Municipal Liability

What is a Tort?

Ballentine's Law Dictionary with Pronunciations defines a tort as an "injury or wrong committed ... to the person or property of another." *Tort*, Ballentine's Law Dictionary (2d ed. 1948). There are three basic types of torts – intentional torts, negligent torts and strict liability torts.

Municipal liability is usually based on negligence, pursuant to Ala. Code 1975, § 11-47-190. Essentially, this code section establishes a negligence standard for municipalities. It states that a municipality can be held liable for the torts of its officers and employees which are due to "neglect, carelessness or unskillfulness." In its simplest terms, a negligent tort arises if the plaintiff can prove four elements:

1. the defendant owed (or assumed) a duty to the plaintiff to use due care;
2. the defendant breached that duty by being negligent;
3. the plaintiff was injured; and
4. the defendant's negligence caused the plaintiff's injury.

The courts have held that the established rules relating to negligence apply in cases involving municipalities. *Birmingham v. Latham*, 162 So. 675 (1935). Thus, all four elements must be satisfied for liability against the municipality to arise. The plaintiff to must plead and prove negligence on the part of the municipality. *Montgomery v. Quinn*, 19 So. 2d 529 (1944). It must also be shown that the negligence of the city breached a duty owed to the plaintiff. *Modlin v. Miami Beach*, 201 So. 2d 70 (1967).

A negligent tort can arise by nonfeasance, by malfeasance, or by misfeasance. **Nonfeasance** is the "omission to perform ... duties that the person owes to his principal." That is, failing to perform a required duty. An example of nonfeasance is the failure of a city clerk to record a paper which the clerk is required by law to record. **Malfeasance** is "the doing of an act which the person ought not to do at all." This is a situation where a person acting exceeds their authority. For instance, when a city police officer arrests a person the officer has no reason to believe committed a crime, the officer commits an act of malfeasance. **Misfeasance** is the "improper doing of an act which a person might lawfully do." An example would be the reckless operation of a fire truck by a firefighter authorized to operate the vehicle.

Although § 11-47-190 creates a negligence standard of care for municipalities, several court decisions that will be discussed later indicate that municipalities must also be concerned with intentional torts. An intentional tort is a willful tortious action taken by the defendant towards the plaintiff. Examples of intentional torts are assault, battery, false imprisonment, false arrest, trespass on real and personal property and so forth.

Strict liability torts rarely apply to municipalities. A strict liability tort is a liability imposed by law on a person even though he has not been guilty of any negligent act or any wanton, willful or intentional wrongdoing. Such liability is usually imposed upon owners of animals for damage done by the animals and upon those who either maintain conditions or engage in activities which are highly dangerous and threaten injury to the general public. The idea is that although neither party is to blame, in balancing the social equities and in determining who can best bear the loss, the loss is shifted by law from plaintiff to the defendant.

The two major types of civil actions filed against municipalities are tort actions filed in state courts and civil rights actions filed in federal court under Section 1983 of the Civil Rights Act of 1971. The Civil Rights Act of 1971, 42 U.S.C. § 1983.

State actions generally commence at the circuit court level. The circuit court has exclusive jurisdiction of all cases involving claims for more than $10,000 and has concurrent jurisdiction with the district court of all cases involving claims above $3,000. Ala. Code 1975, § 12-11-30. Punitive damages cannot be recovered against a municipality. Ala. Code 1975, § 6-11-26.

Claims under Section 1983 generally start in federal district court, although the Alabama Supreme Court held in *Terrell v. City of Bessemer*, that state courts in Alabama must accept Section 1983 cases if the plaintiff elects to file in state court. 406 So. 2d 337 (Ala. 1981).

Municipal Liability in General

Prior to 1975, municipalities in Alabama were liable under state law only for the tortious actions of their agents committed in the exercise of corporate or proprietary functions. Cities and towns were immune from suit if the tort was committed while the municipality was acting in its governmental capacity. *Dargan v. Mayor*, 31 Ala. 469 (Ala. 1858). Each case turned upon whether the court construed the function the municipality was performing was governmental or proprietary in nature. In many cases, the distinction was by no means clear.

In 1906, the Alabama Legislature partially abrogated the doctrine of municipal tort immunity by passing what is now Ala. Code 1975 § 11-47-190. This section states that a municipality can be held liable for the torts of its officers and employees which are due to "neglect, carelessness or unskillfulness." However, in *Bessemer v. Whaley*, 62 So. 473 (Ala. Ct. App. 1913), the Court of Appeals held that the Legislature did not intend to totally abolish the governmental-versus-proprietary-functions test and incorporated it into § 11-47-190 of the code. Thus, until 1975, the resolution of each case involving municipal liability continued to turn upon whether the municipality was performing a corporate or a governmental function.

In 1975, the Alabama Supreme Court totally abolished the doctrine of municipal immunity in *Jackson v. City of Florence*, 320 So. 2d 68 (Ala. 1975), "to let the will of the legislature, so long ignored, prevail." The court held that because the doctrine was judicially created, the court had the power to abolish it. Thus, *Jackson* opened the door for suits against municipalities regardless of the function being performed by the municipality. However, the court noted that it was within the power of the Legislature to limit municipal liability in any manner it deemed necessary.

Statutory Limitations and Defenses

In response to *Jackson*, the Legislature enacted several statutes limiting the tort liability of municipalities. For instance, Ala. Code 1975, § 11-93-2, limits the amount of damages awardable against a municipality to $100,000 per person and $300,000 per occurrence for claims based on personal injuries and $100,000 for a property loss.

This section protects municipalities from losses they incur either on their own or through indemnification of their officers or employees. Section 11-47-190 states that no recovery above this amount may be had against a municipality under any judgment or combination of judgments, whether direct or by way of indemnity arising out of a single occurrence. *See also Benson v. City of Birmingham*, 659 So. 2d 82 (Ala. 1995). Despite this limitation, though, a plaintiff may recover interest on a judgment, even if the interest is in excess of the statutory cap. *Elmore Cty. Comm'n v. Ragona*, 561 So. 2d 1092 (Ala. 1990). In *City of Birmingham v. Bus. Realty Inv. Co*., 739 So. 2d 523 (Ala. 1998), the Alabama Supreme Court held that a municipality must raise the defense of municipal immunity under Ala. Code 1975, § 11-47-190, at trial as an affirmative defense. It cannot be raised for the first time on appeal.

In *Smitherman v. Marshall Cty. Comm'n*, 746 So. 2d 1001 (Ala. 1999), the Alabama Supreme Court held that summary judgment was proper as to the county commissioners and the county engineer in their *individual capacities*. In the alternative, claims against county commissioners and employees in their *official capacities* are, as a matter of law, claims against the county and are subject to the $100,000 cap contained in § 11-92-2 of the Alabama Code. Ala. Code 1975, § 11-92-2. Thus, damages against officials of protected entities for official actions are limited as well. However, in *Suttles v. Roy*, 75 So. 3d 90 (Ala. 2010), the court held that statutes which capped damage awards against cities, towns, and governmental entities at $100,000 did not apply to a personal injury action which was brought against a police officer in his individual and personal capacity. Municipal peace officers are deemed to be officers of the State for purposes of the statute that affords them immunity when sued in their individual capacity. Whether they have such immunity depends upon the degree to which the action involves a State interest. This is a developing area of the law that the League is following closely.

The constitutionality of § 11-93-2 of the code was upheld in *Home Indem. Co. v. Anders*, 439 So. 2d 836 (Ala. 1984). In this case, the court also found that, for purposes of this section, all injuries that stem from a single incident are the result of a single occurrence. But, if the chain of causation is broken by an intervening cause, more than one occurrence has taken place. These maximums were also upheld in *Carson v. City of Prichard*, 709 So. 2d 1199 (Ala. 1998), where the Alabama Supreme Court held that 14 plaintiffs were not limited to total damages of $100,000, although each individual claim could not exceed the statutory cap.

Unfortunately, the Alabama Supreme Court has held that these liability damage limits do not apply to property damage cases, holding that an amendment to § 11-47-190 did not expand the protection of the caps to property damage cases. *See City of Prattville v. Corley*, 892 So. 2d 845 (Ala. 2003). The court held that the statute "places no aggregate limit on a local

governmental entity's liability for property-damage claims payable on multiple judgments arising from the same occurrence." The Court has also held that the cap applies only to cases involving tangible personal property, not those involving lost profits. Damages cap applied only to tangible property, and developers' action sought lost profits. *Lee v. Houser,* 148 So. 3d 406 (Ala. 2013).

The Court has also ruled that the cap on damages for claims against a municipality did not limit the recovery on a claim against a municipal employee in his or her individual capacity. The recovery that was capped was the recovery from a municipality in those limited situations in which a municipality could be held liable in a negligence action. *Wright v. Cleburne Cty. Hosp. Bd., Inc*., 255 So. 3d 186 (Ala. 2017); *Morrow v. Caldwell*, 153 So. 3d 764 (Ala. 2014). The Court further determined that city is not obligated to indemnify municipal employee for negligent actions that occurred outside the performance of his official duties. *Ala. Mun. Ins. Corp. v. Allen*, 164 So. 3d 568 (Ala. 2014).

The statutory caps may also limit a municipality's authority to settle claims for more than the cap. The Attorney General has ruled that if claims against a health care authority created under Ala. Code 1975, § 22-21-310, et seq. are subject to the statutory caps for governmental entities, the authority must pay or settle liability claims within the maximum amounts set by statute; however, for claims not covered by the statutory caps, an authority may pay or settle amounts in excess of the caps. Ala. Op. Att'y Gen. 2005-094.

A further limitation is found in Ala. Code 1975, § 11-47-23. This section states that in order for a plaintiff to recover damages against a municipality, he or she must file a claim with the municipality within six months. If the plaintiff fails to do so, the claim is barred, unless the municipality waives the requirement in this section. *Downs v. City of Birmingham*, 198 So. 231 (1940). It is important to remember that a municipality must raise the plaintiff's failure to comply with this section as an affirmative defense or the court will deem it waived. *Alexander City v. Cont'l Ins. Co.*, 80 So. 2d 523 (1955). The filing of an action within the six-month period was held to constitute sufficient notice to a municipality of the claim against it in *Diemert v. City of Mobile*, 474 So. 2d 663 (Ala. 1985).

Closely related to § 11-47-23 is § 11-47-192, which states that a person who has been injured by a municipality must file a sworn statement with the city clerk stating the manner in which the injury occurred; the day, time and place where the accident occurred; and the damages claimed. *Waterworks & Sewer Bd. v. Brown*, 105 So. 2d 71 (1958). In *Howell v. Dothan*, 174 So. 624 (Ala. 1937), the Alabama Supreme Court stated that the six-month limitation period in § 11-47-23 must be read into this section. Therefore, written notice must be given to a municipality within six months of the accrual of a claim for personal injuries or it is barred. *See Locker v. City of St. Florian*, 989 So. 2d 546 (Ala. Civ. App. 2008).

The notice of claim must be filed within 6 months of the date the plaintiff's cause of action accrues; that is, the date when the plaintiff could first bring an action against the municipality. *City of Mobile v. Cooks*, 915 So. 2d 29 (Ala. 2005). In this case, a property owner's claim against a city for negligently issuing a building permit to a contractor, who was unlicensed and who purported to be an owner of the property, accrued, and the six-month period to file notice of a claim began to run pursuant to Section 11-47-23 of the Code of Alabama 1975, when the city issued the building permit and not the date the city issued the stop work order.

Compliance with § 11-47-192 is mandatory. *City of New Decatur v. Chappel*, 56 So. 764 (Ala. Ct. App. 1911). However, only substantial compliance is required. As long as the information required by the statute is presented in writing to the municipality, a plaintiff will be deemed to have complied with the requirements of this section. *Hunnicutt v. City of Tuscaloosa*, 337 So. 2d 346 (Ala. 1976).

In *City of Bessemer v. Brantley*, 65 So. 2d 160 (1953), the Alabama Supreme Court stated that the purpose of the notice of claim statutes is to allow a municipality time to investigate and determine the merits of the claim. The notice of claim statute was upheld in *Fortenberry v. City of Birmingham*, 567 So. 2d 1343 (Ala. 1990). And, in *Stabler v. City of Mobile*, 844 So. 2d 555 (Ala. 2002), the Alabama Supreme Court held that a former police officer who sued city and its police department for libel, tort of outrage and negligent supervision, did not substantially comply with statutory requirement of filing notice of claim with the city by simply filing a charge of discrimination against the city with the EEOC although many of the factual allegations in the EEOC claim were the same or similar to claims made in former officer's complaint.

The notice of claim must also be properly filed. For example, in *Perry v. City of Birmingham*, 906 So. 2d 174 (Ala. 2005), the Alabama Supreme Court held that an injured pedestrian's mailing of a notice of claim against a city did not constitute "filing" a claim with the city clerk for purposes of the requirement that a tort claim against a city be filed within six months of the date of injury.

The protection of the notice sections is limited, however. In *Swope Alabaster Supply Co. v. City of Alabaster*, 514 So. 2d 927 (Ala. 1987), the Alabama Supreme Court held that the six-month notice of claim statute does not act to bar contract actions. Nor does it apply to separately incorporated municipal boards. *Williams v. Water Works and Gas Bd. of the City of Ashville*, 519 So. 2d 470 (Ala. 1987). The notice of claim statute does, however, apply to unincorporated municipal entities,

such as the Von Braun Civic Center Authority. *Ex parte Von Braun Civic Center*, 716 So. 2d 1186 (Ala. 1998).

It is also important to note that the notice of claim statute does not apply to federal claims brought pursuant to § 1983, as discussed below. *Morrow v. Town of Littleville*, 576 So. 2d 210 (Ala. 1991).

Another legislative protection is found in Ala. Code 1975, § 6-3-11. This section restricts the venue of tort actions against municipalities to the county in which the municipality is located or the county where the cause of action accrued. Although originally held invalid, § 6-3-11 was upheld in *Ex parte Alabama Power Co.*, 640 So. 2d 921 (Ala. 1994). It was also applied favorably in *Ex parte Talladega Cty.*, 632 So. 2d 473 (Ala. 1994), and in *Ex parte City of Greensboro*, 730 So. 2d 157 (Ala. 1999).

A 10-year statute of limitations governs actions brought by public agencies against public officers for nonfeasance, misfeasance or malfeasance. Ala. Code 1975, § 6-2-33. Other statutes of limitations govern actions filed by individuals against public officers.

Ala. Code 1975, § 6-5-336, grants immunity to municipal volunteers engaged in certain activities for governmental entities. The Court has held that donations made by a city to a volunteer fire department do not alter its status as a volunteer fire department. The Volunteer Services Act in Ala. Code 1975, § 6-5-336, immunizes volunteer firefighters from liability and as a result, protects the city from vicarious liability for the firefighters' negligent acts. *Ex Parte Labbe*, 156 So. 3d 368 (Ala. 2014).

Section 6-5-338 of the Code creates a special category of protection for municipal police officers. *See Hollis v. City of Brighton*, 950 So. 2d 300 (Ala. 2006). This Section extends immunity in the performance of their discretionary functions to police officers and the municipalities which employ them for actions taken in the line and scope of the officer's authority. It does not, however, protect an officer who exceeds the authority given in a particular case. *Newton v. Town of Columbia*, 695 So. 2d 1213 (Ala. 1997). *See also* Ala. Op. Att'y Gen. 95-00059. This protection also extends to the municipality; that is, if the officer is entitled to discretionary-function immunity pursuant to § 6-5-338, the city is protected from liability as well. *City of Birmingham v. Sutherland*, 841 So. 2d 1222 (Ala. 2002) and *City of Hollis v. Brighton*. 950 So. 2d 300.

Although it is not actually a protection from liability, § 6-5-338 also requires every private, nongovernmental person or entity who employs a peace officer to perform any type of security work or to work while in uniform during that officer's "off-duty" hours to have in force at least $100,000 of liability insurance. This insurance must indemnify for acts the "off-duty" peace officer takes within the line and scope of the private employment. The failure to have in force the insurance herein required shall make every individual employer, every general partner of a partnership employer, every member of an unincorporated association employer and every officer of a corporate employer individually liable for all acts taken by an "off-duty" peace officer within the line and scope of the private employment.

These Code sections provide limited protection to a municipality faced with tort claims. A municipality must be sure that a plaintiff has complied with all requirements prior to agreeing to pay a claim.

Scope of Municipal Tort Liability

Municipal liability in tort actions often depends upon the cause of the damage – is it the necessary consequence of an authorized act or work? Is it nonfeasance, trespass, nuisance or negligence? Liability may also be influenced by the type of property damaged and by the fact that the damage consists wholly of injuries to the life or limb of a person.

Generally, a municipality will not be held liable for injuries which occur beyond its boundaries and result from acts which are ultra vires or beyond the scope of authority of the officials or employees involved. *See* McQuillin, *Municipal Corporations* § 53.06a (3d ed. 1982). But a municipality is liable for torts committed in performing authorized work, even beyond the limits of the municipality. *Kenny v. New York*, 28 F. Supp. 175, aff'd, 108 F. 2d 958 (1940).

Failure to act (nonfeasance) where there is no mandatory duty and where there is no negligence is no grounds for recovery against a municipality according to most courts. *Koerth v. Borough of Turtle Creek*, 49 A. 2d 398 (1946). This applies, for example, to the passage of ordinances and the exercise of police power. However, a municipality may be held liable for negligently failing to act or for failure to perform a mandatory duty. Additionally, a municipality may assume a duty, thus opening itself to liability. For instance, in *Ziegler v. City of Millbrook*, 514 So. 2d 1275 (Ala. 1987), the Alabama Supreme Court held that, although a municipality does not have to maintain a fire department, if it does so, it can be held liable for failing to provide fire protection. By creating a fire department, the municipality assumed a duty to operate that department reasonably.

If the proof is sufficient, a municipality may be held liable for injuries to property belonging to another where the injury done to plaintiff's property by an act of the municipality is not the necessary result of the public work authorized by law but is caused by negligence in doing the work. *Moore v. Nampa*, 276 U.S. 536 (1928).

Many tort cases filed against municipalities involve personal injuries inflicted upon employees and others. As a general rule, most courts require the plaintiff to prove the following in order to recover:

- That the plaintiff was injured by a servant of the municipality;
- That the act in connection with which the tort was committed was within the corporate powers of the municipality and not ultra vires;
- That the offending officer or servant was acting within the scope of his or her authority, or, if not, the act was ratified by the municipality; and
- That if negligence is required for recovery, the plaintiff must show that he or she was free from contributory negligence and was not precluded from recovery by other tort principles such as assumption of the risk.

See McQuillin, *Municipal Corporations* § 53.10; *See also Tyler v. City of Enterprise*, 577 So. 2d 876 (Ala. 1991).

Generally, a municipality is liable for a trespass committed by its officers or servants in the course of their duties, such as when a municipality is constructing a public improvement and its officers or servants trespass upon abutting private property. *Belgarde v. Natchitoches*, 156 So. 2d 132 (1963). Negligence is not a necessary element to this cause of action. *Robinson v. Wyoming Twp.*, 19 N.W. 2d 469 (1945). However, a city is not liable if the trespass is wholly ultra vires or is beyond the scope of authority of the trespassing officer or servant and remains unratified. *Roughton v. Atlanta*, 39 S.E. 316 (Ga. 1901).

In a proper case, municipality can be held liable in damages for conversion. *Crowe v. City of Athens*, 733 So. 2d 447 (Ala. Civ. App. 1999). Municipalities have also been found liable for loss of consortium. *City of Lanett v. Tomlinson*, 659 So. 2d 68 (Ala. 1995).

It is well established that a municipality can be found liable for the creation of a nuisance, the same as an individual or as a corporation. *See* McQuillin, *Municipal Corporations* § 53.12. In *Hendrix v. Maryville*, 431 S.W. 2d 292 (Tenn. 1968), a Tennessee court held that a city operating a garbage dump was guilty of creating a nuisance. *See also City of Birmingham v. Leberte*, 773 So. 2d 440 (2000).

Alabama has a wrongful death statute (Ala. Code. 1975, § 6-5-410), which has been held to apply to cities and towns. *Anniston v. Ivey*, 44 So. 48 (1907). However, see *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) as to wrongful death actions under 42 U.S.C. § 1983. In *City of Tarrant v. Jefferson*, 682 So. 2d 29 (Ala. 1996), the Alabama Supreme Court held that § 1983 claims against Alabama municipalities, which resulted from a death, survive the plaintiff due to the state's wrongful death statute.

In the exercise of administrative functions, a municipal corporation is generally regarded as having a duty to provide a safe place for its employees to work. Liability attaches for a breach of this duty. However, absolute liability does not apply. The plaintiff must show that the city breached some duty to the employee and that the injury was not strictly the result of an accident. *Oklahoma City v. Hudson*, 405 P. 2d 178 (Okla. 1965). This doctrine has been held to apply not only to the physical place of work but also to tools and equipment used. *Urmann v. Nashville*, 311 S.W. 2d 618 (Tenn. 1958).

Municipalities in Alabama must provide their employees with a safe workplace. Although Alabama municipalities are not subject to OSHA regulations, Ala. Code 1975, § 25-6-1, makes employers liable to employees who are injured in the workplace if:

1. the injury was due to a defect in equipment, etc., used in the workplace;
2. the injury was caused by the negligence of a supervisor appointed by the employer;
3. the injury was caused by the negligence of another employee acting pursuant to orders or directions of the employer; or
4. the injury was caused by the negligence of another employee or other person acting in obedience to instructions given to someone who has been delegated that authority by the employer.

Applying this statute, in *City of Birmingham v. Waits*, 706 So. 2d 1127 (Ala. 1997), a sharply-divided Alabama Supreme Court held that the city of Birmingham could be found liable for failing to provide a safe workplace for its jail employees. In *Waits*, the plaintiff, a city of Birmingham correctional officer, was injured during an altercation between two jail inmates who were returning to their cell following a cleaning detail. 706 So. 2d 1127.

Alabama courts have held that a municipal corporation is generally not liable for the acts of an independent contractor hired by the city or town. *Robertson v. City of Tuscaloosa*, 413 So. 2d 1064, 1066 (Ala. 1982); *Dickinson v. City of Huntsville*, 822 So. 2d 411, 416 (Ala. 2001). However, *McQuillin*, in Sections 53.76(10) through 53.76(50), lists the following exceptions to the general rule where a municipality could be held liable for the acts of independent contractors:

- Where control of the work is reserved by the municipality;

- Where there is a positive act cast upon the municipality which cannot be delegated by it;
- Where the work is inherently dangerous and will probably result in injury to third persons unless methods are adopted by which such consequences may be prevented;
- Where the independent contractor was employed to do an act unlawful in itself; or
- Where the municipality failed to take precautions within a reasonable time after notice of the defect caused by the act of the independent contractor.

Usually, courts will not hold an officer personally liable for damages caused by his or her preventing or abating a nuisance, if the officer acts in a proper manner. *Carter v. City of Gadsden*, 88 So. 2d 689 (1955).

In *Caldwell v. City of Tallassee*, 679 So. 2d 1125 (Ala. Civ. App. 1996), the Court of Civil Appeals held that a municipality cannot act maliciously, therefore summary judgment in its favor was appropriate in a case involving issuing a citation for building code violations.

Sewers and Drains

Alabama municipalities have always been liable for damages caused by their negligence in the operation and maintenance of sewers and drains under their control. However, liability is restricted to public sewers which the corporation controls and does not extend to private sewers and drains which the municipality did not construct or accept. *Irvine v. Smith*, 202 S.W. 2d 733 (1947). In *Montgomery v. Gilmer*, 33 Ala. 116 (1858), the Court pointed out that under common law, a city is under no obligation to provide drainage or sewerage to its citizens unless rendered necessary by its own act. For example, in *City of Dothan v. Sego*, 646 So. 2d 1363 (Ala. 1994), the city had no drainage easement and did not routinely maintain the ditch in question. The city did, however, respond to emergency calls when the ditch flooded. The Alabama Supreme Court held that under these facts, the city had no duty to prevent flooding of the plaintiff's property. If a municipality has never accepted the dedication of a drainage easement, it has neither the authority nor the duty to maintain the easement. Ala. Op. Att'y Gen. 97-00249.

The Alabama Court of Civil Appeals agreed, in *Langley v. City of Saraland*, 776 So. 2d 814 (Ala. Civ. App. 1999). In this case, the court found that a city does not have a duty to correct a defect on private property or in a sewer line owned by an individual and not the city. The city does not have a duty to inspect the sewer lines of private landowners. Therefore, the court upheld the city's motion for a summary judgment.

In *Kennedy v. City of Montgomery*, 423 So. 2d 187 (Ala. 1982), the Alabama Supreme Court held that a city has no duty to provide and maintain proper drainage of surface water from a resident's property to prevent flood damage of the property as this is discretionary with the governing body. Once such authority to maintain a drainage system is exercised, a duty of care exists, and a city may be held liable for damages caused by its negligence. However, a city's occasional cleaning and periodic maintenance of a creek may not constitute an assumption of a duty to maintain the creek. *Royal Auto., Inc. v. City of Vestavia Hills*, 995 So. 2d 154 (Ala. 2008).

If there is actual negligence (something more than mere error in judgment) in the adoption of a plan for a sewage or drainage system, a municipality may be liable. If a sewer, as planned, proves to be insufficient or defective by actual experience, then it has been held to be the duty of the municipality to remedy the situation, if possible. *Birmingham v. Greer*, 126 So. 859 (1930); *Birmingham v. Crane*, 56 So. 723 (1911). Alabama courts have held that if, through negligence, a drainage or sewage system is not sufficient to take care of the sewage and water reasonably expected to accumulate under ordinary circumstances, the municipality will be liable for the resulting injuries. *City of Anniston v. Isbell*, 144 So. 2d 18 (1962); *Morgan v. City of Tuscaloosa*, 108 So. 2d 342 (1959).

In another Alabama case, *Aycock v. City of Decatur*, 122 So. 664 (1929), the Court held that if a municipality itself changes the natural flow of water and constructs ditches or drains which are inadequate for the purpose, it will be liable for damages thereby created. And, in *Jackson v. Carr & Assocs. Engineers*, 710 So. 2d 441 (Ala. Civ. App. 1997), the Court of Civil Appeals held an engineer who altered a drainage system pursuant to an order from the city could be held liable. The Alabama Supreme Court also held in *Lee v City of Anniston*, 722 So. 2d 755 (Ala. 1998), that when Anniston built a portion of a drainage system on state property, it assumed a duty to maintain the new portion.

However, in *City of Birmingham v. Jackson*, 155 So. 527 (1934), the court held that a municipality is not liable for damages caused by an overflow of its sewers occasioned by extraordinary rains or floods. Nor is a municipality liable for increasing the flow of surface water over property from changes in the character of the surface unless the municipality is negligent. *Glissom v. City of Mobile*, 505 So. 2d 315 (Ala. 1987).

Although Alabama courts have held that a municipality is not an insurer of its sewers, the courts have held that a municipality assumes the duty of keeping in good condition and repair the sewers it installs or over which it assumes

jurisdiction. *Sisco v. City of Huntsville*, 124 So. 95 (1929). A municipality is responsible for damages which occur as a result of negligence in the construction, maintenance or operation of its sewer system. *City of Birmingham v. Norwood*, 126 So. 616 (1929).

For instance, in *City of Birmingham v. Leberte*, 773 So. 2d 440 (2000), the Alabama Supreme Court upheld a landowner's claim against a city for negligence, nuisance, trespass, inverse condemnation and injunctive relief, after the landowners alleged that their property was damaged in multiple flooding as a result of the city's failure to operate or reasonably maintain an adequate drainage system. The court further held that each incident of flooding that occurred less than six months before the action was filed was a separate, compensable occurrence. In *Long v. City of Athens*, 24 So. 3d 1110 (Ala. Civ. App. 2009), the Court held that a property owners' cause of action for inverse condemnation accrued, and the applicable two-year statute of limitations began to run, at the time that the taking was complete, which was when their property first flooded as a result of nearby development and increase in drainage to their property.

And, in *Reichert v. City of Mobile*, 776 So. 2d 761 (Ala. 2000), the Alabama Supreme Court found that plaintiff's negligent construction and negligent design claims against a city for the city's drainage system were barred by the statute of limitations because all of the plaintiffs had sued more than two years after they had experienced their first floods after the construction. However, each flood event, thereafter, gave rise to a separate cause of action for negligent maintenance and fact issues existed as to whether the city had failed to provide appropriate upkeep for a storm-drainage system. Therefore, the court reversed the trial court's granting of a summary judgment as to the negligent maintenance claim only.

The Supreme Court of Alabama has held that notice is not a prerequisite to holding a city or town liable for negligence in the construction of sewers. *Jasper v. Barton*, 56 So. 42 (1911). However, in other cases, as in the case of failure to make necessary repairs, notice is ordinarily necessary. *Kershner v. Town of Walden*, 355 P. 2d 77 (Colo. 1960). The existence of a defect for a number of years has been held to constitute sufficient notice. *Craig v. City of Mobile*, 658 So. 2d 438 (Ala. 1995).

Alabama courts have held a municipality liable when a municipal sewer or drain becomes a nuisance and causes an injury. *City of Jasper v. Lacy*, 112 So. 307 (1927); *Bieker v. City of Cullman*, 59 So. 625 (1912).

It has been held that the damages for which a municipality is liable, due to negligence in the care and maintenance of its sewers, and damages arising from injuries to property, do not extend to death, sickness and physical discomfort not associated with property damage caused by the negligence. *Metz v. Ashville*, 64 S.E. 881 (N.C. 1909); *Triplett v. Columbia*, 96 S.E. 675 (S.C. 1918). However, in a case involving stream pollution, the Alabama Supreme Court held that where there is an injury to property rights and also to health, damages for the latter may be included. *Howell v. City of Dothan*, 174 So. 624 (Ala. 1937).

And in *City of Mobile v. Taylor*, 938 So. 2d 407 (Ala. Civ. App. 2005), homeowners filed an action against city to recover for mental anguish allegedly incurred as result of repeated flooding. The homeowners testified that they were afraid of being injured, electrocuted, or drowned in knee-high flood waters and alleged they lost sleep whenever rain was threatened. They also stated a fear that snakes or other animals might enter their homes during floods. The Court of Civil Appeals held that in negligence actions in which the plaintiff seeks compensatory damages for emotional distress, Alabama follows the "zone of danger test," which limits recovery of mental anguish damages to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. The court stated that the issue of whether elderly homeowners were placed in a "zone of danger" by the city's failure to properly maintain the storm-water drainage system was for jury to decide.

Numerous courts have held municipalities liable for damages caused by discharging the outflow of a sewer upon the property of another. These decisions are based upon the reasoning that this discharge constitutes a private nuisance for which action may be maintained by the person injured. *Gibson v. City of Tampa*, 154 So. 842 (Fla. 1934); *Thompson v. McCorkle*, 171 S.E. 186 (Ga. 1933); *Hodges v. Town of Drew*, 159 So. 298 (Miss. 1935). However, in *Paradise Lake Ass'n v. Jefferson Cty.*, 585 So. 2d 812 (Ala. 1991), the Alabama Supreme Court held that the county could not be held liable under a theory of inverse condemnation for discharging raw sewage into a stream which fed into a lake.

Compliance with federal regulations may relieve a municipality of liability for drainage maintenance. For instance, in *Furin v. City of Huntsville*, 3 So. 3d 256 (Ala. Civ. App. 2008), the Court held that a city did not breach a duty to maintain a creek basin, when the city did all it could do to prevent flooding, but was limited by federal regulations.

Road Builder Liability

During and at the end of a road or bridge construction project there is always an issue of liability between the municipality contracting for the project and the contractor. In 2023, the Legislature passed Act 2023-316 in an attempt to resolve this issue. Pursuant to Act 2023-316, a municipality assumes responsibility to maintain a recently constructed road or bridge at the conclusion of the project. The conclusion of the project is the earlier of the following:

1. The date that the municipality notifies the contractor. in writing, that the municipality has assumed maintenance responsibilities for the project.

2. The date following the expiration of 45 days after the contractor provides, by certified mail return receipt requested, notice of presumptive conclusion of the project to the municipality and the municipality fails to respond.
3. The date following the expiration of days after the contractor has completed the advertising requirements of Title 39 and the municipality has made the final payment to the contractor.

Despite the municipality assuming responsibility to maintain the newly constructed road or bridge, the contractor remains liable for (1) any failure by the contractor to follow the plans and specifications resulting in a dangerous condition and (2) any latent defect which creates a dangerous condition that is a result of the work of the contractor. Ala. Code Section 6-5-702 (1975).

Act 2023-316 further creates a rebuttable presumption in favor of municipalities and road contractors in lawsuits arising from any negligent act or omission in the construction or maintenance of a public road. The rebuttable presumption is that the conduct of an operator of a vehicle who is texting and driving, driving under the influence or going 25 miles per hour over the speed limit is the proximate cause of any injury alleged to be suffered by the negligent construction and/or maintenance of the public road. The presumption can only be overcome if the plaintiff establishes by a preponderance of the evidence, that the prohibited conduct was not the proximate cause of the injury. The Act also provides minimum pleading requirements for complaints alleging negligent maintenance or construction of public roads promulgated in Ala. Code Section 6-5-703 (1975). If the pleading requirements are not met, the Act explicitly states the complaint is subject to dismissal for failure to state a claim upon which relief may be granted.

Actions of Officers and Employees

Under the doctrine of respondeat superior, a municipality will be held liable for the torts of its officers and employees if: (1) the relation of master and servant exists between the municipality and the tortfeasor and (2) the act was within the scope of the officers or employees duties and was not ultra vires. In the case of *McSheridan v. City of Talladega*, 8 So. 2d 831 (Ala. 1942), the Alabama Supreme Court held that the rule of respondeat superior applies to Alabama cities and towns. However, a plaintiff must name a negligent municipal officer or employee in order for a municipality to be found liable under respondeat superior. *Coleman v. City of Dothan*, 598 So. 2d 873 (Ala. 1992). Further, as discussed below, respondeat superior may not be used to hold a municipality liable under § 1983.

Unless a statute expressly declares a municipality liable, the general rule stated by the courts is that a municipality is not liable for the completely personal torts of its officers, employees or agents. *McCarter v. Florence*, 112 So. 335 (Ala. 1927). In *Bessemer v. Whaley*, 62 So. 473 (Ala. Ct. App. 1913), the court held that in order to create liability certain statutes require that the act or omission causing the damage must have arisen while the agent, officer or employee of the city or town was acting in the line of duty. And, in *Wheeler v. George*, 39 So. 3d 1061 (Ala. 2009), the Court ruled that a municipality cannot be held liable for the intentional torts of its employees, pursuant to Ala. Code 1975, § 11-47-190.

The general rule is well settled that if the alleged tortious act is wholly ultra vires (i.e. beyond the power of the municipality), no liability for damages arises against the municipality. This rule, with rare exceptions, has quite uniformly prevailed in all courts. *See* McQuillin, *Municipal Corporations* § 53.60. The courts have held that the defense of ultra vires can only be used where the act complained of was wholly beyond the powers of the municipality which the municipality had no right to do under any circumstances. *Lucas v. Louisiana*, 173 S.W. 2d 629 (Mo. 1943).

The Alabama Supreme Court has held that municipalities are not responsible for the acts of their officers, agents or servants for instituting malicious prosecution actions. The Court said that Ala. Code 1975, § 11-47-190, limits the liability of cities and towns to injuries suffered through "neglect, carelessness or unskillfulness." *See Neighbors v. City of Birmingham*, 384 So. 2d 113 (Ala. 1980).

Some of these rules may, however, change depending on the circumstances. For instance, in *City of Birmingham v. Thompson*, 404 So. 2d 587 (Ala. 1981), the court was confronted with the issue of whether the words "neglect, carelessness and unskillfulness" in § 11-47-190 meant that an action can be maintained against the municipality only for negligent acts of employees and not intentional acts. In that case, the plaintiff was allegedly beaten by police officers while he was incarcerated in the city jail. Plaintiff sued the city, claiming that the officers had committed a battery (which is ordinarily an intentional tort) against him and that the city was therefore liable under Ala. Code 1975, § 11-47-190.

The majority opinion narrowed the issue in the case to whether a battery could be considered a negligent tort. The majority held that if the battery occurred as a result of a lack of skill on the part of the employee, the city could be held liable. The case was remanded for a trial on this issue. The dissent hotly contested this holding. In the opinion of the dissenting justices, the Legislature clearly intended § 11-47-190 to preclude suits for intentional torts against municipalities. Therefore, plaintiff's suit against the city for battery, which is an intentional tort, should have been barred.

Under the majority opinion, though, a municipality may be liable for the intentional torts of its officers and employees

if the tort is committed due to a lack of skill on the part of the tortfeasor. This opens municipalities to a wide range of torts which are not normally considered to be negligent torts. Only if a municipality can demonstrate that the act of its agent was intentional and due in no way to carelessness or unskillfulness, can the municipality avoid liability.

The court used a similar line of reasoning in order to hold a municipality liable for false arrest in *Franklin v. City of Huntsville*, 670 So. 2d 848 (Ala. 1995).

These cases have led courts to also, in some instances, hold a municipality liable for its own negligence arising from the actions of the officer or employee. *See*, *e.g.*, *Couch v. City of Sheffield*, 708 So. 2d 144 (Ala. 1998); *Scott v. City of Mountain Brook*, 602 So. 2d 893 (Ala. 1992). This type action does not depend on the usual respondeat superior standards. This usually arises from a failure in hiring, assigning or training a police officer. Or the municipality may be liable for retaining an employee in the face of evidence that he is incompetent. This might be shown by a failure to discipline the officer for his actions.

This is also the rule in federal court, under 42 U.S.C. § 1983. Here, as will be pointed out below, the first issue that must be resolved is whether the officer's action violated federal statutory or constitutional rights. If so, then the plaintiff must demonstrate that the officer acted pursuant to an official policy or custom. Once these two requirements are met, the municipality may be held liable. Under § 1983, a municipality may be liable for either an expressed or implied policy that is invalid on its face. An implied policy might be shown by the municipality's own acts of negligence, as in state court, by failure to properly train or assign its officers. Further, a municipality may be held liable if it later ratifies the officer's action. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

In some cases, though, the existence of a policy or custom is not required under federal law for a municipality to be liable for the actions of its employees. In *Margan v. Niles*, 250 F. Supp. 2d 63 (N.D.N.Y. 2003), a federal district court in New York noted that under the Driver's Privacy Protection Act (DPPA), an employee does not have to act pursuant to a policy or custom in order to be held liable for the improper release of a person's driver's license information. The court also held that the DPPA makes the municipality vicariously liable for this improper action, regardless of their policies.

And, in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998), the United States Supreme Court ruled that employers will be held vicariously liable for the unlawful sexual harassment of employees by supervisors. Employers, though, may raise as an affirmative defense that (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

In 2022, the State Legislature passed Act 2022-340, amending Section 32-10-1 of the Alabama Code. As amended, Section 32-10-1 now allows local law enforcement officers to move a vehicle or require a vehicle to be moved by the driver or with the assistance of a towing or recovery vehicle if the vehicle is disabled as the result of an accident and the disabled vehicle creates a traffic hazard or is obstructing traffic. The Act also bars liability against any local law enforcement officer for damages caused by moving a vehicle pursuant to Section 32-10-1.

Dealing with Loiters

In 2023, the Alabama Legislature crafted two optional procedures for law enforcement officers to follow when dealing with loiters on public roadways or rights-of-way maintained by the state. According to Act 2023-245 (codified in Ala. Code Section13A-11-9), prior to making an arrest for a loitering violation, law enforcement may instruct any suspected loiterer to immediately peaceably exit the public roadway or public right-of-way maintained by the state. An additional option is for the law enforcement officer to offer to transport the suspected loiterer to a location in the jurisdiction that offers emergency housing. According to the new law, law enforcement officer acting pursuant to this section is entitled sovereign immunity under Ala. Code Section 36-1-12.

State Court Immunities

State law cloaks public officers and employees with two distinct types of immunity**.** First is absolute immunity. Absolute immunity generally applies only to legislative and judicial acts by officers and employees**.** Absolute immunity is defined as the total protection from civil liability arising out of the discharge of judicial or legislative power**.** Under the doctrine of absolute immunity, the actor is not subject to liability for any act committed within the exercise of a protected function; the immunity is absolute in that it applies even if the actions of the judicial officer are taken maliciously or in bad faith. *Absolute Immunity*, Black's Law Dictionary (5th ed. 1979).

But, once it is determined that absolute immunity applies to the official function being performed, how far does the protection extend? Provided that the protected official acted within the scope of his or her duties, the protection is total. Courts will not inquire into the motives behind a protected action. The Alabama Supreme Court has held that town officers who enacted zoning ordinances were entitled to absolute legislative immunity for any damages in association with the passage

of the ordinances, even if the officers had impure motives in enacting the ordinance. *Peebles v. Mooresville Town Council*, 985 So. 2d 388 (Ala. 2007).

It is not always easy, however, to determine whether an official is acting within the sphere of protected activities. Absolute immunity does not shield protected officers from suit for all actions, only those taken while acting in a protected capacity. As the court noted in *Bryant v. Nichols*, 712 F. Supp. 887, 890 (M.D. Ala. 1989), "It is the official function that determines the degree of immunity required, not the status of the acting officer. A court must examine the specific activity undertaken by the officials and assess whether it was performed in the course of an activity justifying absolute immunity."

Although councilmembers acting in a legislative capacity are entitled to absolute immunity, simply because an action was performed by a municipal council does not entitle the councilmembers to absolute immunity**.** Clearly, a municipal governing body has both legislative and administrative duties. *See Ex parte Finley*, 20 So. 2d 98 (1945). For example, although the adoption of an ordinance or resolution by a municipal governing body is ordinarily a legislative action, such an activity may be more administrative in nature. It is the essential purpose behind a resolution which guides a court in determining whether a particular action is legislative or administrative and whether absolute immunity applies.

In many cases, the answer is clear. For instance, when a municipality enacts a zoning ordinance, it is obviously performing a legislative function. *Carroll v. City of Prattville*, 653 F. Supp. 933 (M.D. Ala. 1987). However, at other times, the answer may not be so obvious. The Court in *Carroll*, for instance, found a distinction between enacting a zoning ordinance and implementation of the ordinance. Also, in *Bryant v. Nichols*, 712 F. Supp. 887 (M.D. Ala. 1989), the federal district court ruled that where the alleged action was a vote on an employment matter, absolute immunity did not protect councilmembers from liability.

One would ordinarily assume that mayors of Alabama municipalities act as executives whose actions are not protected by absolute immunity. However, in municipalities with populations of less than 12,000, the mayor serves as a member of the council and his or her vote on ordinances and resolutions is protected to the same extent as that of other councilmembers. Also, in *Hernandez v. City of Lafayette*, 643 F. 2d 1188 (5th Cir. 1981) cert. denied, 455 U.S. 907 (1982), the Fifth Circuit Court of Appeals held that a mayor's veto is a part of the legislative process and is entitled to absolute immunity.

It is also clear that absolute immunity protects those who perform judicial acts. For instance, in *Ex parte City of Greensboro*, 948 So. 2d 540 (Ala. 2006), the Court held that acts performed by municipal court clerk/magistrate to ensure that arrest warrants were recalled constituted a judicial function involving the exercise of judgment, and, thus, clerk/magistrate had absolute judicial immunity from negligence and wantonness claims brought by arrestee after she was arrested because one of the arrest warrants had not been put back into the National Crime Information Center computer by a third party.

Absolute immunity, though, is rarely applied. Instead, Alabama courts in the past have followed what used to be called discretionary function immunity. This was considered sufficient to protect public defendants. Under discretionary function immunity, the good faith of the defendant became relevant. Stated simply, discretionary function immunity protected public defendant officers when they in good faith performed a discretionary act that was within the line and scope of their duties.

Alabama Court decisions, though, have made clear that municipalities and their officers and employees can no longer rely on discretionary function immunity. In *Blackwood v. City of Hanceville*, 936 So. 2d 495 (2006), for example, the Alabama Supreme Court noted that § 6-5-338 of the Code essentially replaced discretionary function immunity for municipal police officers with "state-agent" immunity as provided for in *Ex parte Cranman*, 792 So. 2d 392 (2000). In *Cranman,* the Alabama Supreme Court restated the rule governing state-agent immunity, stating:

"A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's

1. formulating plans, policies, or designs; or
2. exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:
    a. making administrative adjudications;
    b. allocating resources;
    c. negotiating contracts;
    d. hiring, firing, transferring, assigning, or supervising personnel; or
3. discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or
4. exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons, or serving as peace officers under circumstances entitling such officers to

immunity pursuant to Ala. Code 1975, § 6-5-338(a) (modified in *Hollis v. City of Brighton*, 950 So. 2d 300 (Ala. 2006)); or

5. exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent *shall not* be immune from civil liability in his or her personal capacity

1. when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or
2. when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."

Rather than depending on discretionary function immunity, defendants must fit their actions into one of the listed *Cranman* categories in order to claim immunity. Strict reliance on these standards can lead to disturbing results. In *Blackwood*, the defendant police officer exceeded the speed limit in response to an emergency call involving a serious accident. In route, the officer's vehicle struck another vehicle, injuring the passenger.

The Court gave the actions of the police officer an extremely narrow interpretation under the *Cranman* analysis, finding that driving to the scene of an accident does not fall within any of the listed *Cranman* categories. The closest, they stated, would be Category (4), listed above.

Even though the Court noted that this list is not intended to be exhaustive, but instead provides mere categories of immunity, the Court applied a very narrow construction to the application of these categories. They noted that Category (4) applies only to the enforcement of criminal laws and driving to the scene of an accident does not implicate the criminal laws. Thus, the Court stated that the officer had no immunity from suit based on § 6-5-338. Although this decision might be different now that the Court has modified the *Cranman* standards to recognize the different immunity standard in § 6-5-338, the Court's narrow construction of these categories to the functions of law enforcement officers is bothersome.

The discretionary part of § 6-5-338(a) is working its way back into the court's analysis, however. In *Ex parte Kennedy*, 992 So. 2d 1276 (Ala. 2008), the Court held that officers involved in a fatal shooting of a suspect were entitled to state agent immunity in a wrongful-death action. A state agent is immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, municipal law-enforcement officers' arresting or attempting to arrest persons, or serving as peace officers under circumstances entitling such officers to immunity pursuant to Ala. Code 1975, § 6-5-338(a). *See also Ex parte Coleman*, 145 So. 3d 751 (Ala. 2013).

Regardless, it is now clear that rather than relying on the protection of discretionary function immunity when performing their discretionary acts, municipal actors must fit their actions into one of the listed *Cranman* categories to entitle the officer or employee to claim immunity.

Cranman, then, created a burden-shifting process. When a defendant raises state-agent immunity as a defense, the state/city agent bears the initial burden of showing that the plaintiff's claims arise from a function that entitles the state/city agent to immunity. Once this is established, the burden shifts to the plaintiff to show that the law requires finding the actor liable, or that the state/city agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his/her authority. *See*, *Ex parte City of Montgomery*, 99 So. 3d 282 (Ala. 2012).

Examples of state agent immunity cases include:

- Arresting officer and police dispatcher who searched the National Crime Information Center (NCIC) database for outstanding warrants, as well as the city employing both, had state agent immunity from tort liability for the mistaken arrest of an individual on a warrant for a different individual who had a similar name. Both the officer and the dispatcher were exercising judgment in the enforcement of criminal laws of the state as law enforcement officers, and the city's immunity derives from their status as law enforcement officers. Swan v. City of Hueytown, 920 So. 2d 1075 (Ala. 2005).
- In a case involving the execution of an arrest warrant, the Alabama Supreme Court held that summary judgment was proper for issues related to the operation of the police department and courts that involved legal issues but was premature for issues that required the development of facts. The Court also held that the city was immune from vicarious liability for the alleged acts of malice or acts of bad faith committed by its officers in the execution of the warrant. Ex parte City of Tuskegee, 932 So. 2d 895 (Ala. 2005).
- In City of Crossville v. Haynes, 925 So. 2d 944 (Ala. 2005), the Alabama Supreme Court held that because a police chief was immune from suit by state-agent immunity for an alleged jail suicide, the employing municipality was also immune from being sued.

- Any alleged negligence by a police officer in initiating and continuing a high-speed pursuit of a motorist did not proximately cause the motorist's wreck and resulting fatal injuries. The officer followed policies and procedures reflected in the city's police department manual. The motorist wrecked because he lost control of his vehicle as a result of his excessive speed during the pursuit. The officer was more than 200-300 yards from the motorist's vehicle when it wrecked, and the motorist could have slowed down and stopped at any time during the chase. Gooden v. City of Talladega, 966 So. 2d 232 (Ala. 2007).
- City and the city's planning director were immune from liability to landowner for flooding of property as a result of construction of a subdivision. Immunity applies to employees of municipalities in the same manner that immunity applies to employees of the state. City of Birmingham v. Brown, 969 So. 2d 910 (Ala. 2007).
- A police officer who was part of team that processed arrestees in a prostitution sting had statutory and state-agent immunity on tort claims by a plaintiff whose name, date of birth, and address were falsely given to the officer by one arrestee as being her own, and who was later incorrectly identified in a press release to news media as one of the arrestees. Even if the city's police department had a policy regarding the verification of an accused's identity, the policy did not include detailed rules or regulations that the officer violated. Ex parte City of Montgomery, 19 So. 3d 838 (Ala. 2009).
- A state agent acts beyond authority and is therefore not immune when he or she fails to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist. A child abuse investigator acted beyond her authority by failing to visit a mother's home and was not entitled to state-agent immunity. Ex parte Watson, 37 So. 3d 752 (Ala. 2009).
- State workers acted outside their authority by disregarding federal mandates requiring them to repair, mark, or light the remains of a coastal pier structure that was damaged in a hurricane three years prior, and therefore, the state workers were not entitled to "state agent immunity" from a negligence and wantonness suit brought by speedboat passengers who were injured in a collision with the pier remains, regardless of whether the suit concerned a function that would otherwise entitle the state workers to state agent immunity. Ex parte Lawley, 38 So. 3d 41 (Ala. 2009).
- Since a police officer is not entitled to immunity for an unlawful arrest claim, Alabama's statutory, discretionary-function immunity under Ala. Code 1975, § 6-5-338 does not extend immunity to the city. Since the alleged conduct of a police officer's assault was intentional, the city is entitled to protection under Ala. Code 1975, § 11-47-190. There is no Alabama state law claim for negligent training or supervision against a city. Since the police chief is entitled to discretionary-function qualified immunity for failure to train, supervise or monitor a subordinate under § 6-5-338, the city is entitled to qualified immunity as well. Black v. City of Mobile, 963 F. Supp. 2d 1288 (S.D. Ala. 2013).
- City's police officers were "peace officers" for the purposes of state-agent immunity under § 6-5-338(a) and their alleged misconduct occurred while in performance of a discretionary function within the line and scope of their law enforcement duties. The city was immune to the claims as to which the officers were entitled to state-agent immunity. The city failed to establish immunity on the claim of negligent training and supervision, since it did not identify the individual or individuals specifically charged with training and supervision of the police officers. Ex Parte City of Midfield, 161 So. 3d 1158 (Ala. 2014).

The Court has also made a distinction between state-agent immunity and state or sovereign immunity. In *Ex parte Donaldson*, 80 So. 3d 895 (Ala. 2011), the Court stated that state immunity and state-agent immunity are two different forms of immunity, and those who qualify for state immunity are treated differently under Alabama law because they are constitutional officers. The Court reached a similar conclusion regarding board of education members, holding that members of a city board of education were entitled to sovereign immunity because the board is an agency of the state. *Ex parte Boaz City Bd. of Educ.*, 82 So. 3d 660 (Ala. 2011).

Many of these distinctions are very difficult to rectify. This is a developing area of law that the League will follow closely.

The Substantive Immunity Rule

One area of municipal tort immunity deserves special consideration. This is the substantive immunity rule. The Alabama Supreme Court has recognized that in certain circumstances, public policy considerations override the general rule that municipalities are liable for the negligence of their employees. In *Rich v. City of Mobile*, 410 So. 2d 385 (Ala. 1982), the court adopted the substantive immunity rule as the law of Alabama and stated that no municipal liability could result "in those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the city's legitimate efforts to provide such public services." *Rich*, 410 So. 2d at 387.

In *Rich*, the plaintiff alleged that the city negligently failed to inspect, or negligently inspected, the sewer lines and connections to the plaintiff's residence. *See id*. The plaintiff claimed that during three preliminary inspections, city inspectors

failed to discover the lack of an overflow trap in the line leading to the residence and that the inspectors failed to make a final inspection of the lines and connections. The elevation of the plaintiff's residence was lower than the system and, due to the lack of the overflow trap, a sewer line backup overflowed into the home.

The court quoted with favor from *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W. 2d 158 (1972):

> "The purpose of a building code is to protect the public ...
>
> "Building codes, the issuance of building permits, and building inspections are devices used by municipalities to make sure that construction within the corporate limits meets the standards established. As such, they are designed to protect the public and are not meant to be an insurance policy by which the municipality guarantees that each building is built in compliance with building codes and zoning codes ...
>
> "... a building inspector acts exclusively for the benefit of the public. The act performed is only for public benefit, and an individual who is injured by any alleged negligent performance of the building inspector in issuing the permit does not have a cause of action [citations omitted]."

The court recognized that, while an individual homeowner may be incidentally affected by the discharge of the sewer inspector's duty, the city owes a larger obligation to the general public. The court stated that to allow an individual to maintain a suit against the municipality for negligent inspection threatens the benefits the general population receives from such inspections.

It is important to remember that substantive immunity must be raised at the trial level. In *Breland v. Ford*, 693 So. 2d 393 (Ala. 1996), the Alabama Supreme Court held that failure to raise the issue of substantive immunity at the trial court level barred the appellate court from considering the issue.

Areas Protected by Substantive Immunity

In two other cases, the court extended the substantive immunity rule to municipal police departments. In *Calogrides v. City of Mobile*, 475 So. 2d 560 (Ala. 1985), the plaintiff attended a fireworks display sponsored in part by the city of Mobile. While there, the plaintiff was attacked by a gang of teenagers and stabbed several times. He sued the city, alleging that it failed to assign a sufficient number of police officers to patrol the crowd attending the display.

The court held that the plaintiff's action was barred by the substantive immunity rule. The court recognized the fact that the city's duty was to provide adequate police protection to the public at large rather than to a particular individual and that to find the city liable would threaten the benefits the public received from police protection.

Similarly, the plaintiff in *Garrett v. City of Mobile*, 481 So. 2d 376 (Ala. 1985), was injured by the same group of teenagers that injured the plaintiff in *Calogrides*. However, because he was injured several minutes later, the plaintiff in *Garrett* argued that a special duty had been created for him as an individual. Again, the court refused to hold the city liable despite notice of the attack on *Calogrides*.

The Court also followed the substantive immunity rule in *Nunnelee v. City of Decatur*, 643 So. 2d 543 (Ala. 1993), upholding a summary judgment in favor of two officers who were sued for releasing a drunk driver who later killed another motorist. Substantive immunity has also been used to protect a municipality from liability from failing to destroy a building which had been condemned. *Belcher v. City of Prichard*, 679 So. 2d 635 (Ala. 1995).

However, in *Williams v. City of Tuscumbia*, 426 So. 2d 824 (Ala. 1983), the Alabama Supreme Court declined to apply the substantive immunity rule to a municipal fire department that failed to respond immediately when notified of a fire. The reason for this failure was because the driver of the fire truck had gone home sick and the city had no one with which to replace him. The court found that the failure to have a backup driver on hand was negligent.

The reason for the distinction between fire protection and police protection is not immediately clear from the facts of the case in the reported decision. As pointed out by Justices Maddox and Torbert in their dissent, "the same public policy considerations that the court found applicable in [*Rich*], are even more compelling in the present case." Hopefully, the court will rethink this position.

In *City of Mobile v. Sullivan*, 667 So. 2d 122 (Ala. Civ. App. 1995), the Court of Civil Appeals held that the substantive immunity rule does not bar a suit against the city for negligent misrepresentations regarding the city's zoning laws. However, some zoning matters are protected by substantive immunity. In *Payne v. Shelby Cty. Comm'n*, 12 So. 3d 71 (Ala. Civ. App. 2008), the Court stated a governmental entity is entitled to substantive immunity from tort claims related to enforcement of a conditional zoning resolution. Similarly, in *Bill Salter Advertising, Inc. v. City of Atmore*, 79 So. 3d 646 (Ala. Civ. App. 2010), the Alabama Court of Civil Appeals held that enactment of a sign ordinance and enforcement of the ordinance by the city and a city building official, in his official and individual capacities, through the refusal to permit an advertising company

to rebuild signs damaged in a hurricane, were an exercise of legislative zoning powers, such that the city and the official did not owe a duty to the company, and, thus, the city and the official were entitled to substantive immunity from the company's action for damages arising out of interpretation and enforcement of the ordinance. The ordinance was enacted to benefit the municipality as a whole.

Overcoming the Substantive Immunity Rule

To overcome the substantive immunity rule, it must generally be shown that the municipality owed some special duty to the plaintiff that it did not owe to the public as a whole and the municipality breached this duty in some way. This issue was raised in *Garrett*, but the court held that the police were not on notice of the attack against him just because of the earlier attack on Calogrides. Generally, a municipality, through its officers or employees, must acknowledge the existence of a special duty in order for it to arise. For instance, in at least one case, a special duty was found to exist when a police department assured a caller that help was on the way and the caller relied upon that assertion to his detriment. *Chambers-Castanes v. King's Cty.*, 100 Wn. 2d. 275, 669 P. 2d 451 (Wash. 1983).

In *City of Kotzebue v. McLean*, 702 P. 2d 1309 (Ala. 1985), a municipality was held liable for the failure of its police department to respond to a call informing them of an impending homicide. Further, in one case, a special relationship was found to exist simply because police protection was provided in the area of a penitentiary. *Cansler v. State*, 675 P. 2d 57 (Kan. 1984).

In a California case, the court held that the police owe duties of care only to the public at large and, except where a "special relationship" has been established, have no duty to offer affirmative assistance to anyone in particular. Without a special relationship, the police owed no duty to the plaintiff. Without a duty, no negligence cause of action can be stated. *Benavidez v. San Jose Police Department*, 71 Cal. App. 4th 853, 84 Cal. Rptr. 2d 157, 99 Daily Journal D.A.R. 3919 (6th Dist. April 27, 1999).

Hilliard v. City of Huntsville

An excellent discussion of the substantive immunity rule appears in *Hilliard v. City of Huntsville*, 585 So. 2d 889 (Ala. 1991). This case involved an allegedly negligent electrical inspection by the city of Huntsville. The city inspected the wiring in an apartment complex. Just over a month later, three people died in an electrical fire at the complex.

The plaintiff argued that the substantive immunity rule adopted in *Rich* should not apply in this case, arguing that *Rich* should be limited to facts identical to those in that case.

The court rejected this interpretation of *Rich*, ruling instead that "the present case is precisely the type of case in which the substantive immunity rule applies." The court found that the city of Huntsville, like most municipalities, performs electrical inspections as a benefit to itself and to the general public. While individuals receive a benefit from these inspections, the benefit is merely incidental to the true goal of the inspection. Just as an individual driver benefits by the state testing and licensing drivers of motor vehicles, the state does not guarantee to individual drivers that all licensed drivers are safe. *Cracraft v. City of St. Louis Park*, 279 N.W. 2d 801, 805 (Minn. 1979).

The court was not persuaded that any distinction exists between sewer inspections and electrical inspections. The plaintiff argued that the sewer inspection in *Rich* involved a duty owed to the public at large, whereas the inspection in the present case, because it was of the electrical system in one apartment building, was a duty owed to individual apartment residents. However, as pointed out by the court, the purpose behind both inspections is the same; that is, to ensure compliance with municipal codes.

The court noted that the cases cited by the plaintiff to indicate that courts in Alabama have declined to extend the holding in *Rich* were based on facts substantially different than those present from *Rich* and the present case. None of the cited cases involved an alleged negligent inspection. For instance, the court cited *Town of Leighton v. Johnson*, 540 So. 2d 71 (Ala. Civ. App. 1989), where the town of Leighton created the defect which caused the injury by knocking a hole in a manhole which allowed raw, untreated sewage to flow into a drainage ditch near the plaintiff's property. Alabama municipalities have long been liable for damages caused by negligent operation and maintenance of sewers and drains under their control. *Sisco v. City of Huntsville*, 124 So. 95 (1929); *City of Birmingham v. Norwood*, 126 So. 616 (1929). Thus, the court held that *Johnson* merely stands for the proposition that the substantive immunity rule did not change the tort laws governing municipal operations.

Besides reaffirming the substantive immunity rule, *Hilliard* is important for several other reasons. First, the court stated that, "Although inspections performed by the city's electrical inspectors are designed to protect the public by making sure that municipal standards are met, and although they are essential to the well-being of the governed, the electrical code, fire code, building code and other ordinances and regulations ... are not meant to be an insurance policy or a guarantee that each

building is in compliance." By lumping these regulations together, the Court makes clear an intention to insulate municipalities from liability for providing these vital services as well.

A second benefit provided in *Hilliard* is the recognition that Ala. Code 1975, § 11-47-190, will not support claims for wantonness against a municipality.

Finally, the court in *Hilliard* ruled that nuisance claims are governed by § 11-47-190 as well. Thus, if a negligence claim is barred by the substantive immunity rule, any alleged nuisance is also precluded.

Handling Claims

In handling claims, municipal officials must remember that the purpose of the notice of claims statutes is to allow them time to fully investigate the allegations against the municipality to determine the validity of the claim. Therefore, claims should be treated seriously and dealt with promptly. This may involve submitting the claim to the municipal attorney or to the insurance company. Regardless of whether municipal officials intend to investigate the claim or have legal representatives do so, certain steps should be followed in determining the merits of the claim. These risk management procedures may help the municipality avoid costly litigation by negotiating a settlement with valid claimants and by refusing to pay on nonmeritorious claims.

Bear in mind that the following information is not meant to substitute for internal methods of obtaining information regarding potential claims before a claim is ever filed. Employees with knowledge of injured citizens or private property should report, to their supervisors, the incident which caused the damage. Supervisors should then report to the municipal clerk, mayor or legal department. A written policy instructing employees to take these measures may give the municipality with even more time to investigate and determine the merits of potential claims. The earlier the municipality receives the notice and the earlier the municipality acts on that notice, the fresher the recollections of witnesses and, perhaps, the more weight a jury will apply to the testimony later should trial result. Additionally, quick notice allows municipal decision-makers to view the accident site before time changes the circumstances surrounding the accident.

When a Claim is Presented

A municipality must take a claim seriously and treat it with the respect it is due. Deal with it promptly. Don't just put it in a file to handle later.

When a claim is presented to the clerk, he or she should stamp it with the date and time it was received. It may also be a good idea to give the presenter a photocopy of the claim, showing the time and date as well.

A citizen's tort claims against a city accrued, and limitations period began to run, on the date of his injuries. The citizen's tort claims for false arrest and false imprisonment against city and its police chief in his official capacity arising out of an altercation with the police chief at a town hall meeting accrued, and the six-month period for presentation of claims against municipalities began to run, on the date of the citizen's arrest. *Locker v. City of St. Florian*, 989 So. 2d 546 (Ala. Civ. App. 2008)

The claim should be filed along with a statement of the clerk's action – assigning it to the insurance company, legal department or municipal attorney, for instance. Some municipalities assign the claim to the municipal department involved. If the claim involves damages caused by a pothole, for example, the clerk would send the claim to the street department for an investigation. Whatever the clerk's duty, the file should indicate that the appropriate action was taken.

If a municipality conducts its own investigation, the file should also show the results. Was the claim determined to be valid? If not, why was it rejected? The names of any witnesses interviewed, their testimony and any remedial action taken could also be added to the file, or at the very least, made available to the municipal attorney and the insurance carrier.

Is the Claim Valid on its Face?

To be valid, a claim must be filed no more than six months following the accrual of the claim. A claimant need not follow a particular form in filing the claim. However, the claim must give the municipality sufficient information to determine the time and place of the accident. The claim should contain a statement of the damages the injured party seeks. Additionally, the claim must be filed with the appropriate person. Statutes require filing the claim with the municipal clerk. However, in *Fortenberry v. Birmingham*, 567 So. 2d 1342 (Ala. 1990), the Alabama Supreme Court upheld presenting the claim to the mayor. The clerk, or other investigating officer, should verify that the claim provides adequate information to investigate the merits.

Another issue that should be considered is whether the notice of claim has to be a sworn statement. The plain language of Ala. Code 1975, § 11-47-192 specifically provides that the notice provided to the city shall be "a sworn[1] statement filed with the clerk by the party injured or his personal representative in the case of his death." Despite the plain language of the

1 *Black's Law Dictionary*, 6th ed., defines "sworn" as being synonymous with the word "verify" which is defined as "To confirm or substantiate by oath or affidavit."

statute, the Alabama Supreme Court has determined that requiring a complaint filed against a city within six months in lieu of a notice of claim pursuant to § 11-47-192 to be a sworn complaint conflicts with the fact that no civil complaint, other than a stockholder's derivative action, is required to be sworn to in Alabama. *See generally* Ala. R. Civ. P. 8. Consequently, there is no need for a complaint to be sworn to in order to comply with either § 11-47-23 or § 11-47-192. *Diemert v. City of Mobile*, 474 So. 2d 663 (Ala. 1985).

The *Diemert* case involved an individual filing a lawsuit within the six month time period rather than filing a separate notice with the city first. The decision in the *Diemert* case does not address the necessity of the notice filed with the clerk being a sworn statement but rather simply addresses the issue of whether a complaint, serving as notice within six months, must be a sworn complaint.

Montgomery v. Weldon, 195 So. 2d 110 (Ala. 1967), indirectly addresses the issue of whether a notice of claim filed with the clerk pursuant to § 11-47-192 must be a sworn statement. In *Weldon* the Alabama Supreme Court held that when a city actively misleads a claimant by continually representing to the claimant that their claim was sufficiently noticed and urges the claimant not to seek legal advice or take any further action for a year, the city is *estopped* from asserting that the claim filed with the city did not comply with the statutory requirements. By way of dicta, the Alabama Supreme Court noted that the plaintiff could not have satisfied the requirements of § 11-47-192 (previously codified at Tit. 37, Section 504, Code 1940) because he failed to provide a sworn statement. However, the court ruled against the city because the facts were such that the city was *estopped*, due to its own actions, from asserting the claimant's failure to file a sworn statement.

Arguably, because there is no specific guidance other than the plain language of the statute and the dicta of *Weldon*, a notice of claim filed with a municipality must be a sworn or verified notice. This argument is countered, however, with the line of cases allowing for "substantial compliance" (*infra*) and the *Diemert* case, decided after *Weldon*, holding that a complaint, serving as notice, does not have to be a sworn complaint.

If the facts as presented in the claim are true, the next step is to determine if the municipality is liable. The facts in the claim may reveal that the municipality was not responsible for the injury at all. For instance, an automobile accident may have occurred on a private roadway. If the claimant alleges that the road was not adequately maintained, the municipality is not liable because it has no duty to keep private roads in repair.

If the facts indicate potential municipal liability, the municipality should conduct a complete and thorough investigation. Once the investigation is finished, the results should be reported to the council for a determination of payment, to begin the negotiation process or to deny the claim altogether. However, state law does not require the council action for the plaintiff to perfect his or her claim. *Stewart v. City of Northport*, 425 So. 2d 1119 (Ala. 1983). Thus, even if the council does not act, the plaintiff may still sue the municipality for acts alleged in the claim.

Municipal Liability Under Section 1983

42 U.S.C. § 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

Municipalities and their officials have been subject to liability under 42 U.S.C. § 1983 since the United States Supreme Court handed down its landmark decision in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Section 1983, which makes municipalities liable for violations of civil rights resulting from customs or policies of the municipality, has become one of the broadest bases for challenges to municipal actions. These next sections discuss § 1983 and the impact it continues to have on municipalities.

Overview of Section 1983

42 U.S.C. § 1983 is not designed as a substitute for state court tort actions. In *Monell*, the Court held that if an employee or officer acted pursuant to an official policy, the municipality could be sued for the civil rights violation. However, the court rejected an argument that a municipality could be held liable under the theory of respondeat superior and required that the municipality's custom or policy actually cause the alleged deprivation of civil rights. A municipality "cannot be held liable solely because it employs a tort-feasor." *See also Cremeens Search Term End v. City of Montgomery*, 779 So. 2d 1190, 1191 (Ala. 2000).

The most difficult hurdle facing a plaintiff under § 1983 is demonstrating that the deprivation of civil rights was due to a policy or custom. However, it is clear that the existence of a written policy is not necessary to impose liability on a municipality. Conversely, the U. S. Supreme Court has held that a "single egregious incident" cannot establish a policy or

custom under § 1983. *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985). Yet, in the *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), the Court found the city liable for a single act by someone the court felt had authority to set policy for the city. And, in *Todd v. Kelley*, 783 So. 2d 31 (Ala. Civ. App. 2000), the Alabama Supreme Court held that where a mayor has the final decision-making authority to fire a police officer under the municipality's rules, the mayor's actions may subject the municipality to liability under § 1983.

Courts have held that Section 1983 protects both constitutional and statutory rights. This was made clear in *Maine v. Thiboutout*, 488 U.S. 1 (1980), where the U. S. Supreme Court stripped away the defense of good-faith immunity from a local government which allegedly violated a right granted to the plaintiffs not by the Constitution, but by regulations made pursuant to a federal law. The Court held that "Section 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."

In addition, the Court in *Thiboutout* held that the plaintiff was entitled to attorneys' fees under the Civil Rights Attorneys' Fees Awards Act of 1976 (to be codified at 42 U.S.C.§ 1988).

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the U. S. Supreme Court held that municipalities are immune from punitive damages in civil rights cases brought under 42 U.S.C. § 1983. The Alabama Supreme Court has held that state courts must accept § 1983 cases if the plaintiff selects a state court as the forum. *Terrell v. City of Bessemer*, *supra*. The appropriate statute of limitations for § 1983 claims is two years. *Owens v. Okure*, 488 U.S. 235 (1989). However, in *Felder v. Casey*, 487 U.S. 131 (1988), the U. S. Supreme Court held that state notice-of-claim statutes do not apply to § 1983 actions. Thus, a plaintiff suing under § 1983 does not have to provide the municipality with notice of his claim within six months. *Morrow v. Town of Littleville*, 576 So. 2d 210 (Ala. 1991).

Section 1983 Immunities

In discussing immunities under § 1983, it is important to draw a distinction between immunities which protect the municipality from those which protect the individual actor. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the court held that municipal defendants in § 1983 actions cannot take derivatively the good-faith immunities of their officers, who are usually co-defendants in § 1983 actions. The good-faith of the defendant municipality is now irrelevant. The only issue is whether the defendant municipality deprived the plaintiff of federal constitutional or statutory rights. Whether the deprivation was intentional, inadvertent, malicious or benign is not an issue.

However, the court in *Owen* made clear that a public officer may be personally immune from liability. The official's good faith is relevant in such cases because it transfers the financial burden of liability from the individual officer to the city or town.

Thus, while municipalities cannot take the immunities claimed by their officials, common law immunities continue to protect officials performing certain functions from § 1983 liability. Courts have recognized that this protection is necessary to preserve independent decision-making by guarding municipal officials from the distracting effects of litigation. *See*, *e.g.*, *Gorman Towers, Inc. v. Bogoslavsky*, 626 F. 2d 607 (8th Cir. 1980); *Bruce v. Riddle*, 631 F. 2d 272 (4th Cir. 1980).

As in state court, there are two types of immunity available to municipal officials, depending upon the function being performed. First, there is absolute immunity. A municipal official cannot be held liable for taking an action that entitles him or her to absolute immunity. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). Whether a person is entitled to absolute immunity depends on the function he or she is performing. If it qualifies as legislative or judicial, he or she is probably entitled to absolute immunity.

The official claiming absolute immunity bears the burden of proving that such immunity is warranted. *Forrester v. White*, 484 U.S. 219 (1988). As the United States Supreme Court noted in *Burns v. Reed*, 500 U.S. 478 (1991), the presumption is that qualified immunity is sufficient to protect government officials.

If the officer or employee's action is not legislative or judicial in nature, he or she may only be granted qualified immunity. Qualified immunity protects municipal officials when acting within their discretionary authority. Generally, this type immunity requires a good faith showing on the part of the official. This form of immunity protects the actor from liability for a discretionary action only if the employee or officer acted in a good faith, reasonable manner.

Qualified immunity operates somewhat differently in federal court than discretionary function immunity does in state court, however. As in state court, qualified immunity is an affirmative defense. This means that it must be pled by the official or the court will deem it to have been waived. While the degree of protection afforded by qualified immunity is not as great as that provided by absolute immunity, qualified immunity still protects official conduct in many areas.

Qualified immunity represents a balancing approach taken by the courts. On the one hand, courts are concerned with the need to provide a damages remedy to protect the rights of citizens. On the other hand, courts must protect officials who are required to exercise their discretion in the public interest. The fear is that officials subject to unbridled liability for discretionary actions, will refuse to make tough decisions that might later be second-guessed by a court.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the United States Supreme Court ruled that governmental officials performing discretionary functions are generally immune from liability for civil damages, provided their conduct does not violate a clearly established law. The court established this test so that insubstantial lawsuits would be disposed of on summary judgment, rather than subjecting officials to the expense of a full-blown trial. The court stated that:

> "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption on government and permit the resolution of many insubstantial claims on summary judgment."

Thus, the goal of the test set out in *Harlow* is to protect government officials from either the costs of trial or the burdens of broad-reaching discovery. To this end, the court stated that more was needed to proceed to trial than "bare allegations of malice."

Harlow, then, established an objective method of determining the good faith of a governmental official. The court further explained this standard in *Anderson v. Creighton*, 483 U.S. 635 (1987). Here, the court made clear that the test is not based solely on the alleged violation of a clearly established right, but also on the official's reasonable belief that the violation was justified in light of the surrounding circumstances. As the court stated in *Anderson*:

> "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were clearly established at the time it was taken."

That is to say, would a reasonable governmental official have believed, in light of the clearly established law and all objective facts present, that the action taken was justified? In order to defeat a motion for summary judgment, a plaintiff must demonstrate that the action not only violated his or her rights but that the government official's action was unreasonable.

The Eleventh Circuit Court of Appeals defines the test like this:

> "could a reasonable official have believed his or her actions to be lawful in light of clearly established law *and* the information possessed by the official at the time the conduct occurred?" *Nicholson v. Georgia Dep't of Human Res.*, 918 F. 2d 145, 147 (11th Cir. 1990). And,

> "A governmental official proves that he acted within the purview of his discretionary authority by showing 'objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.'" *Hutton v. Strickland*, 919 F. 2d 1531, 1537 (11th Cir. 1990). (Citations omitted).

The reasonableness inquiry is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to underlying intent or motivation. *Hutton*, 919 F. 2d at 1540. (Citations omitted).

Thus, as long as the action taken was reasonable under the circumstances, courts will not inquire into motive. Courts anticipate that public officials will apply their own experiences when exercising their discretionary powers and are loathe to substitute their opinions for that of the governmental official.

Hutton v. Strickland provides an excellent example of the analysis courts use to determine whether a particular action justifies granting qualified immunity. In *Hutton*, local sheriff's officers arrested plaintiffs when plaintiffs attempted to repossess ranch property, and they contended reverted to them through recordation of a quitclaim deed. They argued that the purchasers of the ranch property had defaulted on the terms of the land sale contract and that the plaintiffs were entitled to automatic possession of the land. Although the facts bore them out, the courts ruled in their favor due to qualified immunity.

First, though, the district court refused to grant the sheriff's motion for summary judgment. The Eleventh Circuit then reversed. The first inquiry, according to the court in *Hutton*, is whether the public officers were acting within the scope of their discretionary authority. Once this is established, the inquiry shifts to an analysis of whether there was a lack of good faith or the violation of a clearly established law. There are two parts to this analysis. First, the court must determine whether applicable law was clearly established when the action occurred. Next, the court must decide whether a genuine issue of fact exists regarding the alleged violation.

A similar analysis was applied in *Dees v. City of Miami*, 747 F. Supp. 679 (S.D. Fla. 1990). There, Dees, a police officer who was arrested for perjury after making certain statements, filed suit against the city, assistant police chiefs and police investigators. The court described the analysis as to whether the defendant's actions were protected by qualified immunity as follows:

> "In this case, the plaintiff does not dispute that the defendants were performing discretionary functions. ...

> Clearly established at the time of Dees' arrest and prosecution, moreover, was Dees' right to be free from arrest and prosecution absent probable cause ... The critical inquiry with respect to the qualified immunity defense, therefore, is whether the defendant's actions connected with his arrest and prosecution for perjury were objectively reasonable in light of plaintiff's right to be free from arrest and prosecution absent probable cause ... Probable cause in this case, therefore, does not hinge on whether the officers had probable cause to arrest the plaintiff. Instead, it depends on whether 'arguable probable cause' existed." *Id*., at 684. (Citations omitted).

In *Dees*, the court held that if defendants could raise a set of circumstances which justified the arrest, qualified immunity barred the action. Thus, qualified immunity protects an officer if either the law with respect to his actions was unclear, or if a reasonable officer could have believed the action to be lawful in light of the information the official possessed. *McDaniel v. Woodard*, 886 F. 2d 311, 314 (11th Cir. 1989).

The Alabama Supreme Court has confirmed this rule in a similar case. In *City of Birmingham v. Major*, 9 So. 3d 470 (Ala. 2008), the Court noted that a police officer had probable cause to arrest a man for third-degree domestic violence. The Court stated that a civil rights action under §1983 for impermissible arrest is barred if probable cause existed at the time of the arrest. The officer need not have enough evidence or information to support a conviction, in order to have probable cause for arrest.

A public official asserting that he is protected by qualified immunity from liability on a civil rights complaint must establish that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. A civil rights plaintiff attempting to defeat a public official's qualified immunity defense must make two showings: (1) that official violated a constitutional right; and (2) that the illegality of the official's conduct was clearly established. Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause. *Griffin Indus., Inc. v. Irvin*, 496 F. 3d 1189 (11th Cir. 2007).

An individual may also be entitled to qualified immunity even if he is not an employee of the public entity. In *Filarsky v. Delia*, 566 U.S. 377 (2012), the Supreme Court held that an attorney who was retained by a city to assist in conducting an official investigation into a firefighter's potential wrongdoing was entitled to seek the protection of qualified immunity in the firefighter's § 1983 claim alleging his Fourth Amendment rights were violated during the investigation, even though the attorney was not a permanent, full-time employee of the city. Affording immunity under § 1983 not only to public employees but also to others acting on behalf of the government serves to ensure that talented candidates are not deterred by the threat of damages suits from entering public service.

Antitrust Liability

Until 1978 local governments and their attorneys were not overly concerned with antitrust litigation. In 1904, the U.S. Supreme Court turned aside a challenge to Texas legislation which permitted only state licensed harbor pilots to operate in the ports of Texas by ruling that this action did not violate the antitrust statutes. *Olsen v. Smith*, 195 U.S. 332 (1904).

In *Parker v. Brown*, 317 U.S. 341 (1943), the decision which articulated the so-called "Parker State Action Doctrine," the Supreme Court held that actions taken pursuant to the authorization of state legislation were exempt from federal antitrust laws.

Although *Parker* and *Olsen* concerned the activities of state rather than local governments, most observers assumed that a federal antitrust challenge of the activities of a political subdivision of a state would lead to the same result as in *Parker*. However, the Supreme Court's decision in *City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389 (1978), marked the beginning of the end of the complacency of local governments toward antitrust legislation.

In *City of Lafayette, supra*, a severely split Supreme Court concluded that a local government may, in fact, be violating antitrust laws in the operation of municipally-owned activities. The Court's plurality concluded that the only way *Parker* immunity would attach was if there was adequate state involvement in the municipal activity.

In a decision handed down by the U. S. Supreme Court in January 1982, the liability of municipalities for antitrust claims was greatly expanded. The case, *Cmty. Communications v. City of Boulder, Colorado*, 455 U.S. 40 (1982), held that an ordinance adopted by the City of Boulder prohibiting the further expansion of cable television business within the city for three months, during which time the city council was to draft a model cable television ordinance and to invite new businesses to enter the market under the terms of that ordinance, was not entitled to antitrust immunity under the state action doctrine of *Parker v. Brown, supra*.

In its ruling, the Supreme Court made the following points:

- Cities are not sovereign and are not entitled to the same deference as states under the antitrust laws;
- The *Parker* state action exemption only insulates the actions of city government if those actions are in furtherance of state policy;

- Home rule powers are not sufficient to give cities the standing of states under the antitrust laws;
- The state must affirmatively address the subject in order for the city's actions to be considered as "comprehended within the powers granted" by the state; and
- Municipal actions may be judged by a different standard than that which governs the actions of private businesses (the courts may develop special rules for determining whether a municipal regulatory action violates the antitrust laws). For a city to be immune from antitrust liability, the state must adopt an affirmative policy of substituting local regulation for competition.

The *Boulder* case suggests that a state legislature, in order to give its political subdivisions *Parker immunity*, must establish a policy having statewide application. It may not be enough under the *Boulder* decision for a state statute to provide that political subdivisions may engage in specified anti-competitive practices, because permitting each municipality to elect whether to act or not could be viewed as a position of neutrality on the part of the state.

It is interesting to note the case of *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), where the U.S. Supreme Court held that *Parker* immunity is available only if the activities were compelled by the state and not merely prompted or passively accepted. This case involved private litigants attempting to defend antitrust challenges on the grounds that their actions were authorized by the state.

But see *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F. 2d 1286 (11th Cir. 1986), where the Eleventh Circuit Court of Appeals held a legislative grant of power to exercise "exclusive jurisdiction, control, supervision and management over all airports in" the county was sufficient to confer state action immunity for the Authority's limitation on the number of limousines allowed to operate at the airport. The U.S. Supreme Court ruled similarly in *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365 (1991).

The Local Government Antitrust Act of 1984, 15 U.S.C. § 34, effectively limits municipal antitrust liability to declaratory and injunctive relief. Hopefully, future legislation will help to clarify the limits of municipal antitrust liability.

Stitch in Time

The old proverb "A stitch in time ..." is certainly applicable in the case of preventing liability actions and losses. In answer to the question, "Where do we make the first stitch?" it is recommended that a municipality and its incorporated boards use risk management principles to help eliminate and reduce the liability of a municipality. An in-depth risk analysis is complicated and risk management requires time and effort. But most municipalities can benefit from applying these principles to their daily operations.

Other Significant Tort Liability Decisions

- In *J.M.R. v. Cty. of Talladega*, 686 So. 2d 209 (Ala. 1996), the Alabama Supreme Court held that where a youthful offender consents to a negotiated plea but refuses to appeal any defects in the plea, governmental officials are protected by discretionary immunity from a § 1983 claim. The county is also immune.
- In *Nelson By and Through Sanders v. Meadows*, 684 So. 2d 145 (Ala. Civ. App. 1996), the Court of Civil Appeals held that a municipality owes a duty to passengers on an intersection maintained by the state because the municipality had a contract requiring it to notify the state of needed adjustments and changes to the traffic lights at the intersection.
- A municipality may, and in certain circumstances must, provide a defense for and indemnify municipal employees who are sued for the official performance of their duties. Al. Op. Att'y Gen. 97-00073.
- In *Montoute v. Carr*, 114 F. 3d 181 (11th Cir. 1997), the Eleventh Circuit Court of Appeals held that in a § 1983 action against a police officer for excessive force, an arrestee has the burden of proving that no reasonable officer could have believed that the arrestee either had committed a crime involving serious physical harm or that the arrestee posed a risk of serious physical injury to the officer or others.
- In *Ex parte City of Geneva*, 707 So. 2d 626 (Ala. 1997), the Alabama Supreme Court held that the City was protected from liability by Ala. Code 1975, §§ 35-15-1-28, for the operation of a recreational facility at which a child was seriously injured.
- In *Tuscaloosa Cty. v. Hender*son, 699 So. 2d 1274 (Ala. Civ. App. 1997), the Court of Civil Appeals held that a license inspector was not protected by qualified immunity when he had the plaintiff arrested for conducting business without a license without first conducting an investigation.
- In *Barnette v. Wilson*, 706 So. 2d 1164 (Ala. 1997), the Alabama Supreme Court held that a police chief may be sued for defamation for stating to the press that the department had successfully removed four "dirty cops," and then naming the officers involved.

- In *McCool v. Morgan Cty. Comm'n*, 716 So. 2d 1201 (Ala. Civ. App. 1997), the Court of Civil Appeals held that because a municipality had exercised sole control over an intersection that had been annexed into the municipality nine years earlier, the municipality, not the county, was responsible for maintaining the intersection even if the procedures in Ala. Code 1975, §§ 11-49-81 and 11-49-81, had not been followed.
- In *Williams et al. v. Crook and the City of Bay Minette*, 741 So. 2d 1074 (Ala. 1999), the Alabama Supreme Court held that the immunity from tort liability granted by § 6-5-338(a) to the driver of an "authorized emergency vehicle" applies only when the driver is using an audible signal meeting statutory requirements and is meeting the requirements of any law requiring that visual signals be used on emergency vehicles.
- Neither a county board nor a board member who voted with the board to eliminate certain county positions allegedly in retaliation for employee's support of a political adversary is entitled to absolute legislative immunity under § 1983 for the member's pre vote activities taken in an executive or legislative capacity. *Carver v. Foerster*, 102 F. 3d 96 (3rd Cir. 1996).
- In *Mays v. East St. Louis, Mo.*, 123 F. 3d 999 (7th Cir. 1997), the Seventh Circuit Court of Appeals held that an injury caused by a police officer's high-speed chase may be actionable under the Fourth Amendment rules regarding search and seizure, but it is not actionable as a § 1983 claim under the due process clause.
- The United States Supreme Court has held that a high-speed police chase that ends in death does not shock the conscience unless the police act with the intent to cause harm unrelated to the legitimate object of arrest. *Sacramento Cty. v. Lewis*, 523 U.S. 833 (1998).
- In *City of Birmingham v. Bus. Realty Inv. Co.*, 722 So. 2d 747 (Ala. 1999), the Alabama Supreme Court held that damages based on a claim of intentional interference with business relations are not subject to the municipal statutory damages cap.
- The Court of Civil Appeals held in *Roberts v. Baldwin Cty. Comm'n*, 733 So. 2d 406 (Ala. Civ. App. 1999), that a county commissioner was not entitled to absolute immunity from personal liability when he or she votes to continue a county road easement. The court held that a vote on the passage of a resolution concerning the maintenance of a roadway is executive in nature, not legislative.
- Theories of negligence and inverse condemnation, as asserted by homeowners in action against city to recover for damages to houses due to settling that was allegedly caused by the city's repair work on a street, were mutually exclusive and therefore the jury, if it found for the homeowners, was properly required to choose between the two theories. While an inverse condemnation claim requires a showing of causation, it does not require a showing of negligence. Further, the homeowners were not entitled to recover damages for mental anguish absent evidence that they were potentially at risk of physical injury as a result of the city's negligence. *City of Mobile v. Patterson*, 804 So. 2d 220 (Ala. Civ. App. 2001).
- Summary judgment was not appropriate in a road defect case where evidence was put forth in opposition to city's motion for summary judgment providing that at least two people had complained to the city about the road condition and numerous accidents had occurred at the particular intersection involved. Either actual or constructive notice will suffice to impose upon a municipality the duty to correct a dangerous condition on public roads or to provide warning signs**.** *Hollingsworth v. City of Rainbow City*, 826 So. 2d 787 (Ala. 2001).
- The Eleventh Circuit Court of Appeals held that the suspension of a public high school student who displayed the Confederate flag did not violate any clearly established law in 1995 regarding a student's First Amendment right; therefore, the public high school's officials enjoyed qualified immunity from a civil rights suit arising from his suspension for displaying the flag. *Denno v. Sch. Bd. of Volusia County, Fla*., 218 F. 3d 1267 (11th Cir. 2000).
- Pursuant to Ala. Code 1975, § 11-93-2, a health care authority established pursuant to Ala. Code 1975, § 22-21-310, et seq. and its facilities, have the protection of the liability caps for the recovery of damages for bodily injury, death or damage to property. Ala. Op. Att'y Gen. 2003-058.
- Summary judgment was not appropriate in a road defect case where evidence was put forth in opposition to city's motion for summary judgment providing that at least two people had complained to the city about the road condition and numerous accidents had occurred at the particular intersection involved. Either actual or constructive notice will suffice to impose upon a municipality the duty to correct a dangerous condition on public roads or to provide warning signs. *Hollingsworth v. City of Rainbow City*, 826 So. 2d 787 (Ala. 2001).
- Although railroad was statutorily required to maintain railroad crossing and "the streets between their rails and for 18 inches on each side," city owed a duty to motorists to warn them of danger posed by "ditch" that had been dug across road in front of railroad crossing if the city knew or should have known that the danger existed. *Ex parte CSX Transp., Inc.*, 938 So. 2d 959 (Ala. 2006).

- A City industrial development board (IDB) is a "governmental entity" as defined in the Volunteer Service Act, and, thus, a person volunteering for the IDB is immune from civil liability if the damages or injury were not caused by the volunteer's willful or wanton misconduct. A City IDB could not be held vicariously liable for acts of its chairman who was immune from liability under the Volunteer Service Act. *Wheeler v. George*, 39 So. 3d 1061 (Ala. 2009).
- Assistant fire chief for volunteer fire department was acting in good faith and within the scope of his volunteer-firefighter duties with the fire department, a nonprofit organization under the Volunteer Service Act, and, thus, would be liable to occupants of car, who were injured when fire truck collided with their car, only if he engaged in willful or wanton misconduct. The assistant fire chief did not act willfully or wantonly, and thus, the assistant chief was entitled to immunity. *Ex parte Dixon Mills Volunteer Fire Dep't., Inc.*, 181 So. 3d 325 (Ala. 2015).
- The $100,000 municipal damages cap did not apply in action brought by driver and passenger, who were injured in automobile accident, against police officer in his individual capacity for negligence that occurred outside his employment, where accident occurred while officer was on his way to work and was late for his shift. The city was not obligated to indemnify police officer for negligent actions that occurred outside the performance of his official duties, and the city was not considered the real party in interest in the action, even though it sought to intervene to satisfy judgments against officer. *Alabama Mun. Ins. Corp. v. Allen*, 164 So. 3d 568 (Ala. 2014).
- City council's actions in voting to suspend or revoke contractor's building permit to refurbish a Confederate memorial located in city cemetery, considered in conjunction with the actions of city police chief in threatening to arrest contractor's employees if they resumed work on the memorial, could be said to constitute a "deprivation" through interference with contractor's use of the building permit, as required to satisfy element of § 1983 procedural due process claim. *KTK Min. of Virginia, LLC v. City of Selma, Ala.*, 984 F. Supp. 2d 1209 (S.D. Ala. 2013).
- City police department's standard operating procedure (SOP), which allegedly did not contain written procedures for use of force when interacting with mentally ill persons, was not a custom or practice of deliberate indifference to the right of mentally ill van passenger to be free from excessive force that could serve as basis for § 1983 claim against city, where city police officers had not used excessive force against other mentally ill persons, such that city would have been aware of alleged inadequacy of its SOP. Even if a cause of action against a municipality for a supervisor›s negligent training or supervision of a subordinate existed under Alabama law, city and police chief were protected by state-agent immunity in mentally ill van passenger›s negligent supervision action based on allegedly excessive use of force by police officer. *Howard v. City of Demopolis, Ala.*, 984 F. Supp. 2d 1245 (S.D. Ala. 2013).
- Genuine issues of material fact as to whether police officer activated his siren when responding to emergency dispatch and slowed to an appropriate speed through intersection, as would support claim for peace-officer immunity, precluded summary judgment in favor of city and officer in injured driver's action for damages following driver's collision with police car. *Kendrick v. City of Midfield*, 203 So. 3d 1200 (Ala. 2016).
- No statute of limitations applied to bar declaratory judgement claims challenging the validity of a city's permitting ordinances when the ordinances presented a current and ongoing infringement of property rights. *Breland v. City of Fairhope*, 229 So. 3d 1078 (Ala. 2016).
- City police officers were immune from passenger's claims alleging that the officers were negligent during a high-speed pursuit of a vehicle. *Ex parte City of Homewood*, 231 So. 3d 1082 (Ala. 2017).
- City police officers were entitled to state-agent immunity in action stemming from police call related to repossession of motor vehicle. *Ex parte City of Selma*, 249 So. 3d 494 (Ala. 2017).
- City was entitled to immunity for reckless misrepresentation claim, but not negligent misrepresentation claim, brought by the wife of decedent firefighter, who was the decedent's life insurance beneficiary based on alleged misrepresentations regarding the amount of life insurance the firefighter was allowed to keep in place. Park patron failed to establish city had actual knowledge of diagonal crossbar in park presented a condition involving an unreasonable risk of death or bodily harm. *Ex parte City of Guntersville*, 238 So. 3d 1243 (Ala. 2017).
- Ala. Code 1975, § 11-47-190, the immunity statute, limited the city's liability for claims arising from wanton misconduct. *Miller v. City of Birmingham*, 235 So. 3d 220 (Ala. 2017).
- A police officers did not violate a clearly established right when, during the course of a legitimate investigation into a noise complaint, he obtained consent to enter into a private residence and interrupted the investigation to order the resident to stop engaging in the religiously-motivated conduct of praying before issuing a citation. Thus, the officer was entitled to

qualified immunity from the residents § 1983 claim alleging the officer's actions violated her First Amendment rights. *Sause v. Bauer*, 859 F. 3d 1270 (Kan. 2017).

- Statute providing for a cap on damages recoverable against government entities is not applicable to individual capacity claims. *Wright v. Cleburne Cty. Hosp. Board, Inc*., 255 So. 3d 186 (Ala. 2017).
- City was entitled to municipal immunity in negligence action brought by invitee after the invitee fell through a broken drain gate in a city-owned park. *Ex parte City of Muscle Shoals*, 257 So. 3d 850 (Ala. 2018).
- A municipal utility did not have substantive immunity from a personal injury action concerning an electrocution incident on a bridge-repair project. *Ex parte Utilities Bd.*, 265 So. 3d 1274 (Ala. 2018).
- Police officer was entitled to state-agent immunity from claims of negligence and wantonness made by motorist involved in a collision with a patrol car. *Ex parte City of Montgomery*, 272 So. 3d 155 (Ala. 2018).
- Under the property test for evaluating comparator evidence at the prima facie stage of the Supreme Court's McDonnell Douglas burden-shifting framework, in an action asserting an intentional-discrimination claim under Title VII, the Equal Protection Clause, or section 1981, a plaintiff must demonstrate that she or her proffered comparators were similarly situated in all material respects. In so holding, the Eleventh Circuit abrogated circuit precedent apply a "nearly identical" standard or a "same of similar" standard, and declined to adopt the Seventh Circuit's standard, which requires distinctions that are not so significant that they render the comparison effectively useless. *Lewis v. City of Union City, Georgia*, 918 F. 3d 1213 (11th Cir. 2019).
- State-agent immunity was not a basis to find that public school employees were exempt from occupational tax imposed by city. *Jefferson County Bd. of Educ. v. City of Irondale*, 331 So.3d 597 (Ala. 2020).
- Police officer's use of stun gun on motorist when responding to accident in which motorist was involved, following motorist's refusal to get on gurney to go to hospital, was not excessive force under Fourth Amendment, even though paramedics and motorist's friend informed officer that motorist had suffered a seizure and that he would not be able to fully understand officer, where motorist attempted three times to go back to his vehicle and was successful at re-entering vehicle on one of those times, and officer tried to remove motorist from car verbally and physically before using stun gun. *Baker v. City of Madison*, 67 F.4th 1268 (11th Cir. Ala. 2023).

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