and to second degree murder. See *id.* at 462, 303 S.E.2d at 216.

130. *Id.* at 462, 303 S.E.2d at 215 (quoting the insurance policy).

131. *Id.* at 463, 303 S.E.2d at 216.

132. See *id.* at 464, 303 S.E.2d at 216.

133. See *id.* at 464, 303 S.E.2d at 217 (citing *State v. Wilkerson*, 295 N.C. 559, 580-81, 247 S.E.2d 905, 917 (1978)).

134. See *id.* The court briefly noted that the insured should have expected the likelihood of one of the bullets hitting the victim. See *id.*

135. 330 N.C. 697, 412 S.E.2d 318 (1992).

136. See *id.* at 699, 412 S.E.2d at 320.

137. *Id.* at 700, 412 S.E.2d at 321 (quoting the insurance policy).



told her to "get away from here."<sup>138</sup> Stox fell to the floor and severely fractured her right arm.<sup>139</sup> At trial, Stox testified that she could have prevented the fall if she had expected the push,<sup>140</sup> and the insured testified that "he did not intend to knock Stox to the floor or cause her any injury."<sup>141</sup> Based on the trial court's findings of fact, the supreme court classified the injury as "the unintended result of an intentional act."<sup>142</sup> Although the North Carolina Court of Appeals had relied on *Mauldin*<sup>143</sup> in holding that the policy excluded Stox's injury,<sup>144</sup> the supreme court held that the resulting injury, in addition to a volitional act, must be intended in order for the exclusion to apply.<sup>145</sup> The supreme court explained that the insured's push of Stox was not at a level that required an inference of an intent to inflict an injury.<sup>146</sup> The court also stated that the insurer "must prove that the injury itself was expected or intended" and that "[m]erely showing the act was intentional will not suffice" to avoid coverage based on an exclusion in an insurance policy pertaining to expected or intended injuries.<sup>147</sup> Thus, the court held that the injury to Stox was covered by the homeowner's insurance policy.<sup>148</sup>

Although the 1991 case of *Woodson v. Rowland*<sup>149</sup> involved workers' compensation rather than liability insurance, its holding as to when an injury is "intentional"<sup>150</sup> had tremendous impact on future

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138. *Id.* at 699-700, 412 S.E.2d at 320. Stox was apparently talking to a customer's mother while the insured was assisting the customer. *See id.* at 699, 412 S.E.2d at 320.

139. *See id.* at 700, 412 S.E.2d at 320.

140. *See id.*

141. *Id.*

142. *Id.* at 703, 412 S.E.2d at 322 (quoting the trial court's findings of fact).

143. *See supra* notes 127-34 and accompanying text (discussing *Mauldin*).

144. *See Stox*, 330 N.C. at 703, 412 S.E.2d at 322.

145. *See id.* at 703-04, 412 S.E.2d at 322. The supreme court distinguished *Mauldin* on the basis that the insured in that case "obviously knew it was probable that he would injure [the decedent] when he fired four or five shots into her moving car." *Id.* at 704, 412 S.E.2d at 322. This knowledge of probability effectively rendered the injury intentional. *See id.*

146. *See id.* at 706, 412 S.E.2d at 324.

147. *Id.*

148. *See id.* at 711, 412 S.E.2d at 327.

149. 329 N.C. 330, 407 S.E.2d 222 (1991).

150. *See id.* at 340-41, 407 S.E.2d at 228. Workers' compensation is a statutory strict liability scheme that provides compensation to employees for "injur[ies] by accident arising out of and in the course of the employment." N.C. GEN. STAT. § 97-2(6) (Supp. 1996). For a discussion of the intentional injury exception to the Workers' Compensation Act in North Carolina, see generally Melissa F. Ross, Comment, *Ripples in Treacherous Waters: A Consideration of the Effects of North Carolina's Intentional Tort Exception to Workers' Compensation*, 31 WAKE FOREST L. REV. 513 (1996).

cases. In *Woodson*, an employee of a subcontractor hired to dig a trench for a sewer line was killed when the walls of the trench collapsed.<sup>151</sup> Woodson, the administrator of the decedent's estate, brought a wrongful death action arising from the decedent's work-related death.<sup>152</sup> Because the death was work-related, Woodson also had a workers' compensation claim.<sup>153</sup> In most cases, workers' compensation is the exclusive remedy available to injured employees, so the defendant-employer moved for summary judgment.<sup>154</sup> In determining whether the motion should be granted, the North Carolina Supreme Court stated that if the employer could show that death was accidental, the defendants' motions for summary judgment should be allowed because the death would fall within the exclusive coverage of the Workers' Compensation Act, and Woodson would have no other remedies against the decedent's employer or co-worker.<sup>155</sup> However, if the death was proven to be "the result of an intentional tort committed by his employer,"<sup>156</sup> then the motion for summary judgment should be denied.<sup>157</sup> Though Woodson could not prove that the employer intended to injure or kill the decedent, the court, adopting a new standard for the exclusivity provision, stated that Woodson needed to show only that the employer engaged in conduct knowing that it was "substantially certain" to cause death or serious injury.<sup>158</sup> The court held:

[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a

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151. See *Woodson*, 329 N.C. at 334-36, 407 S.E.2d at 224-26. The court stated that the evidence was such that "a reasonable juror could determine that upon placing a man in this trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability." *Id.* at 345, 407 S.E.2d at 231.

152. See *id.* at 334, 407 S.E.2d at 224.

153. See *id.* at 336, 407 S.E.2d at 226; see also N.C. GEN. STAT. § 97-2 (relating to the basis of recovery under the Workers' Compensation Act).

154. See *Woodson*, 329 N.C. at 337, 407 S.E.2d at 226.

155. See *id.*

156. *Id.*

157. See *id.*

158. See *id.* at 340-41, 407 S.E.2d at 228. Only a few states have a rule similar to the "substantial certainty" standard adopted by North Carolina in *Woodson*. See Darin Calbreath Davidson, Comment, *Expansion of the "Deliberate Intention" Exception to Washington's Workers' Compensation Exclusivity: Following Birklied v. Boeing Co., When Does an Employer Intend Employee Injury?*, 32 GONZ. L. REV. 225, 233 (1996); Ross, *supra* note 150, at 521.

civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because . . . the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery.<sup>159</sup>

Thus, for a plaintiff to circumvent the exclusivity provisions of the Workers' Compensation Act, she needs to show that the employer engaged in conduct knowing that it was substantially certain to cause serious injury or death.<sup>160</sup> In addition, such conduct can still be classified as an accident for purposes of the Workers' Compensation Act, leaving the choice of remedy to the plaintiff.<sup>161</sup>

The North Carolina Supreme Court reaffirmed and clarified its *Woodson* position on intentional acts in *Pendergrass v. Card Care, Inc.*<sup>162</sup> In *Pendergrass*, an employee was injured when his arm was caught in a machine he was operating.<sup>163</sup> Among other things, the employee attempted to assert a claim under *Woodson*, so he would not be limited by the exclusive remedy provided in the Workers' Compensation Act.<sup>164</sup> In rejecting the employee's claim against his employer, the court stated the general rule from *Woodson* that allows an injured employee to bring a tort claim against his employer if the employee's injury was the result of intentional conduct by the employer "which the employer knew was substantially certain to cause an injury . . . [and was] so egregious as to be tantamount to an intentional tort."<sup>165</sup> The court also stated that the level of conduct required for a *Woodson* claim involves "a higher degree of negligence than willful, wanton and reckless negligence."<sup>166</sup> Because

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159. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228.

160. *See id.*

161. *See id.*

162. 333 N.C. 233, 424 S.E.2d 391 (1993).

163. *See id.* at 236, 424 S.E.2d at 393.

164. *See id.* at 239, 424 S.E.2d at 395. The court had previously ruled, on a separate claim in the same action, that the "negligence alleged did not rise to the level of willful, wanton, and reckless." *Id.* at 240, 424 S.E.2d at 395. The "willful, wanton, and reckless" standard is used when determining if the exclusivity provision of the Workers' Compensation Act applies to claims against *co-employees*. *See Pleasant v. Johnson*, 312 N.C. 710, 717-18, 325 S.E.2d 244, 249-50 (1985).

165. *Pendergrass*, 333 N.C. at 239, 424 S.E.2d at 395 (emphasis added) (discussing *Woodson*); *see also Owens v. W.K. Deal Printing, Inc.*, 339 N.C. 603, 604, 453 S.E.2d 160, 161 (1995) (quoting *Pendergrass* and stating that an action under *Woodson* does not require an intentional tort "in the true sense of that term"), *rev'g per curiam* 113 N.C. App. 324, 438 S.E.2d 440 (1994).

166. *Pendergrass*, 333 N.C. at 239, 424 S.E.2d at 395.

the employee did not produce evidence to meet this standard, the court held that the employee could not sustain an action in tort against his employer.<sup>167</sup>

*Woodson* and *Pendergrass* provide that an injured employee may avoid the exclusivity provisions of the Workers' Compensation Act and may bring an action in tort against an employer if he can prove that the injury was caused by the employer's intentional conduct, which the employer knew was substantially certain to cause death or serious injury to the employee.<sup>168</sup> In the context of insurance policies that exclude coverage for "bodily injury or property damage which is expected or intended by the insured," the North Carolina courts have required the insurer to prove that the injury itself was expected or intended.<sup>169</sup> If a city has purchased liability insurance, the policy may contain a similar exclusion for injuries or damages that are expected or intended by the city. Thus, in deciding whether a city with liability insurance may raise governmental immunity as a defense, a court will have to interpret the policy to determine if it covers the claimed injury.<sup>170</sup>

A city may waive its governmental immunity not only by purchasing liability insurance, but also by participating in a local government risk pool.<sup>171</sup> Under § 160A-485 of the North Carolina General Statutes, "participation in a [statutory] local government risk pool" is deemed the equivalent of a purchase of insurance, such that the city's immunity is waived.<sup>172</sup> Section 58-23-5 of the North Carolina General Statutes states that two or more local governments may enter into risk pool agreements to protect against property losses and liability claims.<sup>173</sup> In addition, § 58-23-15(3) requires these

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167. See *id.* at 240, 424 S.E.2d at 395.

168. See *supra* text accompanying notes 159, 165 (stating respectively the holdings of *Woodson* and *Pendergrass*).

169. See *supra* notes 127-48 (discussing *Commercial Union Insurance Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983), and *North Carolina Farm Bureau Mutual Insurance Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992)).

170. See N.C. GEN. STAT. § 160A-485 (1994); *supra* note 119 (quoting § 160A-485).

171. See N.C. GEN. STAT. § 160A-485. See generally Coffey, *supra* note 23 (discussing risk pools under § 160A-485 and discussing other, non-statutory risk-management programs).

172. N.C. GEN. STAT. § 160A-485.

173. See N.C. GEN. STAT. § 58-23-5 (1994). Section 58-23-5 states:

In addition to other authority granted pursuant to Chapters 153A and 160A of the General Statutes, two or more local governments may enter into contracts or agreements pursuant to this Article for the joint purchasing of insurance or to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of

agreements to provide that the pool will pay all claims for which each member incurs liability, subject to certain limited exceptions.<sup>174</sup> The inclusion of local government risk pools as a means of waiving governmental immunity occurred when the General Assembly amended § 160A-485 in 1986.<sup>175</sup> Although the amendment has been in force for over a decade, few cases have involved the risk pool prong of the governmental immunity statute.<sup>176</sup>

The North Carolina Supreme Court has interpreted this statute only once, in *Blackwelder v. City of Winston-Salem*.<sup>177</sup> Blackwelder filed a personal injury action against Winston-Salem, alleging that one of its employees was negligent in operating a leaf collection truck and that his negligence proximately caused Blackwelder's injuries.<sup>178</sup> Winston-Salem raised governmental immunity as an affirmative defense and moved for partial summary judgment.<sup>179</sup> Blackwelder also moved for partial summary judgment, asking the court to bar Winston-Salem's governmental immunity defense.<sup>180</sup> Winston-Salem had liability insurance to cover claims in excess of \$1,000,000 and had organized a corporation, Risk Acceptance Management Corporation

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the pool on a cooperative or contract basis with one another, or may enter into a trust agreement to carry out the provisions of this Article. . . . Such local governments shall give the Commissioner [of Insurance of North Carolina] 30 days' advance written notification, in a form prescribed by the Commissioner, that they intend to organize and operate risk pools pursuant to this article.

*Id.*

174. See *id.* § 58-23-15. Section 58-23-15 states:

A contract or agreement made pursuant to this Article must contain provisions:

....

(3) Requiring the pool to pay all claims for which each member incurs liability during each member's period of membership, except where a member has individually retained the risk, where the risk is not covered, and except for amount of claims above the coverage provided by the pool.

*Id.*

175. See Act of July 16, 1986, ch. 1027, 1986 N.C. Sess. Laws 635 (codified as amended N.C. GEN. STAT. § 160A-485). One commentator has noted that "[t]he rationale underlying this amendment is sound: once local government funds are pooled, the third party administrator of the pool acts as the insurer, paying the claims from a centralized fund." Coffey, *supra* note 23, at 731.

176. See *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992) (discussing local government risk pools under the North Carolina General Statutes); *Pharr v. Worley*, 125 N.C. App. 136, 479 S.E.2d 32 (1997) (same); *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 477 S.E.2d 179 (1996) (same); *Cross v. Residential Support Servs., Inc.*, 123 N.C. App. 616, 473 S.E.2d 676 (1996) (same).

177. 332 N.C. 319, 420 S.E.2d 432 (1992).

178. See *id.* at 320, 420 S.E.2d at 433.

179. See *id.*

180. See *id.*

("RAMCO"), to handle claims of \$1,000,000 or less.<sup>181</sup> One issue before the court was whether Winston-Salem's organization of RAMCO constituted a statutory local government risk pool, thereby waiving its governmental immunity.<sup>182</sup> The court held that Winston-Salem had not formed a local government risk pool because, under the statute, two or more governments are needed to form a risk pool.<sup>183</sup>

A second issue before the *Blackwelder* court was whether Winston-Salem effectively had purchased liability insurance by forming and operating RAMCO.<sup>184</sup> The court first examined the statutory definition of insurance contract as an agreement by which the insurer pays money to the insured when something in which the insurer has an interest is destroyed, lost, or injured.<sup>185</sup> The court stated that Winston-Salem had not entered into an insurance contract with RAMCO because "RAMCO has not agreed to pay any money or do any act as an indemnity to the City for loss or injury to the City."<sup>186</sup> Additionally, there was no apparent shifting of risk between the insured and the insurer.<sup>187</sup> Therefore, the court held that Winston-Salem had not waived its governmental immunity by the purchase of liability insurance.<sup>188</sup>

Four years later, in *Wall v. City of Raleigh*,<sup>189</sup> the North Carolina

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181. See *id.* at 320, 420 S.E.2d at 434. In addition to the \$1,000,000 limit under RAMCO, the City also "agreed to pay to RAMCO \$600,000 annually and to reimburse RAMCO for operating expenses, borrowed funds, and all other costs." *Id.* at 321, 420 S.E.2d at 434.

182. See *id.* at 321-22, 420 S.E.2d at 434.

183. See *id.* at 322, 420 S.E.2d at 434; N.C. GEN. STAT. § 58-23-5 (1994); *supra* note 173 (quoting § 58-23-5). No other local government was sharing the risk with Winston-Salem. See *Blackwelder*, 332 N.C. at 322, 420 S.E.2d at 434.

184. See *Blackwelder*, 332 N.C. at 322, 420 S.E.2d at 434-35. If the court had determined that the formation of RAMCO constituted a purchase of liability insurance, Winston-Salem would be deemed to have waived its governmental immunity. See *supra* notes 119-25 and accompanying text (explaining that a government waives its immunity to the extent that it purchased liability insurance that covers a claim).

185. See *Blackwelder*, 332 N.C. at 322, 420 S.E.2d at 435 (quoting N.C. GEN. STAT. § 58-1-10). Section 58-1-10 states:

A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest.

N.C. GEN. STAT. § 58-1-10.

186. *Blackwelder*, 332 N.C. at 322, 420 S.E.2d at 435. Winston-Salem had agreed to indemnify RAMCO for payments made on the city's behalf. See *id.*

187. See *id.* at 323, 420 S.E.2d at 435.

188. See *id.*

189. 121 N.C. App. 351, 465 S.E.2d 551 (1996).

Court of Appeals briefly addressed § 160A-485 and local government risk pools. Wall sued Raleigh, alleging that a debt collector for Raleigh had violated a statute regulating the conduct of such collectors.<sup>190</sup> Raleigh was a member of a local government risk pool, Interlocal Risk Financing Fund of North Carolina.<sup>191</sup> The risk pool indemnified Raleigh for claims up to \$2,000,000; however, the City of Raleigh had to pay a \$500,000 deductible on each claim.<sup>192</sup> Due to the deductible, the court of appeals held that Raleigh had not waived governmental immunity by participation in the local government risk pool for claims of \$500,000 or less.<sup>193</sup>

The previous discussion has focused on whether and to what extent a city's participation in a risk-management program amounts to a waiver of governmental immunity. In some instances, the risk-management program, involving the use of public funds, may not be a local government risk pool formed pursuant to the North Carolina General Statutes.<sup>194</sup> When a city is using public funds, the city's authority to use the funds in a certain manner is sometimes challenged.<sup>195</sup> In *Leete v. County of Warren*,<sup>196</sup> the North Carolina Supreme Court addressed such an issue. The plaintiffs in *Leete* sought an injunction to prevent the Warren County Board of Commissioners from paying \$5000 in severance pay to a county

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190. See *id.* at 352, 465 S.E.2d at 552; see also N.C. GEN. STAT. § 75-50 to -56 (1994) (prohibiting debt collectors from engaging in certain acts in the collection of debts).

191. See *Wall*, 121 N.C. App. at 353, 465 S.E.2d at 553.

192. See *id.*

193. See *id.* at 355, 465 S.E.2d at 554; cf. *Jones v. Kearns*, 120 N.C. App. 301, 308, 462 S.E.2d 245, 249 (1995) (holding that the City of Winston-Salem had not waived its immunity for claims up to \$250,000 that were not covered by its liability insurance policy).

194. See, e.g., *supra* note 181 and accompanying text (discussing, as an example, RAMCO in Winston-Salem).

195. Clearly, a city may deposit funds in a local government risk pool in compliance with § 160A-485 of the North Carolina General Statutes. See N.C. GEN. STAT. § 160A-485 (1994). However, if a city used public funds to form a local government risk pool that does not meet statutory requirements, the city's authority to use the funds could be challenged. See *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994) ("It is a well-established principle that municipalities, as creatures of the state, can exercise only that power which the legislature has conferred upon them."); *Watauga County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 273, 416 S.E.2d 411, 413 (1992) ("A municipality is a creature of the Legislature and it can only exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation . . ."); cf. *Brown v. Commissioners of Richmond County*, 223 N.C. 744, 746, 28 S.E.2d 104, 106 (1943) ("[A] municipality cannot lawfully make an appropriation of public moneys except to meet a legal and enforceable claim . . .").

196. 341 N.C. 116, 462 S.E.2d 476 (1995).

manager after his voluntary resignation.<sup>197</sup> After the manager announced his resignation at a board meeting, the Board authorized the severance pay.<sup>198</sup> In holding that the county could not authorize the severance pay, the supreme court stated that the legislature cannot “ ‘authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay.’ ”<sup>199</sup> Furthermore, a municipality may not appropriate public funds “ ‘except to meet a legal and enforceable claim, and can make no payment upon a claim which exists merely by reason of some moral or equitable obligation which a generous, or even a just, individual, dealing with his own moneys, might recognize as worthy of some reward.’ ”<sup>200</sup> Thus, the court implied that in order to distribute governmental funds, a local government must have a legal obligation to pay the receiver;<sup>201</sup> otherwise, the city would be acting *ultra vires*.

One of the major issues in *Lyles* was whether the DIRM formed by the City, Mecklenburg County, and the Charlotte-Mecklenburg Board of Education was a statutory local government risk pool.<sup>202</sup> The dissent concluded that the DIRM was a local government risk pool almost by default, stating that the agreement was either a local government risk pool within the meaning of the statute, or payment of funds from the DIRM to settle tort claims to which governmental immunity applies would be *ultra vires*.<sup>203</sup> By “presum[ing] that the City acted pursuant to article 20 of chapter 160A of the North Carolina General Statutes as recited in the agreement establishing the risk-management program,”<sup>204</sup> the dissent essentially presumed that the City would not act in a manner that might be *ultra vires*. However, the City may have thought it had the authority to form a non-statutory risk-management program.<sup>205</sup>

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197. See *id.* at 117, 462 S.E.2d at 477.

198. See *id.* at 117-18, 462 S.E.2d at 477.

199. *Id.* at 120, 462 S.E.2d at 479 (quoting *Brown*, 223 N.C. at 746, 28 S.E.2d at 105-06). The legislature may not authorize the payment of gifts or gratuities by a municipality using public funds. See *id.* (citing *Brown*, 223 N.C. at 746, 28 S.E.2d at 105-06).

200. *Id.* at 120-21, 462 S.E.2d at 479 (quoting *Brown*, 223 N.C. at 746, 28 S.E.2d at 105-06).

201. Cf. *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994) (“It is a well established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them.”).

202. See *Lyles*, 344 N.C. at 679-80, 477 S.E.2d at 153.

203. See *id.* at 686, 477 S.E.2d at 156 (Frye, J., dissenting).

204. *Id.* (Frye, J., dissenting).

205. For example, the supreme court implicitly has approved the City of Winston-Salem’s risk-management program even though it is not a statutory local government risk



The dissent also made strong policy arguments for classifying the agreement as a local government risk pool. If the agreement was not deemed a local government risk pool, then the dissent noted that a major problem with such "joint undertaking" contracts . . . is that [they] give[] local governments the unbridled discretion to pay some claims and to assert governmental immunity as to those claims that it does not wish to pay."<sup>206</sup> Under risk-management agreements that are not statutory local government risk pools, the local government could decide to settle some claims and not to settle others. However, if the local government decides not to pay the claim and is sued in court, it may still raise governmental immunity as a defense. The dissent disfavored such a prospect of local government officials making arbitrary decisions about awards to injured parties that were not reviewable by courts.<sup>207</sup> Therefore, based on these policy arguments and the notion that the City's actions would be ultra vires if not made under statutory authority, the dissent argued that the agreement was a local government risk pool.<sup>208</sup>

One weakness in the dissent's argument is that it did not use the plain language of the statute.<sup>209</sup> The dissent maintained that the agreement was a *constructive* local government risk pool,<sup>210</sup> but did not use the statute to bolster its position. The dissent could have expounded on arguments made by Lyles that the agreement fell within the statutory definition of a local government risk pool.<sup>211</sup> Lyles argued that the essence of a local government risk pool is "providing for the payment of claims made against a member on a cooperative or contract basis with one another."<sup>212</sup> Lyles felt that the

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pool. See *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 321-22, 420 S.E.2d 432, 434 (1992); see also *supra* notes 177-88 (discussing *Blackwelder*).

206. *Lyles*, 344 N.C. at 684, 477 S.E.2d at 155 (Frye, J., dissenting).

207. See *id.* (Frye, J., dissenting).

208. See *id.* at 684-86, 477 S.E.2d at 155-56 (Frye, J., dissenting).

209. See *id.* (Frye, J., dissenting). Even if an argument for a certain statutory interpretation is not predicated on plain language, it should at least address the plain language in order to make the argument more complete. One commentator has noted that "[e]ven those [United States Supreme Court] opinions that are based on considerations other than plain language now routinely go through painfully detailed grammatical analysis." Lawrence M. Solan, *Learning our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 243; see also, e.g., *Reves v. Ernst & Young*, 507 U.S. 170, 177-79 (1993) (relying on close grammatical analysis to explicate the meaning of a statute).

210. See *Lyles*, 344 N.C. at 684, 477 S.E.2d at 155 (Frye, J., dissenting).

211. See N.C. GEN. STAT. § 58-23-5 (1994).

212. *Lyles*, 344 N.C. at 679-80, 477 S.E.2d at 153. This language is nearly verbatim from § 58-23-5's definition of a local government risk pool. See N.C. GEN. STAT. § 58-23-5; *supra* note 173 (quoting § 58-23-5).

City's agreement met this criterion, because in certain instances, the City has the right to use money contributed by the other entities to pay claims.<sup>213</sup> Lyles argued that "the entities had pooled retention of their risks for liability claims and provided for the payment of such claims made against any member of the pool on a cooperative or contract basis."<sup>214</sup> Under the agreement, the City was required to reimburse the other entities for money it borrowed to pay claims that were between \$500,000 and \$1,000,000.<sup>215</sup> Lyles asserted that, despite the reimbursement, the agreement was still on a cooperative or contract basis.<sup>216</sup>

In countering this argument, the City relied on § 58-23-15 of the North Carolina General Statutes,<sup>217</sup> which requires the risk pool agreement to "contain a provision that the pool pay all claims for which a member incurs liability."<sup>218</sup> The City argued, and the majority agreed, that the City's agreement did not meet this requirement because each member was required to reimburse the risk pool, with interest, for any funds paid on its behalf.<sup>219</sup> The majority essentially grounded its holding in the belief that there is no sharing of risk when an entity contributes money to a fund wherein another member can use such money with an obligation to repay it.<sup>220</sup> The majority presumably would classify the DIRM as a lender, similar to a bank, rather than a local government risk pool.

The majority also made two other statutory arguments to support its determination that the agreement did not constitute a local government risk pool. First, the statute has certain requirements for organizing such a risk pool.<sup>221</sup> In creating the DIRM and setting up its procedures, the entities involved did not meet these statutory requirements.<sup>222</sup> Second, the majority noted that the

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213. See *Lyles*, 344 N.C. at 679, 477 S.E.2d at 152..

214. *Id.* at 679, 477 S.E.2d at 152-53.

215. See *id.* at 678, 477 S.E.2d at 152; see also *supra* notes 31-35 and accompanying text (elaborating on the terms of the agreement). In addition, the funds borrowed had to be repaid with interest. See *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152.

216. See *Lyles*, 344 N.C. at 679-80, 477 S.E.2d at 152-53.

217. See *id.* at 680, 477 S.E.2d at 153.

218. *Id.*; see also *supra* note 174 (quoting N.C. GEN. STAT. § 58-23-15 (1994)).

219. See *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153.

220. See *id.*

221. See *id.* For example, the local government must give the Commissioner of Insurance of North Carolina 30 days' notice before forming such a pool. See N.C. GEN. STAT. § 58-23-5. There are also requirements for adopting operational procedures and creating boards of trustees. See *id.* § 58-23-10.

222. See *Lyles*, 344 N.C. at 680-81, 477 S.E.2d at 153.

Charlotte-Mecklenburg Board of Education did not meet the statutory definition of "local government."<sup>223</sup> Unfortunately, the majority did not determine the effect this shortcoming would have on deciding whether a local government risk pool existed when the other statutory requirements of creating a risk pool have been satisfied.<sup>224</sup> Nonetheless, the majority in *Lyles* used statutory text to support its holding that the City's agreement was not a local government risk pool.<sup>225</sup>

However, the majority could have bolstered its decision by addressing the policy concerns of the dissent. The rule regarding a city's authority to distribute funds, as stated in *Leete*,<sup>226</sup> provides the background for one such policy concern.<sup>227</sup> In *Leete*, the North Carolina Supreme Court held that the Warren County Board of Commissioners could not authorize a severance payment to a county manager after his voluntary resignation.<sup>228</sup> The court stated that a municipality may not appropriate public funds "except to meet a legal and enforceable claim."<sup>229</sup> If a claim is not legal and enforceable or if the legislature has not conferred the power to spend the funds in a particular manner upon a municipality,<sup>230</sup> then a municipality may not have authority to appropriate the funds.<sup>231</sup> Neither party raised the issue of whether the City of Charlotte's participation in the risk-management program was ultra vires.<sup>232</sup>

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223. See *id.* at 680, 477 S.E.2d at 153. A "local government" means any county, city, or housing authority located in [North Carolina]. N.C. GEN. STAT. § 58-23-1.

224. See *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153. "A local board of education is immune from suit and may not be liable in a tort action unless the Board has duly waived its governmental immunity." *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996) (citing *Fields v. Durham City Bd. of Educ.*, 251 N.C. 699, 700-01, 111 S.E.2d 910, 911 (1960); *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 24-25, 348 S.E.2d 524, 527 (1986)). A board of education may waive its immunity only by purchasing liability insurance. See N.C. GEN. STAT. § 115C-42 (1994). Section 115C-42 "contains no authorization, such as that contained in [N.C. GEN. STAT. § 160A-485], for waiver of immunity by participation in a risk pool." *Hallman*, 124 N.C. App. at 438, 477 S.E.2d at 181.

225. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 153.

226. *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995).

227. See *supra* notes 196-201 and accompanying text (discussing *Leete*).

228. See *Leete*, 341 N.C. at 123, 462 S.E.2d at 480.

229. *Id.* at 120, 462 S.E.2d at 479 (quoting *Brown v. Board of Comm'rs*, 223 N.C. 744, 746, 28 S.E.2d 104, 106 (1943)).

230. See *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994) ("It is a well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them.").

231. See *id.*

232. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 153.

Therefore, the majority did not address the issue directly.<sup>233</sup> The dissent, however, was concerned about the City's payment of funds to settle tort claims to which governmental immunity might otherwise apply.<sup>234</sup> Unless the City had waived its governmental immunity by participating in a local government risk pool, the dissent argued that the payment of funds to settle possible tort claims would be ultra vires.<sup>235</sup>

However, while the City's use of funds may be ultra vires in some situations,<sup>236</sup> the City could use the funds in ways other than settling claims to which governmental immunity might apply. For example, a city may not claim governmental immunity when it is acting for proprietary reasons with its own benefits at stake.<sup>237</sup> In this situation, when a city is clearly not immune, such a city may want to negotiate a settlement of the claim. A city also could use the funds to pay judgments resulting from lawsuits because that city is under a legal obligation to pay.<sup>238</sup> Therefore, a city's use of the risk-management fund is not necessarily ultra vires in all situations.

The majority addressed the ultra vires issue only to the extent necessary to respond to the dissent.<sup>239</sup> In its brief discussion, the majority noted that the legislature provided for the waiver of sovereign immunity by participation in a local government risk pool and provided specific requirements to establish such a risk pool.<sup>240</sup> The majority "believe[d] it would be a mistake to hold that a local government may ignore these statutory requirements and create a

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233. *See id.*

234. *See id.* at 686, 477 S.E.2d at 156 (Frye, J., dissenting).

235. *See id.* (Frye, J., dissenting). The dissent asserted that the City must have intended to form a local government risk pool pursuant to statute, such that its actions were not ultra vires. *See id.* (Frye, J., dissenting).

236. The North Carolina courts have not addressed a case in which a plaintiff argued that a non-statutory risk-management program was ultra vires. A search for such a case yielded none.

237. *See Moffitt v. City of Asheville*, 103 N.C. 191, 203, 9 S.E. 695, 697 (1889) (stating that when a city acts in a "ministerial or corporate character in the management of property for [its] own benefit, or in the exercise of powers, assumed voluntarily for [its] own advantage," the city is "impliedly liable for damage caused by the negligence of officers or agents subject to [its] control"); Harper, *supra* note 18, at 47-49 (discussing *Moffitt* and noting that North Carolina courts continue to deny sovereign immunity to proprietary functions); Gray, *supra* note 100, at 47-50 (discussing the distinction between governmental and proprietary functions and the rule that proprietary activities can result in tort liability).

238. *See Leete v. County of Warren*, 341 N.C. 116, 120-21, 462 S.E.2d 476, 479 (1995); *see also supra* text accompanying note 200 (quoting the relevant portion of *Leete*).

239. *See Lyles*, 344 N.C. at 681, 477 S.E.2d at 153.

240. *See id.*

risk pool to its own liking."<sup>241</sup> The majority then held that there was not sufficient risk-sharing in the agreement for it to be considered a risk pool.<sup>242</sup>

Assuming the City was not participating in a local government risk pool, the agreement might better be classified as "self-insurance." One authority has defined self-insurance as "a planned program of paying from a company's own funds for losses sustained, where it recognizes reasonably the potential losses that might be incurred, does all that it can to avoid or reduce this potential, and then provides a means to process and pay for the losses remaining."<sup>243</sup> Although the DIRM might be classified as self-insurance, the North Carolina Supreme Court refused to characterize a similar program as such in *Blackwelder*.<sup>244</sup>

Nonetheless, strong arguments can be made that self-insurance programs should be a basis for waiver of governmental immunity. Agreements such as the ones in *Blackwelder* and *Lyles* are similar to traditional insurance policies and both provide adequate funds for compensation of victims.<sup>245</sup> The North Carolina legislature already has sought to protect victims by abolishing governmental immunity when a city purchases liability insurance to cover a claim.<sup>246</sup> As "[t]he ideal underlying risk-management is the efficient payment of claims," if a local government has sufficient funds in a risk-management program not amounting to a local government risk pool, "it is the duty of the local government to protect the interest of the individual pursuant to section 160A-485."<sup>247</sup>

The other major issue in *Lyles* was whether the City had waived its governmental immunity by purchasing liability insurance.<sup>248</sup> In arguing that the City had waived its governmental immunity, *Lyles* was in a precarious situation. Because her husband's death occurred

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241. *Id.*

242. See *id.* at 680, 477 S.E.2d at 153. Another major factor was the required reimbursement of the fund for any claims paid on a party's behalf. See *id.*

243. Thomas W. Rynard, *The Local Government as Insured or Insurer: Some New Risk Management Alternatives*, 20 URB. LAW. 103, 111 (1988) (quoting Robert L. Young, *Self-Insurance*, in RISK MANAGEMENT TODAY: A HOW-TO GUIDE FOR LOCAL GOVERNMENT 59, 60 (Natalie Wasserman & Dean G. Phelus eds., 1985)).

244. See *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 322, 420 S.E.2d 432, 434 (1992); see also *supra* notes 184-88 and accompanying text (discussing the court's holding in *Blackwelder*).

245. See Coffey, *supra* note 23, at 732.

246. See N.C. GEN. STAT. § 160A-485 (1994); Coffey, *supra* note 23, at 732.

247. Coffey, *supra* note 23, at 732.

248. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 153.

while in the course and scope of employment, the Workers' Compensation Act applied.<sup>249</sup> To bring a suit in tort against the City, Lyles had to avoid the exclusive remedy provision of workers' compensation.<sup>250</sup> Under *Woodson v. Rowland*,<sup>251</sup> a person may bring a suit in tort against an employer if she can show the "employer intentionally engage[d] in misconduct knowing it [was] substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct."<sup>252</sup> In order to avoid having her suit dismissed on grounds of governmental immunity, Lyles also had to prove that the death of her husband was covered by the City's liability insurance policy.<sup>253</sup> The City's policy covered accidents and "exclude[d] coverage for 'bodily injury intentionally caused or aggravated by or at the discretion of the Insured.'" <sup>254</sup> Thus, Lyles had to prove that the employer engaged in intentional misconduct knowing it was substantially certain to cause serious injury or death<sup>255</sup> and that the bodily injury was not intentionally caused or aggravated by the employer.<sup>256</sup>

The majority and the dissent disagreed as to whether Lyles could bring a *Woodson* claim that would be covered by the City's insurance policy. In holding that Lyles's claim was excluded by the insurance policy,<sup>257</sup> the majority relied on *Stox*,<sup>258</sup> which interpreted a similar exclusion in an insurance policy.<sup>259</sup> The majority stated that under

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249. See *id.* at 681, 477 S.E.2d at 154; see also N.C. GEN. STAT. § 97-2 (1994) (stating the general requirements for recovery under the Workers' Compensation Act).

250. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 154. The Workers' Compensation Act states that if the employee and the employer meet the requirements of the Act, "then the rights and remedies herein granted to the employee [and] his dependents . . . shall exclude all other rights and remedies of the employee [and] his dependents . . . as against the employer at common law or otherwise on account of such injury or death." N.C. GEN. STAT. § 97-10.1.

251. 329 N.C. 330, 407 S.E.2d 222 (1991).

252. *Id.* at 340-41, 407 S.E.2d at 228; see *supra* notes 149-61 and accompanying text (discussing *Woodson* and the application of its standard in other cases).

253. See *Lyles*, 344 N.C. at 681, 477 S.E.2d at 153-54.

254. *Id.* at 681, 477 S.E.2d at 153 (quoting the insurance policy).

255. This proof was necessary to avoid the exclusive remedy provisions of the Workers' Compensation Act. See *id.* at 681, 477 S.E.2d at 154.

256. Lyles needed to prove this in order for the liability policy to cover her husband's death, such that the City could not plead governmental immunity. See *id.* at 681, 477 S.E.2d at 153-54.

257. See *id.* at 682, 477 S.E.2d at 154.

258. *North Carolina Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992); see *supra* note 135-48 and accompanying text (discussing *Stox*).

259. Compare *Lyles*, 344 N.C. at 678, 477 S.E.2d at 152 (excluding coverage in policy for "'bodily injury intentionally caused or aggravated by or at the direction of the Insured'" (quoting the insurance policy)), with *Stox*, 330 N.C. at 700, 412 S.E.2d at 321

*Stox*, "an intentional act is an accident within the meaning of a homeowner's insurance policy if the injury incurred was not intended or substantially certain to be the result of the intentional act."<sup>260</sup> If this is the correct interpretation of *Stox*, then the majority's reasoning is consistent. However, the dissent disagreed with this characterization of *Stox*.<sup>261</sup>

The dissent asserted that *Stox* would allow most *Woodson* claims to be covered by the City's liability insurance policy.<sup>262</sup> The *Stox* court characterized the injury in that case as " 'the unintended result of an intentional act' "<sup>263</sup> and held that the injury was covered by the homeowner's insurance policy.<sup>264</sup> Specifically, the *Stox* court concluded that "it is the resulting injury, not merely the volitional act, which must be intended for [the] exclusion to apply."<sup>265</sup> The dissent characterized the injury in *Lyles* as an unintended result of an intentional act and thus argued that the exclusion in the insurance policy did not apply.<sup>266</sup>

Even if the policy included Lyles's claim, the dissent still needed to explain how Lyles could avoid the exclusive remedy provision of the Workers' Compensation Act. To address this problem, the dissent recalled the court's application of its *Woodson* holding<sup>267</sup> to *Pendergrass v. Card Care, Inc.*<sup>268</sup> The *Pendergrass* court stated that a plaintiff can avoid the exclusive remedy provision of the Workers' Compensation Act if the employer's conduct was "so egregious as to be tantamount to an intentional tort."<sup>269</sup> The dissent stated there was

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(excluding coverage in policy for " 'bodily injury or property damage' " that " 'is expected or intended by the insured' " (quoting the insurance policy)).

260. *Lyles*, 344 N.C. at 682, 477 S.E.2d at 154 (citing *Stox*, 330 N.C. at 709, 412 S.E.2d at 325).

261. See *id.* at 686, 477 S.E.2d at 157 (Frye, J., dissenting).

262. See *id.* at 687, 477 S.E.2d at 157 (Frye, J., dissenting).

263. *Stox*, 330 N.C. at 703, 412 S.E.2d at 322 (quoting the findings of the trial court).

264. See *id.* at 711, 412 S.E.2d at 327.

265. *Id.* at 703-04, 412 S.E.2d at 322.

266. See *Lyles*, 344 N.C. at 688, 477 S.E.2d at 157 (Frye, J., dissenting). The dissent noted that Lyles did not argue or believe that the City intended to injure or to kill her husband. See *id.* (Frye, J., dissenting). The dissent bolstered its interpretation of the holding in *Stox* by noting that Chief Justice Mitchell had written the court's unanimous opinion in that case. See *id.* at 687, 477 S.E.2d at 157 (Frye, J., dissenting). Chief Justice Mitchell joined the dissenting opinion in *Lyles*. See *id.* at 689, 477 S.E.2d at 158 (Frye, J., dissenting). Because Chief Justice Mitchell had written the opinion in *Stox*, the fact that he agreed with the dissent's interpretation and application of *Stox* in *Lyles* adds strength to the dissent's position.

267. See *supra* notes 149-61 and accompanying text (discussing *Woodson*).

268. 333 N.C. 233, 424 S.E.2d 391 (1993); see *supra* notes 162-67 and accompanying text (discussing *Pendergrass*).

269. *Pendergrass*, 333 N.C. at 239, 424 S.E.2d at 395.

a minute difference between an intentional tort and "conduct so egregious as to be tantamount to an intentional tort."<sup>270</sup> Thus, it concluded, an employer may engage in misconduct knowing that such misconduct is substantially certain to cause serious injury or death; in contrast, such misconduct may not be sufficiently intentional to be excluded from an insurance policy that does not cover "bodily injury intentionally caused or aggravated by or at the discretion of the Insured."<sup>271</sup>

In other words, there is a distinction between engaging in misconduct with the intent of causing serious injury or death and engaging in misconduct with knowledge that such misconduct is substantially certain to cause serious injury or death. Essentially, the argument was that the use of the words "intentionally caused" in an insurance policy should be construed narrowly.<sup>272</sup> According to the dissent, bodily injury intentionally caused would probably not include bodily injury substantially certain to be caused.<sup>273</sup> Conduct that is substantially certain to cause serious injury or death is sufficient to remove a claim from the exclusivity provisions of the Workers' Compensation Act.<sup>274</sup> Therefore, the dissent believed that a plaintiff can bring a *Woodson* claim and still have coverage under a liability insurance policy that excludes coverage for intentionally caused injuries.<sup>275</sup> The majority disagreed with this distinction and thus held that by making a *Woodson* claim, Lyles had removed her claim from coverage under the City's insurance policy.<sup>276</sup>

The dissent made a legitimate argument and identified a region between intent and substantial certainty that probably exists. However, the distinction between "intentional" and "substantially certain" would be difficult to apply. Bodily injury that was intentionally caused would include bodily injury that is knowingly or purposely caused. It is unclear how substantial certainty may be distinguished from knowledge or purpose in the context of injury. The majority made the correct assessment by implying that any distinction between bodily injury intentionally caused and bodily

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270. *Lyles*, 344 N.C. at 688, 477 S.E.2d at 158 (Frye, J., dissenting) (quoting *Pendergrass*, 333 N.C. at 239, 424 S.E.2d at 395).

271. *Id.* at 678, 477 S.E.2d at 152 (quoting the City's insurance policy).

272. *See id.* at 688, 477 S.E.2d at 157 (Frye, J., dissenting).

273. *See id.* at 688, 477 S.E.2d at 157-58 (Frye, J., dissenting).

274. *See Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991).

275. *See Lyles*, 344 N.C. at 689, 477 S.E.2d at 158 (Frye, J., dissenting).

276. *See id.* at 682, 477 S.E.2d at 154.



injury substantially certain to be caused is negligible.<sup>277</sup>

Although the City of Charlotte avoided liability in *Lyles*, a question remains as to why a city would purchase liability insurance or participate in a local government risk pool if it will result in a waiver of governmental immunity. First, there are some claims for which a government may not plead immunity.<sup>278</sup> For example, a city may not plead immunity from torts committed in the course of performing a proprietary function.<sup>279</sup> Second, cities may purchase insurance to protect their employees and officials from liability for tortious performance of their official duties.<sup>280</sup> As one commentator has noted, "[t]he promotion of good will between the local government employer and its employees is not only a virtue but a necessity in our increasingly litigious society."<sup>281</sup> Third, a city may purchase insurance to cover its governmental actions, despite waiving immunity, simply to protect the public from harm.<sup>282</sup> After paying taxes to a local government, it may seem inequitable for a taxpayer not to be compensated for an injury resulting from the actions or omissions of that same local government. Finally, a city may wish to participate in a risk-management program to protect "government assets and taxpayer funds from total consumption."<sup>283</sup> Thus, legitimate reasons exist for a municipality to participate in a local

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277. See *id.* at 681-82, 477 S.E.2d at 153-54.

278. See Harper, *supra* note 18, at 72.

279. See *id.* In *Moffitt v. City of Asheville*, 103 N.C. 191, 9 S.E. 695 (1889), the court held that cities are liable for damage caused by the negligence of their officers or agents when they are "acting . . . in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage." *Id.* at 203, 9 S.E. at 697; see also *Steelman v. City of New Bern*, 279 N.C. 589, 592-93, 184 S.E.2d 239, 241-42 (1971) (reaffirming the position of the court taken in *Moffitt*). There are a number of examples of proprietary functions in which a city may engage. See *Raleigh-Durham Airport Auth. v. Stewart*, 278 N.C. 227, 231, 179 S.E.2d 424, 426 (1971) (holding that a municipal corporation, owning and operating a public airport, was acting in a proprietary capacity); *Bowling v. City of Oxford*, 267 N.C. 552, 557, 148 S.E.2d 624, 628 (1966) ("When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity."); *Aaser v. City of Charlotte*, 265 N.C. 494, 497, 144 S.E.2d 610, 613 (1965) (holding that a city, operating "an arena for the holding of exhibitions and athletic events owned . . . to produce revenue and for the private advantage of the compact community," was engaged in a proprietary function); *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235 (1990) ("Non-traditional governmental activities such as the operation of a golf course or an airport are usually characterized as proprietary functions.").

280. See Harper, *supra* note 18, at 72.

281. *Id.*

282. See *id.*

283. Coffey, *supra* note 23, at 716.

government risk pool or to purchase liability insurance. These reasons overlap to some extent with arguments to abolish governmental immunity.

Three primary arguments exist for abolishing governmental immunity. First, cities and counties may purchase liability insurance against tort claims,<sup>284</sup> and "[t]he insurance thus purchased establishes definite limits of liability of the governmental entity and brings predictability to the area of tort damage awards."<sup>285</sup> Second, application of the doctrine seems harsh at times.<sup>286</sup> The North Carolina Supreme Court has recognized this harshness and has been reluctant to expand its application.<sup>287</sup> Finally, the theory of "enterprise liability" supports abolition of governmental immunity,<sup>288</sup> because the theory posits that "the costs of governmental torts are costs of the enterprise of government that should be borne by the public through insurance premiums."<sup>289</sup> Instead of forcing the unfortunate victim to pay the costs of the injuries caused by the government, the public should pay those costs because the public benefits from the government activity.<sup>290</sup>

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284. See Gray, *supra* note 100, at 55. Cities and counties are authorized by statute to purchase insurance. See N.C. GEN. STAT. § 160A-485 (1994) (cities); *id.* § 153A-435 (1994) (counties).

285. Gray, *supra* note 100, at 55.

286. See *id.*; see also *Lindler v. Duplin Bd. of Educ.*, 108 N.C. App. 757, 761, 425 S.E.2d 465, 468 (1993) (denying recovery based on governmental immunity to a teacher who fell and fractured one of her lumbar vertebrae on school premises during a fundraising function for an honorary teachers' sorority); *Plemmons v. City of Gastonia*, 62 N.C. App. 470, 472-73, 302 S.E.2d 905, 906 (1983) (denying recovery based on governmental immunity to a minor who fell off gymnasium bleachers and suffered serious and permanent brain damage).

287. See Gray, *supra* note 100, at 55; see also *Meares v. Commissioners of Wilmington*, 31 N.C. (9 Ired.) 61, 70 (1848) (per curiam) (stating that sovereign immunity was "somewhat harsh in its mildest sense"); *Plemmons*, 62 N.C. App. at 472, 302 S.E.2d at 906 (holding the board of education not liable based on immunity "[w]hile not unmindful that this interpretation is likely to produce harsh results in many cases"); *Casey v. Wake County*, 45 N.C. App. 522, 523, 263 S.E.2d 360, 361 (1980) ("It is, however, the judicial trend in this State not to expand but resist the application of the government immunity doctrine.") (note that the *Southeastern Reporter* contains "restrict" in place of "resist," and "governmental" in place of "government").

288. See Gray, *supra* note 100, at 55.

289. *Id.*

290. See *id.* at 56 (citing *Smith v. State*, 289 N.C. 303, 313, 222 S.E.2d 412, 419 (1976)). The North Carolina Supreme Court discussed the "enterprise liability" theory in *Smith*:

"[S]ince the public purpose involves injury-producing activity, injuries should be viewed as an activity cost which must be met in the furtherance of public enterprise; . . . it is better to distribute the cost of government caused injuries among the beneficiaries of government than entirely on the hapless victims; although the government does not profit from its activities, the taxpayers do, so

Naturally, there also are several compelling reasons to retain governmental immunity. First, the doctrine should be retained for financial reasons.<sup>291</sup> A government repeatedly forced to pay claims against it could go bankrupt if it does not have adequate funds to pay damages.<sup>292</sup> As one commentator noted, "[i]f . . . revenues raised by taxation are diverted to the payment of damage claims caused by employees' torts, the budgetary process would be disrupted and important governmental functions would be impaired."<sup>293</sup> Separation of powers is a second argument for retention of governmental immunity,<sup>294</sup> because if courts heard tort suits involving the discretionary acts of local governments, "judgments made by the legislative branch would be subject to review by the judicial branch."<sup>295</sup> Finally, local governments are unique because they engage in activities that private entities would not ordinarily undertake.<sup>296</sup> If not protected by governmental immunity, local governments would be exposed to substantial risks from these governmental activities.<sup>297</sup> Despite any strength in the arguments for

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the taxpayers should bear the cost of governmental tort liability."

*Smith*, 289 N.C. at 313, 222 S.E.2d at 419 (quoting COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, NATIONAL ASS'N OF ATTORNEYS GENERAL, SOVEREIGN IMMUNITY: THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS 17 (Jan. 1975)).

291. See Gray, *supra* note 100, at 53.

292. See *id.*

293. *Id.*; see also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 978 (4th ed. 1971) ("[C]ities cannot carry on their governments if money raised by taxation for public use is diverted to making good the torts of employees.").

294. See Gray, *supra* note 100, at 54.

295. *Id.* This type of judicial review of legislative decision-making is contrary to the notion of separation of powers required by the constitution. See *id.* But see William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 329 (1995) ("Everyone agrees that the Supreme Court has a power of judicial review that authorizes the Court to pass upon the constitutionality of governmental action and declare it void."). See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 1-33 (2d ed. 1986) (discussing the establishment of and justifications for judicial review).

296. See *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 23, 213 S.E.2d 297, 303 (1975) ("[I]t appears that all of the activities held to be governmental functions by this Court [sic] are those historically performed by the government, and which are not ordinarily engaged in by private corporations."); Gray, *supra* note 100, at 54 ("Local governments undertake activities that private entities would never undertake."). See, e.g., *Hayes v. Billings*, 240 N.C. 78, 81 S.E.2d 150 (1954) (involving a local government erecting and maintaining a jail); *Hamilton v. Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953) (involving a local government installing and maintaining traffic signals).

297. See Gray, *supra* note 100, at 54. "Fire protection and prevention, law enforcement, water and air pollution control, flood control, water and soil conservation, and public health functions are a few examples of activities essential to the public welfare the performance of which would become extremely onerous if government were held liable for all resulting harm." Comment, *The Role of the Courts in Abolishing*

abolition of governmental immunity, the North Carolina courts will not likely dispose of the doctrine without legislative support. The North Carolina Supreme Court has clearly indicated that any abolition of the doctrine of governmental immunity must come from the legislature.<sup>298</sup>

The North Carolina Court of Appeals recently has heard other cases involving waiver of governmental immunity in the context of the DIRM created by the City of Charlotte, Mecklenburg County, and the Charlotte-Mecklenburg Board of Education. *Cross v. Residential Support Services, Inc.*<sup>299</sup> was decided before the North Carolina Supreme Court reversed the court of appeals' decision in *Lyles*.<sup>300</sup> In a suit brought against Mecklenburg County, the court of appeals, relying on its decision in *Lyles*,<sup>301</sup> held that the "County's participation in this risk-management program operates as a total waiver of governmental immunity."<sup>302</sup> The North Carolina Supreme Court, upon a petition for discretionary review, remanded *Cross* to the court of appeals for reconsideration in light of *Lyles*.<sup>303</sup>

The court of appeals also has rejected arguments that the Charlotte-Mecklenburg Board of Education waived its governmental immunity by participating in the DIRM.<sup>304</sup> In *Hallman v. Charlotte-Mecklenburg Board of Education*,<sup>305</sup> the court of appeals stated that "[a] local board of education is immune from suit and may not be liable in a tort action unless the Board has duly waived its governmental immunity. . . . [A] board of education may waive such immunity by purchasing liability insurance."<sup>306</sup> The court of appeals

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*Governmental Immunity*, 1964 DUKE L.J. 888, 893-94.

298. See *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992) ("We feel that any change in th[e] doctrine [of governmental immunity] should come from the General Assembly."); *Steelman v. City of New Bern*, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971) ("[W]e feel that any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court.").

299. 123 N.C. App. 616, 473 S.E.2d 676 (1996), *remanded for reconsideration*, 345 N.C. 341, 483 S.E.2d 164 (1997).

300. 120 N.C. App. 96, 461 S.E.2d 347 (1995), *rev'd*, 344 N.C. 676, 477 S.E.2d 150 (1996).

301. *Id.*

302. *Cross*, 123 N.C. App. at 622, 473 S.E.2d at 680.

303. See *Cross v. Residential Support Servs., Inc.*, 345 N.C. 341, 483 S.E.2d 164 (1997).

304. See *Pharr v. Worley*, 125 N.C. App. 136, 138, 479 S.E.2d 32, 34 (1997); *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 438-39, 477 S.E.2d 179, 181 (1996).

305. 124 N.C. App. 435, 477 S.E.2d 179 (1996).

306. *Id.* at 437, 477 S.E.2d at 180 (citations omitted); see N.C. GEN. STAT. § 115C-42 (1994) (stating that a board of education may waive its immunity by securing liability

relied on the supreme court's decision in *Lyles* to support the same holding in *Pharr v. Worley*,<sup>307</sup> in which it "conclude[d] that the [Charlotte-Mecklenburg Board of Education] is not and could not be, a risk pool participant, and has not waived its immunity."<sup>308</sup> The reasoning in *Hallman* and *Pharr* appears to be generally consistent with the North Carolina Supreme Court's approach to immunity.<sup>309</sup>

As the supreme court has stated, North Carolina will retain governmental immunity until the legislature abolishes the doctrine.<sup>310</sup> If the doctrine were abolished, local governments would be forced to purchase insurance or participate in a risk pool.<sup>311</sup> The current status of the doctrine, where immunity exists unless the local government purchases liability insurance or participates in a local government risk pool,<sup>312</sup> is probably the best position. Local governments are immune from tort liability unless they take specific actions to waive their immunity. Under this scheme, the local government has the option to purchase insurance or participate in a risk pool. The legislature could resolve situations similar to *Lyles* and *Blackwelder*,<sup>313</sup> in which the local governments entered non-statutory risk-management programs, by requiring local government risk-management programs to comply with statutory requirements. After all, the legislature has the ultimate authority to decide whether

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insurance, and making no reference to participation in a local government risk pool).

307. 125 N.C. App. 136, 479 S.E.2d 32 (1997).

308. *Id.* at 138, 479 S.E.2d at 34. The court stated: "[T]he *Lyles* Court held that '[t]he Charlotte-Mecklenburg Board of Education *could not* join a risk pool pursuant to [§ 58-23-1 of the North Carolina General Statutes].'" *Id.* (quoting *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153); see N.C. GEN. STAT. § 58-23-1 (1994).

309. In *Lyles*, the North Carolina Supreme Court stated that only cities, counties, and housing authorities could join a local government risk pool pursuant to Article 23, Chapter 58 of the North Carolina General Statutes. See *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153. In addition, the *Lyles* court held that the DIRM did not give rise to enough risk-sharing to create a local government risk pool. See *id.*

310. See *supra* note 298 (citing cases in which the court deferred to the legislature to abolish the doctrine).

311. See Comment, *The Role of the Courts in Abolishing Governmental Immunity*, *supra* note 297, at 898 (noting that the fear of disastrous effects on limited municipal funds resulting from an abolition of governmental immunity "can be avoided through commercial insurance and other loss spreading techniques"). Even with this protection, the local government could be forced to pay damages that exceed any coverage that it might have. Unlimited liability could lead to serious financial troubles for any local government. In addition, the abolition of governmental immunity would serve as a disincentive for small communities to incorporate and provide services to its citizens at the risk of being found liable for the actions of its employees and agents. Further, local governments would likely have to raise taxes in order to protect themselves from liability.

312. See N.C. GEN. STAT. § 160A-485 (1994); *supra* notes 119-25 and accompanying text (discussing § 160A-485).

313. See *supra* notes 177-88 and accompanying text (discussing *Blackwelder*).

governmental immunity should be abolished or in what circumstances it may be waived.

J. JASON LINK