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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA26-82

Filed 18 November 2026

Cabarrus County, No. 24CV006213-120

JAYLENE MOSS AND RWJ CONSULTING, INC., Plaintiffs,

v.

CITY OF CONCORD; TAC NIBLOCK, LLC; LANDWORKS DESIGN GROUP, P.A.; THE ARDENT COMPANIES, LLC; CMG BUILDERS, INC.; AND HUNTON FOREST HOMEOWNER'S ASSOCIATION, INC., Defendants.

Appeal by defendant from order entered 4 June 2025 by Judge William Arnold Wood in Cabarrus County Superior Court. Heard in the Court of Appeals 29 September 2026.

Cranfill Sumner, LLP, by Steven A. Bader and John P. Wright, for defendant-appellant.

Salter, Shook & Conner, PC, by Joseph R. Pellington, for plaintiff-appellee.

FLOOD, Judge.

Defendant City of Concord appeals from the trial court's order denying its motion to dismiss. On appeal, Defendant argues that the trial court erred in concluding that it was not entitled to governmental immunity. Upon careful review, we affirm the trial court, concluding that Defendant is not entitled to governmental

immunity from suit as it was engaged in proprietary functions.

I. Factual and Procedural Background

Plaintiffs RWJ Consulting, Inc., and Jaylene Moss, RWJ Consulting's principal, own real property located in Concord, North Carolina. Defendant owns an easement for underground pipes that run through Plaintiffs' property.

In 2014, Defendant approved a residential development plan south of Plaintiffs' property that would consist of the development of 361 large, single-family homes. Defendant additionally approved phases two and three of the development plan in 2016. Plaintiffs allege that, in 2019, during construction of the development, a rainstorm produced a flash flood, which resulted in stormwater that "swamped Plaintiffs' property with several feet of brown water from the construction site[,]" "littered [it] with wood debris and fast food cups from the jobsite[,]" "washed away sections of Plaintiffs' fence on the northside[,]" and "destroyed Plaintiffs' fence on the southside . . . ." Plaintiffs further allege that the "force of the water, which included tree debris from the uncontained . . . construction site, also caused one of the stormwater pipes beneath Plaintiffs' front yard to buckle and break, creating a two-foot by two-foot hole in the ground." According to Plaintiffs, several more flashfloods occurred between 2020 and 2024.

In 2022, Plaintiffs sued Defendant[1] for negligence, trespass, and nuisance, alleging that Defendant approved and permitted the stormwater design for the residential development and failed to ensure that the construction area stormwater volume and flow rates were adequate, as well as for inverse condemnation, alleging that Defendant's actions constituted a taking of Plaintiffs' property. Plaintiffs amended their complaint in 2024. In response, Defendant moved to dismiss Plaintiffs' complaint pursuant to Rules 12(b)(1), (2), and (6), arguing, in relevant part, that it was protected by governmental immunity from Plaintiffs' claims. On 4 June 2025, the trial court entered an order denying Defendant's motion to dismiss, concluding that Plaintiffs' complaint "states claims against . . . [Defendant] upon which relief can be granted[.]"

Defendant timely appealed.

II. Jurisdiction

Defendant contends that, although the order from which it appeals is interlocutory, this Court has jurisdiction to hear this appeal because issues regarding governmental or sovereign immunity affect a substantial right.

In most instances, a party has "no right of immediate appeal from interlocutory orders and judgments[,]" *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990);

[1] Plaintiffs also sued Tac Niblock, LLC; Landworks Design Group, P.A.; The Ardent Companies, LLC; CMG Builders, LLC; and Hunton Forest Homeowner's Association, Inc.; however, they are not parties to this appeal.

however, "immediate review is available where the order affects a substantial right[,]" *Smith v. Polsky*, 251 N.C. App. 589, 594 (2017). "In North Carolina, appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Lake v. State Health Plan for Tchrs. & State Emps.*, 234 N.C. App. 368, 370 (2014) (citation and internal quotation marks omitted). "[T]his only applies[, however,] for denial of a motion to dismiss under Rules 12(b)(2), 12(b)(6), and 12(c), or a motion for summary judgment under Rule 56. We cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1)." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209 (2014) (citation and internal quotation marks omitted). Therefore, Defendant's challenges to the trial court's denial of their motion to dismiss under Rule 12(b)(2) and 12(b)(6) based on governmental immunity grounds are properly before us.

Defendant also seeks review of a non-immunity related challenge, specifically, the trial court's denial of its motion to dismiss Plaintiffs' inverse condemnation claim. Defendant asserts we may choose to review this issue to prevent fragmentary appeals. *See RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 530–31 (2000), *aff'd per curiam*, 353 N.C. 362 (2001) ("Although this question again is interlocutory in nature, we choose to address it, given that [the] defendants' sovereign immunity argument is properly before us. After all, to address but one interlocutory or related issue would create fragmentary appeals."). In the alternative, Defendant has filed a petition for

writ of certiorari ("PWC"), contending our review of Plaintiffs' inverse condemnation claim will promote "judicial efficiency[.]"

As Plaintiffs correctly argue, however, this Court has previously declined non-immunity challenges on jurisdictional grounds. *See Hinson*, 232 N.C. App. at 209 ("Because it is well established that '[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order' and that 'the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits[,]' we decline to review the non-immunity related challenges to the trial court's denial of [the] defendants' motions to dismiss." (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380 (1994))). "[I]n most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits." *Bynum v. Wilson Cnty.*, 228 N.C. App. 1, 7 (2013), *rev'd in part on other grounds,* 367 N.C. 355 (2014) (discussing three cases where this Court reviewed the defendant's challenge to the trial court's immunity-related decision on the merits while dismissing the remainder of the defendant's appeal). Accordingly, we decline to review Defendant's interlocutory, non-immunity related claim and deny Defendant's PWC. *See Hinson*, 232 N.C. App. at 209; *Bynum*, 228 N.C. App. at 7.

Thus, we proceed to review solely to the merits of Defendant's governmental immunity argument.

III. Standard of Review

This Court reviews the granting of a motion to dismiss de novo. *See Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679 (2022). "[U]nder de novo review, the appellate court as the reviewing court considers the Rule 12(b)(6) motion to dismiss anew: It freely substitutes its own assessment of whether the allegations of the complaint are sufficient to state a claim for the trial court's assessment." *Id.* When considering a Rule 12(b)(6) motion to dismiss, the question is

> whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. We consider [the] plaintiff's complaint to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim.

Allred v. Cap. Area Soccer League, Inc., 194 N.C. App. 280, 282–83 (2008) (citations and internal quotation marks omitted).

IV. Analysis

On appeal, Defendant contends that the trial court erred in denying its motion to dismiss Plaintiffs' claims due to governmental immunity protection. Specifically, Defendant argues that it acted within its governmental function by permitting the residential development. We disagree.

"[T]o overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Wray v. City of Greensboro*, 370 N.C. 41, 47 (2017). "This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by" the local government. *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 38 (2005).

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent a waiver of immunity." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53 (2004) (citation omitted). "[G]overnmental immunity [, however,] does not . . . apply when the municipality engages in a proprietary function." *Smith v. Scotland Cnty.*, 300 N.C. App. 76, 79 (2025) (citation modified). "In determining whether an entity is entitled to governmental immunity, the issue turns on whether the alleged tortious conduct of the county or municipality was a result of an activity that was governmental in nature or proprietary in nature." *Smith v. Lane*, 298 N.C. App. 560, 562 (2025).

A governmental function is one "which is discretionary, political, legislative, or public in nature and performed for the public good [o]n behalf of the State rather than for itself[.]" *Britt v. City of Wilmington*, 236 N.C. 446, 450 (1952). "In contrast, a

proprietary function is one that is commercial or chiefly for the private advantage of the compact community." *Lane*, 298 N.C. App. at 563 (citation and internal quotation marks omitted). Our Supreme Court has explained that governmental immunity

> renders local governments such as counties and municipal corporations immune from suit for the negligence of [their] employees in the exercise of governmental functions absent waiver of immunity. Although [t]he State's sovereign immunity applies to both its governmental and proprietary functions, the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions. In other words, while governmental immunity protects units of local government from suit for acts committed in [their] governmental capacity, if the entity in question undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations.

Providence Volunteer Fire Dep't, Inc. v. Town of Weddington, 382 N.C. 199, 211–12 (2022) (internal citations and quotation marks omitted).

In order to determine whether a function is governmental or proprietary, "[f]irst, in deference to our tripartite system of government, the appellate courts of this State should consider whether our legislature has designated the particular function at issue as governmental or proprietary." *Est. of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 200 (2012). If "the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant." *Id.* at 202. Notably, however, as

our Supreme Court has explained, "[w]e have repeatedly held that if the undertaking is one in which only a governmental agency could engage, it is perforce governmental in nature." *Id*. But

> when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.

Id. at 202–03 (footnotes omitted). "Consequently, the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case." *Id.* at 203.

Here, Plaintiffs' complaint alleged that Defendant was negligent by granting permission of the residential development as well as by "failing to monitor [the construction site's] stormwater system for adequate maintenance[] and failing to enforce minimum requirements related to stormwater and sedimentation directed at Plaintiffs' property." Furthermore, Plaintiffs alleged Defendant was trespassing because its "failure to maintain its stormwater easement interferes with Plaintiffs' use and enjoyment of their property[,]" such that "[t]he downstream overflows reflect permanent, continuing, and recurring trespass." Additionally, for Plaintiffs' private nuisance claim, they allege Defendant "created and failed to remediate . . . a substantial and unreasonable interference with the use and enjoyment of Plaintiffs'

property."

Under N.C.G.S. § 160A-311(10), stormwater management is a "public enterprise." N.C.G.S. § 160A-311(10) (2025). In *Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville*, this Court held that a plaintiff's negligence, trespass, and private nuisance claims against the city of Fayetteville for stormwater management were not barred by governmental immunity because, "[u]nder N.C.G.S. § 160A-311, stormwater management is a quintessentially proprietary municipal function." 296 N.C. App. 26, 46–47 (2024). Similarly, here, Plaintiffs' claims are not barred by governmental immunity because Plaintiffs' negligence, trespass, and private nuisance claims are alleged to be caused by Defendant's engagement with its proprietary function of stormwater management; thus, "if taken as true," these facts "are sufficient to establish a waiver by" the local government, *see Fabrikant*, 174 N.C. App. at 38, as they have alleged these claims based on inadequate stormwater management, *see Devonwood-Loch*, 296 N.C. App. at 46–47. Accordingly, we affirm the trial court's order denying Defendant's motion to dismiss, as it was engaged in a proprietary function and not entitled to governmental immunity.

V. Conclusion

Upon careful review, we conclude that the trial court correctly denied Defendant's motion to dismiss because Defendant's stormwater management was a proprietary function; thus, Defendant was not entitled to governmental immunity.

AFFIRMED.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).