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Down the Drain: How North Carolina Municipalities Lost Immunity for Storm Drains in *Jennings v. Fayetteville**

INTRODUCTION

When a high school student falls into a city-owned drainage ditch, will the city's prospects of facing expensive wrongful death litigation hinge on the origin of the water in the ditch? If this scenario happens in North Carolina, the answer might be yes. As the law currently stands after the North Carolina Court of Appeals case *Jennings v. City of Fayetteville*,¹ if the ditch carried storm water, the municipality will likely face liability—certainly an unappealing prospect in this time of tightened budgets.² On the other hand, if the ditch carried sewage water, the municipality will likely be immune from the wrongful death claim. In addition to the real-world implications for injured parties and cash-strapped municipalities, this seemingly arbitrary distinction between sewers and storm drains reveals the confusing nature of North Carolina law on government immunity.

In *Jennings*, the North Carolina Court of Appeals held that the City of Fayetteville did not enjoy governmental immunity for a wrongful death claim resulting from the city's operation of storm drains.³ In August 2005, Jesse Marquil King, a senior at Terry Sanford High School, drowned during a rainstorm in Fayetteville when he attempted to cross a flooded area near Spruce Street and was dragged underwater.⁴ In *Jennings*, the Court relied heavily upon the 1996 case of *Kizer v. City of Raleigh*,⁵ where the court of appeals claimed to

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1. ___ N.C. App. ___, 680 S.E.2d 757, *discretionary review denied*, 363 N.C. 654, 684 S.E.2d 891 (2009).

2. See NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES, at viii-1 (2009), *available at* <http://www.nga.org/Files/pdf/FSS0906.pdf> (noting that forty-two states' expected revenues were below target in 2009 and that forty-three states reduced budgetary spending); Brian Winter, *States Struggling with EPA Rules*, USA TODAY, Feb. 3, 2010, at 1A (noting that forty-eight states have cut their budget allowances for dealing with environmental clean-up regulations, many of which are promulgated by the Environmental Protection Agency).

3. *Jennings*, ___ N.C. App. at ___, 680 S.E.2d at 760.

4. *Family Can Sue City Over Drowning*, FAYETTEVILLE OBSERVER, Aug. 5, 2009, at 3B.

5. 121 N.C. App. 526, 466 S.E.2d 336 (1996).

have reviewed the applicable precedent and then broadly concluded that “storm drain maintenance does not enjoy governmental immunity.”⁶

The *Jennings* decision has now exposed municipalities to liability for operating storm drains, despite numerous reasons for concluding that such activity should be immune from lawsuit. This Recent Development concludes that operating storm drains should be considered a “governmental” function—and thus afforded immunity for personal injury damages.⁷ Part I gives a brief history of government immunity over the last several hundred years. Part II lists several reasons why municipalities should enjoy immunity for their maintenance of storm drains, including precedent from the Supreme Court of North Carolina, the extensive regulation of storm drains by the State of North Carolina, and the similarities between storm drains and sewers. Part III shows that precedent also bars recovery for personal injury resulting from storm drains and sewers, even though the courts have historically allowed recovery for property damages. Part IV argues that the failure to shield storm drains from liability forces municipalities to choose between costly renovations of their storm drains and paying for the inevitable lawsuits directly or through liability insurance.

I. THE DOCTRINE OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity traces its origins in Western law to the idea that the king made the laws, and thus “anything the king did was perforce legal.”⁸ Therefore, there could be no valid suit against the sovereign. The doctrine made its way to the United States in the early 1800s⁹ and was soon adopted by nearly every state.¹⁰

6. *Id.* at 529, 466 S.E.2d at 338.

7. See *infra* Part III for a discussion of the historical allowance for recovery of damages to property.

8. DONALD L. DOERNBERG, *SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE* 3 (2005). This concept originally gained legitimacy from the belief of *rex gratia dei*, which states that the king is in power by the grace of God. LEON HURWITZ, *THE STATE AS DEFENDANT: GOVERNMENTAL ACCOUNTABILITY AND THE REDRESS OF INDIVIDUAL GRIEVANCES* 10 (1981).

9. See *Mower v. Inhabitants of Leicester*, 9 Mass. (8 Tyng) 247, 250 (1812) (citing *Russell v. The Men of Devon*, 100 Eng. Rep. 359 (1788)).

10. See 1 *CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENTS: ITS DIVISIONS, AGENCIES AND OFFICERS* § 1.1, at 6–10 (Jon L. Craig ed., 2002) (listing forty-four states with cases holding that a “state may not be sued in its own courts without its consent”). In *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), Justice Oliver Wendell Holmes claimed that the “sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no

However, the enjoyment of sovereign immunity is limited to government bodies that are truly “sovereign,” namely the United States federal government and each state government.¹¹ Excluded from the doctrine are cities and municipalities, which are considered “mere creature[s] of the Legislature . . . [and which have] no inherent power and . . . must exercise delegated power strictly within the limitations prescribed by the Legislature.”¹² As such, by default, municipalities are liable for their actions *unless shielded by the state*.¹³

In North Carolina, municipalities can still enjoy limited *governmental immunity* for actions considered to be “governmental,” as opposed to “proprietary” functions for which the municipality will face liability in the event of negligence.¹⁴ The distinction is that a municipality, which has features of both a corporation and a sovereign government,¹⁵ will not be liable for governmental acts that it carries out on behalf of the state but will be liable for proprietary acts, which are more akin to activities undertaken by a private business.¹⁶ For instance, the construction of a county prison was

legal right as against the authority that makes the law on which the right depends.” *Id.* One scholar has argued that sovereign immunity is actually a “profanation” of the Constitution because it creates a government that is not answerable to its own citizens. *See* DOERNBERG, *supra* note 8, *passim*.

11. *See* 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENTS, *supra* note 10, § 1.1, at 6–10.

12. *State v. Scoggin*, 236 N.C. 1, 8, 72 S.E.2d 97, 102 (1952).

13. *Hillsborough v. Smith*, 10 N.C. App. 70, 73, 178 S.E.2d 18, 21 (1970) (“A municipal corporation may not waive or contract away its governmental immunity in the absence of legislative authority for such action.”).

14. *Evans v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (“Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. 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 waiver of immunity. These immunities do not apply uniformly. The State’s sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.”) (internal citations omitted).

15. *See* *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951).

16. Interestingly, the first North Carolina case dealing with this topic held that municipalities would enjoy liability for doing the state’s work only so long as the municipality does the work “in a skilful and proper manner,” and that, if “the work be not done with ordinary skill and caution, the corporation has not acted in pursuance of the power vested in it” and would be liable to suit as would any individual person. *Meares v. City of Wilmington*, 31 N.C. (9 Ired.) 73, 81 (1848). That is, if the municipality was negligent, it specifically would *not* enjoy immunity. Later, the rule was expanded to examine whether the municipality acted in good faith, rather than whether its work was performed in a skillful manner: “A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which in good faith, it

determined to be governmental,¹⁷ while the building and maintenance of a golf course by a municipality was held to be a proprietary act.¹⁸ The line between governmental and proprietary actions can, however, be difficult to determine, particularly when the activity in question, while typically within the domain of the government, is also occasionally undertaken by private businesses.¹⁹

II. OPERATING STORM DRAINS IS A GOVERNMENTAL FUNCTION

There are a number of reasons why Fayetteville's operation of the storm drains in *Jennings* should have been considered a governmental function and thus immune from suit. First, precedent from the Supreme Court of North Carolina gives definitions of governmental functions that should encompass the operation of storm drains. Second, the extensive regulation of storm drains by the state makes operating the drains an activity performed on behalf of the state. Third, storm drains' similarities to sewers point toward labeling the maintenance of storm drains a governmental function. Fourth, North Carolina precedent regarding the definition of proprietary activities also excludes the operation of storm drains.

A. Supreme Court Precedent

In 1909, the Supreme Court of North Carolina articulated the following test for deciding whether a municipal action can face liability: "When cities are acting in their corporate capacity or in the

exercises discretionary powers of a public or legislative character." *Hill v. City of Charlotte*, 72 N.C. 55, 57 (1875).

17. *Hayes v. Billings*, 240 N.C. 78, 80, 81 S.E.2d 150, 152 (1954). Also held to be governmental was installing and maintaining traffic signals, *Hamilton v. Town of Hamlet*, 238 N.C. 741, 742, 78 S.E.2d 770, 771-72 (1953), and providing water to extinguish fires, *Howland v. City of Asheville*, 174 N.C. 749, 751, 94 S.E. 524, 524 (1917).

18. *Lowe v. City of Gastonia*, 211 N.C. 564, 566, 191 S.E. 7, 8 (1937). Building an airport was also held to be proprietary, *Rhodes v. City of Asheville*, 230 N.C. 134, 141, 52 S.E.2d 371, 376 (1949), as was operating an electrical plant for profit, *Rice v. City of Lumberton*, 235 N.C. 227, 236, 69 S.E.2d 543, 550 (1952). See *infra* Part II.A for descriptions of various examples of government functions.

19. In 1991, the court of appeals lamented:

Drawing the line between municipal operations which are proprietary and subject to tort liability versus operations which are governmental and immune from such liability is a difficult task. The application of the [governmental-proprietary distinction] to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.

Pulliam v. City of Greensboro, 103 N.C. App. 748, 751, 407 S.E.2d 567, 568 (1991) (alteration in original) (citation omitted).

exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents.”²⁰ On the other hand, when “they are exercising the judicial, discretionary, or legislative authority conferred by their charters, or are discharging the duty imposed solely for the public benefit,” they are immune from suit, unless the state specifically withholds such immunity.²¹ In the 1952 case of *Britt v. City of Wilmington*,²² the Supreme Court of North Carolina added that “the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and ‘private’ when any corporation, individual, or group of individuals could do the same thing.”²³

However, in 1975, the court backtracked somewhat from the idea that a governmental function included only those services that no private entity could possibly engage in. In *Sides v. Cabarrus Memorial Hospital, Inc.*,²⁴ the court held that “it appears that all of the activities held to be governmental functions by this Court are those *historically performed by the government*, and which are *not ordinarily engaged in by private corporations*.”²⁵

The operation of storm drains fits nicely within the Supreme Court of North Carolina’s precedents described above. The large areas of land covered by drainage systems and the likelihood of placing the pipes on private property dictate that storm drain construction and maintenance is something that only a governmental agency could successfully provide on any systematic basis.²⁶ One need only look at New York City, which built its first storm drains in 1849, expanded them to over 7,400 miles of pipes, and has been using them ever since.²⁷ The sheer number of drainage systems run by

20. *Metz v. City of Asheville*, 150 N.C. 748, 749, 64 S.E. 881, 882 (1909).

21. *Id.*

22. 236 N.C. 446, 73 S.E.2d 289 (1952).

23. *Id.* at 450–51, 73 S.E.2d at 293.

24. 287 N.C. 14, 213 S.E.2d 297 (1975).

25. *Id.* at 23, 213 S.E.2d at 303 (emphasis added).

26. See Larry W. Mays, *Introduction to STORMWATER COLLECTION SYSTEMS DESIGN HANDBOOK* § 1.3 (Larry W. Mays ed., 2001) (noting that typical drainage systems are a mass of interconnected systems of gutters, culverts, drains, streets, streams, floodways, detention ponds, and pipes used to carry rain and snowmelt to treatment plants or receiving waters); Charles Duhigg, *Sewers at Capacity, Waste Poisons Waterways*, N.Y. TIMES, Nov. 23, 2009, at A18 (noting that New York City alone has over 7,400 miles of storm drain pipes and that the only way to reduce environmentally damaging run-off from entering waterways is for the city to use its zoning powers to require private developers to reconfigure their development plans).

27. Duhigg, *supra* note 26.

municipalities—over 25,000—is certainly evidence of the extent to which cities have come to dominate the drainage landscape.²⁸

Sides also introduced an important second element to the immunity test: governmental functions tend to be those that are not “ordinarily engaged in by private corporations.”²⁹ Certainly, private individuals and businesses could construct and maintain their own limited storm drains contained entirely on their own property,³⁰ but that alone should not preclude a classification of storm drains as a governmental function.³¹ If it could, then sewers would not be governmental either, as private citizens can install septic tanks and thus create their own waste removal systems. That most storm drains, like sewers, tend to flow into municipality-controlled central systems is strong evidence that private corporations themselves do not ordinarily engage in storm drain construction and maintenance, but rather just funnel storm water into the municipalities’ systems.³² Thus, under either the *Britt* or the *Sides* definition of a governmental function, the operation of storm drains qualifies as governmental because it is a service that only a governmental agency could adequately provide and, as discussed above, governmental agencies have historically provided such services.

Accordingly, North Carolina “courts have concluded that when municipalities engage in activities to clean up the municipality or to collect trash, junk, or other waste, they are engaging in governmental functions.”³³ Since “stormwater collects and flows over pavements, lawns, driveways, and other urban surfaces . . . [and] often picks up considerable quantities of pollutants, such as oil and grease, fertilizers, pesticides, and metals,”³⁴ municipalities are performing a governmental function by providing storm drains to collect and

28. *See id.*

29. *Sides*, 287 N.C. at 23, 213 S.E.2d at 303 (emphasis added).

30. *See, e.g., Asheville Sports Prop., L.L.C. v. City of Asheville*, ___ N.C. App. ___, ___, 683 S.E.2d 217, 218–19 (2009) (noting that the plaintiff owned property where the previous owner had installed large drain pipes that ultimately failed and caused plaintiff’s parking lot to cave in).

31. *See Hewett v. County of Brunswick*, ___ N.C. App. ___, ___, 681 S.E.2d 531, 535 (2009) (holding that the county was performing a governmental service even though the same junk-removal service was supplied extensively by private entities).

32. *See Mays, supra* note 26, § 1.3.

33. *Hewett*, ___ N.C. App. at ___, 681 S.E.2d at 535.

34. Roy D. Dodson & Craig D. Maske, *Regulation of Stormwater Collection Systems in the United States*, in *STORMWATER COLLECTION SYSTEMS DESIGN HANDBOOK* § 2.1 (Larry W. Mays ed., 2001).

transport dangerous chemicals and toxins away from our roads and property to treatment plants.³⁵

On the other hand, there is an argument that since municipalities are not liable for damages resulting from their failure to install storm drains,³⁶ such drains are not so essential to the functioning of a city that they can be defined as a governmental function. Refuting this, however, the North Carolina General Statutes include the operation of storm drains as a “public enterprise,”³⁷ listing it among the most important services that a municipality can provide for its citizens.³⁸ As such, the state has given municipalities very wide latitude to regulate, create, and maintain their public enterprises.³⁹ Given the purpose of storm drains and the fact that they tend to have been historically operated by municipalities, there is considerable support for the argument that the operation of storm drains is best qualified as a governmental function for which municipalities should enjoy immunity.

B. Extensive Regulation by the State

Another reason why the operation of storm drains should be considered a governmental function is that they are mandated and extensively regulated by the state in accordance with the federal Environmental Protection Agency (“EPA”), which hands out fines

35. *Hewett*, ___ N.C. App. at ___, 681 S.E.2d at 535.

36. *See* *Martinez v. Cook*, 244 P.2d 134, 140 (N.M. 1952) (“It seems to be a settled principle of law that the establishment of a drain by a municipal corporation is the exercise of a legislative or quasi-judicial power, and the legislative body of the municipality is the sole judge of the necessity therefor.”); *City of Mobile v. Jackson*, 474 So. 2d 644, 649 (Ala. 1985) (holding that storm drains are not so essential to citizens that municipalities should enjoy immunity)

37. N.C. GEN. STAT. § 160a-311(10) (2009).

38. *Id.* § 160a-311(1)–(9) (defining “public enterprises” to include providing electricity, water, sewers, gas, public transportation, garbage removal, cable television, parking facilities, and airports).

39. *Id.* § 160a-312(a)–(b). Additionally, there are practical reasons why municipalities should not be liable for failure to install storm drains: given the huge amount of land over which storm water will run off and collect, municipalities could have hundreds or thousands of locations where a storm drain is not currently installed but would help reduce flooding. If municipalities had to install drain systems in all of these locations, the cost would likely be prohibitive. For instance, New York City has a size of just 303 square miles, U.S. CENSUS BUREAU, NEW YORK (CITY) QUICKFACTS FROM THE U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Aug. 24, 2010), but it is estimated that the city would have to spend \$58 billion to build enough storm drains to prevent all run-off from ever overflowing into nearby water sources, Duhigg, *supra* note 26. Philadelphia has announced that it will spend \$1.6 billion over the next twenty years in order to build “rain gardens and sidewalks of porous pavement and to plant thousands of trees” to help reduce storm water run-off. *Id.*

for storm drain overflows and requires that drains be built so that they do not easily become clogged.⁴⁰ The Supreme Court of North Carolina has stated that “[a]ny activity of the municipality which is discretionary, political, legislative or *public in nature and performed for the public good in behalf of the State*, rather than for itself, comes within the class of governmental functions.”⁴¹

Designed to help reduce pollutant discharges by storm water systems, the National Storm Water Program (“NSW Program”) is “a federal government initiative, directed by the [EPA], with the voluntary cooperation of authorized states and mandatory participation of many local government agencies.”⁴² Importantly, the “EPA must approve a state’s request to operate the [NSW Program] once the EPA determines that the state has adequate legal authorities, procedures, and the ability to administer the program.”⁴³ Once North Carolina gained approval in 1975 to participate in the NSW Program,⁴⁴ the state legislature implemented many of the EPA guidelines for storm drains,⁴⁵ which means that all applications submitted by municipalities must now be approved by the North Carolina Environmental Management Commission.⁴⁶ As such, the program is run at the directive of the state.

While the NSW Program is directed by the state, it is funded and operated largely by the municipalities themselves. “When Congress enacted the . . . program, it did not provide the states with funding to support these comprehensive storm water management programs.”⁴⁷ States essentially hand off the responsibility of complying with the NSW Program to municipalities and other local governmental

40. Duhigg, *supra* note 26.

41. Millar v. Town of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 43 (1942) (emphasis added).

42. Dodson & Maske, *supra* note 34, § 2.3.

43. *Id.* § 2.4.1.

44. See Smith Chapel Baptist Church v. City of Durham, 350 N.C. 805, 808, 517 S.E.2d 874, 876 (1999).

45. N.C. GEN. STAT. § 143-214.7(c) (2009) (“The [North Carolina Environmental Management] Commission shall develop model storm water management programs that may be implemented by State agencies and units of local government. Model storm water management programs shall be developed to protect existing water uses and assure compliance with water quality standards and classifications.”).

46. § 143-214.7(d) (“The [North Carolina Environmental Management] Commission shall review each stormwater management program submitted by a State agency or unit of local government The Commission shall approve a program only if it finds that the standards of the program equal or exceed those of the model program adopted by the Commission pursuant to this section.”).

47. See Smith Chapel, 350 N.C. at 808, 517 S.E.2d at 877.

agencies, which must pay for them by charging fees and taxes.⁴⁸ Therefore, municipalities are performing the state's work of complying with the NSW Program; in other words, the municipalities are performing an activity which is "public in nature and performed for the public good in behalf of the State, rather than for itself."⁴⁹

This situation is of growing concern to municipalities, as an increasing number of local governments have been caught up in the dragnet of the NSW Program.⁵⁰ Beginning in March 2003, the NSW Program guidelines applied to all population centers within those states that had been approved by the EPA to participate in the NSW Program.⁵¹ Any population center of at least 10,000 people with a density of at least 1,000 people per square mile is included in the NSW Program.⁵² One study estimated that these guidelines will require "several thousand additional municipal permits to be issued," and that most of these dischargers will be "small local government agencies with limited technical resources."⁵³

Among the duties now required of such municipalities are (1) obtaining permits for discharges from their own storm water systems,⁵⁴ (2) obtaining permits for any industrial or construction sites operated by the municipality,⁵⁵ and (3) keeping records and performing inspections of all storm water systems.⁵⁶ These requirements are not just perfunctory. Any local government that negligently fails to follow the EPA guidelines can face administrative fines ranging from \$2,500 to \$25,000 per day.⁵⁷ The EPA also has authority to file civil actions in district court.⁵⁸ Falsifying or withholding information from the EPA can result in imprisonment for up to three years and a fine of up to \$50,000 per day.⁵⁹ Prison sentences and cash penalties are doubled for repeat offenders.⁶⁰

48. Duhigg, *supra* note 26; *see infra* Part II.D.

49. Millar v. Town of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 43 (1942).

50. *See* Dodson & Maske, *supra* note 34, § 2.3.

51. *Id.*

52. 40 C.F.R. § 122.32(d) (2009); 40 C.F.R. § 123.35(b)(2) (2009).

53. Dodson & Maske, *supra* note 34, § 2.4.2.

54. *Id.* Not all discharges are considered illicit, but anything not specifically allowed is considered to be illicit. Allowable discharges include, inter alia, such seemingly trivial items as air conditioner condensation, lawn watering, water discharges from extinguishing fires, and unavoidable rising groundwater. *Id.* §§ 2.6–2.7.

55. *Id.* § 2.4.2.

56. *Id.*

57. 33 U.S.C. § 1319(c)(1)(B) (2006).

58. § 1319(b).

59. § 1319(c)(2)(B).

60. *Id.*; § 1319(c)(1)(B).

Considering that so many local government entities now have to bring their storm drain systems up to code and report to the state of North Carolina under penalty of severe civil and criminal punishments, it is no wonder that the “role of local governments in the [NSW] Program has become very significant.”⁶¹ Simply put, if not for municipalities doing the state’s work, North Carolina would not be able to comply with the NSW Program’s requirements. The North Carolina state legislature was the entity that signed on to the NSW Program, yet it is the municipalities that are actually doing all of the legwork. The defendant-city was right to argue in *Jennings* that the extensive state regulation and oversight of municipal storm drains means that municipalities are, in effect, performing a function on behalf of the state—an activity that would receive immunity.⁶²

Despite the EPA’s extensive regulation, the opinion in *Jennings* did not place any weight on this argument. Rather, it relied on the fact that *Kizer* had also been decided after the EPA first began regulating storm drains in the 1970s, and the *Kizer* court had still held that operating storm drains was not a governmental function.⁶³ According to *Jennings*, “our Supreme Court has not overturned or modified this Court’s holding in *Kizer*, and we are bound by its holding that municipalities do not enjoy governmental immunity from liability resulting from their operation of storm drain systems.”⁶⁴ In other words, the *Jennings* court did not consider the EPA regulation argument to be important simply because it had no effect on *Kizer*’s outcome. Rather, the reason that *Kizer* had seemed to ignore this argument is that no defendant-city had previously argued it before a court, likely because the EPA has not imposed such extensive regulations until the last few years.⁶⁵ In fact, the defendant-city in

61. Dodson & Maske, *supra* note 34, § 2.4.2.

62. Defendant-Appellant’s Brief to the Court of Appeals at 11–12, *Jennings v. City of Fayetteville*, ___ N.C. App. ___, 680 S.E.2d 757, *discretionary review denied*, 363 N.C. 654, 684 S.E.2d 891 (2009) (No. COA09-92).

63. *Jennings v. City of Fayetteville*, ___ N.C. App. ___, ___, 680 S.E.2d 757, 760, *discretionary review denied*, 363 N.C. 654, 684 S.E.2d 891 (2009).

64. *Id.*

65. See Dodson & Maske, *supra* note 34, §§ 2.3, 2.4.2. Seeking discretionary review by the Supreme Court of North Carolina, the defendant-city in *Jennings* argued that the court of appeals should not have relied on *Kizer* because there was no evidence that the defendant-city in *Kizer* had even argued that EPA regulation was a factor. Petition for Discretionary Review at 4, *Jennings*, ___ N.C. App. ___, 680 S.E.2d 757 (No. COA09-92). Unfortunately, the Supreme Court of North Carolina apparently found “this ingenious argument unpersuasive,” *Payton v. New York*, 445 U.S. 573, 602 (1980), and denied discretionary review to the defendant-city in *Jennings*. *Jennings*, 363 N.C. 654, 684 S.E.2d 891 (2009).

Jennings seems to be the first case in the country where a municipality argued that extensive EPA regulation of storm drains could result in the operation of storm drains becoming a governmental function, regardless of how it might have been classified in the past.⁶⁶

Given North Carolina's recent extensive regulations and harsh punishments for violating the EPA rules, the *Jennings* court should have considered that the operation of storm drains no longer affects just citizens within a municipality's city limits. Indeed, the EPA and the North Carolina legislature would not have adopted such regulations if storm drain run-off were not a state- and nation-wide problem that could be effectively solved only through municipal action.⁶⁷ Because municipalities are performing this important public duty on behalf of the state, they should be entitled to immunity.⁶⁸

C. Comparing Storm Drains and Sewers

The conclusion in *Jennings* that storm drains do not enjoy immunity is peculiar, given the ample evidence supporting the similarity between storm drains and their immune cousin, sewers.⁶⁹ Providing sewers is something that is usually done solely for the public benefit of removing waste, rather than to generate a profit for the municipality itself.⁷⁰ It seems highly unlikely that any private entity would be able to construct and maintain a sewer system due to the large service area and difficulty of obtaining rights to the land

66. A search of Lexis state cases revealed no other opinions discussing the NSW and municipal liability resulting from storm drains.

67. See generally *Dodson & Maske*, *supra* note 34, § 2 (noting states' heavy reliance on municipalities to carry out storm drain construction and operation).

68. See *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 43 (1942).

69. See *Metz v. City of Asheville*, 150 N.C. 748, 752, 64 S.E. 881, 883 (1909) (“[T]he establishment of a public sewer system is an exercise of a governmental function.”); *Roach v. City of Lenoir*, 44 N.C. App. 608, 610, 261 S.E.2d 299, 300–01 (1980) (“The establishment and construction of a sewer system by a municipality are governmental functions entitling it to immunity from negligence.”). *But see Pulliam v. City of Greensboro*, 103 N.C. App. 748, 753–54, 407 S.E.2d 567, 569–70 (1991) (arguing that sewers are not governmental functions because there is some private competition for waste removal and because there is a general trend toward reducing immunity wherever the case is doubtful). But note that cases since *Pulliam* have backed away from the idea that sovereign immunity should be limited wherever possible. See, e.g., *Hewett v. County of Brunswick*, ___ N.C. App. ___, ___, 681 S.E.2d 531, 535 (2009) (holding that a county-operated junk service's mistaken destruction and removal of a citizen's barn was protected by governmental immunity, even though junk removal was a service provided extensively by private entities).

70. *Metz*, 150 N.C. at 752, 64 S.E. at 883 (“Certainly, nothing is more necessary to the health of a city than that its filth should be removed and its area well drained.”).

through which the pipes must traverse.⁷¹ Additionally, sewers certainly fit under the governmental function category of removing waste and junk.⁷² As such, sewers are a prototypical example of something that a municipality engages in “solely for the public benefit.”⁷³

Merriam-Webster does not define “storm drain,” choosing instead to combine storm drains and sanitary sewers into a single definition under “sewer.”⁷⁴ This is certainly reasonable, given that storm drains carry away refuse: “[A]s stormwater collects and flows over pavements, lawns, driveways, and other urban surfaces, it often picks up considerable quantities of pollutants, such as oil and grease, fertilizers, pesticides, and metals.”⁷⁵ Indicating that storm water typically is funneled through a system of conduits (like sewage), the Supreme Court of North Carolina defined storm water as “rain or snowmelt that does not evaporate or penetrate the ground and is collected by storm drains that transport it to receiving waters.”⁷⁶

Further buttressing the argument that storm drains and sewers are similar in function and purpose is the fact that many older cities even use the exact same pipes and treatment centers for both sewage and storm water.⁷⁷ Such systems are called “Combined Sewer Systems” and carry “sewage under dry weather conditions, but [are] surcharged with runoff under storm conditions.”⁷⁸ Newer municipal systems separate sewage from storm water because of the large volume of run-off water generated during large storms, which would overwhelm treatment centers.⁷⁹ Additionally, sewage and storm drain

71. See *McLean v. Town of Mooresville*, 237 N.C. 498, 500, 75 S.E.2d 327, 328 (1953) (noting that municipalities have the right to “condemn an easement for drainage purposes”). The City of Charlotte has so many storm easements that it has created a website to handle all of its residents’ questions. CITY OF CHARLOTTE & MECKLENBURG COUNTY GOV’T, EASEMENTS, <http://charmeck.org/stormwater/DrainageandFlooding/Pages/Easements.aspx> (last visited Aug. 24, 2010).

72. *Hewett*, ___ N.C. App. at ___, 681 S.E.2d at 535.

73. *Metz*, 150 N.C. at 749, 64 S.E. at 882 (quoting *McIlheney v. City of Wilmington*, 127 N.C. 146, 37 S.E. 187 (1889)).

74. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2081 (1993) (defining “sewer” as “an artificial usually subterranean conduit to carry off sewage and *sometimes surface water (as from rainfall)*”) (emphasis added).

75. *Dodson & Maske*, *supra* note 34, § 2.1.

76. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 807, 517 S.E.2d 874, 876 (1999).

77. *Dodson & Maske*, *supra* note 34, § 2.4.2; *Duhigg*, *supra* note 26.

78. *Dodson & Maske*, *supra* note 34, § 2.4.2.

79. *Id.*

systems both frequently require the placement of an extensive system of pipes and culverts.⁸⁰

The central question remains: What differences are there between sewers and storm drains that lead courts to provide immunity for sewers but not for storm drains? Given that storm drains and sewers both carry refuse water, cover expansive territories of land, and are frequently installed and operated by local governments, there does not seem to be a clear reason why storm drains and sewers are not grouped together for the purposes of immunity. Indeed, many Supreme Court of North Carolina opinions do not even differentiate between sanitary sewers and storm drains, choosing instead to label them with terms like “municipal storm sewer systems”⁸¹ or “the city’s system of storm sewers.”⁸²

D. Operating Storm Drains Is Not Proprietary

Because municipal service provision must be either governmental or proprietary, the argument that the operation of storm drains is governmental is bolstered by the evidence that operating storm drains is *not* a proprietary function. In particular, municipalities are statutorily prevented from turning a profit on their operation of storm drain systems, even though municipalities are allowed to charge a fee for the service.⁸³ The turning of a profit is crucial when determining whether an activity is proprietary or not: municipalities have both corporate and governmental elements, and profit-seeking is seen as indicative of the municipality’s corporate personality—for which immunity is not afforded.⁸⁴

80. See generally Mays, *supra* note 26, § 1.3 (noting that typical drainage systems include an interconnected system of gutters, culverts, drains, streets, streams, floodways, detention ponds, and pipes used to carry rain and snow melt to treatment plants or receiving waters); McLean v. Town of Mooresville, 237 N.C. 498, 500, 75 S.E.2d 327, 328 (1953) (noting that a municipality had statutory authority “to condemn an easement for drainage purposes”).

81. *Smith Chapel*, 350 N.C. at 807, 517 S.E.2d at 876; see also *Matternes v. City of Winston-Salem*, 286 N.C. 1, 15, 209 S.E.2d 481, 489 (1974) (using the phrase “storm sewer drainage system”).

82. *Mosseller v. Asheville*, 267 N.C. 104, 108, 147 S.E.2d 558, 561 (1966).

83. N.C. GEN. STAT. § 160A-314(a) (2009) (allowing municipalities to “establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise”).

84. *Evans v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (“[W]hen a municipal corporation 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.” (quoting *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951))).

One element that courts consider when determining whether an action is proprietary is whether the city charged a fee: “A fee suggests that an activity is proprietary, particularly if a profit results.”⁸⁵ However, charging a fee is merely a weak consideration, since the state legislature has authorized municipalities to charge fees for certain activities that are typically considered governmental functions.⁸⁶ For instance, the Supreme Court of North Carolina refused to label as proprietary the City of Charlotte’s fee-based collection of garbage where the fee merely covered the city’s costs.⁸⁷ Unlike the mere charging of a fee, the fact that a municipality actually turns a profit is considered to be “strong evidence that the activity is proprietary,”⁸⁸ which makes sense given that the purpose of most private businesses and corporations is to make a profit.

The profit element is especially relevant to storm drains because the state legislature requires that “[r]ates, fees, and charges imposed under this subsection may not exceed the city’s cost of providing a stormwater management program and a structural and natural stormwater and drainage system.”⁸⁹ In 1999 the Supreme Court of North Carolina held that the City of Durham had exceeded its statutory authority when it charged its residents a fee that allowed the city to turn a profit on its storm water system.⁹⁰ The legal inability to even *try* to turn a profit dictates that maintaining storm drains is not an activity that any private business or corporation would undertake—which is the textbook definition of a proprietary activity.⁹¹

This profit ban is especially significant because municipalities do not receive funding from the state despite the ever-increasing duties for municipalities to maintain their storm drains under federal and

85. *Id.* at 54, 602 S.E.2d at 671 (citations omitted).

86. *Id.* at 55, 602 S.E.2d at 671; *Schmidt v. Breeden*, 134 N.C. App. 248, 255, 517 S.E.2d 171, 174–75 (1999) (holding that the operation of a school daycare that charged a self-sustaining fee was not a proprietary function).

87. *James v. City of Charlotte*, 183 N.C. 630, 632, 112 S.E. 423, 424 (1922); *see also* *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528–29, 186 S.E.2d 897, 907–08 (1972) (holding that city engaged in a governmental function when it charged a fee to cover operating a landfill for disposal of garbage but still allowing recovery based on nuisance).

88. *Willett v. Chatham County Bd. of Educ.*, 176 N.C. App. 268, 270, 625 S.E.2d 900, 902 (2006) (quoting *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235 (1990)).

89. N.C. GEN. STAT. § 160A-314(a1)(2) (2009).

90. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 815, 517 S.E.2d 874, 881 (1991).

91. *Evans*, 359 N.C. at 53, 602 S.E.2d at 670 (“[W]hen a municipal corporation 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.”).

state laws.⁹² Due to the state's decisions to prohibit profits and to refuse to cover municipalities' costs, storm drains have become money pits⁹³ that no business would dare engage in. Therefore, the operation of storm drains cannot easily be characterized as a proprietary function, which only adds additional weight to the argument that such activity fits well within the Supreme Court of North Carolina's definitions of a governmental function.⁹⁴

III. THE HISTORICAL REFUSAL TO GRANT DAMAGES FOR PERSONAL INJURY

Historically, North Carolina courts have been willing to hold municipalities liable for property damages even when the municipality engaged in a governmental activity.⁹⁵ However, many of these cases specifically excluded from recovery all personal injury or wrongful death damages.⁹⁶ Therefore, *Jennings* exceeded precedent when it allowed recovery for wrongful death.⁹⁷

92. See *supra* Part II.B.

93. See Duhigg, *supra* note 26 (noting that Philadelphia is planning to spend \$1.6 billion to improve storm water run-off, that New York City would have to spend \$58 billion to prevent all illegal storm water discharges from occurring, and that it would cost \$400 billion to fix the nation's sewer and storm drain infrastructure).

94. See *supra* Part II.A.

95. See *Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 537, 151 S.E.2d 35, 37 (1966); *Metz v. City of Asheville*, 150 N.C. 748, 751, 64 S.E. 881, 882 (1909); *Williams v. Town of Greenville*, 130 N.C. 93, 97, 40 S.E. 977, 978 (1902); *Stone v. City of Fayetteville*, 3 N.C. App. 261, 264, 164 S.E.2d 542, 545 (1968).

96. *Metz*, 150 N.C. at 751, 64 S.E. at 882; *Williams*, 130 N.C. at 97, 40 S.E. at 978; *Stone*, 3 N.C. App. at 264, 164 S.E.2d at 545. Going even further than *Metz*, *Williams*, and *Stone*, the 1980 court of appeals case *Roach v. City of Lenoir* refused to allow recovery even for property damages resulting from negligent operation of a sewer system:

The establishment and construction of a sewer system by a municipality are governmental functions entitling it to immunity from negligence. Plaintiffs concede in their brief that "... the maintenance of a public sewerage system is a governmental function[.]" ... Plaintiffs argue that even if the doctrine of governmental immunity is applicable, property damages are recoverable [under a claim of nuisance]. ... We do not agree. The case sub judice is distinguishable since plaintiffs neither allege facts sufficient to support a nuisance claim nor is their claim based on a theory of nuisance. Thus, the City of Lenoir, while performing a governmental function in the maintenance of a sewer system within its municipal jurisdiction, may not be held liable for any damage arising out of the governmental activity unless it expressly waives its immunity pursuant to N.C. Gen. Stat. § 160A-485.

Roach v. City of Lenoir, 44 N.C. App. 608, 610, 261 S.E.2d 299, 300-01 (1980 (first alteration in original)) (citations omitted).

97. *Jennings v. City of Fayetteville*, ___ N.C. App. ___, ___, 680 S.E.2d 757, 760, *discretionary review denied*, 363 N.C. 654, 684 S.E.2d 891 (2009).

The seminal North Carolina storm drain case is *Williams v. Town of Greenville*.⁹⁸ In *Williams*, the defendant-town had cut a drainage ditch near the plaintiff's property, but the ditch was constructed negligently.⁹⁹ As a result, the ditch became

so choked and out of repair that in time of heavy rains it would not carry the water that came down the ditch; [and] . . . defendant had allowed the open ditch to become the depository that of dead fowls and dead animals until it produced a stench both disagreeable and unhealthy¹⁰⁰

The plaintiff's home "became unhealthy, two of his children became sick and died," and the plaintiff "suffered great pain and anguish of mind[,] . . . lost much time in nursing [his children,] . . . and he had large doctor's bills and drug bills to pay"¹⁰¹

The Supreme Court of North Carolina reasoned that governmental immunity applied to all actions of the defendant-town that were made in "pursuance of its legislative or judicial powers," *except* when the municipality's actions damage the rights of property ownership, which "no one has the right to invade, not even the Government, unless it be for public purposes, and then only by paying the owner for it."¹⁰² As such, the court drew a bright-line rule when it held that the defendant-town

may be held to answer in damages as for a trespass, for any damages the plaintiff may have sustained to his property by reason of the wrongful action of the defendant; but not for any sickness that may have been caused to him or his family; nor can he recover damage for his time, the increase in expenses of his family, nor for doctors' bills or medicines¹⁰³

In *Metz v. City of Asheville*,¹⁰⁴ the Supreme Court of North Carolina once again applied the *Williams* rule, this time in the context of sewers. *Metz* involved an administrator who sued the defendant-city when a resident died after contracting typhoid fever from sewer refuse that drained near his house.¹⁰⁵ Relying on *Williams*, the Supreme Court of North Carolina held that the defendant-city was

98. 130 N.C. 93, 40 S.E. 977 (1902).

99. *Id.* at 93-94, 40 S.E. at 977.

100. *Id.* at 93, 40 S.E. at 977.

101. *Id.*

102. *Id.* at 96, 40 S.E. at 978.

103. *Id.* at 97, 40 S.E. at 978.

104. 150 N.C. 748, 64 S.E. 881 (1909).

105. *Id.* at 749, 64 S.E. at 881.

“liable only for damages to the property, not for bills of physicians, increase in expenses of his family, loss of time or mental anguish.”¹⁰⁶

The trend of refusing to allow recovery for personal injury continued in North Carolina well into the twentieth century. A 1930 supreme court case reaffirmed *Metz*,¹⁰⁷ and in the 1968 case of *Stone v. City of Fayetteville*,¹⁰⁸ the North Carolina Court of Appeals summarized the applicable precedent:

Thus it appears that while our Supreme Court recognizes the right of recovery against a municipal corporation for property damage on the theory that one whose property is appropriated for public purposes is entitled to just compensation therefor, it recognizes immunity of a municipal corporation from liability for personal injury or death arising from the maintenance of a ditch used for drainage and sewerage.¹⁰⁹

By allowing recovery for wrongful death, *Jennings* went beyond the still-standing supreme court precedent in *Williams* and *Metz* and even disregarded its own ruling in *Stone*, which ironically had dealt with the same defendant-city as in *Jennings*.¹¹⁰ Therefore, a thorough study of North Carolina precedent like *Williams*,¹¹¹ *Metz*,¹¹² and *Stone*¹¹³ indicates that municipalities should be afforded governmental immunity when their operation of storm drains results in personal

106. *Id.* at 751, 64 S.E. at 882. The *Metz* court also noted the New York Court of Appeals case of *Springfield Fire and Marine Insurance Co. v. Village of Keeseville*, 42 N.E. 405, 408 (N.Y. 1895), where the court refused to allow damages for personal injury after the municipality had negligently operated a waterworks system in an attempt to extinguish a fire. The *Keeseville* decision was reached on financial grounds: “[C]ases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained.” *Id.* at 406. *Metz* also noted the even harsher decision of the Massachusetts Supreme Judicial Court in *Buckley v. City of New Bedford*, 29 N.E. 201, 202 (Mass. 1891), which refused to allow damages even where the defendant-city had created a nuisance. *Metz*, 150 N.C. at 751–52, 64 S.E. at 882.

107. *Wagner v. Conover*, 200 N.C. 82, 84, 156 S.E. 167, 168 (1930) (holding that the noxious fumes emanating from a sewer could be factored into damages only to the extent that the fumes lowered the value of the property itself).

108. 3 N.C. App. 261, 164 S.E.2d 542 (1968). The disagreement between *Stone* and *Kizer* was even pointed out in a North Carolina tort treatise: “Maintenance of a storm drainage system has been the subject of conflicting rulings in the Court of Appeals as to whether it is an immune governmental or a non-immune proprietary function.” CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 19.43.3.2.2 (2d ed. 1999).

109. *Stone*, 3 N.C. App. at 264, 164 S.E.2d at 545.

110. The City of Fayetteville was the defendant in both cases. *Id.*; *Jennings v. City of Fayetteville*, ___ N.C. App. ___, 680 S.E.2d 757 (2009).

111. *Williams v. Town of Greenville*, 130 N.C. 93, 97, 40 S.E. 977, 978 (1902).

112. *Metz v. City of Asheville*, 150 N.C. 748, 751, 64 S.E. 881, 882 (1909).

113. *Stone*, 3 N.C. App. at 264, 164 S.E.2d at 545.

injury. Allowing recovery for a wrongful death claim in *Jennings* was not in accord with 100 years of precedent.¹¹⁴

IV. POLICY CONSIDERATIONS

Storm drain liability may seem to be a dry subject, but a case like *Jennings* could certainly have a large financial impact on the behavior of municipalities, who are already facing limited budgets.¹¹⁵ One only needs to look at recent news reports to find a multitude of deaths caused by storm flooding,¹¹⁶ any one of which could lead the decedent's estate to file suit against the city or county. Extensive litigation resulting from extant drains could threaten municipality budgets, which, as previously described, are already under increased storm water costs thanks to ever-increasing EPA and state regulations.¹¹⁷

There are numerous examples of the problems caused by storm drain costs that face large cities, many of which already have expansive budgets. Minneapolis has fifteen miles of storm water tunnels that are badly outdated, some of which are more than 100 years old and were constructed before the days of reinforced

114. *Jennings* relied heavily upon the conclusion of *Kizer*, which said that a study of supreme court precedent indicated overwhelming evidence for recovery of damages resulting from storm drains. *Kizer v. City of Raleigh*, 121 N.C. App. 526, 528, 466 S.E.2d 336, 338 (1996) (“[P]rior Supreme Court decisions find municipal liability in storm drain maintenance cases.”). As such, the court of appeals felt tethered to *Kizer*'s broad holding. *Jennings*, ___ N.C. App. at ___, 680 S.E.2d at 760 (“[O]ur Supreme Court has not overturned or modified this Court's holding in *Kizer*, and we are bound by its holding that municipalities do not enjoy governmental immunity from liability resulting from their operation of storm drain systems.”). However, *Kizer* actually dealt only with property damages, *Kizer*, 121 N.C. App. at 527, 466 S.E.2d at 337, and thus its holding was not binding on the court of appeals above the *Williams* and *Stone* decisions.

115. See NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 2, at 1; Winter, *supra* note 2 (noting that forty-eight states have cut their budget allowances for dealing with environmental clean-up regulations, many of which are promulgated by the Environmental Protection Agency).

116. See, e.g., Kate Brumback, *9 Southeastern Storm Deaths as Floodwaters Linger*, ASSOCIATED PRESS, Sept. 23, 2009 (discussing details of eight Georgians and one Alabamian who were killed by storm water flooding); Mike Lee, *Fort Worth Grapples with Flood Control*, FORT WORTH STAR-TELEGRAM, Aug. 18, 2009, at B1 (noting that an eighty-year-old storm drain was so outdated that rainfall could yield five feet of water in the city of Fort Worth, and mentioning that several residents died in 2004 when storm drains overflowed); *3-year-old Dies After Falling into Ditch*, ABC11-WTVD, Feb. 17, 2010, <http://abclocal.go.com/wtvd/story?section=news/local&id=7280842> (last visited Aug. 24, 2010) (noting that a three-year old had wandered away from home and drowned in a drainage ditch).

117. See *supra* Part II.B.

concrete.¹¹⁸ The force of the water in some tunnels has caused manhole covers to blow off and geysers to flood the nearby streets.¹¹⁹ Streets and buildings are at risk of collapsing into sinkholes, but the city only has but so much money. It would cost \$75 million to repair those fifteen miles of tunnels, but the annual repair budget is only \$2 million.¹²⁰ Even trying to repair the tight tunnels has its risks: two workers drowned in July 2008 when a sudden deluge caught them off guard.¹²¹ New York City claims that it would cost \$58 billion to repair all of its storm and sewer pipes, which would result in residents' water bills nearly doubling.¹²² Philadelphia will spend \$1.6 billion over the next twenty years just to create sidewalks and green areas that can better absorb rainwater.¹²³ These cities are just a few examples, but they are not the exception: the estimate for bringing the nation's drains up to code is put at \$400 billion over the next ten years.¹²⁴

For cities with budgets smaller than those of New York and Philadelphia, the outcome in *Jennings* is an example of how municipal budgets are already stretched so thin that the costs of a single wrongful death suit could exceed the amount spent annually to repair the storm drain system.¹²⁵ The average wrongful death award in the United States from April 1998 to April 2008 was \$3,448,917 for an adult male,¹²⁶ \$2,990,032 for an adult female,¹²⁷ and \$5,176,519 for a minor.¹²⁸

118. David Shaffer, *A Threat Builds Deep Beneath the Twin Cities*, STAR TRIBUNE (Minneapolis), Feb. 17, 2008, at 1A.

119. *Id.*

120. *Id.*

121. *Id.*

122. Duhigg, *supra* note 26.

123. *Id.*

124. *Id.*

125. However, there are still ways for municipalities to avoid or limit their liability even under the current rule of *Jennings*. For instance, municipalities may still be able to avoid paying damages by arguing contributory or comparative negligence on the part of the plaintiff, especially since more than half of all flood deaths occur when people try to drive cars through flooded areas. *Storm-Related Mortality—Central Texas, October 17–31, 1998*, MORBIDITY AND MORTALITY WEEKLY REP. (Centers for Disease Control and Prevention, U.S. Dep't Health & Hum. Services, Wash., D.C.), Feb. 25, 2000, at 133–35. Municipalities could also argue that a reasonable standard of care would not be able to avoid deaths caused by torrential floods, and, thus, there was no breach of duty. Municipalities can limit total expenditures on storm drain liability by purchasing insurance in the case of property damage or personal injury resulting from their negligence. N.C. GEN. STAT. § 160A-485 (2009). Municipalities could also seek to avoid some litigation by requiring users of storm drains to sign contracts prohibiting suit in the case of damages. *See Smith v. City of Winston-Salem*, 247 N.C. 349, 355, 100 S.E.2d 835, 839 (1957).

126. JURY VERDICT RESEARCH, INC., 4 PERSONAL INJURY VALUATION HANDBOOK § 10.5, at 7 tbl. "Adult Males, Overall" (2008).

One could argue that if municipalities are given immunity for storm drains, they may feel that they have no incentive to improve the drains since there will be no punishment when property or lives are lost due to the negligent operation or construction of the drains. However, given the extensive regulations now in place per the EPA guidelines, municipalities do actually have an incentive to improve their storm drains for the purpose of avoiding flooding and excessive discharges, under penalty of severe civil and criminal punishments.¹²⁹ Imposing additional civil liability may just eat away at town treasuries and result in fewer funds to bring drains up to code.¹³⁰

On the other hand, cases like *Jennings* allow families who have lost loved ones to seek compensation. Concededly, there will indeed be many circumstances where injured parties will be left uncompensated, which certainly is not a very savory outcome for the families. However, an important effect of immunity is that governments can undertake necessary activities without the risk of being bankrupted by litigation,¹³¹ which could result in the citizens of an entire town being left without essential services. This is the necessary trade-off of providing immunity. Rather than arguing the fairness and viability of sovereign immunity,¹³² this Recent Development assumes that immunity will remain a legal tenet in

127. *Id.* § 20.5, at 5 tbl. “Adult Females, Overall.”

128. *Id.* § 30.5, at 3 tbl. “Awards for Minors, Overall.”

129. *See supra* Part II.B.

130. *See* Duhigg, *supra* note 26 (“Plant operators and regulators, for their part, say that fines would simply divert money from stretched budgets and that they are doing the best they can with aging systems and overwhelmed pipes.”).

131. *See* Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 42 N.E. 405, 406 (N.Y. 1895).

132. Some commentators have argued that sovereign immunity in *any* situation is repulsive to our ideal that a government should be answerable to its citizens. *See* DOERNBERG, *supra* note 8, *passim*. Even in the early 1970s, the Supreme Court of North Carolina noted:

[W]e recognize merit in the modern tendency to restrict rather than to extend the application of governmental immunity. This trend is based, *inter alia*, on the large expansion of municipal activities, the availability of liability insurance, and the plain injustice of denying relief to an individual injured by the wrongdoing of a municipality. A corollary to the tendency of modern authorities to restrict rather than to extend the application of governmental immunity is the rule that in cases of doubtful liability application of the rule should be resolved against the municipality.

Koontz v. City of Winston-Salem, 280 N.C. 513, 529–30, 186 S.E.2d 897, 908 (1972). *But see* *Hewett v. County of Brunswick*, ___ N.C. App. ___, ___, 681 S.E.2d 531, 535–36 (2009) (holding that a county-operated junk service’s mistaken destruction and removal of a citizen’s barn was protected by sovereign immunity, even though junk removal was a service provided extensively by private entities).

North Carolina for some time into the future and that the delineation of immune actions from non-immune actions will continue to be decided by courts employing a governmental/proprietary distinction.

CONCLUSION

As North Carolina law currently stands, municipalities have no immunity for their operation of storm drains, despite ample precedent that had severely restricted liability resulting from the negligent operation of storm drains. Given that (1) storm drains fit into precedential definitions of government functions, (2) the state and EPA extensively regulate storm drains with severe punishments for violations, (3) storm drains are remarkably similar to sewers, and (4) municipalities are statutorily forbidden from turning a profit on their operation of storm drains, there is a long train of arguments all tending invariably toward the same conclusion: the operation of storm drains should be afforded governmental immunity. Yet to be seen is whether *Jennings* will leave municipalities up the creek without a paddle if the floodgates of storm drain litigation burst open, or if *Jennings* will (in the permuted words of Justice Frankfurter) languish as a “derelict on the law of the waters.”¹³³

TRENT MCCOTTER

133. Justice Frankfurter's original quote was “a derelict on the waters of the law,” implying that the majority's opinion would not be followed by future courts. *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).





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