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Police Liability Claims

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Police Liability Claims

It is difficult to discuss liability for police officers under Alabama law without focusing on the various forms of immunity that protect police officers. The immunities and defenses provided by statute and by common law shape the type of claims that can have legs.

With the foregoing in mind—and I should offer a spoiler alert here—much deference is given to police officers so that they can attempt to perform their very difficult jobs, which often call for split second responses and for the exercise of a great deal of judgment. Nonetheless, there is a fence around, and limit upon, the discretion that officers are allowed to exercise. That fence is the maxim that no one, not even a police officer, is above the law. Therefore, when officers make simple mistakes (i.e., simple negligence) in the use of their discretion, they will not be held liable. However, when an officer violates clearly established rules, violates clearly established law, acts outside the scope of the officer's official duties, or acts intentionally, willfully, or with malice, then the officer exceeds the bounds of the officer's authority and can be found liable, assuming that the other elements of a tort or claim are satisfied.

Municipalities and their police officers have certain immunities from damages that can be an important part of defending a police liability claim. Because another part of the seminar in which this paper is presented will address damages arising from individual capacity claims against government employees, that topic will not be discussed herein.

I. Overview of State Law Involving Civil Actions against Police Departments and Officers.

A. Claims against Police Officers.

1. Discretionary Function Immunity.

Alabama police officers are entitled to discretionary function immunity as provided by statute.

> Every peace officer, except constables, who is employed or appointed pursuant to the Constitution or statutes of this state, whether appointed or employed as such peace officer by the state or a county or municipality thereof, or by an agency or institution, corporate or otherwise, created pursuant to the Constitution or laws of this state and authorized by the Constitution or laws to appoint or employ police officers or other peace officers, and whose duties prescribed by law, or by the lawful

> terms of their employment or appointment, include the enforcement of, or the investigation and reporting of violations of, the criminal laws of this state, and who is empowered by the laws of this state to execute warrants, to arrest and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such *shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties*.

ALA. CODE § 6-5-338(a) (1975) (emphasis added). The act that adopted Section 6-5-338 became effective April 26, 1994. *See* ALA. ACTS 94-640, p. 1200 §§ 1-3. Therefore, municipal attorneys should be on guard against any cases cited by plaintiff's attorneys prior to that date that stand for the proposition that a police officer would not be entitled to discretionary function immunity. By adopting Section 6-5-338, the Legislature reversed the erosion of police officer immunity that had been occurring until that time.

For many years, the Supreme Court of Alabama analyzed municipal peace officer immunity from tort liability in terms of the dichotomy of ministerial versus discretionary functions, but that is no longer the case. *See Swan v. City of Hueytown*, 920 So. 2d 1075 (Ala. 2005), *reh'g denied* (July 15, 2005). In its most recent decision citing Section 6-5-338, the Supreme Court of Alabama once again confirmed that "the restatement of State-agent immunity as set out by this Court in *Ex parte Cranman*, *supra*, governs the determination of whether a peace officer is entitled to immunity under § 6-5-338(a)." *Ex parte City of Montgomery*, 99 So. 3d 282, 292 (Ala. 2012), *reh'g denied* (June 22, 2012) (citing *Ex parte City of Tuskegee*, 932 So. 2d 895, 904 (Ala. 2005)). In *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000), a plurality of the Supreme Court of Alabama first discussed the restatement of State-agent immunity in its present form, which applies to municipal police officers thanks to Section 6-5-338, and the Court adopted the *Cranman* test in *Ex parte Butts*, 775 So. 2d 173, 178 (Ala. 2000). The *Cranman* restatement provides:

> A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
>
> (1) formulating plans, policies, or designs; or

> (2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:
>
> (a) making administrative adjudications;
> (b) allocating resources;
> (c) negotiating contracts;
> (d) hiring, firing, transferring, assigning, or supervising personnel; or
>
> (3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or
>
> (4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or
>
> (5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.
>
> Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity
>
> (1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or
>
> (2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.

Ex parte Cranman, 792 So. 2d at 405 (emphasis in original). However, the portion of the restatement in *Cranman* most often applied to police officers was modified by *Hollis v. City of Brighton*:

> Given the divergence between the scope of the immunity granted by § 6-5-338(a)-"conduct in performance of any discretionary function within

> the line and scope of his or her law enforcement duties"-and summarized in category (4) of the *Cranman* restatement-"exercising judgment in the enforcement of the criminal laws of the State ...."-we conclude that immune category 4 of the *Cranman* restatement should be expanded to restate the law of immunity in this area so as to reflect § 6-5-338(a).
>
> Because the peace officers' immunity statute does not limit the availability of immunity to "enforcement of the criminal laws," we today modify category (4) of *Cranman* to read as follows:
>
> "A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
>
> "....
>
> "(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons, or *serving as peace officers under circumstances entitling such officers to immunity pursuant to § 6-5-338(a), ALA. CODE 1975*."

Hollis v. City of Brighton, 950 So. 2d 300, 309 (Ala. 2006) (emphasis and alterations in original).

The defendant police officer bears the initial burden of proof to establish "that [the plaintiff's] claims arise from a function that would entitle [him] to immunity." *Giambrone v. Douglas*, 874 So. 2d 1046, 1052 (Ala. 2003). Once that showing is made, "the burden then shifts to [the plaintiff], who, in order to deny [the officer] immunity from suit, must establish that [the officer] acted willfully, maliciously, fraudulently, in bad faith," *id.* at 1056, or that he "was not exercising his . . . judgment in the manner set forth in the examples in *Cranman*." *Ex parte Hudson*, 866 So. 2d 1115, 1118 (Ala. 2003). *See also Howard v. City of Atmore*, 887 So. 2d 201, 205 (Ala.2003).

The first step toward demonstrating that an officer is entitled to discretionary function immunity is to demonstrate that the officer was performing a "discretionary function." ALA. CODE § 6-5-338(a) (1975). "Discretionary acts are '[t]hose acts [as to which] there is no hard and fast rule as to course of conduct that one must or must not take and those requiring exercise in judgment and

choice [involving] what is just and proper under the circumstances.'" *Roberts v. City of Geneva*, 114 F. Supp. 2d 1199, 1216 (M.D. Ala. 2000) (quoting *Montgomery v. City of Montgomery*, 732 So. 2d 305, 310 (Ala. Civ. App. 1999)). Regarding arrests, the suspect need not be found guilty for the officer to be entitled to discretionary function immunity, but the officer must have had at least "arguable probable cause" to make the arrest. *Borders v. City of Huntsville*, 875 So. 2d 1168 (Ala. 2003), *reh'g denied*. *See also, e.g., Exford v. City of Montgomery*, 887 F. Supp. 2d 1210 (M.D. Ala. 2012).

Alabama's courts have recognized that a police department's policies "may grant a police officer discretion to act in a particular manner," but a department's policies "may [also] may eliminate a police officer's discretion to act in a particular manner." *Thurmond v. City of Huntsville*, 904 So. 2d 314, 320 (Ala. Civ. App. 2004). *See also Ott v. City of Mobile*, 169 F. Supp. 2d 1301 (S.D. Ala. 2001). Therefore, great care should be taken when drafting policies not to eliminate an officer's discretion except where absolutely necessary.

The second step toward demonstrating that an officer is entitled to discretionary function immunity is to demonstrate that the officer was acting "within the line and scope of his or her law enforcement duties." ALA. CODE § 6-5-338(a) (1975). Whether an officer was acting within the line and scope of his or her law enforcement duties is a fact-sensitive analysis. *See, e.g., Hooper v. City of Montgomery*, 482 F. Supp. 2d 1330 (M.D. Ala. 2007), *motion to amend denied*, 2007 WL 2069851 (Police officer was not entitled to discretionary function immunity on state law claim based on his alleged disclosure of a former officer's personnel file to the news media.); *Moore v. Crocker*, 852 So. 2d 89 (Ala. 2002), *reh'g denied* (Police officer exceeded his authority by making a warrantless arrest in a county other than the county that contained the municipality that employed him.).

Once the officer has shown that he was performing "any discretionary function within the line and scope of his or her law enforcement duties," ALA. CODE § 6-5-338(a) (1975), then the burden is back on plaintiff to show some form of malice or wantonness. "Discretionary-function immunity, as is the case with State-agent immunity, is withheld if an officer acts with willful or malicious intent or in bad faith." *Borders*, 875 So. 2d 1168 at 1178. Allegations of negligence are not sufficient to remove the immunity provided for a police officer's performance of a discretionary function. *City of Birmingham v. Sutherland*, 834 So. 2d 755 (Ala. 2002), *reh'g denied, cert. denied* 123 S. Ct. 537, 537 U.S. 1018, 154 L.Ed.2d 425.

The immunity afforded by Section 6-5-338 does not apply to police officers when they work for private non-governmental employers in their off-duty hours. ALA. CODE § 6-5-338(b) (1975). Therefore, municipal police departments should carefully consider their off-duty employment policies and always demand strict compliance with the insurance requirements of Section 6-5-338(c).

2. Authorized Emergency Vehicles.

As we are all aware, there are times when effective law enforcement does not comport to strict adherence of the traffic laws. Under certain circumstances, emergency vehicles, including those driven by police officers, may violate four expressly stated types of traffic laws without risk of liability.

> The driver of an authorized emergency vehicle may:
> (1) Park or stand, irrespective of the provisions of this chapter;
> (2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
> (3) Exceed the maximum speed limits so long as he does not endanger life or property;
> (4) Disregard regulations governing direction of movement or turning in specified directions.

ALA. CODE § 32-5A-7(b) (1975). However, the ability to disregard otherwise applicable traffic laws requires that the officer is in hot pursuit, that the officer is responding to an emergency call, or that the officer is responding to a fire. *See* ALA. CODE § 32-5A-7(a) (1975). Moreover, and most importantly, the statute will not shield a police officer unless the officer has ***both lights and sirens in use***. *See* ALA. CODE § 32-5A-7(c) (1975).

The Authorized Emergency Vehicles law is not a carte blanche authorization. There is written into the statute a requirement that the officer "drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others." ALA. CODE § 32-5A-7(d) (1975). In other words, this is a codification of an avoidance of "deliberate indifference." As the Supreme Court of Alabama has observed,

> Obviously, the legislature did not intend § 32-5A-7(b)(3) simply to have a retrospective application, so that an emergency vehicle driver forfeits the privilege accorded by the statute any time he or she exceeds the speed limit and a wreck occurs that endangers life or property. Rather, it is clear that the legislature intended that this standard, along with the others specified in the statute, be applied from the perspective of a reasonably prudent emergency driver exercising his or her discretion under the prevailing circumstances.

Blackwood v. City of Hanceville, 936 So. 2d 495, 507 (Ala. 2006).

B. Claims against Municipalities

1. Alabama's Non-Claim Statutes.

Most state law tort claims against an Alabama municipality, including one for the acts or omissions of its police officers, will either begin with a timely filed verified statement of claim or will be barred by a failure to properly file one. Sections 11-47-23 and 11-47-192 of the *Code of Alabama* (1975) set forth Alabama's municipal non-claim statutes and must be read *in pari materia*. The claim must be filed "within six months from the accrual thereof or shall be barred." ALA. CODE § 11-47-23 (1975); *Poe v. Grove Hill Mem'l Hosp. Bd.*, 441 So. 2d 861 (Ala. 1983); *Harris v. City of Montgomery*, 435 So. 2d 1207 (Ala. 1983); *Poe*, 441 So. 2d 861; *Hunnicutt v. City of Tuscaloosa*, 337 So. 2d 346 (Ala. 1976), *overruled on other grounds*, *Buck v. City of Rainsville*, 572 So. 2d 419 (Ala. 1990); *Patrick v. City of Florala*, 793 F.Supp. 301 (M.D. Ala. 1992). Actual notice is not a substitute for the statutory notice required by Sections 11-47-23 and 11-47-192. *See Large v. City of Birmingham*, 547 So. 2d 457, (Ala. 1990); *Fortenberry v. City of Birmingham*, 567 So. 2d 1342 (Ala. 1990). The non-claims statues must be raised as affirmative defenses. *Hamilton v. City of Anniston*, 268 Ala. 559, 109 So. 2d 728, 83 A.L.R.2d 1172 (Ala. 1959). The filing of suit within the six-month period is sufficient presentment under Section 11-47-23. *Harris v. City of Montgomery*, 435 So.2d 1207 (Ala. 1983).

The notice of claim must be a sworn statement and filed with the municipality's clerk. *See* ALA. CODE § 11-47-192 (1975). In *City of Montgomery v. Weldon*, the injured party sent a letter to city officials detailing his claim, but the injured party failed to swear to the claim. 195 So. 2d 110 (Ala. 1967). As a result, the Supreme Court of Alabama held that the injured party failed to satisfy the requirement of Section 11-47-192 that a statement be sworn and that the injured party could not recover. *See id.*

While the non-claim statutes are the gate keepers of state law tort claims, they do not apply to federal claims, such as those based on 42 U.S.C. § 1983. *See Acoff v. Abston*, 762 F.2d 1543, 1546 (11th Cir. 1985) (Finding that Section 11-47-23 does not apply to Section 1983 claims); *Morrow v. Town of Littleville*, 576 So. 2d 210, 215 (Ala. 1991) (Applying Alabama's general two-year statute of limitations for personal injury claims found in Section 6-2-38(*l*) to Section 1983 claims to the exclusion of Section 11-47-23).

As soon as the party aggrieved is entitled to begin the prosecution of his cause of action, the accrual of the claim occurs. *See Hunnicutt*, 337 So. 2d 346. Accrual of the claim cannot be delayed by capacity issues such as minority status because they are not specifically addressed in the notice statutes. *See Parton v. City of Huntsville*, 362 So. 2d 898 (Ala. 1978). However, the "filing of the

required statement by a parent on behalf of [an] injured minor [is] sufficient compliance." *Id.* at 901 (citing *McDougal v. City of Birmingham*, 123 So. 83 (Ala. 1929), and *City of Huntsville v. Phillips*, 67 So. 664 (Ala. 1914)).

The non-claims statutes are limited to claims against "the municipality." Therefore, they will not apply to claims against individual police officers or other municipal employees in their individual capacities. *See Harris*, 435 So. 2d at 1214 ("We do not read the non-claim statute as requiring that actions against employees of the City be commenced within this six-month period."). However, tort claims against an employee in his official capacity are tantamount to claims against the municipality, and therefore, those official capacity claims are subject to the non-claim statutes. *See, e.g., Locker v. City of St. Florian*, 989 So. 2d 546 (Ala. Civ. App. 2008) (Citizen's tort claims against city and its police chief in his official capacity for negligent hiring, negligent supervision, assault and battery, and outrage/intentional infliction of emotional distress arising out of altercation with police chief at town hall meeting accrued, and six-month period for presentation of claims against municipalities began to run, on date of citizen's alleged injuries, i.e., the date of the town hall meeting.).

Although not a part of the non-claim statutes, a plaintiff's attorney preparing a notice of claim or a city attorney receiving a notice of claim should consider the effect of Section 11-47-191 of the *Code of Alabama* (1975). Under Section 11-47-191(a), an injured party filing suit is required to "join such other person or persons or corporation so liable as defendant or defendants of the civil action, and no judgment shall be entered against the city or town unless judgment is entered against such other person or corporation so liable for such injury . . . ." ALA. CODE § 11-47-191(a) (1975). This can be extremely important for a municipality because the judgment must be executed against the other party liable before it can be executed against the municipality. ALA. CODE § 11-47-191(b) (1975). Nevertheless, no joinder is required "[i]f the injured party shall, before bringing the civil action, demand of the mayor or other chief executive officer of such municipality the name of such other person or persons or corporation as may be liable jointly with the said municipality to such injured party, and if such mayor or other chief executive officer fails to furnish, within 10 days from the making of such demand, the name of such person or persons or corporation so jointly liable." ALA. CODE § 11-47-191(c) (1975).

For a sample notice of claim, please see Appendix A to this paper. When properly completed, the form set forth in Appendix A should satisfy all the requirements of Sections 11-47-23, 11-47-191, and 11-47-192 of the *Code of Alabama* (1975). Nonetheless, even if a notice is less than perfect, "[t]he statute has been given a liberal construction, not requiring technical accuracy, and [the Supreme Court of Alabama] has held that it is sufficient if it informs the authorities of the manner of the injury, the time and place, and the amount claimed, with the nature and character of the injuries." *Maise v. City of Gadsden*, 232 Ala. 82, 84, 166 So. 795, 796 (1936).

2. Immunity from Intentional Torts.

Municipal liability in Alabama is limited to two distinct classes. *See Ellison v. Town of Brookside*, 481 So. 2d 890, 891 (Ala. 1985). Both classifications are found in the text of Section 11-47-190 of the *Code of Alabama*. *See* ALA. CODE § 11-47-190 (1975). One classification provides for municipal liability under the doctrine of *respondeat superior* for injuries resulting from the wrongful conduct of a municipality's agents, officers, or employees. *See id*. The other classification provides for municipal liability arising from the "neglect or carelessness or failure to remedy some defect in the streets, alleys, public ways or buildings." *Id.* Neither of these classifications is meant to create any new cause of action, but rather to limit municipal liability. *Id.* Obviously, in the context of police officers, it is the former, rather than the latter, classification that comes into play.

A municipality may not be held liable for any cause of action "unless such injury or wrong was done or suffered through the *neglect, carelessness or unskillfulness* of some agent, officer or employee of the municipality .... " *Id.* (emphasis added). In other words, a municipality cannot be held liable for intentional conduct. *See Brown v. City of Huntsville, Ala*., 608 F.3d 724, 742 (11th Cir. 2010) (intentional torts); *Hilliard v. City of Huntsville*, 585 So. 2d 889, 892 (Ala. 1991) (wantonness); *Altmayer v. City of Daphne*, 613 So. 2d 366, 369 (Ala. 1993) (willfulness and recklessness).

Even if intentional, malicious, wanton, or reckless conduct is alleged, a municipality is immune from such claims under Section 11-47-190. In *Hilliard v. City of Huntsville*, the Supreme Court of Alabama held that a municipality cannot be held liable for the wanton conduct of its employees. 585 So. 2d at 892. *See also, Hardy v. Town of Hayneville*, 50 F. Supp. 2d 1176, 1192 (M.D. Ala. 1999) ("Because proof of wantonness requires evidence of a reckless or conscious disregard of the rights and safety of others, section 11-47-190 insulates the [municipality] from liability for wantonness."). The *Hilliard* Court reasoned that "[t]o construe this statute to include an action for wanton conduct would expand the language of the statute beyond its plain meaning." *See id.* Therefore, the Court concluded that the *Hilliard* plaintiffs claim of wantonness was properly dismissed.

3. The Interplay of Sections 11-47-190 (Immunity from Intentional Torts) and 6-5-338 (Discretionary Function Immunity).

There is a beneficial paradigm of protection for municipalities for the acts or omissions of their police officers. As stated immediately above, a municipality can only be held liable if its agent acted with neglect, carelessness or

unskillfulness. *See* ALA. CODE § 11-47-190 (1975). Nonetheless, even if the City's agent acted with neglect, carelessness or unskillfulness, a police officer may still be entitled to discretionary function immunity. *See* ALA. CODE § 6-5-338 (1975). For those claims asserted against a municipality based upon vicarious liability, the municipality will enjoy the same immunities as its agent. Under the common law of Alabama, a principal can only be held liable on the basis of *respondeat superior* if liability is found on the part of the agent. *See Gore v. City of Hoover*, 559 So. 2d 163 (Ala. 1990), *overruled on other grounds by Franklin v. City of Huntsville*, 670 So. 2d 848 (Ala. 1995). *See also United Steel Workers of Am. v. O'Neal*, 437 So. 2d 101 (Ala. 1983); *Larry Terry Contractor, Inc. v. Bogle*, 404 So. 2d 613 (Ala. 1981). This common law rule has been held to bar claims against municipalities where the officer or employee was found to have immunity. *See Gore*, 559 So. 2d 163.

It is possible that a plaintiff might argue that an exception exists to the municipality's vicarious discretionary function immunity, but such an argument would be mere folly. It is plain that discretionary function immunity will not stand as a bar to liability when the government actor allegedly acted with malice. Regardless, if the plaintiff claims that the municipality's agent acted in any manner other than negligently, carelessly, or unskillfully, then, under Section 11-47-190, the municipality is immune from liability arising from the acts of its agent.

In sum, if the municipality's agent performs discretionary functions negligently, carelessly, or unskillfully, then, then the municipality is entitled to discretionary function immunity. On the other hand, if municipality's agent performs discretionary functions wantonly (or otherwise intentionally), then the plaintiff has failed to state a claim for which relief can be granted pursuant to Section 11-47-190. If the agent exceeded his authority or the alleged act or omission was not related to the police officer's official duties, then there would be no *respondeat superior* liability at all. In any case, the plaintiff's claims against the municipality would be due to be dismissed. The only way in which a municipality could be held liable for the acts or omissions of its police officer would be if the police officer was not exercising his discretion while acting negligently, carelessly, or unskillfully. Consequently, municipal policies that apply to police officers should be drafted so that they preserve an officer's discretion whenever possible.

4. Immunity from Punitive Damages.

Under Alabama law, punitive damages may not be recovered from a municipality. Section 6-11-26 of the *Code of Alabama* (1975) clearly states "Punitive damages may not be awarded against the State of Alabama or any county or municipality thereof . . . ." ALA. CODE § 6-11-26 (1975). This rule has been upheld in the context of state law claims against municipalities arising from

the acts or omissions of their police officers. *See, e.g., Romero v. City of Clanton*, 220 F. Supp. 2d 1313, 1319 (M.D. Ala. 2002).

II. Liability Under § 1983.

A. Generally.

Under Section 1983, a plaintiff can recover for an alleged injury caused by a constitutional deprivation or otherwise by a violation of the plaintiff's rights secured by federal law. *See* 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id. The alleged wrong must have occurred under the color of law. *See id. See also American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 526 U.S. 40, 143 L.Ed.2d 130 (1999).

Areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because "substantive due process rights are created only by the Constitution." *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (quoting Regents of *Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring)). Therefore, typical state law claims cannot be the basis of recovery under Section 1983.

To recover under Section 1983, the Plaintiff will have to establish more than *de minimis* injury to prove a violation. *See Saucier v. Katz*, 531 U.S. 991, 121 S. Ct. 2151, 2160, 150 L.Ed.2d 272 (2001) (citation omitted).

B. Qualified immunity.

Qualified immunity is the primary tool for responding to a Section 1983 claim against a police officer. "Qualified immunity shields government officials from civil suits in their individual capacities when they perform discretionary functions." *Thrower v. Ziegler*, 12-15071, 2013 WL 1276494 (11th Cir. Mar. 28, 2013) (citing *Andujar v. Rodriguez*, 486 F.3d 1199, 1202 (11th Cir. 2007)). The Supreme Court of the United States explained the purpose of the qualified immunity doctrine in *Pearson v. Callahan*:

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L.Ed.2d 1068 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978), for the proposition qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law").

555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). A qualified immunity defense should be argued as early as possible because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted).

The United States Court of Appeals for the Eleventh Circuit has recently repeated the formula for analyzing whether an individual is entitled to qualified immunity.

> "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). We look to two factors in resolving whether a government official is entitled to qualified immunity. A court must decide (1) whether the facts that a plaintiff alleged make out a violation of a constitutional right, and (2) whether the right was clearly established at the time of the defendant's alleged misconduct. *Id.* It is not mandatory to consider the two factors in a particular order, and courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236.

S.S. ex rel. Montgomery v. Bolton, 12-14932, 2013 WL 2494215 (11th Cir. June 11, 2013). "Once the defendant establishes that he was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to establish that the qualified immunity defense does not apply." *Bennett v. Chitwood*, 12-15426, 2013 WL 2257124 (11th Cir. May 23, 2013) (citing *Holloman v. Harland*, 370 F. 3d 1252, 1267 (11th Cir. 2004)).

The most direct path for a plaintiff to demonstrate a "clearly established" right is to cite case law on point. However, a plaintiff can "show the violation of a clearly established right by describing conduct 'so far beyond the hazy border between' acceptable and unacceptable conditions the official had to know he was violating the Constitution even without caselaw on point." *Carter v. DeKalb Cnty., Ga.*, 12-15903, 2013 WL 2450738 (11th Cir. June 4, 2013). Many of the pronouncements from the United States Court of Appeals for the Eleventh Circuit and from the Supreme Court of the United States speak in terms of "clearly established statutory or constitutional rights of which a reasonable person would have known." *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), *quoted in Thrower*, 2013 WL 1276494 at *1. The import and effect of the "reasonable person" language is that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Thrower*, 2013 WL 1276494 at *1 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)).

C. Claims Against the Municipality Based upon the Doctrine of *Respondeat Superior*.

It is well established that a municipality may not be held liable for claims under Section 1983 that are based upon the doctrine of *respondeat superior*. *See Monell v. Dep't of Soc. Serys.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L.Ed

611 (1977). Therefore, only claims alleging that a municipality's policy or custom caused the alleged violation can stand against the municipality. *See Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997) (citing *Monell*, 436 U.S. 658, 98 S. Ct. 2018).

D. Supervisory Liability.

A supervisor cannot be held liable on the basis of *respondeat superior* for the actions of the employee. *See Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003) (citing *Belcher v. City of Foley*, 30 F.3d 1390, 1396 (11th Cir.1994)). The supervisor must have either "personally participate[d] in the alleged constitutional violation" or acted in such a way that caused the alleged constitutional violation. *See id.* (quoting *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir.1990)). A supervisor "can be held liable under [*Bivens*] when a reasonable person in the supervisor's position would have known that his conduct infringed the constitutional rights of the plaintiff, and his conduct was causally related to the constitutional violation committed by his subordinate." *Braddy v. Florida Dep't of Labor & Empl. Sec.*, 133 F.3d 797, 802 (11th Cir.1998) (emphasis added) (alteration in original) (quoted in *Dalrymple*, 334 F.3d at 995). The Eleventh Circuit Court of Appeals has applied a "deliberate indifference" standard to a failure to supervise and/or train claim. *See Gold v. City of Miami*, 151 F.3d 1346, 1352 (11th Cir. 1998) (applying the deliberate indifference standard to a failure to supervise claim). *See also City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 102 L.Ed.2d 412, 109 S. Ct. 1197, 1205 (1989); *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 411, 137 L.Ed.2d 626, 117 S. Ct. 1382, 1392 (1997) (applying the deliberate indifference standard to an inadequate screening claim). As the Eleventh Circuit Court of Appeals explained in *Dalrymple v. Reno*,

> A causal connection can be established "when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so," [*Braddy*, 133 F.3d at 802], or when the supervisor's improper "custom or policy . . . resulted in deliberate indifference to constitutional rights," *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir.1991). A causal connection can also be established by facts which support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so. *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1561 (11th Cir. 1993) (finding no supervisory liability in the absence of such an inference).

Dalrymple, 334 F.3d at 995-96.

E. Punitive Damages.

A municipality cannot be held liable for punitive damages in a Section 1983 claim. In *City of Newport v. Fact Concerts, Inc.*, the United States Supreme Court held "that a municipality is immune from punitive damages under 42 U.S.C. § 1983." *City of Newport v. Fact Concerts. Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762 (1981). *See also City of Tarrant v. Jefferson*, 682 So. 2d 29, 30 (Ala. 1996) ("[F]ederal law prohibits a § 1983 award of punitive damages against a municipality..."). This rule also applies to municipal officials in their official capacities because those claims are tantamount to suing the municipality, *qua* municipality. *See Brandon v. Holt*, 469 U.S. 464, 473, 105 S. Ct. 873, L.Ed.2d 878 (1985) (Suit against director in his official capacity was in effect suit against the city.); *Busby v. Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (Section 1983 suits against municipal officers in their official capacity and direct suits against municipalities are functionally equivalent.); *Holley v. Roanoke*, 162 F.Supp. 2d 1335 (M.D. Ala. 2001) (Section 1983 claims against city officials in their official capacity were "functionally equivalent" to claims against the city."). Because punitive damages against a municipality are not permitted in a Section 1983 claim, all claims for punitive damages against a municipality and individual defendants in their official capacities arising under Section 1983 are due to be dismissed.

F. Official Capacity Claims.

When asserted along with claims against the municipality, claims against police officers or other municipal agents in their official capacities are due to be dismissed. Claims against the municipality's agents in their official capacity are tantamount to suing the municipality, *qua* municipality. *See Brandon v. Holt*, 469 U.S. 464, 473, 105 S. Ct. 873, L.Ed.2d 878 (1985) (Suit against director in his official capacity was in effect suit against the city.); *Busby v. Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (Section 1983 suits against municipal officers in their official capacity and direct suits against municipalities are functionally equivalent.); *Holley v. City of Roanoke. Alabama*, 162 F.Supp. 2d 1335 (M.D. Ala. 2001) (Section 1983 claims against city officials in their official capacity were "functionally equivalent" to claims against the city.").

The Eleventh Circuit Court of Appeals has specifically decided the question of whether a claim against a police officer in his official capacity should be dismissed when the claim has also been made or could have been made against the municipality. *See Busby*, 931 F.2d at 776. In *Busby v. Orlando*, Busby sued the City of Orlando and several of its agents, including its police chief, in their individual and official capacities. *See id.* at 770. The Eleventh Circuit recognized that

> [b]ecause suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government officials, because local government units can be sued directly (provided, of course, that the public entity receives notice and an opportunity to respond).

Id. at 776. Therefore, the Eleventh Circuit held that the claims against the police chief in his official capacity were properly disposed of by directed verdict. *Id.*

In *Holley v. City of Roanoke. Alabama*, the mayor of Roanoke and several other municipal officials were sued under Section 1983 in both their individual and official capacities. *See Holley*, 162 F.Supp. at 1341 n.2. In that case, the United States District Court for the Middle District of Alabama held that

> Claims against municipal officers in their official capacity are "functionally equivalent" to claims against the entity they represent. *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). To retain this suit as one against Mayor Ziglar and the Council Defendants in their official capacity and also as one against the City of Roanoke would be "redundant and possibly confusing to the jury." *Id.* The court, therefore, will dismiss the section 1983 discrimination claims against Mayor Ziglar and the Council Defendants in their official capacities. *See id.* (affirming directed verdict as to official capacity defendants where city remained as defendant).

Hollev, 162 F. Supp. 2d at 1341 n.2.

G. Claims against "Police Departments."

Often a plaintiff will file a lawsuit and name a municipality's "police department" as one of the defendants, but a municipal police department is not a separate entity that is subject to suit. Rather, it is merely a "department" of the municipality. Therefore, claims against Alabama "police departments" have been recognized as a nullity.

> In order to bring a viable § 1983 claim against a defendant, the defendant sued must be an entity that is subject to being sued. *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992). The capacity

> of a party to be sued is "determined by the law of the state in which the district court is held...." FED.R.CIV.P. 17(b); *See Dean*, 951 F.2d at 1214.
>
> A city's police department in Alabama, however, is not a suable entity or a proper party under state law or for § 1983 purposes. *Hawkins v. City of Greenville*, 101 F. Supp. 2d 1356, 1363 (M.D.Ala.2000); *accord Dean*, 951 F.2d at 1214 ("Sheriff's departments and police departments are not usually considered legal entities subject to suit."); *Eddy v. Miami*, 715 F.Supp. 1553, 1556 (S.D.Fla. 1989) ("Where a police department is an integral part of the city government as the vehicle through which the city government fulfills its policing functions, it is not an entity subject to suit."); *Reese v. Chicago Police Dept.*, 602 F.Supp. 441, 443 (N.D.Ill. 1984) (finding a police department does not have a legal existence separate from the city and, therefore, is not suable entity). Inasmuch as the City of Mobile Police Department is not a suable entity under Alabama law, the claim against Defendant City of Mobile Police Department is frivolous and due to be dismissed.

Lee v. Wood, CV-04-00710-BH-B, 2007 WL 2460756 (S.D. Ala. Aug. 27, 2007). Accordingly, any claims brought against a "police department" are due to be dismissed.

Biographical Information about the Author.

Ben Goldman is a member in the law firm of Hand Arendall LLC, a full-service civil firm with offices throughout Alabama in Birmingham, Mobile, Athens, and Fairhope and in Jackson, Mississippi. Since 2001, Goldman has practiced in Birmingham as a litigator, successfully defending clients through all stages of federal and state court litigation, including trial and appeal. A member of the Alabama Association of Municipal Attorneys since beginning practice, Goldman presently holds public appointments as the City Attorney and Prosecutor for Tarrant, Alabama, and as the Town Attorney for Mulga, Alabama. In addition, he has represented over fifty Alabama municipalities, utilities, development boards, and other governmental entities in various matters. Goldman has also served as corporate counsel to local, regional, and national businesses, representing them in such matters as contract negotiations, employment issues, and collections, and he has represented and advised lenders and large creditors in bankruptcy proceedings. Currently, Goldman is lead counsel for his firm in representing one of the largest creditors (approximately $100 million exposure) in the largest municipal bankruptcy in U.S. history, the Jefferson County, Alabama, bankruptcy.

In 2012, Goldman was recognized by the International Municipal Lawyers Association with the Daniel J. Curtin Young Public Lawyer of the Year Award as the top public lawyer under 40 in the U.S. and Canada. Goldman was selected by the *Birmingham Business Journal* as one of the "2012 Top 40 Under 40," by *B-Metro* as a "Rising Star of the Bar" in its 2013 inaugural class, and *Super Lawyers* has recognized him in multiple years as an "Alabama Rising Star." One of Goldman's municipalities, the City of Tarrant, was awarded the Alabama League of Municipalities' 2012 Municipal Quality of Life Award for cities of its size for its submission, "Making Blight Right." Currently, he is President of the Board of the Legal Aid Society of Birmingham, a Director on the Board of the Birmingham Hospitality Network, and (thanks to being the father of two daughters) a member of the Girl Scouts of North-Central Alabama's Board of Directors.

APPENDIX A
NOTICE OF CLAIM FORM

To: _____, Clerk of the City of _____
Address

_____, Mayor of the City of _____
Address

STATE OF ALABAMA)
COUNTY OF _____)

NOTICE OF CLAIM

Comes now the undersigned and, after being duly sworn, makes the following Notice of Claim to the City of _____ ("City") pursuant to Sections 11-47-23, 11-47-191, and 11-47-192 of the *Code of Alabama* (1975):

My name is _____ [INJURED PARTY'S NAME]. I am over the age of 19 years and I make this Notice of Claim based upon my own personal knowledge, information and belief.

I am represented by _____ [ATTORNEY'S NAME], attorney at law, _____ [FIRM], _____ [ATTORNEY'S ADDRESS]. I request that the City direct all future communications of whatever kind to my attorney.

STATE SUBSTANTIALLY THE MANNER IN WHICH THE INJURY WAS RECEIVED.
STATE THE DAY AND TIME WHERE THE ACCIDENT OCCURRED.
STATE THE PLACE WHERE THE ACCIDENT OCCURRED.
STATE THE DAMAGES CLAIMED.

In accordance with Section 11-47-191(c) of the *Code of Alabama* (1975), I demand of the Mayor the name of such other person or persons or corporations as may be jointly liable with the City to me as the injured party, and I demand that this information be furnished within the time required by law.

Further Affiant saith not.

_____
[INJURED PARTY'S NAME]

STATE OF ALABAMA)
COUNTY OF _____)

Before me, the undersigned Notary Public in and for the State of Alabama at Large, personally appeared _____ [INJURED PARTY'S NAME], and after being first duly sworn, did depose and say that the statements in the foregoing Notice of Claim are true and correct.

Given under my hand and official seal this the _____ day of _____, _____.

_____
Notary Public
My commission expires: _____

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the above and foregoing has been served upon City Clerk _____ via certified article number _____, and Mayor _____ via certified article number _____, by placement of same in the U.S. Mail, properly addressed, postage prepaid, return receipt requested on this the _____ day of _____, _____.

_____
OF COUNSEL

NAME OF ATTORNEY
FIRM NAME
ADDRESS
CITY
PHONE
FAX
EMAIL

--- OR FOR HAND DELIVERY ---

CERTIFICATE OF RECEIPT

Receipt is acknowledged of this Notice of Claim on behalf of the City Clerk of the City of _____ on this the _____ day of _____, _____.

_____
FOR THE CITY CLERK

Receipt is acknowledged of this Notice of Claim on behalf of the Mayor of the City of _____ on this the _____ day of _____, _____.

_____
FOR THE MAYOR