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RE: Sovereign Immunity & Discretionary Functions in Mississippi & Alabama (MASGLP 10-008-03)

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Dear Jim,

Below is the summary of research regarding the question you posed to the Mississippi-Alabama Sea Grant Legal Program about sovereign immunity under Mississippi and Alabama law. As I understand it, you requested a brief summary of how sovereign immunity and the discretionary function exception would potentially impact liability against local governments. The following information is intended as advisory research only and does not constitute legal representation of Louisiana Sea Grant or its constituents. It represents our interpretation of the relevant laws.

MISSISSIPPI

Mississippi Tort Claims Act

The Mississippi Tort Claims Act (MTCA) partially waives sovereign immunity for tort actions subject to: 1) exhaustion of administrative remedies (where required); 2) compliance with 90 day

notice provisions; and 3) numerous exemptions.¹ Listed exemptions apply where the governmental entities and employees are acting within the course and scope of their employment and the claims arise from statutorily identified actions. The list includes: exercise of police power, adoption or failure to adopt ordinances or regulations, discretionary functions, construction approval for public properties, and issuance or denial of any permit (or similar authorization) that the municipality is authorized by law to determine unless the issuance or denial is of an arbitrary or capricious nature.²

The MTCA provides the exclusive civil remedy against a governmental entity.³ As noted by Mississippi courts, “[t]he immunity is limited to specific claims confined to a certain period of time with significant limits on the measure of damages that can be recovered.”⁴ The Mississippi Supreme Court explained that the MTCA should be interpreted as expressly written so as to carry out the Legislature’s intent to strictly limit the State’s waiver of state sovereign immunity.⁵

Discretionary Function

A recent judicial decision addressing the discretionary function exemption is *Knight v. Mississippi Transp. Com’n*, a Mississippi Court of Appeals decision. There the court considered whether highway maintenance and placement of traffic control devices fell within the discretionary function exemption. In reaching the conclusion that such actions were discretionary in nature and therefore exempt from liability, the court laid out the analysis for reviewing such claims.⁶ To determine if the government conduct is discretionary, “the Court must answer two questions: 1) whether the activity involved an element of choice or judgment; and if so, 2) whether the choice or judgment in supervision involves social, economic or political policy alternatives.”⁷

In resolving the first question, the court considered whether the function is discretionary or ministerial.⁸ To be discretionary, a duty must require an official to use her own judgment and discretion in order to carry out the duty.⁹ A duty is ministerial if it is imposed by law and its performance is not dependent on the employee’s judgment.¹⁰

If the act requires discretion, the action must also require some form of public policy analysis to trigger sovereign immunity.¹¹ The Mississippi Supreme Court has stated that “when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows

¹ Miss. Code §§ 11-46-1 – 23. The statute is known as the Mississippi Governmental Immunity Act.

² Miss. Code § 11-46-9.

³ *Spencer v. City of Jackson, Miss.*, 511 F.Supp.2d 671 (S.D.Miss. 2007).

⁴ *Ellisville State Sch. v. Merrill*, 732 So.2d 198, 202 (Miss. 1999); *Knight v. Miss. Transp. Com’n*, 10 So.3d 962 (Miss. Ct. App. 2009).

⁵ *Ellisville*, 732 So.2d at 201-02; *Knight*, 10 So.3d at 968.

⁶ *Knight*, 10 So.3d 962.

⁷ *Dancy v. E. Miss. State Hosp.*, 944 So.2d 10, 16 (Miss. 2006) (citation omitted).

⁸ *Knight*, 10 So.3d at 968 (citing *Dancy*, 944 So.2d at 16).

⁹ *Id.*

¹⁰ *Id.* (citing *Miss. Dep’t of Human Servs. v. S.W.*, 974 So.2d 253, 258 (Miss.Ct.App. 2007); *see also, Barrett v. Miller*, 599 So.2d 559, 567 (Miss. 1992) (stating that sheriff deputies were not exercising discretionary authority in searching a home where the deputies were acting under a search warrant which gave them the authority to search and set forth parameters in which the search should be carried out)).

¹¹ *Knight*, 10 So.3d at 968-69.

a [g]overnment agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion."¹²

Mississippi case law has recognized a wide variety of governmental conduct that involves implementation of social, economic or political policy.¹³ These cases include:

[T]he manner in which a police department supervises, disciplines and regulates its police officer, *City of Jackson v. Powell*, 917 So. 2d 59, 74 (Miss. 2005); the decision to grant or deny parole, *Doe v. State ex rel. Mississippi Dep't of Corr.*, 859 So. 2d 350 (Miss. 2003); the placement or non-placement of traffic control devices or signs, *Barrentine v. Miss. Dep't of Transp.*, 913 So. 2d 391 (Miss. App. 2005); the acts or omissions of high school football coach which caused a player to suffer heatstroke during practice, *Harris ex rel. Harris v. McCray*, 867 So. 2d 188 (Miss. 2003); and the decision of emergency medical personnel to use a "load and go" approach on an expectant mother. *Sanders v. Riverboat Corp. of Mississippi-Vicksburg*, 913 So. 2d 351 (Miss.App. 2005).¹⁴

As summarized by Jim Fraiser, "[s]uffice it to say, the two-prong ministerial/policy discretionary test is the law of the land in Mississippi."¹⁵

ALABAMA

The Alabama Constitution expressly prohibits suits against the state of Alabama: "the State of Alabama shall never be made a defendant in any court of law or equity."¹⁶ However, the doctrine of municipal immunity was judicially abolished in 1975 in *Jackson v. City of Florence*.¹⁷ The general statute governing municipal tort liability in Alabama provides:

No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless such injury or wrong was done or suffered through the neglect, carelessness, or unskillfulness of some agent, officer, or employee of the municipality engaged in work therefor and while acting in the line of his or her duty....¹⁸

This provision, read in conjunction with *Jackson v. City of Florence*, eliminates municipal immunity from liability for the negligent performance of governmental acts. Municipal liability, under the statute, is limited to injuries suffered through "neglect, carelessness or unskillfulness."¹⁹ The liability extends to injuries or wrongs resulting from negligence of agents

¹² *Id.* (citations omitted).

¹³ *Id.* See also *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 306 (5th Cir. 2006).

¹⁴ *Id.* See also Jim Fraiser, *Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions*, 76 Miss. L.J. 973, 991 (2007).

¹⁵ Fraiser, *supra* note 14, at 991.

¹⁶ Ala. Const. art. I, § 14.

¹⁷ *Jackson v. City of Florence*, 320 So.2d 68, 75 (Ala. 1975).

¹⁸ Ala. Code § 11-47-190.

¹⁹ *Id.* See also *Scheuerman v. City of Huntsville, Ala.*, 499 F.Supp.2d 1205, 1227 (N.D.Ala. 2007).

or representatives of the municipality, consistent with the doctrine of respondeat superior.²⁰ Section 11-47-190 further provides that a municipality may be liable for “failure to remedy conditions created or allowed to exist on the streets, alleys, or public ways by a person or corporation not related in service to the municipality.”²¹

The Alabama Supreme Court has, however, recognized municipal immunity as to certain negligent acts. This substantive immunity arises for public service activities of a municipality that are “so laden with the public interest as to outweigh the incidental duty to individual citizens.”²² The Court further opined that public policy considerations “prevent the imposition of a legal duty, the breach of which imposes liability, in those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the City’s legitimate efforts to provide such public services.”²³ This provision has been used to find that a municipality is not liable for negligent inspection of private sewer lines²⁴ or electrical lines.²⁵

Discretionary Function

Alabama law defines discretionary functions as those functions for which “there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances.”²⁶ Alabama applies the discretionary function test when considering immunity of state actors.²⁷ “Discretionary function,” for which state employee will be shielded from liability, is generally characterized by planning tasks, and policy-level decisionmaking; “ministerial function,” on other hand, is characterized by operational tasks and minor decisionmaking.²⁸

Alabama statutorily extends immunity from tort liability to peace officers.²⁹ Case law addressing discretionary function relating to municipalities is generally presented in the context of suits against a police officer and the employing municipality. The analysis considers whether the officer is performing a discretionary duty at the time of the alleged injury.

Summary

While Mississippi provides a limited waiver of sovereign immunity through the MTCA, the discretionary function exception provides municipalities a defense to tort actions. In Alabama, however, municipalities lack sovereign immunity for negligent acts. Further, it is unlikely that the discretionary function exception would apply to local governments unless the actors can demonstrate that they are state actors.

²⁰ *Stephens v. City of Butler, Ala.*, 509 F.Supp.2d 1098, 1116 (S.D.Ala. 2007). Under Alabama law, for an employer to be liable under the doctrine of respondeat superior, the employee must first be liable for a tort.

²¹ *Lanett v. Tomlinson*, 659 So.2d 68 (Ala. 1995).

²² *Hilliard v. City of Tuscaloosa*, 413 So.2d 889, 891 (Ala. 1991). City was entitled to substantive immunity with respect to claim that city had neglectfully, carelessly, unskillfully, negligently or wantonly inspected wiring at apartment complex.

²³ *Id.* (quoting *Rich v. City of Mobile*, 410 So.2d 385, 387 (Ala. 1982)).

²⁴ *Rich*, 410 So.2d 385.

²⁵ *Hilliard*, 413 So.2d 889.

²⁶ *Telfare v. City of Huntsville*, 841 So.2d 1222, 1228 (Ala. 2002).

²⁷ *Defoor v. Evesque*, 694 So.2d 1302 (Ala. 1997).

²⁸ *Id.* at 1305.

²⁹ Ala. Code § 6-5-338.

I hope you find this information helpful. If you would like additional information or have follow up questions, please let me know.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Niki L. Pace', with a large, sweeping flourish extending to the right.

Niki L. Pace
Research Counsel
Mississippi-Alabama Sea Grant Legal Program