



RISK MANAGEMENT RESOURCES

ARTICLES

Stop Being Nice in Your Pleadings to Negligent County and City Employees —
Unless You Sue The Employee Individually, Immunity Will Bite You.



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STOP BEING NICE IN YOUR PLEADINGS TO NEGLIGENT COUNTY AND CITY EMPLOYEES — UNLESS YOU SUE THE EMPLOYEE INDIVIDUALLY, IMMUNITY WILL BITE YOU.

There was a time when most North Carolina county and city governments routinely agreed to waive governmental immunity to the extent of the limits of their liability insurance that covered claims arising out of the negligent acts of their employees. By alleging in the complaint waiver of governmental immunity through the purchase of liability insurance, the plaintiff's claim against the city or county would be viable whether or not the complaint named the negligent employee in either his official or individual capacities or even named him at all. **That day is gone.**

In recent years, most county and city governments in North Carolina have been playing a shell game by purchasing liability policies that purport to cover claims against the county or city for negligence but also contain a Non-Waiver of Governmental Immunity Clause. The Non-Waiver Clause states that the insurance policy does not cover any claim that would otherwise be barred by governmental immunity and is not intended to waive such immunity as a defense. In other words, the city and county retain immunity because the policy does not cover the claim, and the claim is not covered by the policy because the city and county retain their immunity. The Court of Appeals has given this shell game its seal of approval in several reported and unreported opinions, even as one opinion noted the “circular nature of the logic” behind the validity of the Non-Waiver Clause and approved it nonetheless. *See Estate of Early v. Haywood County Dept. of Soc. Serv.*, -- N.C. App. --, 694 S.E.2d 405 (2010)(leaving it to the legislature to address the public policy implications of the Non-Waiver Clause).

Regardless of the public policy implications of the Non-Waiver Clause, the prudent attorney bringing a negligence claim against a county or city should always sue the negligent employee(s) and their supervisors, if appropriate, as named parties and in their individual capacities. Denominating the allegations against the employees in their **individual capacities** should be explicit in the caption, body, and prayer for relief, and discovery should be directed to the individual employees. By making such allegations, the claim should survive the governmental immunity defense because such defense does not apply to employees in their individual capacities. Ironically, if the employee is sued individually in the complaint, the same county or city insurance policy with the Non-Waiver Clause is likely to provide coverage to the employee as an “insured” under the policy when the claim is against him in his individual capacity.

As an added safeguard, the prudent attorney should file a **contemporaneous uninsured and/or underinsured motorist claim** when suing a county or city for a motor vehicle accident caused by a negligent employee. Until an answer is filed and discovery is conducted, the issue of whether the county or city's insurance policy provides coverage for the accident may remain uncertain. A claim for uninsured or underinsured motorist coverage is viable if the claim against the county or city is fully or partially barred by governmental immunity. *William v. Holsclaw*, 128 N.C. App. 205, 495 S.E.2d 166, *aff'd*, 349 N.C. 225, 504 S.E.2d 784 (1998). Should the statute of limitations expire before discovering that there is no insurance

coverage for the county or city's negligence in a motor vehicle accident, any uninsured motorist claim would be barred unless it has been properly asserted under N.C.G.S. § 20-279.21(b)(3) prior to the statute of limitations running.

You may also call Lawyers Mutual should you have any questions or concerns about a present case you have filed or anticipate filing against a county or city. We may be able to assist you in drafting your pleadings, responding to a dispositive motion, or we may decide to consult or engage expert counsel under our claims repair program to work with you so that your client's claim is determined on its merits.