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Sovereign Immunity -- Tort Liability of Municipal Corporations Operating Public Hospitals in North Carolina: Sides v. Cabarrus Memorial Hospital

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Sovereign Immunity—Tort Liability of Municipal Corporations Operating Public Hospitals in North Carolina: Sides v. Cabarrus Memorial Hospital

Under the doctrine of sovereign immunity as first declared by the North Carolina Supreme Court in *Moffitt v. City of Asheville*[1] in 1889, and as more recently affirmed by the court in *Steelman v. City of New Bern*,[2] municipal corporations enjoy immunity from suit in tort if the tortious conduct complained of arose from the exercise of their governmental function.[3] However, there is no immunity from suit if the municipal corporation caused the alleged tort while functioning in its private or proprietary capacity.[4] The judicial classification of the various activities undertaken by municipal corporations as either governmental or proprietary is therefore crucial to the tort plaintiff seeking damages from such entities under North Carolina law. In *Sides v. Cabarrus Memorial Hospital*[5] the North Carolina Supreme Court confronted for the first time the question whether the construction, maintenance, and operation of a hospital by a county or a city is a governmental or proprietary function. In holding that it was a proprietary function,[6] and thus one in which the county or city was subject to unlimited liability in tort, the court followed the modern trend of restricting the doctrine of sovereign immunity as applied to municipal corporations.[7]

1. 103 N.C. 237, 254, 9 S.E. 695, 697 (1889). *See* text accompanying notes 32-33 *infra*.

2. 279 N.C. 589, 592-93, 184 S.E.2d 239, 241-42 (1971). The plaintiff in *Steelman* urged the court to completely abrogate the doctrine as applied to municipal corporations. He contended that the court was the appropriate body to do so since it had originally adopted the doctrine in North Carolina. The court refused to accept this challenge; instead it affirmed the historical approach taken in *Moffitt* and deferred any modifications or abrogations of the doctrine to the General Assembly. *Id.* at 594-95, 184 S.E.2d at 242-43.

3. For a definition of a "governmental function" and a full discussion of the subject see notes 33-39 and accompanying text *infra*. The N.C. General Assembly has authorized municipal corporations to waive their immunity under specific circumstances. N.C. GEN. STAT. § 160A-485 (1974), allows municipal corporations to waive their tort immunity for the operation of motor vehicles by purchasing liability insurance. N.C. GEN. STAT. § 153A-435 (1974), which is set forth in note 17 *infra*, permits a *county* to waive its immunity in tort by purchasing liability insurance coverage. Under both sections the waiver is only to the extent of such coverage.

4. For a definition of "proprietary function" and a more detailed discussion of the subject see notes 33-39 and accompanying text *infra*.

5. 287 N.C. 14, 213 S.E.2d 297 (1975).

6. *Id.* at 24-25, 213 S.E.2d at 304.

7. *See* notes 42-46 and accompanying text *infra*.

Plaintiff in *Sides* was the administrator of the estate of Mrs. Terry Compton Sides. He instituted suit against Cabarrus Memorial Hospital and others,[8] alleging negligence in the treatment and care of the intestate which resulted in her personal injury and wrongful death.[9] His claims against the hospital were based on the doctrine of *respondeat superior*. Defendant hospital moved under rules 12(b)(1), (2) and (6) of the North Carolina Rules of Civil Procedure to dismiss the complaint.[10] It argued that Cabarrus Memorial Hospital was an agency of the State of North Carolina, separate and apart from Cabarrus County,[11] and that therefore the North Carolina Tort Claims Act[12]

8. The named defendants were: Cabarrus Memorial Hospital; Drs. J. Vincent Arey and John R. Ashe, Jr., and their employer Cabarrus Clinic for Women P.A.; pathologists Drs. J.O. Williams and William J. Reeves; and nurse Nancy E. Deason. Brief for Appellee at 3-4, Sides v. Cabarrus Memorial Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974).

9. The plaintiff alleged that Mrs. Terry was admitted to the defendant hospital on the evening of March 8, 1971 under the advice and care of Drs. Arey and Ashe for the delivery of her third child, and that approximately one hour later she gave birth to a healthy female child but subsequently began to lose blood. It was further alleged that Nurse Deason, who was working for Drs. Reeves and Williams, failed to match and cross match her blood when a transfusion was necessary, which contributed to the alleged negligent transfusion by Dr. Arey of *B-positive blood* into her body when her blood type was *A-negative*. As a consequence of these alleged acts of negligence plaintiff contended that Mrs. Terry suffered a "transfusion reaction" resulting in great pain and suffering and eventually her death. 287 N.C. at 15, 213 S.E.2d at 298. *See also* Brief for Appellee at 3-10, Sides v. Cabarrus Memorial Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974).

10. The grounds were that the court lacked jurisdiction over the subject matter, that the court did not have jurisdiction over the defendant, and that the plaintiff failed to state a claim upon which relief could be granted. 287 N.C. at 15, 213 S.E.2d at 298.

11. 287 N.C. at 15, 213 S.E.2d at 298. Defendant's contention that Cabarrus Memorial Hospital was an agency of the state, separate and apart from Cabarrus County, was based upon defendant's interpretation of the Special Act of the General Assembly from which it derived its charter. *See* ch. 307, [1935] N.C. Pub.-Loc. L. 276.

12. N.C. GEN. STAT. § 143-291 (Cum. Supp. 1975). This statute constitutes a waiver by the state of North Carolina of its sovereign immunity from suit in tort up to $30,000. This section reads as follows:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate

placed exclusive jurisdiction of the claim in the North Carolina Industrial Commission, rather than in the superior court. Alternatively, defendant argued that even if the hospital were found to be an agency of the county, its operation was a governmental function and was insulated from suit in tort since there had been no waiver of its governmental immunity.[13] Treating the motion as one for summary judgment,[14] Superior Court Judge (now North Carolina Supreme Court Justice) James G. Exum, Jr. rejected both of these arguments.

Holding that the hospital was an agency of Cabarrus County, not of the State,[15] the North Carolina Court of Appeals affirmed Judge Exum's denial of summary judgment.[16] It further ruled that the purchase of medical malpractice liability insurance for the hospital by the County Commissioners constituted a waiver of the County's sovereign immunity, thus making it subject to liability in tort in the superior court to the extent of the insurance coverage.[17] Though the court of appeals never directly addressed the issue, it is consistent with its analysis to

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order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of thirty thousand dollars ($30,000).

13. *See* notes 17, 20-21 and accompanying text *infra.*

14. N.C.R. CIV. P. 56.

15. 22 N.C. App. at 122, 205 S.E.2d at 788. The court devoted its entire opinion to this issue. In holding that the hospital was an agency of the county, the court thereby destroyed defendants' argument that section 143-291 of the General Statutes applied since that section is limited to the state and its "agencies." Therefore the limited waiver of sovereign immunity authorized by that section ($30,000) was not applicable. The court based its decision on this issue on its interpretation of the special act of the General Assembly by which the hospital was authorized. *Id.* at 120-22, 205 S.E.2d at 787-88. The court also relied upon several rulings by various state and federal agencies that the hospital was an agency of the county. *Id.* at 122, 205 S.E.2d at 788.

16. 22 N.C. App. 117, 205 S.E.2d 784 (1974). The court accepted the hospital's appeal under N.C. GEN. STAT. § 1-277(b) (1974) which provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause."

17. 22 N.C. App. at 122-23, 205 S.E.2d at 788. N.C. GEN. STAT. § 153A-435(a) (1974) allows a county to waive its sovereign immunity as to governmental functions in this limited manner. This section reads as follows:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county. . . .

assume that the court considered the County's operation of the hospital to be a governmental function,[18] for otherwise the issue of waiver would not have arisen.

The North Carolina Supreme Court devoted much of its opinion to the affirmation of the court of appeals decision that the hospital was an agency of Cabarrus County.[19] However, because of its resolution of the issue whether the operation of the hospital by Cabarrus County was a governmental or proprietary function,[20] the court never reached the lower courts' decision concerning the County's waiver of its sovereign immunity.[21] Holding that such an activity is proprietary in nature, the court exposed Cabarrus Memorial, and all other similarly situated hospitals, to unlimited liability in tort for the negligent acts of employees committed within the course and scope of their employment.[22]

To evaluate the *Sides* decision properly, it is necessary to review the judicial history of the doctrine of sovereign immunity, specifically as applied to municipal corporations, and to examine the present status of its application to the operation of a hospital by such entities. The doctrine of sovereign immunity apparently evolved in the English common law from the monarchistic principle that "the King can do no wrong." It followed from that assumption that there was no reason for suits against the sovereign.[23] In 1798, *Russell v. Men of Devon*[24] extended this principle in England to cover the activities of a county. As was true of many other common law principles, the idea that government could not be sued in tort without its consent was soon embraced by American courts.[25] The extension of the doctrine to the activities

18. This approach would have limited the plaintiff's recovery to the amount of liability insurance purchased by the county which would be a larger maximum than the $30,000 in the Industrial Commission but still less than unlimited liability.

19. 287 N.C. at 16-20, 213 S.E.2d at 299-301. The court relied upon the same rationale as the court of appeals. *See* note 16 *supra.*

20. 287 N.C. at 20, 213 S.E.2d at 301.

21. *Id.* at 26, 213 S.E.2d at 304.

22. *Id.* This holding is most favorable to the plaintiff since there is no limit to the county's liability, as there would have been under the court of appeals approach and under defendants' argument that jurisdiction was with the North Carolina Industrial Commission.

23. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970-71 (4th ed. 1971); 72 AM. JUR. 2d *States, Territories and Dependencies* § 99 (1974).

24. 2 Term Rep. 667, 100 Eng. Rep. 359 (K.B. 1788).

25. *E.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) in which Chief Justice John Marshall's opinion applied the doctrine to activities of the federal government. The doctrine has also been applied to the activities of state governments at one time by all the jurisdictions. W. PROSSER, *supra* note 23, at 975. *See also* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), in which Mr. Justice Holmes stated that "[a]

of a town was first accepted in the United States in 1812 in *Mower v. Inhabitants of Leicester*,[26] in which a Massachusetts court held that no action at common law could be brought against a town for defective highways.

The dual character of a municipal corporation, that it is at the same time both a governmental unit and a corporation, was utilized by a New York court in *Bailey v. City of New York*[27] in 1842 to limit the immunity of these entities. In that case the court distinguished between those activities of municipal corporations that were "public" or "governmental" in nature and those that were "private" or "proprietary"; the court limited the tort immunity to those activities classified as "public" or "governmental."[28]

There are several policy reasons that have been historically reiterated to support the immunity of municipal corporations from suit in tort when the activity involved can be classified as governmental in nature:

> [T]he municipality derives no profit from the exercise of governmental functions, which are solely for the public benefit; . . . in the performance of such duties public officers are agents of the state and not of the corporation, so that the doctrine of respondeat superior does not apply; . . . cities cannot carry on their governments if money raised by taxation for public use is diverted to making good the torts of employees; and . . . it is unreasonable to hold the corporation liable for negligence in the performance of duties imposed upon it by the legislature, rather than voluntarily assumed under its general powers.[29]

At first the North Carolina Supreme Court rejected the doctrine of sovereign immunity and its application to municipal corporations. In 1848 the court stated, "[b]ut as the maxim is somewhat harsh in its mildest sense, we are not disposed to extend its application . . . ."[30] Although this view was again approved in 1885,[31] the court eventually accepted the doctrine's application to municipal corporations. Using

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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 legal right as against the authority that makes the law on which the right depends."

26. 9 Mass. 247, 6 Am. Dec. 63 (1812).

27. 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

28. *Id.* at 539-40. For an excellent historical account of this distinction and an analysis of the *Bailey* decision see BARNETT, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations: The Antecedents of Bailey v. City of New York*, 16 OR. L. REV. 250 (1937).

29. W. PROSSER, *supra* note 23, at 978 (footnotes omitted).

30. Meares v. Commissioners of Wilmington, 31 N.C. 73, 86 (1848) (per curiam).

31. Wright v. City of Wilmington, 92 N.C. 156, 159 (1885).

the *Bailey* governmental-proprietary distinctions in *Moffitt v. City of Asheville*[32] in 1889, the court held that:

> The liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the corporation is exercising, when the damage complained of is sustained. . . .
>
> When such municipal corporations are acting . . . in their ministerial or corporate character . . . they are impliedly liable for damage caused by the negligence of officers or agents . . . .
>
> On the other hand, where 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, it incurs no liability for the negligence of its officers . . . .[33]

This approach is the one still utilized by the court today.

An examination of the decisions in which the North Carolina Supreme Court has had to draw the difficult line between governmental and proprietary activities reveals that it has considered two factors to be crucial. It has classified an activity as proprietary only when it has involved a monetary charge of some type,[34] regardless of whether this charge has generated a profit.[35] On the other hand, the court has classified as governmental only those activities that have historically been performed by government rather than by private corporations.[36] However, two further considerations enunciated by the court in *Sides*

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32. 103 N.C. 237, 9 S.E. 695 (1889).

33. *Id.* at 254-55, 9 S.E. at 697.

34. 287 N.C. at 22, 213 S.E.2d at 302. *See, e.g.*, Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972) (charge for use of garbate landfill); Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957) (charge for admission to public park); Foust v. City of Durham, 239 N.C. 306, 79 S.E.2d 519 (1954) (supplying water to customers for which a charge was made and from which a profit was realized); Rice v. City of Lumberton, 235 N.C. 227, 69 S.E.2d 543 (1952) (distributing electricity for profit); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949) (operation of an airport); Lowe v. City of Gastonia, 211 N.C. 564, 191 S.E. 7 (1937) (operation of a golf course).

35. 287 N.C. at 23, 213 S.E.2d at 303. *See, e.g.*, Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957) (charge collected for use of park did not meet operating expenses, held operation of park was a proprietary function); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949) (airport operated by the city at a loss yet held to be a proprietary function).

36. 287 N.C. at 23, 213 S.E.2d at 303. *See, e.g.*, State *ex rel.* Hayes v. Billings, 240 N.C. 78, 81 S.E.2d 150 (1954) (erecting and maintaining a jail by a county); Hamilton v. Town of Hamlet, 238 N.C. 741, 78 S.E.2d 770 (1953) (installation and maintenance of traffic light signals); Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937) (operation of police car); Cathey v. City of Charlotte, 197 N.C. 309, 148 S.E. 426 (1929) (erection and maintenance of police and fire alarm system); Howland v. City of Asheville, 174 N.C. 749, 94 S.E. 524 (1917) (furnishing water for extinguishing fires).

exemplify the leeway built into the traditional tests that has allowed the court to choose one classification or the other in order to effectuate its policy goals or to "do justice" in a particular case.[37] First, even though an activity may be labeled in general a governmental one, liability may be attached to certain of its phases; and conversely, although an activity may be determined in general to be proprietary, certain phases may be held exempt from liability.[38] Secondly, even though prior cases have held an identical activity to be of such a public necessity that funds expended in connection with it were held to be for a public purpose, this prior determination does not guarantee that the classification will be deemed governmental for tort purposes.[39]

The imprecision of the governmental-proprietary test and the court's ability to manipulate it in order to achieve a particular result are especially evident in the *Sides* case. Although *Sides* presented the North Carolina Supreme Court with an issue of first impression, the Fourth Circuit Court of Appeals had earlier held in *Hitchings v. Albemarle Hospital*[40] that if presented with the issue of immunity of a municipal hospital, the North Carolina Supreme Court would construe such an activity to be governmental in nature.[41] The *Hitchings* deci-

37. In Koontz v. City of Winston-Salem, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972) Mr. Justice Branch said: "[A]pplication 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." The same opinion is expressed in Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910, 938 (1936), in which the author states that "[t]he rules sought to be established are as logical as those governing French irregular verbs."

38. 287 N.C. at 21, 213 S.E.2d at 302. *Compare* Woodie v. Town of North Wilkesboro, 159 N.C. 353, 74 S.E. 924 (1912) (operation of municipal water plant held proprietary) *with* Klassette v. Drug Co., 227 N.C. 353, 42 S.E.2d 411 (1947) *and* Mabe v. City of Winston-Salem, 190 N.C. 486, 130 S.E. 169 (1925) (furnishing of water to extinguish fires held governmental).

39. 287 N.C. at 22, 213 S.E.2d at 302. *Compare* Turner v. City of Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944) (expenditure of public funds for construction and maintenance of airport was for a *public purpose*) *with* Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949) (operation and maintenance of airport a *proprietary function*); *compare* James v. City of Charlotte, 183 N.C. 630, 112 S.E. 423 (1922) (city engaged in *governmental function* when it removed garbage for its inhabitants for a fee that covered only its actual collection and disposal expenses) *with* Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972) (city engaged in *proprietary function* in operating a landfill for disposal of garbage where city had contracted with county to dispose of county garbage for a fee).

40. 220 F.2d 716 (4th Cir. 1955).

41. *Id.* at 718. The court reasoned as follows:

> We must, of course, follow the law of North Carolina. No case directly in point has been found. We think, however, that the North Carolina cases show a distinct tendency to hold to the so-called majority rule, which would grant immunity in the instant case. We think, under these cases, the munici-

sion therefore points out that another well qualified court can apply the same tests utilized in *Sides* and yet reach the opposite conclusion concerning immunity.

Although *Hitchings* rather than *Sides* represents the majority rule in the United States as to municipal hospital liability,[42] this rule, like the doctrine of charitable immunity, is being increasingly abandoned.[43] Modern courts often apply the traditional classification tests in such a way as to restrict rather than to extend the tort immunity of municipal corporations, especially when they are considering the operation of a public hospital. The reason for this judicial trend is that the traditional arguments used to justify municipal tort immunity are no longer considered valid. The most plausible of these justifications was based upon the fact that municipal activities and treasuries were extremely limited; courts therefore concluded that holding municipalities liable for the torts of their employees would place an unbearable burden upon cities' treasuries, thus adversely affecting their service to the public.[44] Today, however, municipal operations have mushroomed to encompass a myriad of activities. Also, municipal revenues have grown dramatically on account of new tax levies and direct payments from citizens for services rendered. Considering the relatively inexpensive availability of liability insurance, the cost of paying for the torts of municipal employees can be absorbed as a normal operating expense. This additional outlay from the municipal treasury appears inconsequential when viewed against the gross inequity involved in totally denying relief to a tort victim just because his injury is attributable to the actions of a municipal employee or agent performing a governmental function.[45]

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palities here were, in operating the hospital, exercising a governmental function. Certainly, the health of its citizens is a matter of grave public concern to a State, or municipal subdivisions thereof.

Id.

42. For a state-by-state analysis see II A HOSPITAL LAW MANUAL, Negligence, Immunity to Suit, Section 3, 45-55 (1973); Annot., 25 A.L.R.2d 203 (1952).

43. *See* note 42 *supra*. For a thorough discussion of the demise of the doctrine of charitable immunity see Annot., 25 A.L.R.2d 29 (1952).

The North Carolina Supreme Court abolished the doctrine of charitable immunity as applied to hospitals in North Carolina in Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).

44. *See* text accompanying note 29 *supra*.

45. Commentators for years have been calling for the abrogation of the doctrine of sovereign immunity. *See, e.g.*, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Note, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888; Note, *Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability*, 41 N.C.L. REV. 290 (1963). *See generally* Annot., 60 A.L.R.2d 1198 (1958); Annot., 120 A.L.R. 1376 (1939).

The North Carolina court was cognizant of these considerations in reaching its result in *Sides*.[46]

Although adhering to the historical classification approach, the North Carolina Supreme Court in *Sides* joined the ranks of a growing minority of jurisdictions that have refused to extend the immunity doctrine to the operation of a hospital by a municipal corporation. Noting the existence of this judicial trend and approving the policy reasons supporting it, the court applied the traditional tests and found that the hospital derived "substantial revenues" from room rents, nursing care, and laboratory work.[47] It also found that the operation of a public hospital was not one of the "traditional" services rendered by local governments.[48] Therefore, the court concluded that this activity possessed all of the characteristics that had been traditionally labeled as proprietary in nature.

The *Sides* decision indicates that, although steadfast in its refusal to modify or abolish the doctrine of sovereign immunity, considering any such action exclusively within the domain of the General Assembly,[49] the court is nevertheless willing to manipulate the traditional classification tests to ensure that the doctrine's coverage is not extended. Had it not so strongly desired to hold the hospital accountable for the acts of its employees, the court could just as easily have concluded, as did the Fourth Circuit in *Hitchings*, that the operation of a public hospital is a uniquely governmental function and is therefore shielded from liability.

In conclusion, it must be noted that the *Sides* decision may have a significant impact on future cases involving the application of the doctrine of sovereign immunity to other activities of municipal corporations. As a practical matter, this decision indicates that a tort plaintiff seeking damages from a municipal corporation and alleging negligence on the part of the municipality's employees or agents should structure his arguments within the framework of the traditional tests applied by the court in *Sides*, rather than attempting to convince the court to abrogate the immunity of such entities entirely. In a case in which there is not strong North Carolina precedent for classifying the municipal activity involved as governmental, the plaintiff's chances for recovery are

46. 287 N.C. at 24, 213 S.E.2d at 304.
47. *Id.* at 24, 213 S.E.2d at 303. *See* notes 36-37 and accompanying text *supra.*
48. *Id.* at 25, 213 S.E.2d at 304. *See* note 36 and accompanying text *supra.*
49. *E.g.*, Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971).

excellent considering the court's statement in *Sides* that in cases of doubtful applicability, the rule should be resolved against the municipality.[50]

F. JOSEPH TREACY JR.

Workmen's Compensation—Apportionment of Disabilities Is Limited Under the North Carolina Act

The purpose[1] of the North Carolina Workmen's Compensation Act[2] is to relieve employees injured in industrial accidents from the cost of their resulting disabilities by passing the cost on to the consuming public.[3] To effectuate this purpose the Supreme Court of North Carolina has adopted a policy of liberal construction of the Act, particularly of the coverage clauses.[4] In *Pruitt v. Knight Publishing Co.*,[5] a case of first impression,[6] the North Carolina Court of Appeals held that a disability resulting from an industrial accident aggravation of a previous non-compensable injury cannot be apportioned under the North Carolina Act: the employer is responsible for the entire disability.[7] In so holding, the court followed the rule adopted by

50. 287 N.C. at 25, 213 S.E.2d at 304.

1. The North Carolina Act itself contains no statement of purpose; the purpose may be inferred from the critics' discussions of the North Carolina Act and the Workmen's Compensation Acts generally. *See* note 3 *infra*. The North Carolina Supreme Court has spelled out the purpose of the Act in several decisions, *e.g.*, Barnhardt v. Yellow Cab Co., 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966); Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 412, 132 S.E.2d 877, 879 (1963); Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 203, 102 S.E.2d 841, 844 (1958).

2. N.C. GEN. STAT. §§ 97-1 to -122 (1972), *as amended*, (Cum. Supp. 1975).

3. COMMISSION OF THE AMERICAN FEDERATION OF LABOR, WORKMEN'S COMPENSATION: REPORT UPON OPERATION OF STATE LAWS 13 (1914); Malone, *The Limits of Coverage in Workmen's Compensation—the Dual Requirement Reappraised*, 51 N.C.L. REV. 705 (1973).

4. *E.g.*, Hollman v. Public Util. Dep't, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968); Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 576, 139 S.E.2d 857, 862 (1965); Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 480, 57 S.E.2d 760, 762 (1950) (dictum); Edwards v. Piedmont Publishing Co., 227 N.C. 184, 192, 41 S.E.2d 592, 597 (1947) (concurring opinion); Johnson v. Asheville Hosiery Co., 199 N.C. 38, 40, 153 S.E. 591, 593 (1930).

5. 27 N.C. App. 254, 218 S.E.2d 876 (1975).

6. No supreme court or appellate court case on the *Pruitt* issue has been found. Since the North Carolina superior court decisions and the North Carolina Industrial Commission decisions are unreported, it is not possible to say with certainty whether the issue has previously been presented in those forums.

7. 27 N.C. App. at 257, 218 S.E.2d at 878.