

## **Immunity: Sovereign, Legislative, Official and Governmental**

### **Ministerial Acts and Immunity for Discretionary Acts**

Under Mississippi law, a form of qualified immunity from personal liability is given to public officials engaged in the performance of discretionary acts. For purposes of public official immunity, Mississippi and many other states recognize a distinction between "ministerial" and "discretionary" duties of public officials. The 1935 case of *Poyner v. Gilmore*, sets out the test for making this distinction between ministerial duties, which the official neglects at his peril, and qualifiedly protected discretionary public functions:

The most important criterion...is that if the duty is one that has been positively imposed by law and its performance required at a time and manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the [official's] judgment or discretion, the act being discharged thereof is ministerial.

The Mississippi Supreme Court has consistently refused to extend this public official immunity defense to government employees who perform ministerial acts in a negligent manner. The rationale for this result is that the possibility of personally subjecting a person to civil liability tends to encourage proper performance of statutorily prescribed and specifically designated duties. On the other hand, the rationale for extending public official immunity to public officials performing discretionary acts is that officials who perform governmental functions and lawful duties that require "personal deliberation, decision and judgment" need to be protected in performing those governmental functions. They should be allowed to continue their basic policymaking decisions without fear of legal retribution in the form of personal financial liability.

The basis for immunizing government officials from liability when performing discretionary acts, while limiting the liability of government officials to those who perform ministerial acts, lies in the inherent need to promote efficient and timely decision-making without lying in fear of liability for miscalculation or error in those actions. In *Newton v. Black*, 133 F. 3d 301 (5<sup>th</sup> Cir. 1998), the Fifth Circuit provided an excellent analysis of Mississippi qualified immunity law in the context of officials who, when sued for damages, are immune from tort liability when performing discretionary functions. The Court observed that qualified immunity for the discretionary acts of public officials has evolved "[i]n order to allow our lawmakers and government officials to participate freely and without fear of retroactive liability in risk-taking situations requiring the exercise of sound judgment, the discretionary-ministerial distinction has evolved." *Id.* at 306, citing *State for Use and Benefit of Brazeale v. Lewis*, 498 So. 2d 321, 322 (Miss. 1986). In *Newton*, a state prisoner beaten by another prisoner sued several prison officials under Section 1983 and state law, claiming failure to protect, inadequate medical care and negligence. The Fifth Circuit held that as to the one prison official against whom damages had been awarded by the lower court, that official's duty to report one prisoner's threat against another was discretionary for purposes of qualified immunity under Mississippi law:

As it turns out, Lieutenant Brewer was mistaken in his assessment of the seriousness of the threat; but, obviously, that does not deprive him of qualified immunity for the exercise of his discretion in making

that assessment.... “There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.”<sup>87</sup>

### Exceeding Authority, Intentional Torts and Wilful Wrongdoing

An important avenue of liability remains open for governmental employees or officials performing discretionary acts, and that avenue of liability can overcome what would otherwise be qualifiedly protected discretionary public official functions. Public official immunity can be lost when a governmental employee’s or official’s actions are so extreme as to substantially exceed his scope of his employment. Immunity thus can be lost where the employee or official substantially exceeds his authority and commits wrongs under color of office. This can happen where the action consists of such intentional and deliberately wrongful conduct as assault, intentional infliction of emotional distress, malicious prosecution, false imprisonment and similar intentional torts or wilful wrongs.

### "An Exercise of Poor Judgment" Not Enough

In *Grantham v. Mississippi Department of Corrections*, 522 So. 2d 219 (Miss. 1988), the Mississippi Supreme Court addressed the issue of when a public official could be subjected to personal liability while performing discretionary acts.

This case was a tragedy. Five weeks after Clem Jimpson was paroled by the state Parole Board from a life sentence for murdering a store clerk, he attacked, attempted to kidnap and brutally shot Linda Grantham in the base of her skull as she was returning from lunch to her job as an assistant bank vice-president. Grantham, paralyzed from the neck down as a result of the gunshot injuries, in turn sued the Parole Board members who voted to parole Jimpson. Now a quadriplegic, she sought to hold them personally liable for damages, charging that by paroling and releasing Jimpson they acted arbitrarily, negligently and with reckless disregard for the safety of society in general, and herself in particular. Specifically, Grantham alleged that (1) the Parole Board members paroled Jimpson "with reckless disregard" for her safety, (2) failed to review all pertinent information about Jimpson's prior conviction of murder during a robbery, and (3) made no inquiry into his previous social history and criminal record, which included serving 22 years in prison, 5 armed robbery charges, and a previous escape from Parchman.

The opening lines of the Mississippi Supreme Court’s opinion set the tone for this landmark decision:

[W]e know the painful lesson of recidivism: that among those paroled it is a statistical certainty that some will strike again, if only we could know which ones.... Our law has long afforded substantial immunities to these officials in the face of plaintiffs’ pleadings, and with good reason. Only where they act with gross disregard for the safety of society or in clear violation of statutory directive may they be charged to answer at the bar of civil justice.

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<sup>87</sup>Quoting *Gregoire v. Biddle*, 177 D. 2d 579, 581 (2d Cir. 1949).

The Court noted that the parole Board members' exercise of discretionary authority to grant or deny parole was one of the toughest judgment calls for any official to make, that not even the most careful screening may eliminate all recidivism, and that "in the best run system there will be some parolees who will commit new offenses while on parole." Nonetheless, the Court concluded that Linda Grantham's Complaint stated a claim upon which relief may be granted and not have been dismissed:

These actions, according to Grantham, were substantial departures from the duties imposed upon the members of the Parole Board by Section 47-7-17. Grantham charged that Defendants had been guilty of gross neglect of their duties under Section 47-7-17. The Court refused to classify those duties as ministerial, and held that Grantham's complaint was "sufficient to pierce the shield of these officials' qualified immunity to suit as outlined above."

The case was then remanded to the Circuit Court, and a jury trial was held, resulting in a jury verdict for \$2.5 million compensatory and \$500,000 punitive damages against the Parole Board members individually. But the Mississippi Supreme Court reversed and rendered, holding that the members did not lose their qualified immunity by exercising "poor judgment" in voting to parole Jimpson, and that the trial court should have granted their motion for a judgment notwithstanding the jury verdict. *Sykes v. Grantham*.<sup>5</sup> In this second appeal, the Supreme Court concluded that the discretionary decision of the parole Board was the result of personal deliberation and judgment, but that its members did not commit wilful wrongs or malicious acts, act with reckless disregard or exceed or pervert their discretionary authority -- "theirs was an exercise of poor judgment." *Id.* at 212.

The Court concluded with this scathing attack on the State:

The real culprit in this case is the State of Mississippi, which failed its citizens miserably in providing an outmoded, archaic parole system, loosely drawn, and with scant guidelines. It placed untrained and unknowledgeable laymen in a sensitive place of importance to perform the work of experts. Yet, when the finger of blame points to the State, absolute governmental immunity insulates and protects it. As a result of the tragic injury sustained by Mrs. Grantham, the State Legislature enacted a law providing for a full time parole Board with members who are salaried employees of the State. The law further provided that "the Board, its members and staff shall be immune from civil liability for any official acts taken in good faith and in exercise of the Board's legitimate governmental authority." §47-7-5(4) (Supp.1989).

### Case-by-Case Determinations

With the ministerial-discretionary distinction well in mind, one would think there is nothing but a mechanical test for determining if and when a governmental official or employee will enjoy public official immunity for discretionary acts. The test isn't always easy to apply. Our courts have recognized that it would be difficult to conceive of an official act that did not admit some discretion in the manner of its performance, even if it involved only the driving of a nail. It is for this reason that each case has to be decided on its particular facts and circumstances, with immunity depending on how clearly and specifically the law has established a particular duty, act or function as one involving mandatory or unambiguously designated action, as opposed to one which the performance of her lawful duties requires "personal deliberation, decision and judgment."

## Sovereign Immunity Distinguished

A couple of points need to be made on the subject of public official immunity. First, don't confuse it with sovereign immunity. The two concepts are legally, conceptually and historically distinct. In the historic case of *Pruett v. City of Rosedale*, the Court abolished the common law doctrine of sovereign Immunity, but it emphasized:

[I]t is our opinion that abolishment of sovereign immunity does not apply to legislative, judicial and executive acts by individuals acting in their official capacity, or to similar situations of individuals acting in similar capacities in local governments, either County or municipal.

Pruett left intact and had no effect on the immunity granted to the legislature, judiciary and executive office and to "those public officers who are vested with discretionary authority." *Id.* at 1052.

Second, our state law has long recognized the proposition that no sovereign immunity exists when the relief sought is a declaration that a particular statute or action of the State is unconstitutional. *State v. Hinds County Board of Supervisors*, 635 So. 2d 839, 842 (Miss. 1994).

### Local Government and Legislative Immunity: *Bogan v. Scott-Harris*

Legislative immunity was extended to local government officials in *Bogan v. Scott-Harris*, 140 L.Ed.2d 79 (1998). Until *Bogan*, many assumed that legislators--federal, state or regional--enjoyed absolute immunity from civil liability for legislative activities. *Id.* at 85. With origins in Parliament's struggle with the English crown over 500 years ago, legislative immunity may shield officials from questioning pursuant to subpoena, section 1983 claims, claims for attorney's fees and even criminal prosecution for legislative acts. *United States v. Helstoski*, 442 U.S. 477 (1979); *United States v. Johnson*, 383 U.S. 169 (1966).

*Bogan* extended legislative immunity's cloak to local government officials against whom a trial court jury had returned substantial damage verdicts for eliminating an employee's job through a budget-cutting measure. Immunity was upheld despite findings the officials had retaliated against the employee for engaging in constitutionally protected speech.

The Court had previously extended legislative immunity to regional legislators, and lower courts applied it to local legislators, but not until *Bogan* did the Court explicitly apply it to local municipal officials performing legislative functions. *Lake Country Estates v. Tahoe Regional Planning Authority*, 440 U.S. 391 at 1979). Eight circuits at that time had extended legislative immunity to local legislators performing traditional legislative functions. M. Ross, Sword & Shield Revisited - A Practical Approach to Section 1983, 516 n.31 (ABA State and Local Government Law Section 1998), citing *Atchison v. Raffiani*, 708 F. 2d 96 (3rd Cir. 1983); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Hernandez v. City of LaFayette*, 643 F. 2d 1188 (5th Cir. 1980); *Haskell v. Washington Township*, 864 F. 2d 1266 (6th Cir. 1988); *Reed v. Village of Shorewood*, 704 F. 2d 943 (7th Cir. 1983); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F. 2d 272 (8th Cir. 1980); *Kuzinich v. County of Santa Clara*, 689 F. 2d 1345 (9th Cir. 1982); *Espanola Way Corp. v. Meyerson*, 690 F. 2d 837 (11th Cir. 1982), cert. denied, 460 U. S. 1039 (1983). Moreover, Justice

Marshall's dissent eighteen years earlier in *Lake Country*, 440 U.S. at 407, left open the question of whether egregious "legislative" misconduct falls outside the scope of legislative immunity.

*Bogan* answered both questions, holding city officials "absolutely immune from suit under Section 1983 for their legislative activities," *Bogan*, 140 L.Ed.2d at 88, even in the face of a jury's finding that "constitutionally sheltered speech was a substantial or motivating factor" underlying their conduct. *Id.* at 85.

### Facts of *Bogan*

Janet Scott-Harris was an African-American serving as City Administrator and sole employee of the Health & Human Services Department of Fall River, Massachusetts. Her job was eliminated by an 8-2 vote of the city council. She allegedly exercised her First Amendment rights when she charged Dorothy Bitcliffe, another city employee serving under her supervision, with making repeated racial and ethnic slurs about her colleagues --remarks that Scott-Harris deemed offensive to blacks and those of French heritage. When Scott-Harris prepared the charges, Bitcliffe allegedly used "political connections" with other officials, including Council Vice-President Roderick, to get the punishment reduced to a 60-day suspension without pay. With the charges pending, the next fiscal year's budget was prepared, and it included eliminating the department whose sole employee was Scott-Harris. Her section 1983 suit charged the city, the entire city council and mayor with racial motivation and violation of First Amendment rights. City officials claimed their actions were legislative and protected by legislative immunity. The jury exonerated all defendants on the race discrimination charge, but held Bogan and Roderick liable for damages since "constitutionally sheltered speech was a substantial or motivating factor" underlying their conduct. After the federal district court denied Bogan and Roderick's motions for judgment notwithstanding the verdict, the Second Circuit affirmed.

A unanimous Supreme Court, speaking through Justice Clarence Thomas, reversed and held that these two local government officials were entitled to absolute legislative immunity from liability for their legislative activities. Tracing the legislative immunity doctrine back to its roots in common law and reason, the Court held that "local legislators are entitled to absolute immunity from section 1983 liability for their legislative activities." Immunity attaches to all actions taken "in the sphere of legitimate legislative activity" and cannot be overcome by proof of discriminatory, unconstitutional or illegal motive or intent on the part of the official performing the legislative act.

### Rationale for Extending Immunity

The Court reasoned that the actions of Council Vice-President Roderick in voting for the ordinance were "quintessentially legislative" and that Mayor Bogan's actions in introducing the budget and signing the budget-cutting ordinance into law were "formally legislative" even though the Mayor was an executive official, since his actions were "integral steps in the legislative process." *Id.* at 89. Their legislative decision-making activities involved termination of a position and had "prospective implications that reach well beyond the particular occupant of the office." *Id.*

The ordinance "bore all of the hallmarks of traditional legislation" and "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its

constituents." *Id.* The City Council was governing "in a field where legislators traditionally have power to act," and the challenged activities of the Mayor and Council Vice-President were "undoubtedly legislative." *Id.*

### Impact of *Bogan* on Local Government

In *Bond v. Marion County Board of Supervisors*, the Court analyzed the legislative immunity doctrine as defined in *Bogan*, finding it inapplicable under the facts of that case.

Local government officials performing legislative functions often ask if they have personal liability exposure for their official actions. Before *Bogan*, no clearcut answer could be given to such questions as whether a city or County official could be held liable to

a disgruntled government employee whose position has fallen to the budget ax?

a person aggrieved by the passage of a law, ordinance or legislative resolution?

a trigger-happy constituent aggrieved over statements made by an official during performance of official duties?

*Bogan* minimizes liability exposure when these actions constitute "legitimate legislative activity."

### Political vs. Litigation Hazards

At the grassroots level of government, lively debate energizes the decision-making process. That process has its hazards, but they should be political and not litigation hazards. Political reality, at two or four-year intervals, empowers registered voters of every municipal ward and County supervisor district to help the democratic process function responsively and to help remind elected officials that their office is a public trust. *Bogan* explicitly endorses this view.

### What is a "Legislative Act"?

Local government officials performing legitimate legislative functions are now shielded from civil liability based on their actions, conduct and decisions that are integrally related to quintessentially and undoubtedly legislative functions. In this context, a "legislative" act is "an integral part of the deliberative and communicative processes by which [legislators] participate in committee and [legislative] proceedings" as well as any act that relates to "the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of [the legislative body]." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Justice Felix Frankfurter's description of the parameters of legislative immunity illustrates its breadth, extending immunity to "the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; ...securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the

exercise was regular according to the rules of the house, or irregular and against their rules." *Tenney v. Brandhove*, 341 U.S. 367, 374 (1951).

"Sphere of Legitimate Legislative Activity"

Based on federal, state and regional legislative immunity precedent, the following may be within the "sphere of legitimate legislative activity":

Balancing social needs and rights of different groups. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1046 (9th Cir. 1988).

Formulation of policy. *Cf. Cinevision v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984).

Decision-making applicable to the community, as opposed to acts directed at one or a few targeted individuals. *Negron-Gaztambide v. Hernandez-Torres*, 35 F.2d 25 (1st Cir. 1994); *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9<sup>th</sup> Cir. 1988).

Introducing and voting for legislation.<sup>16</sup> See generally, *United States v. Helstoski*, *supra*

Making a speech favoring or opposing pending legislation. See generally, *United States v. Johnson*, *supra*.

Voting for a local government redistricting plan, even one that allegedly discriminates against minorities. *Latino PAC vs. City of Boston*, 581 F. Supp. 478 (D. Mass. 1984).

Confirming an executive appointment. *Kraus v. Kentucky State Senate*, 872 S.W.2d 473 (Ky. 1994)

Sending legislative communications. *Ray v. Proxmire*, 581 F.2d 988 (D.C. Cir. 1978); *Rousack v. Harsha*, 470 F. Supp. 285 (M.D. Pa. 1978).

Voting to seat or unseat a member. *Porter v. Bainbridge*, 405 F. Supp. 83 (S.D. Ind. 1975).

Failing to enact legislation, as in failing to adopt an alternative to a redistricting plan submitted by the Governor. *Marylanders for Fair Representation v. Schaeffer*, 144 F.R.D. 292 (D. Md. 1992).

Making a speech for or against pending legislation. See generally *United States v. Johnson*, *supra*.

Conducting hearings, receiving information for committee consideration from confidential sources, issuing subpoenas and examining witnesses as part of a legislative committee's authorized investigative hearing process, including developing a legislative redistricting plan. *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984); *Gravel v. United States*, *supra*; *Romero-Barzelo v. Hernandez-Agosto*, 75 F.3d 23 (1st Cir. 1996).

Hiring and firing employees. *Browning v. Clerk, United States House of Representatives*, 789 F.2d

923 (D.C. Cir. 1986); *Prelesnik v. Esquina*, 347 N.W.2d 226 (Mich. App. 1984).

Publishing reports for legislative purposes. *Doe v. McMillan*, 412 U.S. 306 (1975).

Authorizing media coverage for open hearings. *Id.*

### Legislative Immunity Not a Panacea

*Bogan* provides a cloak of immunity for legitimate legislative activities of local government officials, but it won't make their political life a bed of roses. Insulating legislative conduct from judicial interference through section 1983 suits for damages, declaratory judgments and injunctions goes no further than the nature of the legislative act itself. It does not extend to administrative acts or performance of ministerial duties, and liability exposure continues for those slugs who seek to exploit public office for personal gain, as these examples illustrate:

Undertaking acts without legislative authority, even if "legislative acts." *Thompson v. Ramirez*, 597 F. Supp. 730 (D. P.R. 1984).

Filing incomplete or false reports of campaign expenses and contributions, falsely disclosing income sources, or falsely claiming travel expense reimbursement. *United States v. Rose*, 28 F.3d 181 (D.C. Cir. 1994); *United States v. Myers*, 692 F.2d 821 (2nd Cir. 1982); *United States v. Clay*, 420 F. Supp. 853 (D. D.C. 1976).

Soliciting and accepting bribes. *United States v. Brewster*, 408 U.S. 501 (1972).

Making defamatory remarks in a press conference, press release or television broadcast. *Williams v. Brooks*, 945 F.2d 1322 (5th Cir. 1991); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Cole v. Gray*, 638 F.2d 804 (5th Cir. 1981); *Benford v. ABC*, 502 F. Supp. 1148 (D. Md. 1980).

Trying to influence or pressure another branch of government. See generally *Doe v. McMillan*, *supra*; *Gravel v. United States*, *supra*; *United States v. Johnson*, *supra*; *Cole v. Gray*, *Supra*.

Making administrative personnel decisions that single out and affecting individuals differently from others, as opposed to legislative acts involving establishment of public policy. *Gross v. Winter*, 692 F. Supp. 1420 (D. D.C. 1988); *Negron-Gaztambide v. Hernandez-Torres*, *supra*; *Yeldell v. Cooper Green Hospital*, 956 F.2d 1056 (11th Cir. 1992).

Engaging in illegal or unconstitutional conduct by legislative staff or conduct beyond what is "essential to the deliberation" of the legislative body. See generally *Hutchinson v. Proxmire*, *supra*, and *Doe v. McMillan*, *supra*.

Engaging in legislative acts of state legislators subject to criminal prosecution in federal court, *United States v. Gillock*, 445 U.S. 360 (1980), except that legislative immunity is available to state legislators as a

defense to a prosecution under RICO. *Chappell v. Robbins*, 73 F.3d 918 (9th Cir. 1996).

### Waiver of Legislative Immunity

Legislative immunity is a personal defense assertable by an official for actions taken "in the sphere of legitimate legislative activity." It doesn't bar suits against local government entities for constitutional and federal statutory violations under 42 U.S.C. §1983, and may be waived by an "explicit and unequivocal renunciation" of the immunity protection, cf. *United States v. Helstoski*, *supra* at 491, or by intervening in an action to defend the constitutionality of a law, as in *May v. Cooperman*, 578 F. Supp. 1308 (D. N.J. 1984). There the Attorney General and Governor of New Jersey refused to defend a "one minute period of silence" statute against a constitutional attack. The Senate President and Speaker of the House then intervened and defended the statute throughout the litigation. The court held the statute unconstitutional and found these legislators had moved outside the sphere of legitimate legislative activity, waived their legislative immunity by undertaking the executive branch's responsibility to defend the statute, and were liable for attorneys' fees under 42 U.S.C. §1988.

### Extension of Legislative Immunity to Local Government Legislators

Legislative immunity carries with it a heavy responsibility to the public trust. Now that the Court has explicitly extended legislative immunity to local government legislators, it would be prudent to advise County and municipal officials, like their brothers and sisters in federal, state and regional legislative bodies, when their actions and deliberations move into the realm of the exercise legislative powers. Such powers should in every instance be exercised for the public good. Precedent concerning the nature, scope and applicability of legislative immunity can be found in the wealth of case law involving immunity claims of federal, state and regional legislators. Regardless of the level of government at which they serve, their actions in the legislative sphere should not be inhibited by the chilling effect of section 1983 suits or other forms of judicial interference, nor should their exercise of legislative discretion be distorted by fear of personal liability arising from legislative activities they are called on to perform.

At the local government level, the decision-making process would surely suffer if citizen-legislators -- often serving part-time -- had their time and energy sapped away by defending lawsuits that challenge the propriety, motivation, thoroughness and wisdom of legislative actions. *Bogan v. Scott-Harris* makes clear that the threat of civil liability in the absence of legislative immunity would likely deter our best and brightest citizens-public servants from making that bold leap into service on the local government level. The ultimate check and balance on legislative abuse accordingly should remain at the ballot box through the electoral process.

### Mississippi Tort Claims Act

Miss. Code Ann. §11-46-17 provides for creation of the Tort Claims Fund over which the Mississippi Tort Claims Board shall provide oversight, the powers and duties of the Board being spelled out in detail in §11-46-19.

Section 11-46-17(3) requires all political subdivisions after October 1, 1993, to

obtain such policy or policies of insurance, establish such self-insurance reserves, or provide a combination of such insurance and reserves as necessary to cover all risks of claims and suits for which political subdivision may be liable under this chapter; provided, however, that such policy or policies of insurance or such self-insurance may contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to political subdivisions.

#### Liability Insurance Coverage: Exclusions, Notice and Duty to Defend

The mere fact that a local government entity has been issued a liability insurance policy does not trigger liability for damages under the MTCA. Legitimate and properly drafted exclusions from coverage have been and will continue to be upheld by the courts, and liability under the MTCA will not necessarily result in coverage and indemnification under a liability insurance policy.<sup>88</sup>

In *Titan Indemnity Company v. City of Brandon*, 27 F. Supp.2d 693 (S.D. Miss. 1997), a police officer while acting for a multijurisdictional narcotics unit was not an insured under the City's law enforcement liability policy, which defined "insured" to exclude any multijurisdictional law enforcement organization that was not a named insured.

*Titan Indemnity Company v. Estes*, 825 So.2d 261 (Miss. 2002), and *Meyers v. Miss. Ins. Guaranty Assoc.*, 2003 Miss. LEXIS 298 (Miss. 2003) both involved a collision between two occupied and moving vehicles. In *Estes*, the City's fire truck collided with another vehicle, killing the plaintiffs' decedent. The City's CGL policy excluded damages "arising out of" auto accidents. The *Estes* Court enforced the CGL exclusion since the plaintiffs "would not have been damaged but for the collision." *Estes, supra* at 656. The Court subsumed plaintiffs' varying theories of liability into this but for analysis and thereby rejected the plaintiffs' argument "that the other proximate causes asserted are not so intertwined with the use or maintenance of the fire engine to fall within the auto exclusion." *Id.*

The Court in *Meyers* enforced the same CGL exclusion because it found "no question that Meyers would not have been injured but for the collision between the truck and his vehicle." *Meyers*, 2003 Miss. LEXIS at \*10. There the plaintiff Meyers collided with the insured's truck, which had turned into his lane. Rejecting the argument that claims of negligent management and hiring were not subsumed by the but for analysis, the Court reiterated that "[c]overage under a GCL policy with an auto-exclusion for injuries arising out of the use of an automobile 'should not vary depending upon the theories of liability asserted.'" *Id.* (quoting

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<sup>88</sup>See *Titan Indemnity Company v. Estes*, 825 So. 2d 261 (Miss. 2002) (insurance coverage for wrongful death action arising from intersection collision between fire truck and decedent's vehicle brought against city and fire chief held barred under auto policy's non-cumulation clause, commercial general liability policy's auto exclusion and public official liability policy's bodily injury exclusion).

*Estes, supra* at 656).

It should be noted, however, that a County that has obtained insurance coverage for which it is entitled to a defense and potential indemnification based upon the allegations of a complaint filed against the County is entitled to coverage, defense and indemnification like any other insured. An insurer who gambles with a County's policy coverage and loses will ultimately get its chain jerked with the same force as when the insured is an individual in the private sector. See ***Genesis Indemnity Insurance Company v. Bolivar County***, 793 So. 2d 683 (Miss. App. 2001), *aff'd* (Miss. Oct. 2001) (County granted summary judgment against its liability insurer that had refused, on the advice of its "coverage counsel," to defend County in suit by firetruck chassis vendor, forcing County to defend itself successfully against double payment for a firetruck purchased from dealer that later filed for bankruptcy protection after receiving payment from County, court holding that UCC entrustment rule applied to insulate County from liability and that insurer was liable for all of County's costs of defense at trial and on appeal).

#### Limitations, Tolling and Substantial Compliance with MTCA's Notice Requirement

The Mississippi Supreme Court still grapples with cases involving whether or not a claimant has failed to give timely and effective notice to a governmental entity in substantial compliance with the MTCA, whether or not the one year statute of limitations contained in the MTCA has been tolled, and whether or not prior pending federal actions toll the various statutes of limitations that come into play with claims covered by and outside the scope of the MTCA.

Substantial compliance with the notice requirement was found in ***Williams v. Tolliver***, 759 So. 2d 1195 (Miss. 2000), where notice given to the Bolivar County Administrator of a tort claim against a Sunflower County Constable was held sufficient. Substantial compliance was also found in ***Powell v. City of Pascagoula***, 752 So. 2d 999 (Miss. 1999), where the plaintiff's residence address was omitted from the original notice letter, in ***Alexander v. Mississippi Gaming Commission***, 735 So. 2d 360 (Miss. 1999), where information regarding the extent of the plaintiff's injury was not given, and in ***Carr v. Town of Shubuta***, 733 So. 2d 261 (Miss. 1999), where the amount of damages was not given.

The MTCA was amended in 1999 to clarify the notice of claim requirements, and that amendment was given a bright line interpretation in ***Williams v. Clay County***, No. 2002-CA-00224-SCT (Miss. Nov. 13, 2003). There the Court applied the 1999 amendment to §11-46-11<sup>89</sup> to hold that an action was barred under

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<sup>89</sup>As applied to counties, the amended language states in pertinent part that "All actions brought under the provisions of this chapter shall be commenced with one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after; provided, however, that the filing of a notice of claim ... shall serve to toll the statute of limitations for a period of ... 120 days from the date [of notice], during which time no action may be maintained by the claimant unless the claimant has received a notice of denial of claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice. However, should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the

the one year statute of limitation, where the plaintiff sustained injuries when she fell down the stairs at the county courthouse on November 1, 1999, notice was given on November 15, 1999, and plaintiff filed her suit on January 31, 2001. The Court held that the 120-day tolling period expired within the one-year statute of limitations, and that the plaintiff was then entitled to a minimum of 90 days to file an action after the 120-day tolling period, which also expired before the one-year statute of limitations. When November 1, 2000 passed, the Court concluded, “so did the time for filing Williams’s action.” Bright-line rules are rare, and in footnote 5 of the opinion, the Court provided one, setting forth the following summary of how the notice provision under the 1999 amendment is to operate with regard to counties:

We do not suggest that the statute of limitations is less than one year. The tolling provision allows the claimant up to an additional 120 days to bring suit if notice is given within the final 120 days of the one year limitation period. A claimant has, at a minimum, one year to bring suit. If a claimant files notice 30 days after the injury, and the government denies the claim 30 days later, the claimant still has one year from the date of the injury to bring suit. If a claimant files notice eleven months and twenty-nine days from the date of the injury, the statute is tolled for 120 days from that notice. After the 120-day period, the claimant has 90 days to bring suit. Should the government respond within the 120-day period, the claimant has 90 days to bring suit from the date of response.

In *Boston v. Hartford Accident & Indemnity Company*, 822 So. 2d 239, 248 (Miss. 2002), the Court held, based on *Norman v. Bucklew*, 684 So. 2d 1246, 1256 (Miss. 1996), that a cause of action based on a jail suicide accrued prior to enactment of the MTCA, and that the pendency of a prior federal court action tolled the statute of limitations. *Lee v. Thompson*, No. 2002-CA-00082-SCT (Miss. Sept. 11, 2003) is a recent example of a misreading of Boston’s tolling principle, and provides a good example of how the Court is interpreting the clear legislative intent of the MTCA’s exemptions and the one-year statute of limitations applicable to intentional torts that fall outside the scope of the MTCA. Plaintiffs in *Lee* initiated their wrongful death claim on behalf of the minor child of the decedent against Coahoma County and its sheriff, Andrew Thompson, in state court, asserting state claims for negligence as well as federal claims arising from a jail suicide. Following removal to federal court, Senior District Judge Neal Biggers dismissed the complaint without prejudice, allowing plaintiffs thirty days in which to file an amended complaint in the federal court action. Rather than filing an amended complaint in the federal court action, plaintiffs filed a new state court complaint. In their new state court complaint, plaintiffs, in addition to the negligence claims, now asserted for the first time intentional tort claims based on the underlying tort of assault and battery. The trial court held that the negligence claims arising from the jail suicide were barred by the MTCA’s inmate exemption, and the intentional tort claims to which the MTCA was not applicable were barred by the one-year limitation period prescribed by Miss. Code Ann. §15-1-35 (1995). Plaintiffs argued on appeal that they were protected by the tolling of the statute of limitations, under the authority of *Boston* and *Bucklew*, but the Mississippi Supreme Court concluded that its decisions in those two cases did not aid the plaintiffs in *Lee*, and that once the first wrongful death suit was commenced by the filing of the state court complaint, the minor plaintiff no longer enjoyed the protection of the minor savings statute since there could be but one cause of action under Mississippi’s wrongful death statute, Miss. Code Ann. §11-7-13. Thus, once the original state court action was commenced, the minor child of the decedent was governed by the same statute of limitations as her mother, who had her chance to pursue the

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claimant’s receipt of notice of denial of claim from the governmental entity. ...” Miss. Code Ann. 11-46-11(3) (1999).

wrongful death claim on behalf of her minor child:

[The mother], while being given the opportunity to amend her federal court pleadings, chose instead to file a new state court action alleging for the first time various intentional torts against the Coahoma County defendants. It must be remembered that in the initial state court action which was removed to federal court, the complaint alleged negligence by the Coahoma County defendants for failing to prevent Lawson's suicide. We do know from Judge Biggers' opinion of August 15, 2000, that this complaint was later amended during the pendency of the federal court action so as to substitute Lee as a party plaintiff in that cause.... Lee has simply waited too long to refile a new state court action raising for the first time various claims of intentional torts allegedly committed by Sheriff Thompson and the other Coahoma County defendants. ...

The Court's discussion of the purpose of statutes of limitations was drawn from its earlier opinion in *Cole v. State*, 608 So. 2d 1313 (Miss. 1992):

[T]he fact that a barred claim is a just one or has the sanction of a moral obligation does not exempt it from the limitation period. These statutes of repose apply with full force to all claims, and courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case. The establishment of these time boundaries is a legislative prerogative. That body has the right to fix reasonable periods within which an action shall be brought and, within its sound discretion, determine the limitation period.

Application of the MTCA statute of limitations is a question of law.<sup>90</sup> The Court has held that a discovery rule applies to the MTCA's one-year statute of limitations, and that the discovery rule will toll the statute of limitations "until a plaintiff should have reasonably known of some negligent conduct, even if the plaintiff does not know with absolute certainty that the conduct was legally negligent."<sup>91</sup> The discovery rule by definition "can have no effect with regard to injuries which are not latent."<sup>92</sup> Two recent cases involving claims of latent injury and tolling bear some discussion in this regard.

In *Wayne General Hospital v. Hayes*, No. 2001-IA-0030-SCT (Miss. Nov. 6, 2003), the Court held that the discovery rule as applied to the one-year statute of limitations mandated by the MTCA did not apply to wrongful death actions, "[b]ecause death is not a latent injury," and thus the plaintiffs were not allowed to benefit from the protections afforded by the discovery rule. An action for the wrongful death of a person accrues on the date of the person's death<sup>93</sup>, and the plaintiffs' action filed against UMMC defendants after the expiration of the MTCA statute of limitations was time barred.

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<sup>90</sup>Cf. *Sarris v. Smith*, 782 So. 2d 721, 723 (Miss. 2001).

<sup>91</sup>*Sarris*, *supra* n. 65, at 725, quoted in *Moore ex rel. Moore v. Singing River Hospital of Gulfport*, 825 So. 2d 658, 667 (Miss. 2002). .

<sup>92</sup>*Chamberlin v. City of Hernando*, 716 So. 2d 596, 606 (Miss. 1998).

<sup>93</sup>*Sweeney v. Preston*, 642 So. 2d 332 (Miss. 1994).

In *Punzo v. Jackson County*, No. 2002-CA-01196-SCT (Miss. Dec. 4, 2003), the Court held that a property owner's claim for money damages was improperly dismissed because "the discovery of a latent injury rule applied to toll the statute of limitations." Plaintiff's home was located downstream from a county-maintained bridge on which the county had made alterations and south of the site where the county had raised the road on the north side of the bridge. Plaintiff's home flooded in 1995, three times in 1998, and again in 2001. Plaintiff gave notice of his claim to the county on September 9, 1999, and filed suit on December 8, 1999. The trial court held that the one-year statute of limitations under the MTCA began to run at the time of the alleged wrongful conduct consisting of the raising of the road, and found as a fact in granting summary judgment dismissing the claim that the injury to the plaintiff was "immediate rather than latent," despite plaintiff's claim that he did not discover the alterations to the bridge until 1998, and that the cause of floodwaters getting into his house was not readily apparent or obvious. Reversing, the Mississippi Supreme Court held that the latent injury rule applied, and that the trial court erred in not holding a hearing before making the finding of fact that the injury was "immediate rather than latent." The Court reasoned:

[S]ome instances of discovery require knowledge beyond that of a layman. Water flow and flood currents are subjects requiring expert knowledge to fully comprehend....

[G]enuine disputes as to the ability to discover a latent injury are questions of fact to be decided by the fact finder, not on summary judgment.

The Court in *Punzo* also addressed the county's contention that if the injury was latent, then the plaintiff did not use the requisite reasonable diligence to determine the cause of the flooding, especially in light of the fact that three years had passed between the first flood and the time the plaintiff claimed he learned about the bridge's alterations by the county from a neighbor:

This Court maintains that one flood does not create enough notice of an actionable claim's existence or of someone's fault. The second flood was just six months before Punzo's third flood and his learning of the bridge alterations. The record indicates that Punzo had completed the cleanup and repair of his house from the damage of the second flood in March of 1998 just a month or so prior to the third flood in September of 1998. Within six months of that flood he learned of the alleged cause. We find that six months is a reasonable time period to discover the alleged cause of the harm.

Issues regarding a governmental entity's or government official's timely notice of claim to a liability insurer have been considered by the courts in a number of cases. In *Bolivar County v. Forum Ins. Co.*, 779 F.2d 1081 (5<sup>th</sup> Cir. 1986), the County ultimately prevailed as successful defendant in voting rights litigation, but its delay in notifying its insurer of the suit until five months after filing was not excusable under a policy requiring notice "as soon as practicable." The insurer was not required to prove that it suffered actual prejudice from the delayed notice of the claim. The County Administrator had contacted and received the opinion of the County's insurance agent of record that coverage was not provided under the policy, but the Court held that the insurance agent had no authority to bind the insurer.

In *State of Mississippi v. Richardson*, 817 F.2d 1203 (5<sup>th</sup> Cir. 1987), coverage was denied where neither the Tax Collector nor the County gave timely notice to the insurer of the Tax Collector's loss, with

respect to which a Consent Judgment had been entered. The Court noted that had the insurer known about the suit against the Tax Collector before October 18, 1982, it might have intervened or urged the Tax Collector as part of his policy obligations not to sign a Consent Judgment.

In *Reliance Insurance Co. v. County Lind Place, Inc.*, 692 F. Supp. 694 (S.D. Miss. 1988), a ten month delay in giving notice of the institution of suit could by no stretch of the imagination be considered in compliance with the policy requirement of notice “as soon as practicable.” Under the terms of the policy, prompt notice was made a condition precedent to the insurer’s liability, and under applicable state law, the company was relieved of any policy obligations regardless of the presence or absence of demonstrable prejudice.

#### Exemptions from Liability under MTCA

The Mississippi Supreme Court has systematically addressed most, but not all, of the statutory exemptions from liability under the MTCA. For a comprehensive discussion of the exemptions and an exhaustive summary of exemption cases from other jurisdictions, see J. Fraiser, **A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees’ Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial and Limitation of Liability**, 68 Miss. L. J. 703 (Spring 1999).

#### The Inmate Exemption

Miss. Code Ann. §11-46-9(1)(m) (Supp. 1999) provides in part that a governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim “of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed.”

The inmate exemption applies to all inmates, regardless of classification as “convicted” or “non-convicted.” *Liggins v. Coahoma County Sheriff’s Dept.*, 2002 Miss. LEXIS 248, \*6 (Miss. 2002)(pre-trial detainee arrested for disturbing the peace and public intoxication).

The exemption applies to all claims under state law, including wrongful death claims asserted by wrongful death beneficiaries who stand in the position of their decedent inmate, *Carter v. Mississippi Department of Corrections*, No. 2002-CA-01726-SCT (Miss. 2003), and is not limited to conditions of confinement. *Jones v. City of Jackson*, 203 F.3d 875, 880 (5<sup>th</sup> Cir. 2000)(pre-trial detainee sued county for illegal detention, but his claims were barred by §11-46-9(1)(m)).

The exemption covers wrongful death claims. *Phillips v. Monroe County*, 143 F. Supp.2d 663, 669 (N.D. Miss. 2001)(wrongful death claim on behalf of county inmate who died during cancer treatment at UMC barred by §11-46-9(1)(m)).

The exemption applies to an inmate injured while working in a work release program, *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 1207-08 (Miss. 2003), as well as to an inmate of a county detention

center. *Webb v. DeSoto County*, 843 So. 2d 682 (Miss. 2003).

The exemption applies to a person who, at the time of a jail incident, was waiting for his mother to bring the bond money to the jail so that he could be released. *Love v. Sunflower County Sheriff's Department*, No. 2002-CA-01724-SCT (Miss. 2003) ("The cold hard facts are that until the money was paid and all paperwork complete, Love's release was not "imminent." At the time of the incident in question, Love was an inmate in the Sunflower County Jail and thus the Sunflower County defendants are exempt from liability under Miss. Code Ann. §11-46-9(1)(m).")

### Respondeat Superior and State Law Claims

While §1983 liability may not be imposed on the basis of *respondeat superior*, vicarious liability may arise with regard to tort claims arising under state law. In *Barrett v. Miller*, 599 So. 2d 559 (Miss. 1992), Plaintiffs sued the Lauderdale County Sheriff and Deputies alleging that the Deputies acting under the Sheriff's authorization had illegally searched their home, violated the rights under the Fourth and Fourteenth Amendments of the United States Constitution, and performed the search in an unreasonable manner which damaged their home. The trial court granted Defendants' Motion to Dismiss and Motion for Summary Judgment, applying §1983 principles to determine whether the Plaintiffs' claim of excessive force was actionable. On appeal, the Mississippi Supreme Court held that the trial judge erred by characterizing this as a 1983 action, reasoning that the Plaintiffs had filed an excessive force action seeking a state remedy provided within the ambit of traditional tort law, that they did not allege a constitutional violation of their civil rights and did not seek a remedy under federal or state constitutional law.

### Impact of §19-25-19

Turning to the applicability of the doctrine of *respondeat superior* and vicarious liability as applied to the Sheriff, the Court noted in *Barrett* that the basis of the action against the Sheriff was that the deputies were his agents and servants and acting in the scope of their authority and in furtherance of the business of the Sheriff and that "any liability he may have would have to come vicariously or through *respondeat superior*." The Court noted that under Miss. Code Ann. §19-25-19 (Supp. 1991), the Sheriff may be held liable for damages and shall be liable for the acts of his deputies, but "it goes without saying that the Sheriff can be held liable only if the deputies have done something wrong." The Court then held that the deputies were not clothed in qualified immunity, and the action they took was not discretionary but ministerial and immunity did not extend to them. The deputies in this case were not exercising discretionary authority in searching the plaintiffs' home, but were acting under a search warrant which gave them the authority to search and set out the parameters in which the search should be carried out. The Court noted in this regard:

Both federal and state law protect individuals from unreasonable searches. In carrying out the search warrant, the deputies were performing a ministerial function. The discretionary function, determining the probable cause for the issuance of the warrant, had already occurred. The execution of the search warrant was a ministerial act and required no discretionary decision-making, aside from the place in the house to search, on the part of the deputies executing the warrant. As the execution of the search warrant was a ministerial act, the deputies who executed it are not shielded from liability by qualified

immunity.

### Qualified Immunity

As to the deputies who obtained the search warrant, the Court in Barrett held that the action of these deputies was discretionary and not ministerial and that as a matter of law these deputies had qualified immunity and summary judgment and dismissal were properly entered in favor of them. As to the deputies executing the search warrant, the Court held these deputies were not immune from suit under qualified or good faith immunity because they were engaged in a ministerial function, and that these deputies were obligated to search the house in a manner to locate the items indicated in the warrant. Since it did not appear beyond any reasonable doubt that the plaintiffs could prove no set of facts upon which they would be entitled to relief, the Court concluded that summary judgment and dismissal was improper as to those deputies.

### Liability Under §19-25-19

Finally, the Court in Barrett concluded that summary judgment and dismissal as to the Sheriff was improper, rejecting the Sheriff's contention that he was cloaked in immunity and was not involved in the search of the plaintiffs' home.

Notwithstanding, Sheriff Miller is made liable for the actions of his deputies through Miss. Code Ann. §19-25-19, which provides vicarious and *respondeat superior* liability to a sheriff for the actions of his deputies. Sheriff Miller has no liability for his own actions, but would be liable for the actions of his deputies if the deputies themselves are found to be liable.

See generally *Boston v. Hartford Accident and Indemnity Company*, 822 So. 2d 239 (Miss. 2002), a case involving the death of a mentally ill detainee in the county jail while she was incarcerated pending involuntary commitment proceedings. The court held that three jailers' statutory duties under §§ 41-21-67 and 41-21-69 to schedule a medical and psychiatric examination within 24 hours of the decedent's detention was a mandatory directive and a ministerial function, which would disqualify them from the protection of qualified immunity.

In *Mississippi Department of Transportation v. Cargile*, 847 So. 2d 258 (Miss. 2003), MDOT was held negligent in failure to warn of a dangerous road condition that led to hydroplaning when the plaintiff's truck ran through a large pool of water which had collected on the road and hydroplaned, left the road and crashed, and it was not entitled to immunity from tort liability arising from injuries sustained by a driver in a single-vehicle accident on a wet road. The Court noted that the basis for immunity given to government officials is the inherent need to promote efficient and timely decision making without fear of liability, but in this case the governmental entity had prior notice of similar accidents and injuries at or near the same place, not too remote in time from the particular occurrence. The Court concluded that MDOT's duty to regularly inspect and maintain the highway was discretionary, rather than ministerial, but its duty under §11-46-9 required it to exercise a minimum standard of ordinary care to maintain the statutory shield, and its duty to warn of dangerous conditions if given notice, either actual or constructive, of a dangerous condition, became one of ordinary care in warning and/or providing relief from the dangerous condition to those who use the roads. Its rationale

emphasized the role of the finder of fact with respect to the factual issue of the government actor's use of ordinary care:

Miss. Code Ann. §11-46-9 requires the actor to exercise a minimum standard of ordinary care to maintain the statutory shield. As in *Jones*, MDOT has a duty to warn of dangerous conditions if given notice, either actual or constructive, of a dangerous condition. ... MDOT's duty becomes one of ordinary care in warning and/or providing relief from the dangerous condition to those who use the roads. ... [I]mmunity for discretionary acts is granted only when ordinary care is used, ... A government actor's use of ordinary care is a question for the finder of fact.

Affirming, the Court held that the trial judge was thus the proper person to decide whether MDOT used ordinary care, and he held MDOT to be partially responsible and apportioned 50% fault to MDOT.

### Loss of Qualified Immunity

In *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996), Plaintiff broke his neck and was rendered a quadriplegic as a result of driving his truck into a washout in the middle of a County road. One month before the accident, the County Supervisor for the district in which that road was located had replaced an existing bridge on the road with a culvert, but the day before the accident the entire roadbed surrounding the culvert had washed out, leaving an open pit or hole about 16 to 20 feet by 24 to 30 feet and 6 to 8 feet deep. The County Supervisor observed the washout and instructed a County employee to put "Road Closed" signs 200 to 300 feet to the north and south of the washout, but the signs were not lighted nor were there any barricades erected. When the Plaintiff approached from the south and drove into the pit during a heavy rain, he thought the pit was only standing water, and claimed that he saw no warning signs. When the County Supervisor discovered the Plaintiff, he observed that the sign in the southbound lane had either been blown over or knocked over. The members of the County Board of Supervisors were sued in their individual capacity and in their official capacities as the Board of Supervisors of Alcorn County. The Plaintiffs asserted that the Supervisors in their individual capacities were not entitled to qualified immunity. On appeal from the trial court's sustaining of the County Supervisors' Motion for Summary Judgment predicated on qualified immunity, the Mississippi Supreme Court held that while Alcorn County and its Board of Supervisors had sovereign immunity, and while the County Supervisors were cloaked with qualified immunity, there was nonetheless a genuine issue of material fact as to whether the County Supervisor who had instructed a County employee to put the "Road Closed" signs north and south of the washout had exceeded his authority or was so grossly negligent that his action could be described as constructively intentional, and if so, he had no immunity. In reaching this result, the Mississippi Supreme Court reasoned that under prior precedent, Supervisors have been found immune from liability for injuries that result from negligent maintenance of public roads. See *Coplin v. Francis*, 631 So. 2d 752, 753 (Miss. 1994) and *Webb v. County of Lincoln*, 536 So. 2d 1356, 1358-60 (Miss. 1988).

### MUTCD and Proof of the Standard of Care

The Manual on Traffic Control Devices, known as the MUTCD, describes the application of control devices such as warning and caution signs, and a host of other devices for marking or designating hazardous

road conditions, maintaining adequate warning signs, and in other ways establishing minimum standards of safety, “but shall not be the legal requirement for the installation.” **Manual on Traffic Control Devices** §1A.09 (Millennium Ed. with Revision No. 1 changes Dec. 28, 2001). Moreover, the Manual expressly states that the “decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment.” *Id.* As the Mississippi Supreme Court recently emphasized, “the manual should not be considered a substitute for engineering judgment.”<sup>94</sup>

In a series of rulings that incorporated the Manual on Uniform Traffic Control Devices (MUTCD) and an ordinary care standard into the legal analysis of a local government body’s duties and corresponding liability under the Mississippi Tort Claims Act, the Court has dramatically shifted the momentum in the development of the law of sovereign immunity as it relates to road maintenance and warnings. In the first of these rulings, *Jones v. Panola County*, 725 So. 2d 774 (Miss. 1998), the Court was confronted with a plaintiff who drove past “road closed” signs and other warnings that a bridge was out, and as he rounded a curve on the previously county-maintained but temporarily closed gravel road, his vehicle struck a large gravel pile that was used as a barricade and to keep vehicles from running off an out-of-service bridge. The Court considered the relationship between the Manual on Uniform Traffic Control Devices (MUTCD) and the standard of care imposed on a county in carrying out its duty to warn and to determine the need for traffic control devices and to post warning signs conforming to state law, and held that the MUTCD was nonconclusive proof of the standard of care. In reaching this conclusion, the Court held that “the relevant MUTCD provisions may properly be considered by a jury as evidence of negligence, albeit not as conclusive evidence thereof.” *Id.* at 778. The Court also stressed that a verdict favoring the plaintiff based solely on the MUTCD guidelines would be improper. *Id.* at 778-79.

In *Jones v. Mississippi Department of Transportation*, 744 So. 2d 256 (Miss. 1999), Tunica County reopened a road but did not place a stop sign where the road intersected with another road to form a “T” intersection. Although the Court recognized that Mississippi had not formally adopted a manual, the MUTCD was the manual to be used in conformity with the statutes. The Court held in that case that both counties and the Department of Transportation have a duty to warn motorists of a known dangerous condition and that the MUTCD applied to County and state maintenance of public roads, in one case a rural gravel road on which a bridge had been closed and in the other an intersection of a secondary County road with a state highway under construction.

In *Leflore County v. Givens*, 754 So. 2d 1223 (Miss. 2000), the Court superimposed upon the discretionary acts exemption of the MTCA a duty of ordinary care, holding that a County could be liable for negligence by not exercising ordinary care to adequately warn of a dangerous curve in a public road.

The Court retrenched somewhat in *Donaldson v. Covington County*, 846 So. 2d 219 (Miss. 22003), when it “decline[d] to extend the holding in *Jones v. Panola County* or to more strictly enforce the provisions of the MUTCD,” reasoning that it was not compelled to expand its prior holdings in that case or in *Jones v. MDOT*:

To rule as Donaldson urges would substitute the MUTCD for engineering judgment. This Court declines to hold that the MUTCD is [the] only factor in determining whether the county exercised

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<sup>94</sup> *Donaldson v. Covington County*, 846 So. 2d 219 (Miss. 22003).

ordinary care.

Beyond traffic safety and standards for warning signs in connection with road maintenance and construction, our courts have begun to look to other safety standards and even federal regulations as admissible evidence and “a measure to show reasonable care consistent with industry standards.” In *Wilkins v. Bloodsaw*, 850 So. 2d 185 (Miss. App. 2003), a premises liability case, no handicap access was provide for the Pizza Hut steps down which the disabled adult son of Evelyn Wilkins fell. Plaintiff’s expert provided admissible testimony, based in part on safety standards and federal regulations that provided a measure to show reasonable care consistent with industry standards, and provided the trial court with evidence sufficient to withstand summary judgment. He also provided the court with a sufficient basis for establishing such crucial facts as the lack of available handicap accessibility on the premises and such crucial expert testimony that “but for the absence of a ramp this accident would not have happened...” *Id.* at \*6.

### Ministerial vs. Discretionary Duties

The Court noted in *Mohundro* that this qualified immunity only afforded protection against suits that arise out of the performance of discretionary duties and that under its earlier decision in *Grantham v. Mississippi Department of Corrections*, 522 So. 2d 219, 225 (Miss. 1988), a Supervisor or other public official

has no immunity to a civil action for damages if his breach of a legal duty causes injury and (1) that duty is ministerial in nature, or (2) that duty involves the use of discretion and the governmental actor greatly or substantially exceeds his authority and in the course thereof causes harm or (3) the governmental actor commits an intentional tort.

### Discretionary Public Duty

As noted in *Maness v. Gant and Alcorn County*, 786 So. 2d. 401, 405 (Miss. 2001), a duty owed to the general public is simply not actionable by a private individual. Absent a special relationship created by statute, our case law has declined to impose a broad duty upon individuals to control the actions of others acting in a discretionary capacity. *Warren v. Glascoe*, 2003 Miss. at Lexis 68 (February 11, 2003). In *Connell v. State of Mississippi*, 841 So. 2d 1127, 1136 (Miss. 2003), the Mississippi Supreme Court recently considered the issue of alleged liability against the State Parole Board for the criminal actions of a parolee from another state who had been accepted for supervision by the State of Mississippi at the time he committed a violent rape, stating:

It is a naive fiction to say parole officers have control over felons who are freeon parole. A person who does not have the ability to control another’s conduct should not have liability imposed upon him or her for the tortuous act of that other person.

### Definition of "Ministerial"

Citing *Coplin*, *supra* at 754, *Poyner v. Gilmore*, 171 Miss. 859, 865, 158 So. 922, 923 (1935), and *T.M. v. Noblitt*, 650 So. 2d 1340, 1342 (Miss. 1995), the Court explained that a duty is ministerial in nature

when

the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.

#### Statutory Minimum Standards

Mississippi statutes specified the minimum requirements of the construction of culverts, "leaving no room for discretion in meeting the minimum standards set out there." Slip Op. at 11. As to minimum standards, the Court stated in *Mohundro*:

There is no evidence that these standards were not met;...there was no breach of a ministerial duty [by] the Board as a whole,...or any ... individual Supervisors.

#### Grossly Negligent and Constructively Intentional Conduct

In concluding, however, that there was a genuine issue of material fact as to whether the individual Supervisor, Dixon, had exceeded his authority in this case or was so grossly negligent that his action could be described as constructively intentional, thereby removing his qualified immunity, the Court stated:

The decision to replace the existing bridge on Mathis Road with a culvert was a discretionary function, but there may be a genuine issue of fact regarding whether Dixon substantially exceeded his authority in making that decision. He made the decision on his own without consulting the rest of the Board or a professional engineer to see if a culvert would be sufficient. See *Coplin*, 631 So. 2d at 755. Miss. Code Ann. §19-3-41 (1972) vests the Board of Supervisors of a County with full jurisdiction of roads, bridges and ferries. Dixon knew of the washout in Mathis Road on Sunday morning and was admittedly worried that someone might drive into it. Even though he was cognizant of the dangerous condition, by the time Mohundro drove off into the pit Monday morning, Dixon still had made no effort to warn the public other than to post unilluminated signs. Although whether to erect a barricade or some other type of warning device is dependent upon the public official's judgment and discretion, if it may be shown that Dixon acted with such gross neglect or callous indifference to the safety of Mohundro and the public as a whole such that his conduct may be fairly described as constructively intentional, he is not entitled to immunity. See *McFadden v. State*, 542 So. 2d 871, 881 (Miss. 1989).

#### Police Protection Exemption

The MTCA provides the exclusive civil remedy for any tort actions brought against a Mississippi governmental entity or its employees. Miss. Code Ann. § 11-46-7(1) (1993). Although the MTCA waives sovereign immunity for certain tort actions, it also prescribes certain exemptions from this statutory waiver under which the governmental entity retains its sovereign immunity.

The Police Protection exemption provided under the Mississippi Torts Claim Act (MTCA) is set forth in Miss.

Code Ann. §11-46-9(1)(c) (1997):

A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

Arising out of any act or omission or an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury . . .

When the immunity afforded by this exemption is invoked, the plaintiff must prove by a preponderance of the evidence that the defendant officer acted in reckless disregard for the safety of the plaintiff at a time when he was not engaged in criminal activity. *Simpson v. City of Pickens*, 761 So.2d 855, 859 (Miss. 2000).

### High-Speed Pursuit

To determine whether an officer, while pursuing a fleeing suspect, acts with reckless disregard for the safety of others, the Mississippi Supreme Court recently considered six factors:

- (1) length of chase;
- (2) type of neighborhood;
- (3) characteristics of the streets;
- (4) the presence of vehicular or pedestrian traffic;
- (5) weather conditions and visibility; and
- (6) the seriousness of the offense for which the police are pursuing the vehicle.

*City of Jackson v. Brister*, 838 So.2d 274, 2003 Miss. LEXIS 79, \*15 (Miss. 2003)(quoting *District of Columbia v. Hawkins*, 782 A.2d 293 (D.C.Ct.App. 2001)).

The following cases illustrate how these factors influence a determination of “reckless disregard.”

In *Brister*, officers responded to a bank teller’s report that someone had attempted to pass a forged check. The Mississippi Supreme Court determined that officers easily could have but did not block the suspect’s vehicle in the parking lot, copy its tag number as it sped away, or follow departmental procedures in initiating pursuit. *Brister*, 838 So.2d at \*13-14. Further, the officers pursued the suspect through a heavily populated residential area at 11 a.m., spurring the suspect to exceed 70 to 80 miles per hour in a 35 miles per hour zone and chasing her over a hill into a vision-obscured intersection where she collided with another vehicle. In determining from these factors that the officers had acted with reckless disregard, the Mississippi Supreme Court emphasized that the pursuit itself had violated protocol and had continued even into a blind intersection. *Id.* at \*17.

In *Hawkins*, like *Brister*, lack of visibility contributed prominently to a finding of recklessness. There officers pursued a hit-and-run suspect through a residential neighborhood at rush hour, spurring the suspect to speed 90 miles per hour through a 25 miles per hour zone and chasing him into a blind intersection, which the officers knew was heavy with vehicle and pedestrian traffic, where he collided with another vehicle. *Hawkins*, 782 A.2d at 301. During the pursuit, the officers themselves exceeded the speed limit through this “heavily trafficked area” by 65 miles per hour. *Id.* at 302, n.5. In affirming that the officers had acted with reckless disregard to the safety of others, the D.C. Court of Appeals explained:

Most importantly, as the police knew, the roadway (Ely Place) had a crest which obstructed the view of what was on the other side of the hill. Thus as the trial court pointed out, the evidence showed that “these officers were driving at an excessively high rate of speed without knowing what faced them, or the Nissan Pathfinder they were pursuing, over the crest of the hill.”

*Id.* at 302. The Court distinguished these facts from those of an earlier case, *District of Columbia v. Walker*, 689 A.2d 40 (D.C. 1991)(finding no reckless disregard), where officers had engaged in a highspeed pursuit down a two lane road with light traffic and no pedestrians. *Id.* at 301.

In *Peak v. Ratliff*, 408 S.E.2d 300 (W.Va. 1991), the case from which *Hawkins* adopts its six factors, good visibility on the roadway and at the accident site supported a determination that the officers’ high speed pursuit did not recklessly disregard the safety of others, even though it occurred on a two lane road that passed residential areas, side streets, businesses, a golf course, and school. Further, the road was hilly and twisty, had a 35 to 45 mile per hour speed limit, and was traveled at the time by many motorists heading home from work. The officers witnessed the suspect exceed 60 to 100 miles per hour, pass traffic in blind curves, and force on-coming vehicles off the road, before finally hitting a car head-on. *Id.* at 309. Despite these conditions the Supreme Court of Appeals of West Virginia found that, considering all factors, the officers did not act with reckless disregard since they chased a serious law violator, knew the road, had good visibility and weather, slowed their speed (which was between 60 and 100 miles per hour) when they passed cars, faced only moderate traffic, saw no pedestrians, and pursued for only a short period of time before the chase ended. *Id.* at 310.

In *City of Jackson v. Lipsey*, 834 So.2d 687 (Miss. 2003), an officer’s failure to activate his lights and siren, combined with his sudden, high-speed cut in front of on-coming traffic, factored prominently in a finding of recklessness. There the officer decided to respond to a burglary in progress, even though he was not dispatched to it. Although it was late at night, he proceeded without headlights, blue lights, or siren. He suddenly cut a left-hand turn in front of an approaching vehicle, causing a collision. The accident report faulted the officer for the collision, finding that he had failed to yield the right-of-way. The trial court adopted the finding and also concluded that, in an effort to surprise the burglary suspects, the officer had made the deliberate and intentional decision not to activate his headlights, blue lights, or siren. *Id.* at 690. The Mississippi Supreme Court affirmed that these conditions could indicate the officer acted with reckless disregard for the safety of others. *Id.* at 693.

In *City of Jackson v. Perry*, 764 So.2d 373 (Miss. 2000), an officer's speeding without lights or siren, combined with his not being engaged in a criminal pursuit or emergency response, factored prominently in a finding of recklessness. There the officer drove at or above 57 miles per hour in a 35 miles per hour zone, at night on a city street, while on his way to dinner. As in *Brister* and *Hawkins*, the officer blindly crested a hill at high speed, and this prevented him from avoiding collision once the plaintiff's vehicle, which was turning onto the street from an apartment complex, came into view.<sup>95</sup> *Id.* at 379. After investigating the accident, the officer's own police department found him at fault and reprimanded him for his driving. *Id.* at 378. At trial, the officer admitted that he routinely disregarded his speed while driving and acknowledged that speeding purposelessly violated police protocol and/or the law.<sup>96</sup> *Id.* at 377. On review, the Mississippi Supreme Court held that, under these conditions, the officer's actions showed a reckless disregard for the safety of others. *Id.* at 378.

In *Perkins v. City of Forest*, C.A. No. 3:99c4834BN (S.D. Miss. Nov. 27, 2000)(Barbour, J.)(unpublished op.), the District Court found that, under the conditions presented, an officer's high-speed response did not constitute an act of reckless disregard for public safety. After hearing a dispatcher report a hit and run disturbance, the officer engaged his blue lights, wigwags, and siren and responded by driving 50 miles per hour through a 35 miles per hour zone on a business district highway, amid heavy rush hour traffic, past numerous private driveways. He collided with a car exiting a parking lot, leaving skid marks of 122, 115, and 54 feet and killing the driver. Signs and vegetation along the highway may have limited the officer's ability to see cars entering the highway, for he admitted not seeing the car until it was directly in front of him. *Id.* at 2-3. Using the standard announced in *Maldonado* that "wantonness is a failure or refusal to exercise any care, while negligence is a failure to exercise due care," *Id.* at 8, the district court held that the officer's act of speeding could not by itself constitute reckless disregard and found that the officer could not be faulted for anything other than his speed: he was responding to criminal activity; he used due care by activating his lights and siren; and he braked to avoid the collision. *Id.* at 12.

#### Acting with Reckless Disregard for Plaintiff's Safety

An officer acts with "reckless disregard" when he fails to exercise any care. This means that he (a) appreciates a risk and (b) deliberately disregards it, even though (c) the risk involves a high probability of harm. *Maldonado v. Kelly*, 768 So.2d 906, 910-11 (Miss. 2000). The Mississippi Supreme Court has affirmed "reckless disregard for the safety of others" where an officer backed up an incline entrance to a parking lot knowing he could not be sure the area was clear,<sup>97</sup> where an officer allowed a visibly intoxicated driver to

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<sup>95</sup> At trial, an eye-witness estimated that after cresting the hill, the officer's cruiser skidded on its brakes about 300 feet.

<sup>96</sup> Regarding which the decision is somewhat unclear, merely saying: "Edwards further admits that police officers, unless they are on an emergency call, must abide by the speed limit."

<sup>97</sup> *Maye v. Pearl River County*, 758 So.2d 391, 395 (Miss. 1999).

continue driving,<sup>98</sup> and where an officer sped without reason, without lights or sirens.<sup>99</sup> In contrast, the Court has held that an officer did not act with “reckless disregard” where he was aware of a danger—a blind intersection—but “took specific steps to avoid the collision” by stopping and looking both ways just as “any ordinary person would have done.” *Id.* at 911.

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#### Political Subdivisions other than the State

Miss. Code Ann. §11-46-1 (i) (2003) defines a political subdivision as:

“Any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including but not limited to any county, municipality, school district, community hospital as defined in Section 41, 13-10, Mississippi Code of 1972, airport authority or other instrumentality thereof, whether or not such body or instrumentality thereof has the authority to levy taxes or to sue or be sued in its own name.”

In the case of ***Spencer v. Greenwood-Leflore Airport Authority***, 834 So.2d 707 (2003), an airport created by action of the City of Greenwood and Leflore County, Mississippi, alleged that it was not a governmental entity subject to suit because joint airport boards are not specifically listed in the definition of political subdivisions found in Miss. Code Ann. §11-46-1(i). Although not specifically listed in the statute, the very fact of specific legislation which authorized the creation of joint airport boards to perform certain public

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<sup>98</sup> ***Turner v. City of Ruleville***, 735 So.2d 226, 227 (Miss. 1999).

<sup>99</sup> ***City of Jackson v. Perry***, 764 So.2d 373, 377 (Miss. 2000).

<sup>100</sup> ***Maye v. Pearl River County***, 758 So.2d 391, 395 (Miss. 1999).

<sup>101</sup> ***Turner v. City of Ruleville***, 735 So.2d 226, 227 (Miss. 1999).

<sup>102</sup> ***City of Jackson v. Perry***, 764 So.2d 373, 377 (Miss. 2000).

functions made such a board subject to the expansive definition of political subdivisions under the act. *Id.* at 711. In contrast, there is no similar legislative expression creating separate sheriff's departments. In the case of *Conrad v. Holder*, 825 So.2d 16 (Miss. 2002), Sunflower County Sheriff Ned Holder and Deputy Sheriff Stevie Little were sued under the provisions of the Mississippi Tort Claims Act. Dismissal for the Defendant Sheriff was proper because the Plaintiffs failed to meet the requirement of naming a governmental entity as a defendant. There, the Court specifically stated "The Plaintiffs did not name Sunflower County as a defendant." *Id.* at page 19.

#### Lack of Jurisdiction of State Highway System (no legal duty)

Claims are often asserted under the Mississippi Tort Claims Act against county governments for road maintenance-related accidents and conditions which occur on roads outside their jurisdiction. Under Miss. Code Ann. §65-3-3 (1972), as amended, and §170 of the Mississippi Constitution the State of Mississippi and Mississippi Department of Transportation have exclusive jurisdiction of the state highway system.

Section 170, Mississippi Constitution of 1890, provides as follows:

Each county shall be divided into five districts, a resident freeholder of each district shall be selected, in the manner prescribed by law, and the five so chosen shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the legislature may have the power to designate certain highways as state highways, and place such highways under the control and supervisors of the state highway commission, for construction and maintenance.

Hence, it is within the power of the Mississippi Legislature to designate a state highway system under the exclusive jurisdiction of the State of Mississippi and not subject to any duty of maintenance or control by a county. This is exactly what is found in Miss. Code Ann. §65-3-3 (1972), as amended. Even where the legislature has authorized municipalities under Miss. Code Ann. §65-1-75 (1972) to exercise joint maintenance of state highways within their corporate limits, this can only be done with the prior approval of the director of the Mississippi Department of Transportation spread upon its official minutes. MS AG OP, Hon. Mark C. Baker, Issued 11/03/2000.

#### Scope of Employment

Under Miss. Code Ann. §11-46-7(2) (1993) an employee of a governmental entity has immunity under state law from personal liability unless the employee is acting outside of the scope of his or her employment. *Stewart v. City of Jackson*, 804 So. 2d 1041 (Miss. 2002).

Miss. Code Ann. §11-46-5(2) (1993), defines the scope of employment as follows:

For the purpose of this chapter an employee shall not be considered acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, liable, slander, defamation or any criminal offense other than traffic violations.

Miss. Code Ann. §11-46-5 (2) (1993) (emphasis added)

An employee is acting outside the scope of his or her employment when the employee is sued for a tort which requires malice as a necessary element. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584 (Miss. 2001). In the case of *Lumberman's Underwriting Alliance v. The City of Rosedale*, 727 S0.2nd 710(Miss. 1998), summary judgment was granted to the City of Rosedale on a claim brought by the fire insurance carrier for a local grocery store that burned when its sprinkle system failed. A moonlighting city employee who went onto private property to turn off a leaking water valve was held as a matter of law to have been outside the course and scope of his employment with the City of Rosedale.

#### Obvious to One Exercising Due Care

The Mississippi Supreme Court has recognized that a governmental entity is entitled to absolute immunity in the event that the provisions of Miss. Code Ann. § 11-46-9 (1)(v)(1999), are satisfied. This statutory exemption provides that a governmental entity shall not be liable for any claim:

Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee if the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care. (Emphasis added in original).

*City of Clinton v. Smith*, 2003 Miss. Lexis 550 (October 23, 2003), involved a slip and fall on the wheelchair ramp outside of a municipal building owned by the City of Clinton, Mississippi. The plaintiff injured himself when he slipped on snow and ice that had accumulated on the wheelchair ramp. The plaintiff had seen snow and ice covering the ramp before he ventured onto it. The Mississippi Supreme Court reversed and rendered judgment for the City of Clinton, based on this exemption:

Smith by his own testimony, during his deposition and during cross-examination, admitted that the ice and snow on the ramp was obvious for anyone to see. Based on that admission, the facts present a situation of an open and obvious condition which is required for immunity pursuant to 11-46-9(1)(v).

#### Excess Coverage

§ 11-46-17(4) authorizes any governmental entity of the state to purchase excess liability insurance coverage and to be sued in excess of the liability limits set forth in §11-46-15, those limits being \$50,000.00 for

causes of action arising between July 1, 1993, and July 1, 1997, \$250,000.00 for causes of action arising between July 1, 1997, and July 1, 2001, and \$500,000.00 for causes of action arising on or after July 1, 2001. See §11-46-15(1)(a-c). In purchasing such excess liability insurance coverage, a governmental entity's immunity from suit "shall be waived only to the extent of such excess liability insurance carried." § 11-46-17(4). See *Boston v. Hartford Accident and Indemnity Company*, 822 So. 2d 239 (Miss. 2003) (addressing insurance coverage pre-MTCA); *Titan Indemnity Company v. American Justice Insurance Reciprocal*, 758 So. 2d 1037 (Miss. 2000) (doctrine of mutual repugnancy applicable where two different insurance policies contained "other insurance" clauses).

### Settlement of Small Claims

Up until October 1, 1993, Miss. Code Ann. §19-7-8 (1992) provided statutory authorization for a Board of Supervisors in certain instances to pay claims not exceeding One Thousand (\$1,000.00) Dollars out of the general fund where the County had liability insurance coverage but a deductible in excess of the amount of the claim. Section 19-7-8 was repealed by Laws of 1992, Ch. 491, §11, effective October 1, 1993. Similarly, a companion statute in the Mississippi Tort Claims Act, Miss. Code Ann. §11-46-16 (1992) contained an automatic repealer of October 1, 1993, as to political subdivisions. In AG Op. No. 91-0850 to Younger, December 14, 1991, the Attorney General's office concluded that a County would not have authority to require a Twenty-Five Thousand (\$25,000.00) Dollar deductible for all liability claims, including automobile-related claims, whereby the County would be liable for the first Twenty-Five Thousand (\$25,000.00) Dollars of any occurrence after which the balance of the claim would be paid up to Five Hundred Thousand (\$500,000.00) Dollars by the insurance company. The opinion concluded that the contemplated proposal was not authorized by law, stating:

While §11-46-16 allows a County generally to pay claims up to the amount of the deductible on a liability insurance policy, there is specifically exempted from this authority (by way of the statutory cross-reference to §19-7-8) the power to pay deductibles in any amount over One Thousand (\$1,000.00) Dollars for liability arising out of the County's operation of a motor vehicle.

### Claims Within Deductible

Now that both §19-7-8 and §11-46-16 have been repealed, it appears that counties may nonetheless have legal authority to pay claims arising from wrongful or tortious acts or omissions on the part of the County or its employees where those claims are within the amount of the deductible contained in the County's liability insurance coverage, whether through an insurance policy or through a self-insurance reserve. Such authority may be gleaned from several sources:

1. Under §11-46-5(1), the immunity of political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment has been waived from and after October 1, 1993, which waiver is to the extent of the maximum amount of liability provided in §11-46-15. That maximum amount of liability is Fifty Thousand (\$50,000.00) Dollars for causes of action arising between July 1, 1993, and July 1, 1997.

2. Even though County Home Rule, Miss. Code Ann. §19-3-40 (1990), does not authorize a Board of Supervisors to grant any donation unless authorized by some other statute, it is submitted that the Mississippi Tort Claims Act now provides statutory authorization for such a payment of an uncovered damage claim. Section 11-46-17(3) clearly contemplates that counties may obtain insurance policies or establish self-insurance reserves with deductibles, which are clearly within the meaning of "any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to political subdivisions."

3. The simultaneous repeal of §11-46-16 and §19-7-8, coupled with statutory waiver of sovereign immunity for political subdivisions subject to specified limits of liability, is entirely consistent with the conclusion that a County would be authorized to pay legitimate damage claims up to the amount of the deductible under its liability insurance policy, and such authorization would also be consistent with County Home Rule, insofar as payment of a claim within the statutory limits of liability and within the amount of the deductible would be payment on a claim for which the County no longer has immunity under the sovereign immunity doctrine.

4. All plans of insurance and/or reserves must be submitted for approval to the Mississippi Tort Claims Board, Miss. Code Ann. §11-46-17(3) (Supp. 1995), and it would certainly appear that the Board's approval of a County's insurance policy containing a deductible would necessarily entail approval of the deductible as an essential provision of the policy.