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Municipal Liability for Negligent Inspections in *Sinning v. Clark* - A 'Hollow' Victory for the Public Duty Doctrine

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NOTE

MUNICIPAL LIABILITY FOR NEGLIGENT INSPECTIONS IN *SINNING v. CLARK*—A "Hollow" Victory for the Public Duty Doctrine

I. INTRODUCTION

Americans are conditioned from birth through death to save money so that one day they may purchase their own home. In modern day "Americana," this is known as the "American Dream"— a two story house with a two car garage and a white picket fence. Often, rather than dwell in deplorable tenant housing, many Americans will bow to the banking industry and mortgage their lives away to build a "custom home" according to their individual tastes and preferences. Increasingly, however, this "American Dream" has turned into an "Amityville Horror" nightmare.[1] Although their homes are not occupied by demons and unfit for occupation in this regard, many homeowners discover their "custom home" contains major structural defects which make their homes uninhabitable for failure to comply with the local building code.

Dr. and Mrs. Sinning found themselves in this situation. Less than two years after construction, the Sinnings discovered their home had sagging and shifting floors, doors which failed to close, windows out of plumb, cracked sheetrock and wall materials, unlevel staircases, cracking brick veneer, a leaking roof, and rotting front porch columns, making it unfit for occupation.[2] The Sinnings were experiencing their own "Amityville Horror" nightmare.

Dr. and Mrs. Sinning did not know or understand the intricacies of the building code or correct engineering calculations to

1. The "Amityville Horror" was a movie about a family in New York whose house was occupied by demons. The consensus of the viewing public was that the house was "unfit for occupation."

2. Sinning v. Clark, 119 N.C. App. 515, 516, 459 S.E.2d 71, 72 (1995).

guarantee proper construction of their home. Instead, they relied on their general contractor and local building inspector to ensure compliance with the applicable state and local laws. Two tortfeasfors caused the Sinning home to be constructed and inhabited when there was non-compliance with the building code. Dr. and Mrs. Sinning had a cause of action against the builder for his non-conforming construction.[3] The second tortfeasor, the municipal building inspector,[4] inspected and certified to them that their home met the requirements of the North Carolina Building Code.[5] However, in *Sinning v. Clark*,[6] the North Carolina Court of Appeals held that even though the municipal building inspector approved non-conforming construction through negligent on-site inspections, Dr. and Mrs. Sinning did not have a cause of action against the municipality which employed the inspector.[7] Rather,

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3. An action against a builder for constructing a non-complying structure may be predicated upon numerous grounds, including breach of contract and breach of implied warranty. *See generally* Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

4. *See* N.C. GEN STAT. § 160A-411 (1982). Section 160A-411 provides in part:

> Every city in the State is hereby authorized to create an inspection department, and may appoint one or more inspectors who may be given the titles of building inspector, electrical inspector, plumbing inspector, housing inspector, zoning inspector, heating and air-conditioning inspector, fire prevention inspector, or deputy or assistant inspector, or such other titles as may be generally descriptive of the duties assigned. The department may be headed by a superintendent or director of inspections. Every city shall perform the duties and responsibilities set out in G.S. 160A-412[.]

5. *See* N.C. GEN. STAT. § 160A-423 (1993). Section 160A-423 provides:

> At the conclusion of all work done under a permit, the appropriate inspector shall make a final inspection, and if he finds that the completed work complies with all applicable State and local laws and with the terms of the permit, he shall issue a certificate of compliance. No new building or part thereof may be occupied, and no addition or enlargement of an existing building may be occupied, and no existing building that has been altered or moved may be occupied, until the inspection department has issued a certificate of compliance. A temporary certificate of compliance may be issued permitting occupancy for a stated period of specified portions of the building that the inspector finds may safely be occupied prior to final completion of the entire building. Violation of this section shall constitute a Class I misdemeanor.

6. *Sinning*, 119 N.C. App. at 521, 459 S.E.2d at 74.

7. *Id.* However, principles of tort law dictate that when a plaintiff is injured through the negligent conduct of another party and the plaintiff proves duty,

a cause of action accrues against a municipality for the negligent acts of its building inspectors only where a legally enforceable duty is created by the municipality specifically to the individual plaintiffs.[8] In arriving at its conclusion, the North Carolina Court of Appeals examined the liability of a municipality which has waived its governmental immunity by procuring liability insurance for its inspection department.[9] In doing so, the *Sinning* court invoked the judicially created pseudo-governmental immunity of the public duty doctrine.[10] The court relied on its decision in *Lynn v. Overlook Development*,[11] which the court interpreted as allowing the public duty doctrine to bar recovery in code enforcement cases, to deny the Sinnings' claim.

This Note examines the North Carolina Court of Appeal's decision in *Sinning v. Clark*. First, the Note briefly reviews governmental immunity in code enforcement cases. Second, the Note provides an historical overview of the public duty doctrine and examines the legal analysis which other jurisdictions have used to reject the public duty doctrine in inspection cases. Next, the Note discusses North Carolina's concept of governmental immunity and surveys North Carolina's application of the public duty doctrine, including the doctrine's application in *Lynn v. Overlook Development*. Fourth, the Note analyzes the *Sinning* court's application of the public duty doctrine in light of the supreme court's decision in *Lynn* and analyzes how other jurisdictions have handled similar cases and if those methods would be applicable to North Caro-

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breach of duty, causation, and damages, that plaintiff states a claim upon which relief may be granted. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 30, at 143 (4th ed. 1971). Furthermore, the tort principles of *respondeat superior* dictate that the master of a negligent servant engaged in the master's activity should bear the loss. *Id.* § 69 at 458. However, contrary to *Sinning*, this Note suggests that the municipality, as master of the negligent inspector, should bear the loss of an innocent injured from the negligent inspection of the building code enforcer.

8. *Sinning*, 119 N.C. App. at 520-21, 459 S.E.2d at 74.

9. *Id.*

10. The public duty doctrine states that "a government entity is not liable for injury to a citizen where liability is alleged on the ground that the governmental entity owes a duty to the public in general, as in case of police or fire protection." Annotation, *Modern Status of Rule Excusing Governmental unit from Liability From tort liability on Theory That Only General, Not Particular, Duty was owed Under the Circumstance*, 38 A.L.R. 4th 1194, 1196 (1965 & Supp. 1994) [hereinafter cited as "Annotation"]. For a general discussion of the public duty doctrine see *infra* notes 38-59 and accompanying text.

11. Lynn v. Overlook Dev. Inc., 98 N.C. App. 75, 389 S.E.2d 609 (1990), *aff'd in part, rev'd in part*, 328 N.C. 689, 403 S.E.2d 469 (1991).

lina. Finally, the Note concludes that the North Carolina Court of Appeals erred by not following the supreme court's analysis in *Lynn* and suggests that the "special duty" exception to the public duty doctrine applies in building code enforcement cases.[12]

II. THE CASE

In November 1989, Dr. and Mrs. Sinning entered into a contract with Bailey Custom Homes, Inc. for construction of a home located in New Bern, North Carolina.[13] Numerous times while construction was in progress, Mr. Linwood E. Toler, a building inspector for the City of New Bern with a Level III building, electrical, mechanical, and plumbing inspection certificate, inspected the home for building code violations.[14] On December 20, 1990, Mr. Toler issued the Sinnings a thirty-day temporary certificate of occupancy which permitted the Sinnings to move into the home subject to Bailey Custom Homes, Inc. "finish[ing] up small jobs."[15] Upon moving into the residence, the Sinnings discovered major structural defects in the construction of their home including, but not limited to, sagging and shifting floors, doors which failed to close, windows out of plumb, cracked sheetrock and wall materials, unlevel staircases, cracking brick veneer, a leaking roof, and rotting front porch columns.[16]

After further investigation and inquiry, the Sinnings filed a complaint with the North Carolina Code Qualifications Board against Mr. John F. Clark, Code Administrator for the City of New Bern, Mr. Toler, and the City of New Bern.[17] After an investigation, the Code Qualifications Board issued a report concluding

12. The focus of this Note is the court of appeals decision in *Sinning* and its effect on the application of the public duty doctrine in a negligence action brought by a plaintiff against a municipality for negligent inspections by their building code enforcers. This Note does not include any actions which may be brought under the Tort Claims Act found in N.C. GEN. STAT. § 143-291-300.1 (1993). *See generally* McBride v. N.C. State Bd. of Educ., 257 N.C. 152, 125 S.E.2d 211 (1959) (This Tort Claims Act has no application with respect to acts of employees of city or county administrative units). Further note that an unsophisticated homeowner most often does not inquire into the sufficiency of the liability insurance or the solvency of the contractor whom they entrust with the construction of their "dream" home. Such are the facts of *Sinning*.

13. *Sinning*, 119 N.C. App. at 516, 459 S.E.2d at 72.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 521, 459 S.E. 2d at 75.

"that there appear[ed] to be basis in fact to the charge of willful misconduct, gross negligence, or gross incompetence against Lenwood (sic) E. Toler."[18]

The Sinnings brought an action against Mr. Clark and Mr. Toler, acting in their official capacities as employees, and the City of New Bern, seeking compensatory and punitive damages.[19] The Sinnings alleged the defendants were negligent in failing to locate and require correction of numerous building code violations and structural defects and for failing to advise them that their residence was structurally unsound and unfit for occupation.[20] The district court granted judgment in favor of the defendants and Sinnings appealed.[21] The court of appeals affirmed the trial court's decision holding that the Sinnings' complaint did not state a claim for common law negligence.[22] The court based its decision on the common law public duty doctrine and concluded that "a municipality and its agents ordinarily act for the benefit of the general public and not for a specific individual when exercising its statutory police powers, and, therefore, cannot be held liable for a failure to carry out its statutory duties to an individual."[23] In so holding, the court of appeals declined to follow the reasoning used by the North Carolina Supreme Court in *Lynn v. Overlook Development*,[24] which would have applied the "special duty"[25] exception in code enforcement cases. The *Sinning* court stated that

> the [Supreme] Court declined to decide the issue of whether [G.S. § 160-411-438, and the North Carolina State Building Code] created a duty owed by the city building inspector to a purchaser . . . Thus, we continue to follow our decision in *Lynn* . . . and hold [that the statutes and the code] do not create a special duty owed by defendants to plaintiffs over and above the duty owed to the general public.[26]

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18. *Id.*

19. *Id.* at 516, 459 S.E. 2d at 72.

20. *Id.* at 516, 459 S.E. 2d at 73.

21. *Id.* at 516, 459 S.E. 2d at 72.

22. *Id.* at 516, 459 S.E. 2d at 73.

23. *Id.*

24. Lynn v. Overlook Dev., Inc., 328 N.C. 689, 403 S.E.2d 469 (1991). For discussion of *Lynn*, see *infra* notes 144-51 and accompanying text.

25. For a discussion of the "special duty" exception, see *infra* notes 113-29 and accompanying text.

26. *Sinning*, 119 N.C. App. at 520, 459 S.E.2d at 74.

III. BACKGROUND

A. *Governmental Immunity for Code Enforcement*

Historically, the common law doctrine of sovereign or governmental immunity provided an absolute defense to the tort liability of the state and its subdivisions, including municipalities.[27] The activities performed by governmental entities were eventually classified as either governmental or proprietary functions.[28] Governmental functions are functions which solely benefit the general public."[29] Proprietary functions are "those activities which could be performed by the private sector."[30] Under the governmental function-proprietary function distinction, governmental entities are liable only when they perform functions which are private in nature.[31] Proprietary functions may create liability because the governmental entity is held to the same standard as a private actor would be held if the private actor performed.[32] In contrast, governmental functions performed by the entity are immune from liability because the entity is engaged in an activity "primarily for the advantage of the state as a whole."[33] Code enforcement activities are considered governmental functions.[34] No reported cases

27. For a discussion of the history of the governmental immunity, see: Deborah L. Markowitz, *Municipal Liability for Negligent Inspection and Failure to Enforce Safety Codes*, 15 HAMLINE J. PUB. L & POL'Y 181 (1994) [hereinafter "Markowitz, *Municipal Liability*"]; Patti Owen Harper, *Statutory Waiver of Municipal Immunity Upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis*, 4 CAMPBELL L. REV. 41 (1981) [hereinafter "Harper, *Statutory Waiver*"]; Beecher Reynolds Gray, *Local Government Sovereign Immunity: The Need for Reform*, 18 WAKE FOREST L. REV. 43 (1982) [hereinafter "Gray, *Local Government Sovereign Immunity*"]; *see also* Galligan v. Town of Chapel Hill, 276 N.C. 172, 171 S.E.2d 427 (1970); Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970), *cert. denied*, 277 N.C. 727, 178 S.E.2d 831 (1971).

28. For a complete discussion of the governmental function and proprietary function and its ramifications see: Markowitz, *Municipal Liability, supra* note 27; Harper, *Statutory Waiver, supra* note 27 at 47-49; Gray, *Local Government Sovereign Immunity, supra* note 27 at 44-49.

29. Markowitz, *Municipal Liability*, *supra* note 27, at 186.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* Markowitz, *Municipal Liability, supra* note 27. Inspections are considered a governmental function in North Carolina. *See* Pignott v. City of Wilmington, 50 N.C. App. 401, 273 S.E.2d 752, *cert. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981) (holding that the building inspector was a "public official" of

have held otherwise.[35] Absent waiver, governmental immunity still provides an absolute defense to municipalities for the negligent performance of code enforcement and inspections.[36] However, nearly all states provide some mechanism to waive governmental immunity.[37]

B. *The Public Duty Doctrine*

1. *Historical Context*

The public duty doctrine provides that, absent a special relationship between the governmental entity and the injured individual,[38] the governmental entity will not be liable for injury to an individual where liability is alleged on the ground that the governmental entity owes a duty to the public in general.[39] The doctrine

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the city who engaged in the performance of governmental duties and no liability could attach unless the inspector acted maliciously or corruptly or outside of and beyond the scope of his duties).

35. *Pignott*, 50 N.C. App. at 403, 273 S.E.2d at 754.

36. *See* Markowitz, *Municipal Liability, supra* note 27. For a discussion of how to waive governmental immunity in North Carolina, see Harper, *Statutory Waiver, supra* note 27 at 47-49; Gray, *Local Government Sovereign Immunity, supra* note 27 at 44-49. *See also* Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970), *cert. denied*, 277 N.C. 727, 178 S.E.2d 831 (1971) (Except where waived under authority of statute, the common law rule of governmental immunity is still the law in North Carolina.).

37. *See* Markowitz, *Municipal Liability, supra* note 27.

38. This is the "special relationship" exception which arises when a citizen becomes singled from the general population and a special duty is owed him by the governmental entity. Such a duty is established by a special relationship between the government and the citizen and a breach of that duty may result in liability for damages suffered by the citizen." Annotation, *supra* note 10, at 1196. For a discussion of North Carolina's treatment of the "special relationship" exception, see *infra* notes 113-29 and accompanying text.

39. *See* Annotation, *supra* note 10, at 1196. The public duty doctrine prohibits the imposition of liability upon a governmental unit for the negligent breach of a statutory duty that results in damages, unless that statute establishing that duty clearly intended to create a duty not only to the general public but to a more limited class to which the individual requesting relief belongs.

Stone & Rinker, *Governmental Liability for Negligent Inspections*, 57 TUL. L. REV. 328, 331 (1982) [hereinafter "Stone & Rinker, *Governmental Liability*"]; *see also* Markowitz, *Municipal Liability, supra* note 27; Note, *State Tort Liability for Negligent Fire Inspection*, 13 COLUM. J.L. & SOC. PROBS. 303, 322-23 & nn.94-95 (1977) ("Government officials, and more recently their employers, have long been held liable for their tortious conduct only if the duty of care breached was one owed to a particular individual, and not one owed to the public in general."); Scott J. Borth, Comment, *Municipal Tort Liability For Erroneous Issuance of*

has been commonly described by the oxymoron, "duty to all, duty to none."[40] The United States Supreme Court created the doctrine in *South v. Maryland*.[41] In *South*, the plaintiff sued the local sheriff for breach of a duty in failing to provide police protection when the sheriff refused to arrest the plaintiff's alleged kidnappers.[42] The *South* Court held the powers and duties of the sheriff are by nature a public duty and "punishable by public indictment only."[43] As such, the *South* court concluded that the plaintiff's cause of action failed because no duty was created to the individual plaintiff.[44]

After the historic tort barrier of governmental immunity crumbled and states provided waiver mechanisms,[45] state courts resurrected the *South* rule to provide limits to governmental tort liability when their legislatures had not done so.[46] Thus, state

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Building Permits: A National Survey, 58 WASH. L. REV. 537, 548 (1983) [hereinafter "Borth, *Municipal Tort Liability*"] ("The public duty doctrine provides that a claimant who is alleging inadequate performance of a governmental activity has the burden to show that the municipality owed a duty to the claimant and not solely to the general public when performing the activity in question.").

40. *See, e.g.*, Adams v. State, 555 P.2d 235, 241 (Alaska 1976); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1015 (Fla. 1979); Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986). The result is that one may have a duty to exercise reasonable care to everyone, but no one can bring an action when that duty is breached.

41. 59 U.S. (18 How.) 396 (1855). In *South*, the plaintiff alleged that the local sheriff knew that he had been kidnapped and held for ransom for four days; yet, the sheriff failed to try to free him or to arrest the alleged kidnappers. *Id.* at 398-99. The plaintiff sued the sheriff for failing to provide police protection and failing to enforce the laws of the state. *Id.* at 398-99.

42. *South*, 59 U.S. (18 How.) at 398-99.

43. *Id.* at 402-03 ("It is an undisputed principle of the common law, that for a breach of a public duty . . . punishable by public indictment only.").

44. *Id.* at 402-03.

45. Sovereign immunity provided an absolute defense to the tort liability of the state and its subdivisions. W. PROSSER ON THE LAW OF TORTS § 131 at 979 (4th ed. 1971). There was no need for the public duty doctrine because sovereign immunity provided the limitation upon governmental tort liability.

46. *See* Stone & Rinker, *Governmental Liability, supra* note 39, at 331 ("Yet in abrogating state and municipal immunity, legislatures and courts have recognized that there must be some limits to government tort liability . . . The doctrine most frequently used to insulate governmental entities from liability is the public duty defense . . ."); *see also* Borth, *Municipal Tort Liability, supra* note 39, at 548 ("This legislative failure forces the courts to draw a line between denying compensation to the victims of negligent public employees and unduly interfering with the desirable purposes for which municipalities exist. Most

courts embraced the public duty doctrine to confine liability to specific types of governmental actions, namely those not undertaken for the public in general.[47] Consequently, the revived public duty doctrine provides a uniquely governmental defense to tort liability where a waiver of governmental immunity has occurred.[48]

Generally, proponents advance two arguments in support of the doctrine.[49] First, the doctrine protects the governmental entities from a flood of lawsuits that could potentially cripple the public coffers.[50] Second, the doctrine protects governmental entities which provide much needed but high risk services, where potential liability or the fear of potential liability would eliminate those services.[51] While a majority of states accept these rationales,[52] the public duty doctrine is not without its critics.[53] In fact, several

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courts have attempted to shape the contours of governmental tort liability in these states by applying the public duty doctrine.").

47. *Id.*

48. *Id.*

49. *See* Stone & Rinker, *Governmental Liability, supra* note 39, at 340 ("These advocates contend, first, that the public duty doctrine is necessary to protect governments from a multiplicity of lawsuits, some fictitious, satisfaction of which would place a heavy drain on the public treasury. The second policy argument against tort liability of governments is that such liability . . . might discourage government from engaging in innovative programs, with the result that governmental agencies may abandon the field of inspection altogether."); *see also* John Cameron McMillian. Jr., Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 504, 513-14, n. 34 (1987) [hereinafter "McMillan, *Government Liability*"] ("The principal rationales espoused by courts are fear that abolition of the public duty doctrine will unduly interfere with governmental operation and subject government to an overwhelming financial burden.").

50. *See supra* note 49.

51. *See supra* note 49.

52. The following states embrace some form of the public duty doctrine: California, Hawaii, Illinois, Indiana, Kansas, Michigan, Minnesota, Nevada, New York, North Carolina, Ohio, Pennsylvania, and Washington. Annotation, *supra* note 10, at 1194; *see also* Sestito v. Groton, 423 A.2d 165 (Conn. 1979), Frankfort Variety, Inc. v. Frankfort, 522 S.W.2d 653 (Ky. 1977), Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984), and Barrat v. Burlington, 492 A.2d 1219 (R.I. 1985).

53. The following state cases have rejected the public duty doctrine: Adams v. State, 555 P.2d 235 (Alaska 1976) (abrogated the public duty doctrine in a negligent inspection case); Ryan v. State, 656 P.2d 597 (Ariz. 1982) (abolishing the public duty doctrine in a negligent furnishment of police protection); Leake v. Cain, 720 P.2d 152 (Colo. 1986) (abolishing the public duty doctrine in a negligent furnishment of police protection case); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979) (abrogating the public duty

jurisdictions reject the doctrine in an effort to ameliorate the harsh results that can occur when a governmental entity negligently provides services.[54]

Critics advance several arguments against the public duty doctrine. First, the application of the doctrine allows governmental entities to use the shield of sovereign immunity when the legislature no longer mandates such immunity.[55] Second, the application of the doctrine requires that plaintiffs injured by a negligent official suffer solely because of the governmental status of the tortfeasor.[56] Third, the application of the doctrine promotes incompetence by providing no meaningful incentive for the governmental entity to provide services of optimal quality.[57] Fourth, even with the elimination of the doctrine, plaintiffs must still prove breach of duty, causation, and damages; a vigorous task just

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doctrine in a highway case); Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980) (abolishing the doctrine in a construction case); Wilson v. Nepsted, 282 N.W.2d 664 (Iowa 1979) (abolishing the public duty doctrine in a negligent inspection case); Schear v. Board of County Comm'rs, 687 P.2d 728 (N.M. 1984) (abolishing the public duty doctrine in a negligent furnishment of police protection case); Brennen v. City of Eugene, 591 P.2d 719 (Or. 1979) (abolishing the public duty doctrine in the negligent issuance of a taxicab permit); Coffey v. Milwaukee, 247 N.W.2d 132 (Wis. 1976) (abrogating the public duty doctrine in a negligent inspection case); DeWald v. State, 719 P.2d 643 (Wyo. 1986) (abolishing the public duty doctrine in a negligent police pursuit case).

54. *See* note 53.

55. Several courts equate the public duty doctrine to sovereign immunity. These courts reason that because sovereign immunity was abolished, the public duty doctrine also was abolished. *See generally* Adams v. State, 555 P.2d 235, 241-242 (Alaska 1976) ("in reality a form of sovereign immunity"); Coffey v. Milwaukee, 247 N.W.2d 132, 139 (Wis. 1976) (holding that the "public duty-special duty doctrine" reverts back to the abolished sovereign immunity distinctions of proprietary-governmental); Ryan v. State, 656 P.2d 597 (Ariz. 1982) (holding that public duty doctrine was sovereign immunity in "bright new-word package"); Schear v. Board of County Comm'rs, 687 P.2d 728, 730 (N.M. 1984) (holding that legislative abolishment of sovereign immunity also abolished the public duty doctrine); DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986) ("in essence a form of sovereign immunity and viable only when sovereign immunity was the rule"); Leake v. Cain, 720 P.2d 152 (Colo. 1986) (holding that legislative abolishment of sovereign immunity also abolished the public duty doctrine).

56. This theory derives its existence from one of the reasons for abrogating sovereign immunity treating private and government tortfeasors the same, rather than predicating liability solely upon the status of tortfeasor. *See* Adams v. State, 555 P.2d 235, 241 (Alaska 1976) ("Where there is no immunity, the state should be treated like a private litigant.").

57. *See* Stone & Rinker, *Governmental Liability, supra* note 39, at 343-44.

like in any other negligence action.[58] Finally, the wide availability of liability insurance allows a governmental entity limited pecuniary exposure while still compensating the injured individual.[59]

2. *Rejection of the Public Duty Doctrine in Code Enforcement Cases*

Jurisdictions rejecting the application of the public duty doctrine in inspections cases combine three theories to hold a negligent governmental entity accountable. The first theory asserts that the public duty doctrine reinstates sovereign immunity.[60] Consequently, because the state has expressly abandoned the sovereign immunity defense for governmental tortfeasors, the traditional tort concept of foreseeablity dictates the parameters of governmental tort duty.[61] The second theory asserts that the public duty doctrine applies only where there is a public duty.[62] Because the legislature imposes a duty and prescribes a standard of conduct in the form of an inspection statute, the "statutory duty" owed by inspectors constitutes an individual duty and is not subject to the doctrine.[63] The third theory asserts that the public duty doctrine may be overcome through the tort concepts of affirmative action and reliance.[64] Consequently, when an inspec-

58. *Id.* at 348; *see also* Ryan v. State, 656 P.2d 597, 599 (Ariz. 1982) and Leake v. Cain, 720 P.2d 152, 160 (Colo. 1986).

59. *See* McMillian, *Governmental Liability, supra* note 49, at 535-536 & n.145 ("The government can further protect its resources by carrying liability insurance."); *Ryan*, 656 P.2d at 599 ("insurance should be obtained by the state to protect it from financial loss").

60. *See supra* note 27 and accompanying text.

61. *See generally infra* notes 70-79 and accompanying text.

62. Note that "recovery by individuals has usually been denied on the grounds that the building codes were not designed to create a duty to an individual." Stone & Rinker, *Governmental Liability, supra* note 39, at 332.

63. *Id.*

64. *See Coffey*, 247 N.W.2d at 139 & n.2. The court relied on the RESTATEMENT (SECOND) OF TORTS to hold a governmental entity responsible for its negligent acts. It provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or

tor undertakes the affirmative act of inspection and an owner relies on the inspector's actions, the "affirmative action duty" owed by the inspector constitutes an individual duty and is not subject to the doctrine.[65] The "statutory duty" and "affirmative action duty" theories derive there existence from the "special relationship" and "special duty" exceptions[66] but clearly reject the application of the public duty doctrine in inspection cases.[67] Moreover, courts generally commingle variations of all three theories to buttress their legal analysis when holding that a governmental entity owes an individual duty to a plaintiff.[68]

Recently, several courts have rejected the public duty doctrine in negligent inspection actions against governmental entities.[69] In the land mark case of *Adams v. State*,[70] the Supreme Court of Alaska became the first court to reject the public duty doctrine. In *Adams*, the plaintiff alleged that state fire officials negligently failed to take corrective action after an inspection of hotel premises revealed a number of fire hazards.[71] The Supreme Court of Alaska held the public duty defense to be "in reality a form of sov-

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(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or third person upon the undertaking

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

65. *See infra* notes 76-79, 87-90 and accompanying text.

66. One commentator would submit that there was no need to abolish the public duty doctrine in the cases which have done so because the same individual duty could be reached by properly employing the "special relationship" exception. *See* Borth, *Municipal Tort Liability*, *supra* note 39, at 552 & n.77 (stating that the *Adams* court's assumptions that it made to abolish the public duty doctrine were "questionable because the facts of the case support a finding of a 'special relationship.' ").

67. *See generally supra* notes 38-59 and accompanying text.

68. *Id.*

69. *Id.*

70. Adams v. State, 555 P.2d 235 (Alaska 1976). In *Adams*, three state fire inspectors made a fire inspection of the Gold Rush Hotel. *Id.* at 238. The inspectors found several violations and promised to send the manager a copy so that he might correct the violations. *Id.* Eight months later, the hotel burned to the ground killing five people. *Id.* at 236. The inspectors never sent the letter detailing the fire hazards. *Id.* at 239.

71. *Id.* at 236. The State of Alaska defended upon the grounds that its "public status" precluded liability because the state "owed a duty to the public generally" and [did] not owe an actionable duty to any individual." *Id.* at 241.

ereign immunity."[72] Because sovereign immunity had been abolished by statute in Alaska,[73] the public duty doctrine, if applied, "would create immunity where the legislation has not."[74] Furthermore, the *Adams* court held "where there is no immunity, the state is to be treated like a private litigant."[75]

The *Adams* court supported their legal analysis by relying on the common law principles of foreseeability, affirmative action, and reliance to create an individual duty owed by the inspectors.[76] The Alaska Supreme Court first held that the purpose of the fire inspection was to protect life and property from fire.[77] Further, the plaintiffs, who were the victims of the negligent inspection, "were members of that class; they were the intended beneficiaries of the inspection services provided and the foreseeable victims of the fire hazard left uncorrected."[78] According to the court, "in undertaking to inspect and advise on the conditions in [the premises], the state undertook a duty to those injured by the burning of the hotel, not to the public in general."[79] The *Adams* court abolished the public duty doctrine by equating the doctrine to the abandoned concept of sovereign immunity.

The Supreme Court of Wisconsin has also rejected the public duty doctrine in inspection scenarios. In *Coffey v. Milwaukee*,[80]

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72. *Id.* at 241. The *Adams* court recognized the inequities of the public duty doctrine. It stated, "an application of the public duty doctrine here would result in finding no duty owed to the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would owe such a duty, no 'special relationship' between the parties existed." *Id.* at 241-42.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 240 ("We do not reach the issue of whether the state had a statutory duty to take action concerning the hazards discovered at the Gold Rush, because we find that the state assumed a common law duty by its affirmative conduct.").

77. *Id.* at 241 ("The purpose of fire inspection is to protect life and property from fire.").

78. *Id.*

79. *Id.* at 241. The *Adams* court further stated, "once an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections, and that liability will attach were there is a negligent failure to discover fire hazards which would be brought to light by an inspection conducted with ordinary care." *Id.* at 240.

80. Coffey v. Milwaukee, 247 N.W.2d 132 (Wis. 1976). In *Coffey*, the plaintiff alleged that the City of Milwaukee negligently inspected certain defective standpipes that were necessary to furnish water to fight fire in the building where the plaintiff was a tenant. *Id.* at 134. The plaintiff asserted that the defendants were required to inspect the standpipes pursuant to the state

the plaintiffs asserted that the city negligently inspected fire sprinkler devices in the plaintiff's building.[81] The *Coffey* court first stated that the defense of sovereign immunity had been abolished in a previous decision.[82] Further, the Supreme Court of Wisconsin emphasized that "Any duty owed to the public generally is a duty owed to individual members of the public."[83] According to the court, "Under the circumstances of this case, there is no distinction to be drawn between a 'public duty' and 'special duty.' "[84]

After rejecting the public duty doctrine, the *Coffey* court held that the "duty to inspect is statutorily imposed" by the Wisconsin inspection statute.[85] The court stated that "A building inspector must be held to have foreseen that his alleged negligence in performing the required inspection might have foreseeably resulted in harm to someone."[86] The court further held that once the inspector "did undertake to inspect the building, [the inspector] had a duty to exercise reasonable care" pursuant to the tort doctrines of affirmative action and reliance.[87] Thus, the *Coffey* court

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inspection statute. *Id.* at 135-36. The City of Milwaukee defended by claiming that "the duties imposed on the building inspector by the applicable statutes with respect to fire safety inspection are clearly duties owed to the public in general and not to the specific plaintiff in this case." *Id.* at 137.

81. *Id.* at 134.

82. *Id.* at 137 (citing to Holytz v. Milwaukee, 115 N.W.2d 618 (Wis. 1962). The *Coffey* court also addressed the issue whether the abolition of sovereign immunity created a new cause of action against governmental entities. The court stated, "on the issue of duty, we would point out that *Holytz* . . . did not create any new liability for a municipality; what it did was to remove the defense of municipal immunity from tort liability." *Id.* at 137.

83. *Id.* at 139. The *Coffey* court further held that "the public duty — 'special duty' distinction espoused in the cases cited by the City of Milwaukee . . . set up just the type of artificial distinction between 'propriety' and 'governmental' functions which this court sought to dispose of in *Holytz*." *Id.* at 139.

84. *Id.*

85. *Id.* at 136.

86. *Id.* at 139.

87. *Id.* The *Coffey* court cited with approval the RESTATEMENT (SECOND) OF TORTS. It provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognized as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or

rejected the public duty doctrine in inspection cases by holding that the statutorily imposed duty to inspect imposed a standard of reasonable care on inspectors.

The Iowa Supreme Court similarly rejected the public duty doctrine in inspection scenarios in *Wilson v. Nepsted*.[88] In *Wilson*, the plaintiff alleged that the municipality's agent negligently breached statutory duties relating to the inspections requiring compliance to the building and fire codes.[89] The court stated that a "duty can be created by statute if the legislature purposed or intended to protect a class of persons to which the victim belongs against a particular harm which the victim has suffered."[90] The Court specifically held that the "ordinances and statutes were designed for the protection of a special, identifiable group of persons . . . from a particular harm . . . not members of the public generally."[91] Moreover, the particular language of the statute provided a strong "foundation on which to posit a legal duty."[92] The *Wilson* court emphasized that the "financial consequences of legislation must be the primary responsibility of the legislature and cannot weigh heavily in the court's function of interpreting statutory language."[93]

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

88. Wilson v. Nepsted, 282 N.W.2d 664 (Iowa 1979). In *Wilson*, the plaintiffs alleged statutes and ordinances relating to building codes, occupancy permits, and fire regulation required the City of Des Moines to perform inspections, issue certificates and permits for apartment buildings and compel compliance. *Id.* at 666. The plaintiffs further alleged that the city had negligently breached those statutory duties by conducting a negligent inspection. *Id.* Several months after the alleged negligent inspection by the defendants, a fire killed several guests or residents. *Id.* The City of Des Moines defended upon the ground that "the applicable state and municipal inspection laws are designed to protect the public generally and do not create a duty of care to these individual plaintiffs." *Id.* at 667.

89. *Id.* at 666.

90. *Id.* at 667.

91. *Id.* at 672. The *Wilson* court further concluded that "A statutory duty designed to protect something larger than an identifiable class is the exception, not the rule." *Id.* at 671.

92. *Id.* at 673.

93. *Id.* at 674.

The Supreme Court of Louisiana also rejected the public duty doctrine in inspection scenarios in *Stewart v. Schmieder*.[94] In *Stewart*, the plaintiff alleged that the city breached its statutory duties by negligently inspecting and approving a structurally defective building.[95] The *Stewart* court, discrediting the public duty doctrine, stated that "under the jurisprudence of this state, the mere fact that a duty is of a public nature, and benefits the general public, does not require a conclusion that a city cannot be found liable for the breach of that duty."[96] The court further concluded that the public duty doctrine did not apply when "the statute or ordinance setting forth the duty indicates, by its language, that the duty is designed to protect a particular class of individuals."[97] The *Stewart* court held that the inspector was statutorily "empowered and obligated to issue such notices and orders necessary to enforce codal compliance, to remove unsafe and illegal conditions, and to 'secure the necessary safeguards during construction'."[98] Furthermore, the inspector breached "its duty to examine plans for proposed construction projects, and thereby caused injury to the plaintiff."[99]

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94. Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980). In *Stewart*, the plaintiffs brought suit against the City of Baton Rouge alleging that the city breached its statutory duty by not examining the construction plans and by negligently inspecting the site. *Id.* at 1353. The plaintiffs alleged as a result of the city's negligence, the building collapsed during the final stage of construction killing three construction workers. *Id.* at 1353. The City of Baton Rouge defended on the ground "that even if its employees breached a duty imposed by ordinance, it is not liable to these plaintiffs that its duties in the issuance of permits and the inspection of construction are owed to the public generally and not to any particular member of the public." *Id.* at 1356.

95. *Id.* at 1353.

96. *Id.* at 1358.

97. *Id.*

98. *Id.* The *Stewart* court also advanced several public policy arguments in support of the abolition of the public duty doctrine. First, the court stated, "It has been criticized because it places the costs of inadequate performance on the shoulders of the innocent victims of official neglect, rather than spreading the costs of such neglect throughout society." *Id.* at 1357 (citations omitted). Second, "The doctrine is also said to be predicated upon the erroneous assumption that, without it, a municipality would be subject to crippling judgments because of the negligence of its employees, a fear which also hampered the abrogation of sovereign immunity." *Id.* (citations omitted). Third, "The doctrine also has the effect of removing a great deal of the incentive for public bodies to see that the functions of government are carried out responsibility and with reasonable care." *Id.*

99. *Id.* at 1358.

As a final example, the Court of Appeals of Arizona rejected the public duty doctrine in inspection scenarios in *Brown v. Syson*.[100] In *Brown*, the plaintiffs alleged that the city negligently inspected the construction of their home resulting in their home containing numerous building code violations.[101] The *Brown* court stated that the public duty doctrine had been expressly abandoned in an earlier court decision.[102] As a result, Arizona courts "[should] no longer engage in the speculative exercise of determining whether the tortfeasor has a general duty to the individual party, which spells no recovery, or if he had a specific individual duty, which means recovery."[103] The court stated that "the parameters of duty owed by the state will ultimately be . . . subject to the same tort law as private citizens" and thus rejected the application of the public duty doctrine in inspection cases.[104]

C. *North Carolina's Position*

1. *Statutory Waiver of Governmental Immunity*

Absent waiver, governmental immunity still provides an absolute defense to municipalities against tort liability for negligent performance of code enforcement and inspections.[105] How-

100. Brown v. Syson, 663 P.2d 251, (Ariz. Ct. App. 1983). In *Brown*, the plaintiffs alleged that the City of Bisbee negligently inspected their home such that the home was constructed in violation of the Uniform Building Code and Uniform Housing Code then in effect in the City of Bisbee. *Id.* at 252. The Supreme Court of Arizona reversed and remanded because the public duty doctrine was no longer in effect in Arizona in light of Ryan v. State, 656 P.2d 597 (Ariz. 1982). *Id.* at 251-52. *See infra* notes 76-78 and accompanying text.

101. *Brown*, 663 P.2d at 251.

102. *Id.* at 252 (citing Ryan v. State, 656 P.2d 597 (Ariz. 1982)). In *Ryan*, plaintiff brought a negligent supervision action against the State of Arizona based on an escaped inmate's act of armed robbery against the plaintiff. *Id.* at 597. The *Ryan* court held that the public duty doctrine substituted the previously abandoned sovereign immunity defense only in a "bright new-word package." *Id.* at 598. Furthermore, the court answered the state's concern that if the public duty doctrine was abandoned, the "government would come to a standstill because its agents would be afraid to act." *Id.* at 598. The *Ryan* court responded that purchasing liability insurance would sufficiently protect government entities against financial ruin from adverse tort judgments. *Id.* at 599.

103. *Id.* (citing *Ryan*, 656 P.2d at 599).

104. *Id.*

105. *See* Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970), *cert. denied*, 277 N.C. 727, 178 S.E.2d 831 (1971) (except where waived under

ever, N.C. Gen. Stat. § 160A-485[106] provides that if a municipality

authority of statute, the common law rule of governmental immunity is still the law in North Carolina.). Note inspections are considered a governmental function in North Carolina. *See* Pignott v. City of Wilmington, 50 N.C. App. 401, 273 S.E.2d 752 (1981), *cert. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981) (holding that the building inspector was a "public official" of the city who engaged in the performance of governmental duties and no liability could attach unless the inspector acted maliciously or corruptly or outside of and beyond the scope of his duties). For a discussion of the governmental function — proprietary function distinction and its ramifications in North Carolina, see Harper, *Statutory Waiver, supra* note 27, at 47-49; Gray, *Local Government Sovereign Immunity, supra* note 27, at 44-45.

106. *See* N.C. GEN. STAT. § 160A-485 (1986). Section 160A-485 provides:

Waiver of immunity through insurance purchase

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

(b) An insurance contract purchased pursuant to this section may cover such torts and such officials, employees, and agents of the city as the governing board may determine. The city may purchase one or more insurance contracts, each covering different torts or different officials, employees, or agents of the city. An insurer who issues a contract of insurance to a city pursuant to this section thereby waives any defense based upon the governmental immunity of the city, and any defense based upon lack of authority for the city to enter into the contract. Each city is authorized to pay the lawful premiums for insurance purchased pursuant to this section.

(c) Any plaintiff may maintain a tort claim against a city insured under this section in any court of competent jurisdiction. As to any such claim, to the extent that the city is insured against such claim pursuant to this section, governmental immunity shall be no defense. Except as expressly provided herein, to any tort claim lodged against it, or to restrict, limit, or otherwise affect any defense that the city may have at common law or by virtue of any statute. Nothing in this section shall relieve a plaintiff from any duty to give notice of his claim to the city, or to commence his action within the applicable period of time limited by statute. No judgment may be entered against a city in excess of its insurance policy limits on a tort claim for which it would have been immune but for the purchase of liability insurance pursuant to this section. No judgment may be entered against a city on any tort claim for which it would have been immune but for the purchase of liability insurance pursuant to this

purchases liability insurance, the municipality will be deemed to have waived its governmental immunity to the extent of its liability insurance coverage.[107] As a result, North Carolina courts

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section except a claim arising at a time when the city is insured under an insurance contract purchased and issued pursuant to this section. If, in the trial of any tort claim against a city for which it would have been immune but for the purchase of liability insurance pursuant to this section, a verdict is returned awarding damages to the plaintiff in excess of the insurance limits, the presiding judge shall reduce the award to the maximum policy limits before entering judgment.

(d) Except as otherwise provided in this section, tort claims against a city shall be governed by the North Carolina Rules of Civil Procedure. No document or exhibit which relates to or alleges facts as to the city's insurance against liability shall be read, exhibited, or mentioned in the presence of the trial jury in the trial of any claim brought pursuant to this section, nor shall the plaintiff, his counsel, or anyone testifying in his behalf directly or indirectly convey to the jury any interference that the city's potential liability is covered by insurance. No judgment may be entered against the city unless the plaintiff waives his right to a jury trial on all issues of law or fact relating to insurance coverage. All issues relating to insurance coverage shall be heard and determined by the judge without resort to a jury. The jury shall be absent during all motions, arguments, testimony, or announcement of findings of fact or conclusions of law with respect to insurance coverage. The city may waive its right to have issues concerning insurance coverage determined by the judge without a jury, and may request a jury trial on these issues.

(e) Nothing in this section shall apply to any claim in tort against a city for which the city is not immune from liability under the statutes or common law of this State.

107. *See* N.C. GEN. STAT. § 160A-485 (1986), *supra* note 106. *See also* White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967) (A city waives its immunity from civil liability in tort by purchasing liability insurance; however, immunity is waived only to the extent that the city is indemnified by the insurance contract.); Galligan v. Town of Chapel Hill, 276 N.C. 172, 171 S.E.2d 427 (1970); Gordon v. Hartford Accident & Indem. Co., 576 F. Supp. 203 (W.D.N.C. 1983), *aff'd*, 740 F.2d 961 (4th Cir. 1984); Herndon v. Barrett, 101 N.C. App. 636, 400 S.E.2d 767 (1991). For a discussion of the legislative purpose of section 160A-485, see Tamura D. Coffey, *Waiving Local Government Immunity in North Carolina: Risk Management Programs Are Insurance*, 27 WAKE FOREST L. REV. 709 (1992) (hereinafter "Coffey, *Waiving Local Government Immunity*") ("The explicit public policy behind section 160A-485 is the concern for giving adequate compensation to persons injured by a public entity. This concern is not simply tantamount, but superior, to the investment of governmental immunity doctrine in the protection of public assets."). *Id.* at 731

apply traditional negligence concepts to governmental tortfeasors who have waived their governmental immunity.[108]

Prior to this statutory abrogation of sovereign immunity, North Carolina courts had no reason to apply traditional negligence concepts to governmental activities.[109] Now, plaintiffs may assert a claim against a city, political subdivision, or other government agency whereas previously the cause of action would have been barred by the defense of governmental immunity.[110] In response to an allegation of liability in tort, a city, political subdivision, or other government agency may assert any common law or statutory defense available, except governmental immunity.[111] Once a governmental entity elects to purchase liability insurance, the governmental entity elects to be treated for tort liability purposes, like any other private entity.[112] Consequently, under N.C. Gen. Stat. § 160A-485, a municipality that purchases liability insurance for its inspection department may be liable for negligent code enforcement.

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108. Coffey, *Waiving Local Government Immunity, supra* note 107, at 731.

109. For a discussion of the governmental function — proprietary function distinction and its ramifications in North Carolina see Harper, *Statutory Waiver, supra* note 27, at 47-49, Gray, *Local Government Sovereign Immunity, supra* note 27, at 44-45.

110. North Carolina courts have interpreted section 160A-485 as not creating any new causes of actions. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2 (1988), *cert. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988) (A waiver of governmental immunity did not create a cause of action where one did not previously exist.). Further, the logical reading of section 160A-485 is that the barrier of governmental immunity may not be employed when the city could have raised it as a defense. N.C. GEN. STAT. § 160A-485 (1986), *supra* note 106. Therefore, the result under section 160A-485 is that it does not create any new liability for a municipality; it only removes the defense of governmental immunity from tort liability when the governmental entity purchases liability insurance.

111. *See* N.C. GEN. STAT. § 160A-485 (1986), *supra* note 106:

> Any plaintiff may maintain a tort claim against a city insured under this section . . . As to any such claim, to the extent that the city is insured against such claim pursuant to this section, governmental immunity shall be no defense. Except as expressly provided herein, to any tort claim lodged against it, or to restrict, limit, or otherwise affect any defense that the city may have at common law or by virtue of any statutes.

112. *See supra* notes 105-11 and accompanying text.

2. Survey of Public Duty Doctrine Cases

North Carolina limits application of the public duty doctrine to "police protection" scenarios. The North Carolina Court of Appeals first embraced the public duty doctrine in *Coleman v. Cooper*.[113] In *Coleman*, the plaintiff alleged that the City of Raleigh, through its police department, and Wake County, through the Wake County Department of Social Services, negligently failed to protect her two daughters from their murderer/father when both defendants knew the victims' murderer/father was dangerous.[114] The *Coleman* court rejected an argument advocating a special duty of protection as it related to police officers, thereby formally adopting the public duty doctrine and relieving the city and its police department of liability.[115] The court of appeals described the public duty doctrine as follows: "[When] furnishing police protection, a municipality ordinarily acts for the benefit of the public at large and not for a specific individual . . As the duty is to the general public rather than to a specific individual no liability exists for the failure to furnish police protection."[116] The *Coleman* court concluded that the "special

113. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2 (1988), *cert. denied*, 322 N.C. 834, 317 S.E.2d 275 (1988). In *Coleman*, the mother of two daughters brought a wrongful death suit arising out of their murders by her former husband, who was their father and stepfather. *Id.* at 189-90, 366 S.E.2d at 3-4. Plaintiff sued the City of Raleigh, the Raleigh Police Department, Wake County, and Cooper (employee of the Wake County Department of Social Services). *Id.* at 188, 366 S.E.2d at 2. Plaintiff alleged that the defendants negligently failed to protect her minor children from their murder when both defendants knew of previous sexual molestations and the dangerous propensities of the father-murderer. *Id.* at 189-91, 366 S.E.2d at 4-5.

114. *Id.* at 189-91, 366 S.E.2d at 4-5.

115. *Id.* at 192-95, 366 S.E.2d at 5-7.

116. *Id.* at 192-93, 366 S.E.2d at 5-6 (citations omitted). The *Coleman* court stated the rationale behind adoption of the public duty doctrine as follows: The "amount of police protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed . . . This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided." *Id* at 195, 366 S.E.2d at 6. Note the *Coleman* court stated that "unless a statute provides to the contrary, only persons in being may be sued." *Id.* at 192, 366 S.E.2d at 5. The court concluded that no statute existed in North Carolina which authorized suits against police departments. *Id.*

relationship" and "special duty" exceptions to the public duty doctrine did not apply under these facts.[117]

When considering Wake County's liability, the court of appeals found that N.C. Gen. Stat. § 7A-517, *et seq.*, which deals with the treatment of juveniles who have been found to be abused or neglected, created a specific duty owed to a particular class of individuals,[118] and the violation of that specific duty constituted negligence *per se*.[119] The court held that the social worker's failure to notify proper authorities violated N.C. Gen. Stat. § 7A-544.[120] The court further held that one of the statute's specific purposes was to protect minors from harm and that the harm which resulted constituted the specific type of harm the statute intended to prevent.[121] Accordingly, the court reasoned that the social worker's violation of the statute constituted negligence *per se*.[122] The court of appeals in *Coleman* applied the public duty doctrine to the police protection scenario and specifically recognized that a statutorily prescribed standard of conduct creates a

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117. *Id.* at 193-95, 366 S.E.2d at 6-7. For a discussion of the public duty doctrine's exceptions, see *infra* notes 126-27, 134, 138 and accompanying text.

118. *Id.* at 195-197, 366 S.E.2d at 7-8. The *Coleman* court first started their analysis by dismissing Wake County's defense of sovereign immunity because Wake County waived this defense by purchasing liability insurance pursuant to N.C. GEN. STAT. § 153A-435. *Id.* at 195, 366 S.E.2d at 7. This statute is similar to N.C. GEN. STAT. § 160A-485. *See supra* notes 106-12 and accompanying text.

119. *Id.* at 195-97, 366 S.E.2d at 7-8. The *Coleman* court held that a "standard of conduct may be determined by reference to a statute which imposes upon a person a specific duty for the protection of others so that a violation of the statute is negligence *per se*." *Id.* at 195, 366 S.E.2d at 7. (citing Lutz Indus. Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955)). The court cited the RESTATEMENT (SECOND) OF TORTS, Section 286 which provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
> (a) to protect a class of persons which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results.

RESTATEMENT (SECOND) OF TORTS § 286 (1985).

120. *Coleman*, 89 N.C. App. at 195-98, 366 S.E.2d at 7-8.

121. *Id.*

122. *Id.*

specific duty or "special duty" which bars application of the public duty doctrine.

The North Carolina Supreme Court officially recognized the public duty doctrine in *Braswell v. Braswell*.[123] In *Braswell*, the plaintiff asserted a negligence claim against the Pitt County Sheriff's Department for failing to provide police protection.[124] The *Braswell* court held that a municipality and its law enforcement agents act for the benefit of the public and there is no liability for failing to provide police protection to specific individuals.[125] The court also recognized two exceptions to the public duty doctrine which arise when a "special relationship"[126] or "special duty"[127] between the injured individual and the police has arisen.[128] The North Carolina Supreme Court pragmatically justified the adoption of the public duty doctrine on the grounds that the doctrine "recognizes the limited resources of law enforcement and refuses

123. Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991).

124. *Id.* at 366, 410 S.E.2d at 899. In *Braswell*, the plaintiff, the administrator of the estate of a woman who was fatally shot by her estranged husband, a deputy sheriff, brought suit against the sheriff for the alleged negligent failure to provide police protection and for continuing to employ the husband/deputy after learning of threats against the decedent. *Id.* at 363-70, 410 S.E.2d at 897-901. The trial court granted a directed verdict for the sheriff. *Id.* at 366-67, 410 S.E.2d at 899. The court of appeals, 98 N.C. App. 231, 390 S.E.2d 752 (1990), ordered a new trial on the negligent failure to protect. *Id.* at 368, 410 S.E.2d at 899.

125. *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 902. The *Braswell* court defined the public duty doctrine as follows: "[A] municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Id.* (citing *Coleman, supra* note 113 and accompanying text).

126. *Id.* at 371, 410 S.E.2d at 902 (A special relationship arises between an injured party and the police when the injured party has been a state's witness or an informant who has aided law enforcement officers.) (citing *Coleman, supra* note 113).

127. *Id.* at 371, 410 S.E.2d at 902 (A special duty arises when a municipality, through its police officers, promises protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection causally related to the injury suffered) (citing *Coleman, supra* note 113). The *Braswell* court further discussed the "special duty" exception when the plaintiff relied on it for liability. *Id.* To make out a prima facie case under the "special duty" exception to the public duty doctrine the "plaintiff must show that an actual promise was made by the police to create a special duty, that this promise was reasonably relied upon by the plaintiff, and that this reliance was causally related to the injury ultimately suffered by plaintiff." *Id.*

128. *Id.* ("Although we have not heretofore adopted the doctrine with its exceptions, we do so now.").

to judicially impose an overwhelming burden of liability for failure to prevent every criminal act."[129] Thus, the *Braswell* court embraced a limited application of the public duty doctrine to police protection" scenarios.

Since *Braswell*, the North Carolina Court of Appeals has applied the public duty doctrine in three cases, each involving quasi-police protection duties.[130] In *Prevette v. Forsyth County*,[131] the plaintiff brought an action against Forsyth County and the Forsyth County Animal Control Department alleging they negligently failed to protect an individual from vicious dogs which the defendants knew were dangerous.[132] The *Prevette* court held that the Animal Control officers act for the benefit of the public, and that no liability exists for failing to furnish police protection to specific individuals.[133] Furthermore, the "special relationship"

129. *Id.* at 371, 410 S.E.2d at 901. The *Braswell* court further stated that "the amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed." *Id.*

130. Prior to *Braswell*, the North Carolina Court of Appeals applied the public duty doctrine in two cases. Both cases were "failure to furnish police protection" scenarios. *See supra* notes 113 and accompanying text; Hull v. Cantrell, 104 N.C. App. 29, 407 S.E.2d 611 (1991) (The general rule is that law enforcement agencies and officials are not under a duty to protect individuals from the criminal actions of others unless there is a special relationship or special duty.).

131. Prevette v. Forsyth County, 110 N.C. App. 754, 431 S.E.2d 216 (1993). In *Prevette*, the plaintiff administratrix of the estate of an individual who was killed by a dog attack, alleged that Forsyth County, through its animal control departments, was charged with the responsibility of enforcing all state and county laws relating to the care, custody, and control of animals, including the confinement of vicious dogs. *Id.* at 756, 431 S.E.2d at 217. Further, *Prevette* plaintiff alleged that the animal control departments knew or should have known of the dangerous propensities of the two animals because of previous detainments made by them. *Id.* at 757, 431 S.E.2d at 218. The plaintiffs asserted that the defendants "were negligent because they failed to adequately train and supervise their employees/agents . . ." *Id.*

132. *Id.* at 757, 431 S.E.2d at 218 ("The defendants in the case at bar are being sued for their alleged failure to properly protect an individual from dogs which the defendants allegedly knew or had reason to know were dangerous.").

133. *Id.* at 756-757, 431 S.E.2d at 218. The *Prevette* court quoted at length the *Braswell* court's adoption of the public duty doctrine. *Id.* at 757, 431 S.E.2d at 218. The court then held "because this cause of action clearly arises out of Forsyth County's agents alleged failure to provide sufficient protection to the individual decedent in this case, we must find that the public duty doctrine applies here and bars plaintiff's cause of action." *Id.* at 758, 431 S.E.2d at 218.

exception to the public duty doctrine did not apply even though the officers knew of the dangerous propensities of the dogs.[134]

Similarly, in *Clark v. Red Bird Cab Co.*,[135] the plaintiff asserted that the City of Burlington and its police officers negligently failed to properly investigate the credentials of a driver when the driver applied for a permit to operate a taxicab.[136] The *Clark* court held that police officers act for the benefit of the public, and that no liability exists for failing to furnish police protection.[137] Furthermore, the "special duty" exception to the public duty doctrine did not apply because the municipal code provision allowing police review before the issuance of taxi-cab permits "created no special duty owed by police to taxicab customers over and above the duty owed to the general public."[138]

In *Davis v. Messer*,[139] the plaintiff alleged that the Town of Waynesville, its Fire Chief and Fire Department, and Haywood County were negligent by initially responding to an emergency 911 call and thereafter not fighting the fire that consumed the plaintiff's residence.[140] The *Davis* court held that the public duty

134. *Id.* at 758, 431 S.E.2d at 218-19 (Policing animal control officers in the neighborhood in which victim was attacked is too broad to justify application of the special relationship exception.).

135. Clark v. Red Bird Cab Co., 114 N.C. App. 400, 442 S.E.2d 75 (1994). In *Clark*, the plaintiff alleged that the City of Burlington was negligent by failing to properly investigate the credentials of an applicant for a permit to operate a taxicab. *Id.* at 401, 442 S.E.2d at 76. The plaintiff in *Clark*, administrator of the estate, contended that the issuance of a taxicab permit to a person who had a felony record and a reputation for dangerous tendencies proximately caused the death of the victim. *Id.*

136. *Id.* at 401-02, 442 S.E.2d at 76. In *Clark*, the City Code of Burlington established certain procedures for obtaining a taxicab permit, including general inspection by the police authorities into the overall character of an applicant to operate a taxicab. *Id* at 402. Further, a right to refuse an applicant with a felony record was provided in the same municipal code. *Id.*

137. *Id.* at 404, 442 S.E.2d at 78 ("This case is governed by the 'public duty doctrine', or the general common law rule that 'a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals'.").

138. *Id.* at 405, 442 S.E.2d at 78-79 ("Here, plaintiff has no alleged facts which would indicate the City of Burlington made an overt promise to protect [the plaintiff], giving rise to a special duty owed.").

139. 119 N.C. App. 44, 457 S.E.2d 902 (1995).

140. *Id.* at 51-52, 457 S.E.2d at 907. In *Davis*, the 911 operator reported the fire call and specifically inquired whether the residence was in a certain fire district. *Id.* at 55, 457 S.E.2d at 909. Messer, the Fire Chief, and his crew promptly proceeded toward the fire. *Id.* However, they never reached their

doctrine applied to fire protection services because fire protection services were "sufficiently similar to the protective services offered by . . . police department[s]. . ."[141] However, the plaintiff in *Davis* did state sufficient factual circumstances to invoke the "special duty" exception.[142] The court explained that by the Town "accepting the 911 call and proceeding towards the scene of the fire, the town (through the acts of its employee, Messer, and its fire department) promised it would provide fire-fighting assistance and protection; the promised protection never arrived; and plaintiffs relied upon the promise to respond to fire as their exclusive source of aid, resulting in the complete destruction of their home."[143]

3. Lynn v. Overlook Development, Inc.

In *Lynn v. Overlook Development, Inc.*, the North Carolina Court of Appeals expanded the application of the public duty doctrine and held that a municipal building inspector owes no legal duty to a specific individual.[144] The *Lynn* appellate court concluded that a municipality could not be liable to an individual plaintiff because the North Carolina Building Code provides a duty to the public at large.[145] However, the court's application of

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destination because Messer ordered the fire truck to return to the station when only .4 mile from the plaintiff's burning home after Messer discovered the plaintiff's residence was out of his fire district. *Id.*

141. *Id.* at 55-56, 457 S.E.2d at 909.

142. *Id.* at 56-57, 457 S.E.2d at 909-10. The *Davis* court defined the "special duty" exception as "when a municipality through its protective officers has created a special duty to a particular individual by promise of protection causally related to the injury suffered." *Id.*

143. *Id.* at 56-57, 457 S.E.2d at 910.

144. 98 N.C. App. 75, 389 S.E.2d 609 (1990). In *Lynn*, the plaintiffs purchased a new condominium unit from the Overlook Development. *Id.* at 76-77, 403 S.E.2d at 610-11. Upon completion of the unit, the plaintiffs assumed occupancy until numerous construction defects were discovered. *Id.* The plaintiffs brought suit against the City of Asheville and its building inspector, among others, for negligent inspection of the plaintiff's unit. *Id.* The plaintiffs alleged that "the inspector was negligent under the standards set forth at N.C. GEN. STAT. §§ 160A-411, *et. seq.* and the North Carolina Building Code § 105 in that he improperly issued a building permit to [defendants], failed to observe code violations in the construction of plaintiff's unit, or alternately, having observed such violations, failed to take appropriate remedial measures, including notifying the plaintiffs and revoking the building permit." *Id.* at 78, 403 S.E.2d at 613.

145. It is equally undeniable, however, that such powers fall within the City's statutory police powers, and consequently, the duty owed in this

the public duty doctrine to municipal building inspections must be carefully scrutinized in light of the North Carolina Supreme Court's analysis in *Lynn*.

Contrary to the court of appeals, the North Carolina Supreme Court, when reviewing *Lynn v. Overlook Development*,[146] assumed for purposes of its decision, without specifically deciding, that a duty existed to the individual plaintiff and disregarded the public duty doctrine, which was advanced by the court of appeals.[147] The failure of the supreme court to acknowledge the legal duty argument made by the court of appeals and the lengthy discussion by the supreme court regarding the building inspector's duties raises the question whether the public duty doctrine applies to the inspection scenario.[148] Additionally, the argument advocated by the supreme court in *Lynn* implicitly suggests that the North Carolina Statutes and the North Carolina Building Code establish an individual duty thus making the public duty doctrine inapplicable.[149] Moreover, the statutory duties imposed upon the building inspector appear to create an individual duty similar to the individual duty imposed upon the social worker in *Coleman*, but unlike the non-statutorily imposed duties relating to the police.[150] However, the supreme court's analysis of the duty found in North Carolina's inspection statute failed to specifically adopt such an analysis as controlling.[151]

> case is not to the plaintiffs individually but to the general public . . . Such a waiver [of sovereign immunity by purchasing liability insurance] does not entitle plaintiffs to proceed against the City by predicating recovery on those claims against [the building inspector] that were properly dismissed.

Id. at 78-79, 403 S.E.2d at 613.

146. 328 N.C. 689, 403 S.E.2d 469 (1991).

147. The supreme court specifically assumed solely for the purposes of the *Lynn* decision that an individual duty existed in the inspection statute. The analysis by the supreme court thus "begs the question." whether such a duty would be found by the court under a similar case without a proximate cause problem. For additional analysis of the supreme court's decision in *Lynn*, see *infra* notes 175-90 and accompanying text.

148. For a comparison of the supreme court's review of *Lynn* and *Sinning*, see *infra* notes 175-90 and accompanying text.

149. *See infra* notes 175-90 and accompanying text.

150. *See supra* notes 113-22 and accompanying text.

151. *See supra* note 147 and accompanying text.

IV. ANALYSIS

A. *Public Duty Doctrine Embraced in Code Enforcement Cases*

In their complaint, the Sinnings alleged that the City of New Bern's purchase of liability insurance removed the defense of governmental immunity which arose from code enforcement, a governmental function.[152] Acknowledging this, the North Carolina Court of Appeals began its analysis in *Sinning* by implicitly noting that the City of New Bern could not be held liable unless the individual defendants, acting within their official capacity, were negligent.[153] The court noted that "negligence presupposes the existence of a legal relationship between the parties . . ." and "if there is no duty, there can be no liability."[154]

The *Sinning* court then described the public duty doctrine as follows: "[A] municipality and its agents ordinarily act for the benefit of the general public and not for a specific individual when exercising its statutory police powers, and, therefore, cannot be held liable for failure to carry out its statutory duties to an individual."[155] The court noted that the doctrine had been specifically adopted in North Carolina, and that the prior decision of the court of appeal's in *Lynn* made the doctrine applicable under these facts.[156]

B. *Rejection of the Public Duty Exceptions*

1. *"Special Relationship" Not Contemplated in* Sinning

The *Sinning* court next applied the two exceptions to the public duty doctrine to the facts of the case. The court noted that both exceptions have been narrowly construed. The court stated that the special relationship exception applies "where there is a special relationship between the injured party and municipality." The special duty exception applies "where the municipality . . . creates a special duty by promising protection to the individual, the protection is not forthcoming, and the individual reliance on the promise of protection is causally related to the injury suffered."[157] The special relationship exception did not arise under these facts

152. *Sinning*, 119 N.C. App. at 516, 459 S.E.2d at 72.
153. *Id.* at 516, 459 S.E. 2d at 73.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 519-20, 459 S.E. 2d at 73-74.

because no relationship was contemplated.[158] Moreover, if a special relationship arose under these facts, "a municipality would become a virtual guarantor of the construction of every building subject to its inspection, exposing it to an overwhelming burden of liability for failure to detect every code violation or defect."[159]

2. *The North Carolina Supreme Court's Analysis of the "Special Duty" Exception in* Lynn *Rejected in* Sinning

The court of appeals did not follow the supreme court's reasoning in *Lynn* when it applied the "special duty" exception in code enforcement cases. The *Sinning* court stated that "the [Supreme] Court declined to decide the issue of whether [G.S. § 160-411 *et. seq.*, and the North Carolina State Building code] created a duty owed by the city building inspector to a purchaser . . . Thus, we continue to follow our Court of Appeal's decision in *Lynn*, . . . and hold [that the statutes and code] do not create a special duty owed by defendants to plaintiffs over and above the duty owed to the general public."[160]

By failing to follow the supreme court's analysis in *Lynn*, the court of appeals in *Sinning* ignored a growing minority of jurisdictions that persuasively advocate that statutorily imposed duties prescribing a standard of conduct for an inspector establish an individual duty to all foreseeable plaintiffs injured by the negligence of such inspection. The *Sinning* court's failure to analyze the issue is a major judicial oversight. If an individual duty is found, such duty would bar the application of the public duty doctrine. Other jurisdictions which have decided the issue, such as the Supreme Court of Wisconsin in *Coffey,* rejected the doctrine because the Wisconsin inspection statute imposed a duty and prescribed a standard of conduct for the inspectors.[161] Similarly, the Supreme Court of Iowa in *Wilson* rejected the doctrine because the inspection statute created an individual duty to foreseeable plaintiffs injured by the negligence of the inspectors[162]. Further,

158. *Id.* at 520, 459 S.E. 2d at 74.

159. *Id.*

160. *Id.*

161. *Coffey*, 247 N.W.2d at 132. The Supreme Court of Wisconsin in *Coffey* held that a building inspector must be held to have foreseen that his alleged negligence in performing the required inspection might have foreseeably resulted in harm to the owners and occupants. *Id.*

162. *Wilson*, 282 N.W.2d at 664. The Supreme Court of Iowa in *Wilson* held that the inspection "statutes and ordinances were designed for the protection of a

the Supreme Court of Louisiana in *Stewart* rejected the doctrine because the duty found within the inspection statute was designed to protect a particular class of individuals injured by negligent inspections.[163] Additionally, the Supreme Court of Arizona in *Brown* rejected the doctrine because the inspection statute created an individual duty to owners injured by negligent inspections.[164] The modern trend,[165] which the *Sinning* court failed to acknowledge, relies on an inspection statute which imposes a duty and a standard of conduct upon the inspector, thereby creating an individual duty to foreseeable plaintiffs injured by the inspector's negligence, resulting in the inapplicability of the public duty doctrine.

Because the *Sinning* court decided the issue was controlled by the court of appeal's decision in *Lynn,* there was no need to analyze North Carolina's inspection statutes. However, an analysis of Chapter 160A of the North Carolina General Statutes, which contains North Carolina's statutory scheme of inspection regulation, reveals the fallacy of the *Sinning* court's conclusion that a "special duty" does not exist. First, in N.C. Gen. Stat. § 160A-411,[166] all cities are required, by one of several authorized methods, to perform the duties and responsibilities listed in section 160A-412,[167] including enforcing state and local laws relating to the construc-

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special, identifiable group of persons . . . from a particular harm . . . not members of the public generally." *Id.*

163. *Stewart*, 386 So.2d at 1351. The Louisiana Supreme Court in *Stewart* found that their inspection statute created foreseeable plaintiffs through the class intended to be protected. *Id.*

164. *Brown*, 663 P.2d at 252. The *Brown* court stated that "the paremeters of duty owed by the state will be . . . subject to the same tort law as private citizens" and thus rejected the application of the public duty doctrine to inspection cases by relying on a statutorily imposed duty upon an inspector. *Id.*

165. *Wilson*, 282 N.W.2d at 667 ("Moreover, the trend in this area is toward liability. The public duty doctrine has lost support . . .").

166. *See* N.C. GEN. STAT. § 160A-411, *supra* note 4.

167. *See* N.C. GEN. STAT. § 160A-412 (1982). Section 160A-412 provides:

> The duties and responsibilities of an inspection department and of the inspectors therein shall be to enforce within their territorial jurisdiction State and local laws relating to
> (1) The construction of buildings and other structures;
> (2) The installation of such facilities as plumbing systems, electrical systems, heating systems, refregeration systems, and air conditioning systems;
> (3) The maintenance of buildings and other structures in a safe, sanitary, and healthful condition;
> (4) Other matters that may be specified by the city council.

tion of buildings, installation of facilities, and maintenance of buildings. These duties include the issuance and denial of building permits and certificates of compliance.[168] Further, during the construction process, municipal building inspectors must make as many inspections as are necessary to satisfy themselves that the work is being done in accordance with all applicable laws and with the terms of the permit.[169] No completed building may be occupied until the inspector, after a final inspection, issues a certificate of compliance which states that the structure complies with all applicable state and local laws.[170] Moreover, if at anytime during an inspection, the inspector finds any defects or finds that the building has not been constructed in accordance with applicable state and local laws, the inspector is to notify the owner or occupant.[171] Furthermore, an inspector who willfully fails to perform any of his required duties will be subject to criminal prosecu-

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These duties shall include the receipt of all applications for permits and the issuance or denial of permits, the making of any necessary inspections, the issuance or denial of certificates of compliance, the issuance of orders to correct violations, the bringing of judicial actions against actual or threatened violations, the keeping of adequate records, and any other actions that may be required in order to adequately enforce those laws. The city council shall have the authority to enact reasonable and appropriate provisions to enforce these laws.

168. *Id.*

169. *See* N.C. GEN. STAT. § 160A-420 (1982). Section 160A-420 provides:

> As the work pursuant to a permit progresses, local inspectors shall make as many inspections thereof as may be necessary to satisfy them that work is being done according to the provisions of any applicable State and local laws and of the terms of the permit. In exercising this power, members of the inspection department shall have a right to enter on any premises within the jurisdiction of the department at all reasonable hours for the purposes of inspection or enforcement action, upon presentation of proper credentials.

170. *See* N.C. GEN. STAT. § 160A-423, *supra* note 5.

171. *See* N.C. GEN. STAT. § 160A-425 (1982). Section 160A-425 provides:

> Defects in building to be corrected.
>
> When a local inspector finds any defects in a building, or finds that a building has not been constructed in accordance with the applicable State and local laws, or that a building because of its condition is dangerous or contains fire hazardous conditions, it shall be his duty to notify the owner or occupant of the building of its defects, hazardous conditions, or failure to comply with law. The owner or occupant of the building of its defects, hazardous conditions, or failure to comply with law. The owner or occupant shall immediately remedy the defects, hazardous conditions, or violations of law in the property he owns.

tion.[172] Clearly, the *Sinning* court failed to adequately examine the statutory authority and recognize the individual duty contained therein.

In addition, the *Sinning* court's analysis disregarded traditional statutory interpretation. It is well settled in North Carolina that a statute designed for the protection of the public is a "safety" enactment, the violation of which constitutes negligence *per se*, unless otherwise provided by the legislature.[173] Where a statute is not a "safety" enactment but sets a standard of conduct, a violation of the statute may be evidence of negligence.[174] In *Coleman,* the court held that "a standard of conduct may be determined by reference to a statute which imposed upon a person a specific duty for the protection of others so that a violation of the statute is negligence *per se*."[175] Further, the *Coleman* court clearly established that a statutorily imposed standard of conduct bars application of the public duty doctrine because the statute creates an individual duty to the plaintiff.[176] Thus, according to *Coleman*, if the duties imposed on an inspector are contained within a "safety" enactment or is prescribed by statute, the legislature intended to create an individual duty. This duty would bar application of the public duty doctrine.

Contrary to the *Sinning* court's analysis, the supreme court in *Lynn v. Overlook Development* addressed the issue of whether the statutory duties imposed on building inspectors pursuant N.C. Gen. Stat. § 160A-411 *et seq*., are safety regulations which impose

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172. See N.C. GEN. STAT. § 160A-416 (1993). Section 160A-416 provides:
> If any member of the inspection department shall willfully fail to perform the duties required of him by law, or willfully shall improperly issue a permit, or shall willfully give a certificate of compliance without first making the inspections required by law, or willfully shall improperly give a certificate of compliance, he shall be guilty of a Class I misdemeanor.

173. *See, e.g.*, Jackson v. Housing Auth. of High Point, 73 N.C. App. 363, 369, 326 S.E.2d 295, 300 (1985) ("A statute or ordinance designed for the protection of the public is a 'safety' enactment and its violation constitutes negligence *per se*, unless the legislative body provides otherwise: and where a statute or ordinance is not a 'safety' enactment but sets a standard of conduct, its violation may be evidence of negligence."); Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2 (1988), *cert. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988); Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955); Lynn v. Overlook Dev., Inc., 328 N.C. 689, 403 S.E.2d 469 (1991).

174. *Jackson*, 73 N.C. App. 369, 326 S.E.2d at 300.

175. *See supra* notes 113-22 and accompanying text.

176. *Id*.

a statutory standard of care.[177] The plaintiff in Lynn filed an action for damages against the inspection department, the City of Asheville, and others arising from the alleged wrongful issuance of a building permit to an unlicensed contractor, negligent inspection, and for failing to take appropriate remedial measures such as notifying the plaintiff of revocation of the building permit.[178] Similar to the plaintiff in *Sinning*, the plaintiff in *Lynn* alleged that the building inspector was negligent because he violated the standard set forth in N.C. Gen. Stat. § 160A-411 *et seq.*, and the North Carolina Building Code § 105.[179]

The supreme court initially decided whether sections 160A-411 *et seq.*, were "safety" enactments which provide a statutory standard of care for building inspectors.[180] After reviewing the statutory scheme, the court stated that "it appears that one of the specific purposes of N.C. Gen. Stat. § 160A-411 to -425 is to promote the safety of the general public."[181] Relying on those statutes, the court held that "the language of the Building Code suggests that the particular provisions of the Code pertinent here are safety regulations . . . The intent of the Building Code is evident in its stated purpose to promote the public health, safety,

177. *Lynn*, 328 N.C. at 689, 403 S.E.2d 469. The *Lynn* court started by brazenly stating "our appraisal of the facts found in the complaint and exhibits differs somewhat from the facts stated in the opinion of the Court of Appeals." *Id.* at 690, 403 S.E.2d at 469. The *Lynn* court noted that plaintiffs assumed occupancy before a certificate of compliance, "a precondition for legal occupancy," was issued. *Id.* Further, "an inspection was conducted by [the building inspector after plaintiffs had moved in] but [the inspector] did not issue a certificate of compliance, inform the plaintiffs of any problems with construction, or inform them that they were occupying the unit in violation of N.C.G.S. § 160A-423." *Id.*

178. *See supra* note 144 and accompanying text.

179. *Lynn*, 328 N.C. at 689, 403 S.E.2d 469.

180. *Id.* at 692, 403 S.E.2d at 471 ("[W]e must first determine whether the statute complained of is a safety statute and whether plaintiffs belong to the class of persons for whose protection and benefit the statute and the Building Code were enacted.").

181. *Id.* at 695, 403 S.E.2d at 472. The *Lynn* court noted that the statutes and the building code were silent as to the legislative purpose and to the class of persons for whose benefit they were enacted. *Id.* at 694, 403 S.E.2d at 472. The court then stated that "careful consideration of the provisions" and "the ends they were manifestly intended to accomplish" must determine the intent. *Id.* To reach this legislative intent, the *Lynn* court quoted the enabling statute: "All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare and their provisions shall be liberally construed to those ends." *Id.*

morals, or general welfare."[182] In addition, the court concluded that sections 160A-411 *et seq.*, are "safety" regulations which impose an individual duty upon the inspector, the violation of which may be negligence *per se*.[183]

Because *Coleman* recognized that a statutory duty creates a "special duty" to protect a specific class of plaintiffs from a particular type of harm, and because the supreme court in *Lynn* held that damages relating to an inspector's acts or omissions constitute the particular type of harm which sections 160A-411 *et seq.*, seek to protect, North Carolina's inspection statute, similar to the statutes in Wisconsin, Iowa, Louisiana, and Arizona, imposes a standard of conduct upon inspectors.[184] Further, just as the Supreme Court of Iowa in *Wilson* found that the particular language of the inspection statute provided a basis for imposing a standard of conduct,[185] North Carolina'a inspection statute, applying the supreme court's decision in *Lynn*, provides a strong foundation upon which to establish a statutory standard of care for inspectors.[186] Furthermore, similar to the statutorily imposed duties in *Stewart*, the statutory duties imposed on North Carolina building inspectors "empower[s] and obligate[s] them to issue such notices and orders necessary to enforce codal compliance, to remove unsafe and illegal conditions, and to secure the necessary safeguards during construction."[187] Clearly, the North Carolina inspection statute prescribes a standard of conduct similar to

182. *Id.*

183. *Id.* at 695-96, 403 S.E.2d at 472-73 ("Although the violation of a statute which imposes a duty upon city building inspectors in order to promote the safety of the public, including the plaintiffs, may be negligence *per se*, such negligence is actionable only if it is the proximate cause of the injury to the plaintiff."). The *Lynn* court was unclear whether these particular plaintiffs as purchasers were within the class intended to be protected. *Id.* at 695, 403 S.E.2d at 472. As such, the court stated "[a]ssuming without deciding the issue, that a city building inspector owes a statutory duty to these particular plaintiffs as purchasers . . ." to reach the easier question of proximate cause. *Id.* at 695, 403 S.E.2d at 472-73. The court specifically held that when the plaintiffs elected to assume occupancy before the final inspection, that act constituted "an intervening, independent cause of plaintiffs' damages." *Id.* at 696-97, 403 S.E.2d at 473. "Therefore, the acts or omissions by the city building inspector did not proximately cause the plaintiffs' damages." *Id.*

184. *See supra* notes 177-83 and accompanying text.

185. *See supra* notes 88-93 and accompanying text.

186. *See supra* notes 177-83 and accompanying text.

187. *See supra* notes 94-99 and accompanying text.

those found in states that have rejected the public duty doctrine in inspection cases.

As the *Sinning* court recognized but failed to address, the question remains whether owners and occupants are the intended beneficiaries of the duties imposed upon building inspectors. However, North Carolina courts consistently construe the intended beneficiaries of N.C. Gen. Stat. sec. 160A-411-438, and the North Carolina Building Code as the owners and occupants of buildings. Although the action was not levied against a building inspector in *Jackson v. Housing Authority of High Point*, the court of appeals stated that "the obvious purpose of [160A-425] is to protect the lives and limbs of the occupants of the building affected."[188] Similarly, in *Lutz Industries v. Dixie Home Stores*, the supreme court held that the "legislative purpose of the [Building Code] was 'to protect life, health and property.' "[189] Thus, the *Sinning* court's application of the public duty doctrine to inspection cases in North Carolina is illogical.[190] Moreover, according to *Lynn*, a violation of the duties set forth in N.C. Gen. Stat. 160A-411-438 is negligence per se.

Clearly, the *Sinning* court declined to follow the road map which the supreme court in *Lynn* charted. The *Sinning* court concluded, with very little analysis, that the court of appeal's decision in *Lynn* as controlling and declined to analyze any of the relevant issues related to the "special duty" exception. Therefore, because the court of appeals in *Sinning* "missed the boat" by not adopting the "special duty" exception, North Carolina should re-examine application of the public duty doctrine to code enforcement cases and disregard the *Sinning* opinion as controlling.

C. *Sinning's Failure to Consider Tort Principles of Affirmative Action and Reliance*

Another approach the *Sinning* court failed to address was the effect of the tort principles of affirmative action and reliance in

188. Jackson v. Housing Auth. Of High Point, 73 N.C. App. 363, 369, 326 S.E.2d 295, 299 (1985). In *Jackson,* the defendant was a municipality but the alleged misconduct arose from its capacity as a landlord. *Id.* at 364-65, 326 S.E.2d at 297.

189. 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955). In *Lutz,* the defendant was a private corporation. The status of the defendant should not change the intended beneficiaries of a particular statute.

190. To allow such an inconsistently, North Carolina would in essence resurrect the defense of sovereign immunity. *See supra* notes 70-79 and accompanying text.

code enforcement situations. Contrary to *Sinning*, several courts from other jurisdictions have buttressed their rejection of the public duty doctrine I inspection cases by concluding that once an inspector undertakes to perform an inspection, an individual duty to exercise ordinary care arises to protect owners and occupants from harm. The Supreme Court of Alaska in *Adams* recognized the affirmative action principle by holding that

> once an inspection has been undertaken, the stat has a further duty to exercise reasonable care in conduction fire safety inspections, and that liability will attach where there is a negligent failure to discover a fire hazard which would be brought to light by an inspection conducted with ordinary care.[191]

The Supreme Court of Wisconsin in *Coffey* recognized the affirmative action principle in statutorily mandated duties by holding that once the inspector undertook to conduct the required inspection, the inspector had a duty to exercise reasonable care during that inspection.[192]

Because the *Sinning* court decided the issue was controlled by the court of appeals decision in *Lynn*, there was no need to analyze North Carolina's inspections statutes in conjunction with the doctrines of affirmative action and reliance. However, North Carolina imposes upon every person, who enters into an active course of conduct, the positive duty to exercise ordinary care to protect others from harm.[193] Further, a violation of the duty created by active conduct is negligence.[194] Contrary to *Sinning* but similar to *Adams* and *Coffey*, once an inspector undertakes to perform the duties required in 160A-411,[195] the tort principles of affirmative action and reliance further justify not applying the public duty doctrine to inspection cases. The individual duty found in actively conducting inspection makes the public duty doctrine inapplicable.[196] Thus, once an inspector enters a premises, a duty arose to properly inspect the premises to protect the owners and occupants from harm.[197] Therefore, because the court of appeals in *Sinning*

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191. Adams v. State, 555 P.2d 235, 240 (Alaska 1976).

192. *See supra* notes 80-90 and accompanying text.

193. *See, e.g.*, Williamson v. Clay, 243 N.C. 337, 90 S.E.2d 727(1956); Council v. Dickerson's Inc., 233 N.C. 472, 64 S.E.2d 551(1951); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632(1985); Baker v. Dept. Of Corrections, 85 N.C. App. 345, 354 S.E.2d 733(1987).

194. *See* cases cited *supra* note 193.

195. *See supra* notes 105-12 and accompanying text.

196. *See supra* notes 76-79, 80-84 and accompanying text.

197. *See supra* notes 76-79, 80-84 and accompanying text.

failed to apply the tort doctrines of affirmative action and reliance, North Carolina should re-examine application of the public duty doctrine to code enforcement cases and disregard the *Sinning* opinion as controlling.

D. Sinning's failure to weigh policy considerations

The *Sinning* court failed to weigh any policy considerations. In doing so, the *Sinning* court failed to recognize that expansion of the public duty doctrine to municipal building inspections is not supported by the same policy reasons used by courts in applying the doctrine to police protection services. The distinction between police protection and building inspection is equivalent to "nonfeasance"[198] versus "misfeasance".[199] The *Coleman* and *Braswell* courts limited adoption of the public duty doctrine was grounded upon the theory that the imposition of a duty upon the limited resources of law enforcement "to prevent every criminal act" would create "an overwhelming burden of liability."[200] "Nonfeasance" from failure to provide police protection is factually and legally distinguishable from the scenario created by building inspections.

The building inspector commits an affirmative act of negligence, or "misfeasance",[201] which is rooted in the negligent performance of statutorily mandated duties. Specifically, the building inspector visits a construction site and actively participates by inspecting the ongoing and completed portions of the

198. Nonfeasance is defined, with respect to public officials, as the substantial failure to perform a required legal duty. BLACK'S LAW DICTIONARY 1054 (6th ed. 1990).

199. Misfeasance is defined, with respect to public officials, as doing in a wrongful manner that which the law authorizes or requires. BLACK'S LAW DICTIONARY 1054 (6th ed. 1990). "Nonfeasance" refers to total omission or failure to act while "misfeasance" is acting wrongfully. *Id.* The distinction is that by "misfeasance", a new risk of harm has been created by the conduct of the defendant, while by "nonfeasance", the defendant did not make the situation worse, he merely failed to benefit the plaintiff by intervening. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, sec. 56 (5th ed. 1984). *See also* W. PROSSER, HANDBOOK ON THE LAW OF TORTS 338-39 () ("Liability for 'misfeasance' then may extend to any whom harm may reasonably be anticipated as a result of the defendant's conduct, or perhaps even beyond (cite); while for 'nonfeasance' it is necessary to find some definite relationship between the parties, of such a character that social policy justifies the imposition of a duty to act."

200. *See supra* notes 113-29 and accompanying text.

201. *See supra* note 199.

structure. In addition, all new construction must be inspected by a building inspector.[202] The factual equivalent in police protection would be if every citizen had a personal police officer escorting them to ensure protection. Clearly, the "limited resources" justification does not apply to inspections because all new construction must be inspected regardless of allotted resources.[203] The *Sinning* court's failure to recognize these considerations is but another nail in the coffin of the public duty doctrine.

Perhaps the strongest policy consideration overlooked by the *Sinning* court is that, from a practical standpoint, extension of the public duty doctrine to building inspection cases leaves an individual constructing a home in an extremely difficult position. The individual often is in a position to know or understand the intricacies of the building code or correct engineering calculations for proper construction. Instead, homeowners rely on their general contractor and building inspect to insure compliance with the applicable state and local laws. Thus, municipalities are in the enviable position of having statutory responsibility for insuring the compliance and safety of the construction, but when they prove incapable of performing their responsibilities, they claim governmental immunity via the public duty doctrine. This position is illogical. Without accountability to injured individuals, inspection departments serve no useful purpose because they are required to act for the benefit of anyone. Certainly, public policy is not offended by holding government accountable when they have a required duty to inspect new construction. Indeed, public policy demands that building inspectors be competent and act with due care when they inspect premises that they are statutorily charged with inspecting, if they are going to inspect at all.

V. Conclusion

The North Carolina Court of Appeal's decision in *Sinning v. Clark* sets forth the standard to be used when determining whether a municipality is liable for the negligent acts of its building code enforcers. The court invoked the public duty doctrine and declined to follow the reasoning used by the supreme court in *Lynn v. Overlook Development Company*, which would have allowed the "special duty" exception to be applied in code enforcement cases. The court failed to acknowledge that sec. 160A-411-

202. *See supra* nots 166-72 and accompanying text.
203. *See supra* nots 166-72 and accompanying text.

438 creates an individual actionable duty against the municipality. In addition, an individual duty to exercise reasonable care may be independently imposed upon a building inspector resulting from his affirmative conduct and the homeowner's reliance when performing the statutorily required duties.

Accordingly, North Carolina should re-examine application of the public duty doctrine in code enforcement cases and disregard the *Sinning* opinion. If not, municipalities can cower behind governmental immunity after acting negligently. Without accountability to injured homeowners, inspection departments serves no useful purpose because they are not required to act for the benefit of anyone. The citizens of North Carolina deserve a government that will perform necessary services with competence ad compensate individuals who are injured at the expense of governmental torts.

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