**Governmental Immunities**

*Good Judge-ment podcast*

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***Hello folks and welcome to another edition of the Good Judge-ment Podcast. As always, I’m your host, Wade Padgett.***

And I’m Tain Kell, and today we give a BIG podcast shout out to our friend, Judge Kevin Morris of the Walton Magistrate court for suggesting a great topic for discussion today.

***But Tain, Kevin didn’t just make a suggestion, he went far above and beyond the call of duty.***

That’s right, Wade, Kevin wrote the outline for today’s entire podcast.

***Let’s get our audience to give Kevin a Good Judge-ment Podcast standing ovation.***

Wow, Wade, I think that’s one of the longest standing ovations we’ve ever had on the podcast!

***Well, let’s dive right into our topic for today, Governmental Immunities.***

Yeah, this topic can be really confusing, so we’re going to try to break it down for you in a way that will be helpful.

***Immunities for Governments and Governmental Employees:***

Whenever litigation against a government or a government official occurs, the defense of *immunity* invariably arises. This can be a very confusing area because there are different immunity rules depending on the nature of the claims asserted. And there are different immunity rules depending upon whether the government is the *named* defendant, as opposed to a government official or employee being the defendant.

It also depends on whether that official or employee has been sued in his or her “official capacity” or in an “individual capacity.” So, let’s see if we can straighten that out.

There are different rules depending on whether the defendant is a city- as opposed to a county or the state. Finally, there are also different rules if the suit is in federal court.

***ENTITY CLAIMS***

***I. Sovereign immunity***

***A. State Law Claims***

In Georgia, the ability to bring a state tort law action against a government entity such as the State of Georgia, a county, a school district or a state or county employee is limited, and in some instances entirely prohibited, because of the doctrine of Sovereign Immunity.

This doctrine came to the state from English common law, and the concept that the king, having his power conferred from God or derived from divine power, could do no wrong. Thus, under that concept, the king (and therefore the State) could not be sued.

While this concept seems at first glance to be outdated and silly, it does make some sense. After all, in our system of government, powers are derived from the consent of the people, and the government IS the people, so suing the government is really just suing the people, or at least the taxpayers.

Sovereign immunity applies to the government and also to government officials and employees when sued in their official capacities. That makes sense, doesn’t it?

Well, yes, because suing an official for doing his or her official duties is just another way of getting at the State.

**Individual suits: Official Immunity**

When a government official or employee is sued in his individual capacity, however, there is no sovereign immunity defense; instead, a different type of defense applies, and it is called *official immunity* when a state law claim is asserted, and *qualified immunity* in cases involving a federal law claim

The application of sovereign immunity also differs depending on the entity being sued: State, County, or City.

Sovereign immunity bars a lawsuit based upon a state law tort claim unless there is a state statute or constitutional provision that expressly waives that immunity.

Sovereign immunity in Georgia has been waived for tort claims under Georgia law for:

(1) motor vehicle accidents arising from the use of county vehicles,

(2) whistleblower claims by county employees, and

(3) condemnation and inverse condemnation claims (the taking of private property for public use, which can include claims of maintaining a nuisance).

Sovereign Immunity does not apply to **contract claims** at all, because where the State has expressly made promises through contract, it can be sued to enforce those promises.

Lawsuits based upon state law claims other than these, when filed against a government itself or against officials and employees of the county sued in their official capacities, are generally barred by sovereign immunity.

Sovereign immunity is not a defense to federal claims, such as claims for a violation of federally protected civil rights and claims for employment discrimination. In those instances, the government can be sued directly.

**State Tort Claims Act**

**O.C.G.A. §§ 50-21-21 – 50-21-37**

**(a)** The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the General Assembly recognizes that, while private entrepreneurs voluntarily choose the ambit of their activity and can thereby exert some control over their exposure to liability, state government does not have the same flexibility. In acting for the public good and in responding to public need, state government must provide a broad range of services and perform a broad range of functions throughout the entire state, regardless of how much exposure to liability may be involved. The exposure of the state treasury to tort liability must therefore be limited. State government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of this state that the state shall only be liable in tort actions within the limitations of this article and in accordance with the fair and uniform principles established in this article.

**(b)** The General Assembly also recognizes that the proper functioning of state government requires that state officers and employees be free to act and to make decisions, in good faith, without fear of thereby exposing themselves to lawsuits and without fear of the loss of their personal assets. Consequently, it is declared to be the public policy of this state that state officers and employees shall not be subject to lawsuit or liability arising from the performance or nonperformance of their official duties or functions.

**(c)** All of the provisions of this article should be construed with a view to carry out this expression of the intent of the General Assembly.

**O.C.G.A. §§ 50-21-23**

**(a)** The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state’s sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from conduct on the part of state officers or employees which was not within the scope of their official duties or employment.

**(b)** The state waives its sovereign immunity only to the extent and in the manner provided in this article and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States

**Liability caps:**

$1 million per “loss” or injury; $3 million per incident.

**Other limitations:**

Must file a pre-suit notice within 12 months from date of loss.

**Official Immunity**

If a government official or employee is sued on a state law claim in his or her individual or personal capacity, the state constitution affords a limited type of immunity from suit and damages. As noted, this is called *official immunity*, and it applies where the person was performing an *official function* without *malice*, even if the act was performed negligently;

Wait, you called it official immunity, but it applies to suits against employees in their PERSONAL capacity???

Yep, confusing, isn’t it?

Official immunity does not apply if the person was performing what is called a “*ministerial function” that is a specifically directed act (like following a mandated act or policy)* and acted negligently.

It also does not apply if an employee acted with an intent to cause harm. Of course, there you have to look at whether that employee was acting outside the scope of his or her employment just like you would in any other vicarious liability case.

Two examples from actual cases help explain these immunity provisions. In ***Lincoln County v. Edmond***, the county and the county road superintendent were sued for negligence when a felled tree caused a serious accident prior to the arrival of the work crew. The fallen tree had been reported early in the morning, before the workday began, but the super- intendent did not go directly to the site as soon as he learned the road was blocked. The county was dismissed based on sovereign immunity because the accident involved only privately owned vehicles, no insured county vehicles. The road superintendent asserted official immunity, claiming he was performing a discretionary function, but his claim to immunity was denied. The court ruled that once the road superintendent knew that the downed tree created a road hazard, he had a ministerial duty to remove it. It was up to a jury to decide if he acted negligently. He therefore faced unlimited exposure, and the case was settled.

In ***Cameron v. Lang***, a county sheriff’s deputy was pursuing a fleeing felon at a high rate of speed. The felon crossed the centerline and struck a third party’s car head on, killing the driver. The deceased driver’s widow sued the deputy and the sheriff in his official capacity, which was the equivalent of suing the county government. The deputy was granted official immunity because his actions in pursuing the fleeing felon, in the heat of an emergency, were held to be discretionary. Because, in his official capacity, the sheriff represented the county, he claimed sovereign immunity. However, because the deputy’s patrol car was insured by the county, sovereign immunity had been waived, and his immunity defense was rejected. If a jury were to determine that the deputy acted negligently in starting or continuing the chase, then even though the deputy is immune, the sheriff would be liable because sovereign immunity had been waived. The sheriff’s liability is limited, however, by the amount of insurance covering the patrol car.

These cases reveal that there are two key questions to be answered in every tort case against a county and its officials and employees: (1) Was there an insured county vehicle involved in causing the injury? (2) Was the official or employee performing a discretionary or ministerial function? If no insured county vehicle was involved, then the county will be dismissed, and the county official or employee will have to stand trial individually. If the county official or employee negligently performed a ministerial function, then there is no limit to his or her personal liability.

***B. Federal Claims:***

In the context of federal causes of action, government officials can be sued in state courts for alleged violations of the U.S. Constitution and federal statutes regulating local governments. Many suits are filed under *42 U.S.C. §1983*, which is a federal statute that allows any person to seek redress for a deprivation of rights guaranteed under the Constitution by persons acting under color of state law. These suits can arise from claims against the police for excessive force or unreasonable searches and seizures (rights protected under the Fourth Amendment); claims by jail inmates based on conditions of confinement, including inadequate medical care (rights protected under the Eighth and Fourteenth Amendments); and claims that allege the county has infringed upon someone’s First Amendment rights (relating to free speech, political expression, or government establishment of a religion), Second Amendment rights (relating to restrictions on firearms), or the Fourteenth Amendment’s equal protection clause (prohibiting the treatment of similarly situated persons differently without a qualifying reason).

***GOVERNMENT EMPLOYEES***

***II. Federal Claims***

1. ***Qualified Immunity***

*Qualified immunity* is a legal defense that protects public officials for alleged violations of the U.S. Constitution that have not been clearly established. The Supreme Court first introduced the qualified immunity doctrine in 1967 because it recognized that constitutional law is constantly changing, and public officials could not be “expected to predict the future course of constitutional law.” Since then, the Court has repeatedly stated that the goal of qualified immunity is to protect public officials who “make reasonable but mistaken judgments” about constitutional questions and also to alleviate the injustice of subjecting public officials to liability when they are required to exercise discretion. Put simply, the doctrine of qualified immunity has sought to eliminate the danger that public officials would be deterred from executing their public duties with decisiveness and discernment if they face the constant threat of personal liability.

Qualified immunity, however, is not absolute immunity. Indeed, qualified immunity does not protect public officials who are 1) plainly incompetent, 2) knowingly violate the law, or 3) violate another’s clearly established statutory or constitutional rights. The third category—the clearly established category—is where most cases are litigated. And, when deciding whether a public official has violated clearly established law, the Supreme Court has held that the highly fact specific analysis must be done on a case-by-case basis in light of existing case law, *i.e.,* binding legal precedent. Quite simply, the relevant inquiry asks: Is there a prior, factually analogous Supreme Court or Court of Appeals decision that would have put the public official on notice that their conduct/decision/action was unlawful? If so, the public official is not afforded qualified immunity, but if there isn’t a sufficiently similar case, he/she/they will be protected.

Recently, qualified immunity has come under attack by critics who claim it unjustifiably insulates public officials. Those in favor of doing away with it most frequently cite to shocking uses of force by police as their motivation. They contend qualified immunity prevents officers from being held accountable when they abuse their power. There are essentially two paths for eliminating qualified immunity: First, the Supreme Court created qualified immunity, so it could do away with it at any time, and second, Congress, with the signature of the President, could end qualified immunity through legislation. Notably though, neither is simple. In June 2020, the Supreme Court considered accepting as many as eleven (11) qualified immunity appeals; in the end, it took none, effectively inviting Congressional action. Meanwhile, a least one bill aimed at doing away with qualified immunity was introduced into the House of Representatives during the summer of 2020. Early indications, however, are that the bill does not have widespread support because many legislators consider the bill to be anti-law enforcement.

**Other State Claims:**

**Claims for Injunctions, Mandamus and Declaratory Relief**

In some cases, brought in either state or federal court, the plaintiff does not ask for monetary relief, the plaintiff instead wants the judge to order the county to do or not do something. These are called actions for *affirmative relief*, and usually take two forms.

**Injunction**

A lawsuit seeking an ***injunction*** (sometimes preceded by a *temporary restraining order*) typically asks the court to stop the county from undertaking an action.

For example, if a county’s sign ordinance regulating billboards runs afoul of the First Amendment, an outdoor advertising company can obtain an injunction to prevent enforcement of the ordinance.

For an injunction to issue there must be no other adequate remedy, meaning if the action is not stopped it will be too late to restore the parties to the status quo later.

**Mandamus**

If the plaintiff contends the county has failed to do something it is legally required to do, then an action for ***mandamus*** can be filed, seeking an order compelling the county to follow the law.

For example, a constitutional officer who believes the county governing authority has failed to fund his or her budget according to law can file a writ of mandamus, asking the court to force the county to fund the budget in an amount legally required.

Mandamus will not issue unless the party requesting it has a clear legal right to what is being requested—if the defendant by law has discretion to take the action or not, then mandamus normally is not available.

In both of these actions, if the plaintiff wins, the plaintiff can be awarded attorney’s fees.

**Declaratory Judgment**

A *declaratory judgment* is a claim where a party contends there is uncertainty in the legal rights and responsibilities between the party making the claim and the opposing party, and the suit requests the court to rule on the question. This can occur when a state law, local ordinance or local policy is unclear in terms of its application to a particular situation or person, and the court is asked to clarify the law before action is taken to enforce it.

***B. Prosecutorial Immunity***

“Prosecutors are entitled to absolute immunity for the initiation and pursuit of criminal prosecution. *See Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). The analytical key to prosecutorial immunity is whether the allegations at hand stem from the prosecutor's function as a legal advocate. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) ("Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in h[er] role as an advocate for the State, are entitled to the protections of absolute immunity."); *see also Mastroianni v. Bowers*, 173 F.3d 1363 (11th Cir. 1999) (same). Further, prosecutorial immunity is not limited solely to prosecutors title. *Hart v. Hodges*, 587 F.3d 1288, 1296 (11th Cir. 2009). As the Supreme Court explained in Buckley, a "functional approach" is necessary to determine whether absolute immunity is warranted. 509 U.S. at 269. Courts must look to "the nature of the function performed, not the identity of the actor who performed it." *Jones v. Cannon*, 174 F.3d 1271, 1282 (11th Cir. 1999) (quoting *Buckley*, 509 U.S. at 269). The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. *Burns v. Reed*, 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991).” *Smith v. Hatcher*, 2021 U.S. Dist. LEXIS 36875 \*; 2021 WL 716633 (SDGA Civil Action No. 2:19-CV-167 January 19, 2021).

The Eleventh Circuit has held that a prosecutor’s conduct in recusing (or not) from involvement in a prosecution is “intimately associated with the judicial phase of the criminal process” and thus protected by prosecutorial immunity. *Hoffman v. Office of the State Atty.*, 793 Fed. Appx. 945, 950-951; 2019 U.S. App. LEXIS 35745 ; 2019 WL 6461256 (11th Cir. 2019). “As to [the prosecutor’s] alleged failure to recuse due to [another’s] involvement, the decision whether to recuse from a prosecution is an action intimately associated with the judicial phase of the criminal process, little different conceptually than a decision to initiate or pursue a prosecution.” *Hoffman*, at 950. Prosecutorial immunity extends to "actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Hoffman*, at 951, *citing Buckley v. Fitzsimmons*, 509 U.S. 259, 272, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993).

During the 2002 legislative session, the Georgia General Assembly decided that counties should not be able to avoid responsibility for accidents involving their county vehicles simply by choosing not to insure those vehicles.76 Since 2005, counties have been liable for the negligent operation of county vehicles, whether they are insured or not. The limits of liability are $500,000 per person and $700,000 per occurrence.77 The county employee who negligently operates the vehicle will not be subject to suit or personal liability.78 Although the legislation did not require counties to insure their vehicles,79 there is no longer a financial incentive for being uninsured. This legislation applies only to motor vehicle claims; the law of sovereign and official immunity remains the same for cases not involving the operation of county vehicles.

**Now, as my law school professor was fond of saying “Let’s change the law”:**

***Lathrop v. Deal, 301 Ga. 408 (2017)***

In Lathrop, the Supreme Court of Georgia clarified and modified the law on immunity in Georgia. In that case, Governor Deal was sued by several physicians over statutes regulating abortions. In analyzing the law, the Supreme Court determined that immunities applied and took the opportunity to clarify the law on both sovereign and official immunity.

The main holding of the case was that the doctrine of sovereign immunity prohibits the State from being sued in *any* suit unless it has consented. Therefore, the law of sovereign immunity applies to suits for injunctive relief as well as declaratory judgment actions, in addition to traditional tort applications.

This landmark case substantially expanded the doctrine of sovereign immunity beyond its traditional applications.

***Department of Transportation v. Mixon,*** 312 Ga. 548 (Oct. 5, 2021)

In a more recent case, the Supreme Court clarified the extent of the doctrine. The Court ruled that the Just Taking Clause of the Constitution did not prohibit a claim of Inverse Condemnation, that is, a taking of private property without prior payment or without invoking the doctrine of eminent domain.

**Cities and Municipal Liability**

Cities are not subdivisions of the state as counties and school districts are. Instead, they are essentially incorporated entities. Since they are not part of they state, they have assumed their status voluntarily, which then assumes certain potential liabilities.

Thus, city liability is different from state and county liability.

We do not have time to break down all the differences here, but know that different limits on liabilities apply to cities, and cities can take certain actions- such as purchasing insurance- that can potentially waive their immunities or the limitations of their immunities.

**Folks, that is all we have time for today, but again, a big “thank you” to our friend Judge Kevin Morris for doing our jobs for us!**

Thanks for being with us today on the Good Judge-ment Podcast.

**And remember, vitamin C boosts your immunities!**