ALABAMA MUNICIPAL LAW 101

PREPARED FOR THE HUNTSVILLE MADISON BAR "LAST CHANCE CLE" 2017

LORELEI A. LEIN
GENERAL COUNSEL
ALABAMA LEAGUE OF MUNICIPALITIES

The Constitution of Alabama does not recognize any inherent right of local government. Except where restricted by limitations imposed by the state and federal Constitutions, the Legislature of Alabama is vested with complete, or absolute, power. In the exercise of this power, the Legislature used general statutes to create municipal corporations and declared them political and corporate entities. These municipalities are delegated a portion of the sovereign powers of the state for the welfare and protection of their inhabitants and the general public within their jurisdictional areas. All powers, property, and offices of a municipal corporation constitute a public trust to be administered as such within the intent and purposes of the statutes which created them and within the limitations imposed by the state and federal Constitutions.

The powers of Alabama cities and towns are delegated by the Legislature and are subject to removal and limitation of power by the Legislature. Regardless of the origin, the powers of municipal corporations should not be viewed as weak, unimportant, or second rate. When the Legislature adopted the Municipal Code, which today is found in Title 11 of the Code of Alabama, a broad array of power was granted to the cities and towns of Alabama. The Legislature has continued to grant new powers that enable municipalities to deal with the changing times of today. The best way to understand the importance of municipal powers is to visualize society without them.

In providing for the organization and administration of mayor-council cities and towns, the Legislature deemed that the legislative functions of a municipality should be vested in the council. Sections 11-43-2, 11-43-40 and 11-43-43, Code of Alabama 1975. Section 11-43-43 of the Code states that all legislative powers and other powers granted to cities and towns shall be exercised by the council, except those powers conferred on some officer by law or ordinance. Therefore, the state Legislature has entrusted the municipal council with the duty and responsibility of exercising a wide variety of the sovereign powers of the state which vitally affect the life, liberty and property of citizens within their jurisdictions. Further, where cities have adopted the council-manager form of government, the council is also authorized to exercise all legislative functions of the municipality. Section 11-43A-83, Code of Alabama 1975.

Sources of Power

The sources of power of a municipal corporation include the Constitution, the statutes of the state, and special acts of the Legislature, particularly where such acts are in the charter for specific cities or towns. In an early Alabama case, *Mobile v. Moog*, 53 Ala. 561 (Ala. 1875), Justice Manning quoted Judge Dillon from his work on municipal corporations: "It is a general rule, and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation – not simply convenient, but indispensable."

McQuillin cites this case as authority in stating that Alabama cities and towns have no inherent powers, but such a statement requires an understanding and agreement on the meaning of the word "inherent." *See* 2A McQuillin *Municipal Corporations*, 3rd Ed. Section 10:12. It is true that a city has no authority to confer upon itself power it does not possess. Courts in Alabama follow the Dillon Rule in determining whether or not a city or town is authorized to exercise a particular

power. *See New Decatur v. Berry*, 7 So. 838 (Ala. 1890); *Best v. Birmingham*, 79 So. 113 (Ala. 1918).

In *Best v. Birmingham*, the Supreme Court of Alabama held that the Court of Appeals erred in holding that municipal corporations have no implied powers. In so ruling, the court pointed out that except for the power of taxation (and probably some others not necessary to mention here), municipal corporations are clothed with powers implied or incidental. As a guide, the court noted that these incidental or implied powers must be germane to the purpose for which the corporation was created. Municipal powers cannot be enlarged by construction to the detriment of individual or public rights. The power must relate to some corporate purpose which is germane to the general scope of the object for which the corporation was created or has a legitimate connection with that object. *Harris v. Livingston*, 28 Ala. 577 (Ala. 1856).

Unfortunately, no precise definition distinguishes "indispensable powers" from powers which are merely useful or convenient. As a general policy, municipal corporations are held to a reasonably strict observance of their express powers. *Ex parte Rowe*, 59 So. 69 (Ala. App. 1912). The safest rule is that if there is substantial doubt as to the existence of a particular power, such power will be held by the courts not to exist.

The powers of a municipality may be derived from a single express grant or from a combination of enumerated powers which must be construed together. The purpose of all rules of construction is to arrive at the intent of the Legislature. It follows that if fairly included in or inferable from other powers expressly conferred and consistent with the purposes of the municipal corporation, the exercise of the power should be resolved in favor of the municipality to enable it to perform its proper functions.

Types of Power

Two basic types of powers are delegated to and exercised by Alabama cities and towns. The two basic types of power are those of a political body (legislative) and corporate body (ministerial). As a political body, municipal powers are general in application and public in character. As a corporate body, a municipality has powers that are proprietary in character, powers exercised for the benefit of the municipality in its corporate or individual capacity. Such powers are for the internal benefit of the municipality as a separate legal entity. *State v. Lane*, 62 So. 31 (Ala. 1913).

As a political body, a municipal corporation exercises legislative powers of a general and permanent nature which affect the public generally within the territorial jurisdiction of the municipality. In this instance, the council acts very much as an arm of the state Legislature. As a corporate body, a municipality exercises powers of a ministerial nature for the private benefit of the corporation. In this case, a municipality acts in a manner comparable to the board of directors of a private corporation.

The distinction between these two types of powers is important to determine if a council must formally adopt an ordinance to exercise a particular power. If the power exercised requires the action of the council in its legislative capacity, then a formal ordinance is required in the manner prescribed by statute. If the action is of a ministerial nature, then the council may exercise the power by resolution or simple motion set forth in the journal.

The formalities required by statute for the adoption and publication of ordinances of a general and permanent nature are set out in Sections 11-45-2 and 11-45-8, Code of Alabama 1975, and must be followed closely by the council.

Exercise of Powers

The powers of a municipality, both corporate and legislative, are required to be exercised by the council in legal meetings as prescribed by statute. Action taken by petitioning individual councilmembers will not suffice. The municipal journal is the only evidence acceptable in determining the action which the council took on a particular item of business, and parol evidence

will not be received to establish such action. *Penton v. Brown-Crummer Inv. Co*., 131 So. 14 (Ala. 1930).

The method of exercising a power granted by the Legislature is dependent upon whether the statute prescribes the manner of performance or not. The prescribed procedure for adopting ordinances of a general and permanent nature is mandatory. In exercising ministerial powers, it should be noted that sometimes procedures are prescribed by statute. In some cases, courts recognize such procedures as mandatory and in other instances they are declared to be directory only.

Generally, where a statutory grant of power provides that a municipality "**shall**" or "**mus**t" perform an act in a prescribed manner, the statute is declared mandatory. Prince v. Hunter, 388 So. 2d 546 (Ala. 1980). Where a statute provides that the municipality "**may**" perform an act or exercise a power, it is declared to be directory or permissive. Jackson v. State, 581 So. 2d 553, 559 (Ala. Crim. App. 1991). However, it is important to note that in all cases of statutory interpretation, the legislative intent ultimately controls over the use of the words "shall," "may," or "must." *Mobile Cty. Republican Executive Comm. v. Mandeville*, 363 So. 2d 754, 757 (Ala. 1978)

Where performance is left to the discretion of the municipal council, the council must use reasonable methods or procedures within the restrictions of the state and federal Constitutions. The general rule is that unless restrained by statute or constitutional provision the council may, in its discretion, determine for itself the means and method of exercising the powers delegated to the municipality. The rule of strict construction, often applied to determine if a municipality has the power to perform a particular function or act, is not generally applied to the method used by a council to exercise a power which is plainly granted.

Discretion Not Reviewable

Where a council has acted within the sphere of powers granted to the municipality, it is well established that courts will not sit in review of the proceedings of municipal officers and departments in the exercise of their legislative discretion. Cases where bad faith, fraud, arbitrary action, or abuse of power are affirmatively shown are exceptions to this rule. *Hamilton v. Anniston*, 27 So.2d 857 (Ala. 1946). Where a power exists, there is a legal presumption that public officials properly and legally executed it in a reasonable manner. It is often stated that if the result of a given action of the council is an economic mistake, an extravagance, or an improper burden on the taxpayers, the answer is at the ballot box rather than a court proceeding. Courts do not inquire into the motives prompting a municipal governing body to exercise a discretionary power, be it legislative or corporate in nature, unless there is a showing of fraud, corruption or oppression. *Pilcher v. Dothan*, 93 So. 16 (Ala. 1922). Error or mistakes in judgment do not constitute an abuse of discretion.

Non-Delegable Powers

Legislative powers rest with the discretion and judgment of the municipal council. The council cannot delegate or refer such powers to the judgment of a council committee or an administrative officer. There is a distinct difference in delegating the power to make a law, which involves discretion and judgment, and conferring authority or discretion to execute a law pursuant to the directions contained in the law. The council can appoint administrative agents to perform ministerial duties to carry out the legislative will.

An ordinance not outlining a guide or a rule for the exercise of administrative discretion, leaving the whole matter to the discretion of the officer, is an unwarranted delegation of legislative power. Such ordinances are universally held unreasonable, arbitrary, or oppressive. When adopting ordinances, a council should provide standards and guides to be used by officers responsible for administration of the ordinances.

The council may appoint investigative committees to study and report facts, but final discretion as to any action required must be made by the council.

The council may authorize the mayor to make a particular contract which the council alone is authorized to make, and subsequently ratify such contract and take action pursuant thereto. Here the ratification constitutes the performance of the duty imposed on the council.

The council cannot, by agreement, bind its successors to forgo or exercise their legislative powers. *City of Birmingham v. Holt*, 194 So. 538 (1940); AGO 97-00118.

Necessity for Council Action

In some instances, statutes relating to municipal powers are self-executing. However, in most instances, the grants of power are not effective until the council takes legislative action to set them in motion. The authority to levy a tax or impose a license, for example, must be put in motion by affirmative action by the council before such powers can actually be administered. In other words, the Legislature generally places municipal powers at the discretion of the municipal council or governing body, to be exercised or not, according to the judgment of the council. Such action is taken by the adoption of an ordinance, resolution, or motion as the granting authority may require.

Municipal Liability in General (State Courts)

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 of Mobile*, 31 Ala. 469 (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 Section 11-47-190, Code of Alabama 1975. 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 *City of Bessemer v. Whaley*, 8 Ala. App. 523, 62 So. 473 (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 Section 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*, 294 Ala. 592, 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.

In response to *Jackson*, the Legislature enacted several statutes limiting the tort liability of municipalities. For instance, to protect the public coffers because damages against a municipality are paid for municipal taxpayers, Section 11-93-2, Code of Alabama 1975, limits the amount of damages recoverable against a municipality. 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 County Commission v. Ragona*, 561 So. 2d 1092 (Ala. 1990). In *City of Birmingham v. Business Realty Investment Co*., 739 So. 2d 523 (Ala. 1998), the Alabama Supreme Court held that a municipality must raise the defense of municipal immunity under Section 11-47-190, Code of Alabama 1975, at trial as an affirmative defense. It cannot be raised for the first time on appeal.

In *Smitherman v. Marshall County Commission*, 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 recoery cap contained in Section 11-92-2 of the Alabama Code. 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 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.

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 if an employee was sued for wantonness. 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. *Morrow v. Caldwell*, 153 So.3d 764 (Ala.2014). The issue of whether suits can be maintained against municipal employees acting within the line and scope of their employment for negligence claims is a developing area of the law moving through Alabama's courts.

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. This protection also extends to the municipality; that is, if the officer is entitled to discretionary-function immunity pursuant to Section 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*.

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*, 3rd Rev. Ed., Section 53.06a. 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*, 355 PA 121, 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*, Section 53.10. See also *Tyler v. City of Enterprise*, 577 So. 2d 876 (Ala. 1991).

Actions of Officers and Employees

In state courts, 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*, 243 Ala. 162, 8 So. 2d 831 (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).

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*, 216 Ala. 72, 112 So. 335 (1927). In *Bessemer v. Whaley*, 8 Ala. App. 523, 62 So. 473 (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 §11-47-190, Code of Alabama 1975.

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*, Section 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 Section 11-47-190, Code of Alabama 1975, 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 Section 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 Section 11-47-190, Code of Alabama 1975.

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 Section 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); and *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.

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. *Black's Law Dictionary* 761 (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, 246 Ala. 218 (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.

And, it is 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 defendants officers when they in good faith performed a discretionary act that was within the line and scope of their duties.

Recent 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 Section 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 § 6-5-338(a), Ala.Code 1975. (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."

The discretionary part of Section 6-5-338(a) is working its way back into the courts 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 section 6-5-338(a), Code of Alabama 1975. 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).

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.

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 v. City of Mobile*, 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. 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.*, 293 Minn. 220, 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 inspectors 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."

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 County Com'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.

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 (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*, 220 Ala. 59, 124 So. 95 (1929); *City of Birmingham v. Norwood*, 23 Ala. App. 451, 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 Section 11-47-190, Code of Alabama 1975, will not support claims for wantonness against a municipality.

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

Conclusion

For more information on municipal law in Alabama, please contact the legal department of the Alabama League of Municipalities.

334.262.2566
www.alalm.org