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Alabama's Statutory Cap on Damages Applicable to Governmental Entities

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INTRODUCTION

It is hard to believe that in the year 2014, there is still a cloud of controversy over the Alabama law that provides a statutory cap on damages for claims of bodily injury, death and property damage against governmental entities that was enacted almost 40 years ago. After the enactment of Ala. Code § 11-93-2 in 1977, there was initially some unsuccessful litigation contesting the statutory cap on grounds that it violated the right of citizens to a trial by jury. There have been some other minimal attacks on the statutory cap over the years without any real success. After several unsuccessful direct attacks on the statutory, there have been recent attempts to circumvent the statutory cap altogether by suing municipal and county employees in their individual capacities, even when those employee's acts or omissions were clearly committed within the line and scope of their employment with their governmental employers. The theory submitted by litigants in those situations has been that the statutory cap applies to the public coffers and to the assets of cities and counties and that by suing an employee individually, the plaintiff is not actually seeking to recover against the city or county or execute on any assets of the city or county but rather seeking to recover against any insurance coverage that might exist to cover the city or county employee when sued individually. To fully appreciate where we currently stand on these issues, it is important to have some knowledge of the background leading up to where we are today. The purpose of this outline is to provide a general background in this regard.

MUNICIPALITIES AND COUNTIES IN ALABAMA AT ONE TIME ENJOYED IMMUNITY FROM TORT LIABILITY

For many years in Alabama, municipal and county liability was predicated upon the negligent performance of a proprietary, as opposed to a governmental, function. Hilliard v. City

of Huntsville, 585 So.2d 889 (Ala. 1991). The rule in Alabama for many years was that municipalities and counties were immune to tort liability in the exercise of governmental, as opposed to proprietary functions. A governmental function was one that was essential to its existence, in the sense of serving the public at large, and performed for the common good of all. A proprietary function is one that is executed for the special benefit and advantage of the citizens. The distinction between governmental and proprietary acts, however, lent itself more to definition than to application. Garbage collection, for example, was classified as governmental, while sewer disposal was deemed proprietary. Repair and maintenance of streets was deemed proprietary, but operating a street sweeper to keep the streets clean was governmental.

The Alabama Legislature enacted legislation that appeared to diminish the effect of municipal immunity in 1907. That statute is the predecessor of what is now Ala. Code (1975) § 11-47-190. However, for many years after its enactment, that statute was interpreted by the courts to continue to allow municipal liability as to proprietary acts but not as to governmental acts. The appellate courts of this state's interpretation in that regard seemed to perpetuate municipal immunity just as it had existed prior to the enactment of that statute, and both trial courts and appellate courts of the State of Alabama continued to labor over the distinction between proprietary and governmental acts.

THE ALABAMA SUPREME COURT'S ABOLISHMENT OF IMMUNITY FOR MUNICIPALITIES AND COUNTIES

In 1975, the Alabama Supreme Court abolished the doctrine of municipal immunity in the case of Jackson v. City of Florence, 294 Ala. 592 (1975). That case appeared to recognize the full effect of those statutes that had long provided for municipal liability but had been interpreted otherwise. The Alabama Supreme Court's ruling in Jackson eliminated the

distinction between governmental and proprietary functions, making municipalities liable for the negligent performance of a number of activities for which they had previously been immune. Jackson, supra at p. 74. In Jackson v. Florence, an action was brought to recover from a city and several of its police officers for injuries which the officers allegedly negligently or willfully inflicted on the plaintiff during and following his arrest. The Circuit Court of Lauderdale County dismissed the plaintiff's complaint, and the plaintiff appealed the dismissal of his complaint to the Alabama Supreme Court. On appeal, the Alabama Supreme Court noted that, in many prior cases, the only clue as to whether a particular function was determined to be governmental or proprietary was found only in cases expressly declaring that a particular function fell within one or the other category. The Court then noted the Alabama Legislature's 1907 legislation which is now codified at Ala. Code § 11-47-190, and determined that the courts of Alabama had nevertheless continued to distinguish between governmental functions and proprietary functions, which had the effect of making the legislative enactment of 1907 ineffective insofar as changing the law as it had been judicially declared in the state since 1854. The Court stated that it had the responsibility for correcting what had been universally condemned as a bad rule of law in the area of municipal immunity. The Court stated that the rule of municipal immunity could no longer be rationally defended. The Court recognized the national trend toward abolishing governmental immunity as to various governmental entities and destroyed any remaining foundations in the logic for the rule of immunity by adopting the following language:

> It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt . . . [municipalities] from liability for their torts, and that the entire burden of

> damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distribute it among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.

See Jackson v. City of Florence at pages 598-599. The Court further stated in abolishing the doctrine of municipal immunity, Alabama now joined a growing number of states in abolishing governmental immunity as to various governmental units. In its decision, the Court also stated the following:

> In deciding, as we do, that municipal immunity for tort is abolished in this state after the date of this opinion, we recognize the authority of the Legislature to enter the entire field, and further recognize its superior position to provide with proper legislation any limitations or protection it deems necessary in addition to those already provided . . .

See Jackson v. City of Florence at page 600. The Jackson court expressed the hope that the Alabama Legislature would provide, through legislation, additional limitations and protections for governmental bodies.

The same day that the Jackson v. City of Florence case abolished immunity for municipalities, the Alabama Supreme Court released another decision of Lorence v. Hospital Board of Morgan County, 294 Ala. 614 (1975) which abolished tort immunity for counties by holding that counties did not enjoy governmental immunity from suit either with respect to acts arising from performance of their governmental or their proprietary functions.

THE ALABAMA LEGISLATURE'S RESPONSE TO THE ABOLISHMENT OF IMMUNITY FOR MUNICIPALITIES AND COUNTIES

Thereafter, the Alabama Legislature, presumably in response to the two 1975 Supreme Court opinions abolishing tort liability immunity for cities and counties, enacted

several statutes restoring some form of limited liability and protections to cities and counties. For example, the statute setting a limitation on damage for tort recovery against cities and counties in the sum of $100,000 per person and $300,000 per accident for bodily injury or death, was enacted. See Ala. Code (1975) § 11-93-2. In addition, the Legislature passed a statute prohibiting punitive damages from being rendered against cities and counties. See Ala. Code (1975) § 6-11-26. The Legislature also passed a notice of claim statute for cities and counties which basically provided another layer of protection against tort liability for cities and counties. See Ala. Code (1975) § 6-5-20, § 11-12-5, and § 11-12-8. The Legislature also has enacted a statute limiting the venue where actions may be brought against cities and counties. See Ala. Code § 6-3-11.

Since the statutory cap on liability damages for bodily injury and death against cities and counties was enacted in 1977, there have been numerous attempts defeat the statutory cap, or in the alternative, to circumvent or get around the statutory cap. Initially, there were many claims that the statutory cap was unconstitutional because it allegedly deprived individual plaintiffs a right to a jury trial. There have been several significant Alabama Supreme Court decisions, worthy of mention and consideration, regarding various attempts of plaintiffs to circumvent the statutory cap on damages against cities and counties.

ALABAMA SUPREME COURT CASES SEEKING TO CIRCUMVENT THE STATUTORY CAP

Smitherman v. Marshall County Commission, 746 So.2d 1001 (Ala. 1999)

On August 4, 1995, Jamie Smitherman, a minor, was a passenger in an automobile driven by Robin Kilpatrick. As the automobile traveled along a Marshall County maintained road, Kilpatrick lost control of the vehicle, which then left the roadway, ran upon a pile of dirt, became airborne and landed in a creek. As a result of the accident, the passenger, Jamie Smitherman, suffered injuries that rendered her a quadriplegic. Jamie Smitherman, along with her mother, sued Marshall County; Marshall County Commission; and past and present Marshall County Commissioners and Marshall County Engineer Bob Pirando, acting individually and in their official capacities. In their complaint, the plaintiffs alleged that the Marshall County defendants were under a legal duty to maintain the roadway involved in the accident and that they had been provided with notice of a dangerous condition on the roadway and that they had negligently or wantonly failed to take the action necessary to keep the road in a reasonably safe condition.

After some discovery was completed in the case, the plaintiffs moved for a partial summary judgment, seeking in part, a ruling from the trial court that the statutory governmental-entity damages cap of § 11-93-2, Ala. Code (1975) did not apply to county employees in their individual capacities nor did it apply to county employees sued in their official capacities. The county defendants responded with their own summary judgment motion. Thereafter, the trial court partially granted the county defendants' motion for summary judgment, dismissing the plaintiffs' individual capacity claims against the Marshall County Engineer as well as individual claims against the members of the County Commission. However, in its order the trial court held that the plaintiffs' official capacity

claims against the Marshall County defendants were not limited by Alabama's statutory cap on damages applicable to governmental entities.

On appeal, the Supreme Court affirmed the trial court's summary judgment motion for the county engineer and commissioners in their individual capacities stating that there was no evidence that County Engineer Bob Pirando acted outside the line and scope of his employment as county engineer and that Cook v. St. Clair County, supra, clearly held that county commissioners could be sued only in their official capacities and not individually.

On appeal, the plaintiffs primarily focused on their claims that they could sue County Engineer Bob Pirando and the members of the County Commission in their official capacities and still get around the statutory cap on injuries and damages set out in § 11-93-2, Ala. Code (1975). In support of their argument, the plaintiffs had a very creative and, on its face, persuasive argument to support their claim that they could get around the statutory cap by suing county employees in their official capacities. The plaintiffs claimed that Alabama's statutory cap law applied to governmental entities only and not their employees. § 11-93-2 provides as follows:

> The recovery of damages under any judgment against a governmental entity shall be limited to $100,000 for bodily injury or death for one person in any single occurrence. Recovery of damages under any judgment or judgments against a governmental entity shall be limited to $300,000 in the aggregate where more than two persons have claims or judgments on account of bodily injury or death arising out of a single occurrence.

The plaintiffs claimed that it was without dispute and clear that the statutory cap applied only to governmental entities as that term was defined under the statute and not to county employees or elected officials such as county commissioners who were not included under the definition of governmental entities. The plaintiffs submitted that § 11-93-1 (1),

which contained the definition portion of the statutory cap law, defined government entity as follows:

> GOVERNMENT ENTITY. Any incorporated municipality, any county, and any department, agency, board, or commission of any municipality or county, municipal or county public corporations, and any such instrumentality of instrumentalities acting jointly. "Governmental entity" shall also include public school boards, municipal public school boards, and city-county school boards when such school boards do not operate as functions of the State of Alabama. Governmental entities shall also mean county or city hospital boards when such boards are instrumentalities of the municipality or county or organized pursuant to authority from a municipality or county.

Immediately thereafter, § 11-93-1 (2) defines employee as follows:

> EMPLOYEE. An officer, official, employee or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of any governmental entity in any official capacity, temporarily or permanently, in the service of the governmental entity, whether with or without compensation, but the term "employee" shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the government entity to which this chapter applies in the event of a claim.

On appeal in Smitherman, the plaintiffs argued that the Legislature could easily have made certain that the $100,000 was applicable to employees of a governmental entity, including "employee" in the definition of "governmental entity," but it did not do so, but rather made the statutory cap available only to governmental entities. In its initial decision in the Smitherman case, the Alabama Supreme Court agreed with the plaintiff's official capacity arguments and entered a decision reversing the trial court and holding that county employees sued in the official capacities were in fact not governmental entities to which the statutory cap applied, and that plaintiffs could basically get around the statutory cap by suing municipal and county employees in their official capacities.

As you can imagine, the Smitherman opinion shocked cities, counties, and other governmental entities, and their attorneys who had routinely defended them. An application for rehearing was then filed by the county defendants and amicus briefs were filed on behalf of Mobile County, the Association of County Commissions, the Alabama Trial Lawyers Association, Shelby County, Alabama, Madison County, Alabama, and others. After several months in the Alabama Supreme Court on rehearing, the Alabama Supreme Court withdrew its initial opinion entered five months earlier and entered a substituted opinion holding in part that claims against county commissioners and employees in their official capacity were in fact subject to the statutory cap. The Court indicated that there had been apparent confusion in the past by several of the Supreme Court's cases that discussed the application of the statutory cap on damages when defendants other than government entities were sued. After reviewing many of those previous decisions in its opinion, the Court concluded that to hold that the statutory cap of § 11-93-2 did not apply to claims against the county commissioners and county engineer in their official capacities would effectively repeal that Code section because plaintiffs would then simply file their actions against employees of the county government entity instead of the government entity itself. The Court stated that, in construing acts of the Legislature, it presumed that the Legislature "does not enact meaningless, vain or futile statutes." Even though the plain meaning of the statutory cap law did not include employees of a county or municipality in the definition of a government entity to which the statutory cap applied, the Court held that they must interpret a statute in a way that was consistent with their understanding of the Legislature's intent when it gives a meaningful effect to that intent.

Suttles v. Roy, 75 So.3d 90 (Ala. 2010).

After the Smitherman decision of the Alabama Supreme Court in 1999, there was about a ten-year period that expired without any significant attacks on Alabama's statutory cap. However, in 2010, the Supreme Court addressed an appeal from the Circuit Court of Jefferson County that made a direct attack on the applicability of the statutory cap by claiming the statutory cap did not apply to municipal or county employees sued in their individual capacities. Although that argument was addressed somewhat in the Smitherman appeal, it was not the main focus of that appeal.

In May of 2006, the plaintiff, Trudy Roy, was walking along Central Avenue in Homewood, Alabama. When she approached the corner of 29th Court Street and Central Avenue, several Homewood police officers on motorcycles were stopped at the intersection directing traffic. Apparently, a fundraising event known as the "Torch Run" was underway, and participants were about to proceed through that intersection. Roy alleges that she was given permission by one of the police officers to cross the intersection. As she did so, she was struck by a motorcycle driven by Suttles, who at the time was employed by the City of Homewood Police Department and, without dispute, acting within the line and scope of his employment at the time of the accident. Roy contended that, at the time of the collision, Suttles "was driving at a high rate of speed while conducting 'leap frog' maneuvers from intersection to intersection to control traffic during in the Torch Run event." As a result of the accident, Ms. Roy suffered numerous injuries.

On April 14, 2007, Roy filed a complaint in the Circuit Court of Jefferson County seeking damages from Homewood, Suttles, and several fictitious defendants, claiming that they had caused her injuries. She also alleged that Homewood was vicariously liable for Suttles' actions and for the actions of certain fictitiously named defendants. Roy named Suttles in both his official capacity as Homewood police officer and in his individual capacity. Suttles and Homewood separately answered Roy's complaint. In September of 2007, Officer Suttles and Homewood filed a joint motion seeking a partial summary judgment on the issue of damages. Specifically, they alleged that, at the time of the accident, it was undisputed that Suttles was acting in the line and scope of his employment as a police office for the City of Homewood. Accordingly, Suttles and Homewood contended that, pursuant to § 11-93-2 and § § 11-47-24(a) and -47-190, the maximum amount of damages that Ms. Roy could recover in her action against them was $100,000. Suttles subsequently also moved for summary judgment, claiming that he was entitled to State-agent and other immunity as to the claims alleged against him in his individual capacity.

The plaintiff Roy opposed Homewood and Suttles' motion for a partial summary judgment on the damages issue, arguing that, although the damages for claims against Homewood and against Suttles in his official capacity may be capped at $100,000, the cap did not apply to the claim against Suttles in his individual capacity.

A subsequent order held that the plaintiff Roy could not recover against the City of Homewood in an amount exceeding the statutory cap provided under § 11-93-2, Ala. Code (1975). In that same order, the Court denied Officer Suttles' motion for summary judgment to the extent that it attempted to limit his liability in his personal or individual capacity to

$100,000. The Court also held that there were genuine issues of fact for a jury to decide whether Officer Suttles was liable for claims against him in his individual capacity and as to whether he was entitled to any type of immunity.

The trial court subsequently certified its summary judgment order as appropriate for interlocutory appeal under Rule 5, Alabama Rules of Appellate Procedure. Thereafter, Homewood and Officer Suttles petitioned the Alabama Supreme Court for interlocutory appeal.

On appeal, the Supreme Court noted Homewood and Suttles' argument that because the accident occurred while Suttles was working within the line and scope of his employment for Homewood, the plaintiff Roy could not pursue and action against Suttles in his individual capacity. In addition, Suttles and Homewood argued that, even if Alabama law recognized a direct action against Officer Suttles in his individual and personal capacity, notwithstanding the plaintiff's concession that Suttles' alleged actions were performed by him in the line and scope of his employment, Alabama nevertheless caps damages at no more than $100,000 against Homewood and Suttles pursuant to § 11-47-190 and § 11-93-2. According to the Supreme Court, the sole argument submitted by the City of Homewood and Officer Suttles' on that issue was based upon an immunity argument.

In its decision, the Alabama Supreme Court analyzed several previous cases including the case of Smitherman v. Marshall County. The Alabama Supreme Court noted that, insofar as plaintiff Roy's action sought damages against Suttles in his official capacity, that claim was effectively a claim against the City of Homewood and the statutory cap of § 11-93-2 applied to any recovery against Homewood and Suttles in his official capacity of $100,000.

However, with regard to whether the statutory cap applied to the plaintiff's individual claims against Suttles, the Court stated that § 11-93-2 capped the damages that one may recover "against a governmental entity" and that the policy of § 11-93-2 was to "preserve and to protect the public coffers, for the benefit of all citizenry. . . ." The Court further stated that, because a claim against a county employee or municipal employee in his or her official capacity is necessarily a claim against the county or municipality, damages for such claims are capped by § 11-93-2 at $100,000. However, the Supreme Court noted that a claim against an employee in his or her individual capacity does not seek to recover damages from the public coffers or governmental entity; and, accordingly, by its plain language, § 11-93-2 had no application in cases involving claims against public employees individually.

The Court also noted Homewood and Suttles' contention that, at the time of Roy's injuries, Suttles was acting in the line and scope of his employment, and there was no factual distinction between Roy's claims against Suttles in his official capacity and his individual capacity. The Supreme Court also noted the argument of Suttles and Homewood that it made no sense at all for damages sought against him in his official capacity to be capped, while damages sought against him in his individual capacity were not. The Court, however, noted that there was no case or statutory authority submitted for the argument advanced by the City of Homewood and Suttles that the Supreme Court or the trial court should consider the individual claim against Suttles as, in substance, an official-capacity claim subject to the cap of § 11-93-2. The Court noted that, when no legal authority is cited or argued, the effect is the same as if no argument had been made. The Court concluded that accordingly, Homewood and Suttles had not demonstrated that the trial court had erred in denying their

motion for summary judgment on the issue of whether the statutory cap applied to the plaintiff's claims against Suttles in his individual capacity. The Court held that the trial court's denial of Homewood and Suttles' motion for summary judgment as to the claims against Suttles in his individual capacity was affirmed.

As with the Smitherman case ten years earlier, the first Suttles opinion got the attention of all municipalities, counties, and public employees, including peace officers and firefighters. When a decision was made by Homewood and Suttles to seek rehearing, numerous amicus briefs were filed by various public entities in support of Homewood and Suttles' Application for Rehearing. Virtually all of the amici curiae argued on rehearing that to allow the plaintiff to exceed the statutory cap by suing a public employee individually would, in effect, be contrary to the Supreme Court's earlier decisions in Cook v. St. Clair County and Smitherman v. Marshall County. Several amici curaie made persuasive arguments as to why a governmental employee should not be liable individually for acts or omissions that were clearly committed while in the line and scope of their employment. In addition, the amici curiae argued that the Court's initial decision allowing the plaintiff to exceed the statutory cap by simply suing a public employee individually, for acts clearly performed in the line and scope of their employment with their governmental employer, would make it difficult, if not impossible, to recruit, hire, and retain good and qualified employees who would in essence be risking their own personal assets for torts that occurred within the line and scope of their employment with their public employers.

Approximately one year and two months after its original decision of May 21, 2010, the Alabama Supreme Court issued a decision overruling the application for rehearing and

slightly modifying its earlier decision. In a somewhat rare move, Justice Shaw who authored the original May 21, 2010, opinion concurred in overruling the application for rehearing but also entered a separate special concurring opinion. In his special concurrence, Justice Shaw stated that the reason for his special concurrence was to "write specially to address some of the concerns expressed by the parties and amici curiae in briefs filed on application for rehearing." Suttles at page 100.

In the special concurrence, Justice Shaw indicated that, in their initial appeal, Homewood and Suttles offered on a very limited argument on the issue of whether Suttles, who was acting in the line and scope of his employment at the time of the incident made the basis of the underlying action, could be sued in his individual capacity. Justice Shaw indicated that Homewood and Suttles focused their argument on the rationale of the Alabama Supreme Court's decision in Ex parte Hale, 6 So.3d 452 (2008), a decision involving immunity from suit afforded sheriffs' deputies under the Alabama Constitution. Suttles at page 101. Justice Shaw further noted that Homewood and Officer Suttles argued the case of Smitherman v. Marshall County for the first time in their reply brief and that arguments and issues raised for the first time in a reply brief were not properly before the Court and therefore could not be considered. The Court then attempted to try to distinguish the facts in Smitherman from the facts in the Suttles case.

Perhaps most importantly, Justice Shaw noted that numerous amici curiae briefs had been filed in support of granting a rehearing in this case. Justice Shaw noted that many of the briefs contained arguments that there were several reasons for holding that acts performed by a municipal officer in the line and scope of his employment could not form the grounds for

an individual-capacity claim against such an officer. Justice Shaw stated, however, those issues and arguments raised by the amici curiae, however persuasive, were not argued by the original parties to the case in initial briefs and therefore could not be considered for the first time on rehearing. Justice Shaw then discussed several arguments made by the amici curiae and stated why several of their arguments misinterpreted the Court's initial opinion in this case. Justice Shaw specifically stated that the original opinion in the Suttles case did not overrule Cook v. St. Clair County or Smitherman v. Marshall County. Justice Shaw also noted that several amici curiae had argued persuasively that Suttles should not be sued in his individual capacity for acts done in the line and scope of his employment but that since those issues were not raised by Homewood and Suttles in their original brief, the Court's original opinion did not address those issues and "resolution of that issue will have to wait until another day." The Court stated that a decision on those separate issues raised as to why a public employee should not be sued in his individual capacity for work done in the line and scope of his employment would have to wait until they were actually presented to the Court by the parties to another proceeding properly before the Court. Suttles at pages 104-105.

Accordingly, most parties reading the Suttles special concurrence by Justice Shaw came away from that case with the understanding that many of the good arguments raised by various amici curiae as to why Suttles and other public employees should not be able to be sued individually for acts in the line and scope of their employment were not considered or addressed in the Suttles case but would be considered by the Alabama Supreme Court and given due consideration by the Court once those issues were properly before the Court in another appeal.

Rolando Stallworth and the Birmingham-Jefferson County Transit Authority v. Benjamin McDaniel, Alabama Supreme Court Case No. 1101018 (April 13, 2012)

This case arose out of a single-vehicle accident that occurred on May 8, 2010. Around 4:00 a.m. on that day, a collision occurred between McDaniel, a pedestrian, and a Birmingham-Jefferson County Transit Authority Bus operated by Rolando Stallworth. That accident took place in downtown Birmingham. Shortly before the accident, McDaniel had driven his car from his place of employment and parked his car near the intersection where the accident occurred. McDaniel planned to walk from his parking space to a Wachovia Bank branch a few blocks away. McDaniel testified that, when he came to the intersection of Fifth Avenue and 17th Street North, where the accident occurred, he stopped at a corner to wait for the traffic lights in the pedestrian walk to signal a change. McDaniel claimed that he waited at the intersection, and when the pedestrian walk light came on, he began to cross the street within the crosswalk. While in the crosswalk, McDaniel was struck by a bus making a right-hand turn onto 17th Street.

On June 23, 2010, McDaniel filed a complaint in the Circuit Court of Jefferson County and did not demand a jury trial. The complaint asserted claims of negligence and wantonness against Stallworth and the Birmingham-Jefferson County Transit Authority (BJCTA) as Stallworth's employer – via the doctrine of *respondeat superior*, as well as claims against the BJCTA for negligent and wanton hiring, training and supervision of Stallworth. The complaint asserted that McDaniel was suing Stallworth only "in his individual capacity" yet also stipulated that Stallworth was working "within the line and scope of his employment" with the BJCTA at the time of the incident at issue.

On February 17, 2011, the trial court entered a partial summary judgment order, finding that the BJCTA was a "governmental entity" and that any judgment against it would be limited to $100,000 pursuant to Ala. Code (1975) § 11-93-2. That order also held that any successful claim against Stallworth in his "individual capacity" would not be subject to the cap established by § 11-93-2.

A non-jury bench trial of this case began on February 28, 2011, before Birmingham Circuit Judge Scott Vowell. It was undisputed at the trial that McDaniel's claims against Stallworth were only asserted against him in his "individual capacity" even though McDaniel admitted that Stallworth was "within the line and scope of his employment" with a government entity at all times pertinent to that case.

McDaniel rested his case on February 28, 2011, and Stallworth and the BJCTA moved for a judgment as a matter of law – asserting that § 11-93-2 applied to Stallworth for actions taken while in the line and scope of his employment as an agent of a governmental entity, and that McDaniel had neither proved that Stallworth had acted as an individual at the time of the accident nor that the BJCTA improperly hired, trained or supervised Stallworth. That motion was denied.

The defendants then put on their case the following day, and, after resting, they moved once more for a judgment as a matter of law on the same grounds as the prior motion, which was again denied. The trial concluded on March 1, 2011, and on the afternoon of March 1, 2011, the trial court rendered judgment in McDaniel's favor, on McDaniel's claim for "damages for negligence, in the amount of one million dollars, compensatory damages only." Said judgment limited the damages against the BJCTA to $100,000, but found that

the damage limitation of Ala. Code § 11-93-2 did not apply to the judgment against the individual defendant Stallworth. Accordingly, the court rendered a verdict in favor of the plaintiff against Stallworth individually in the sum of $900,000.

On March 29, 2011, defendants Stallworth and the BJCTA filed a motion to alter, amend or vacate or in the alternative, motion for new trial or, in the alternative, motion for remittitur. That motion was denied by the trial court on April 4, 2011. On May 23, 2011, Stallworth and the BJCTA filed their notice of appeal of the trial court's judgment in favor of McDaniel and the denial of their post-judgment motions. Amicus briefs were filed on behalf of Stallworth and the BJCTA by several entities including the Alabama League of Municipalities and Alabama Water and Waste Water Institute. In the Stallworth appeal, some of the amici curiae arguments that the Alabama Supreme Court did not address in the Suttles rehearing, as being untimely, were argued in the Stallworth appeal.

On Friday, April 13, 2012, the Alabama Supreme Court through Justice Woodall released an opinion affirming the trial court's judgment with no opinion. Rule 53 of the Alabama Rules of Appellate Procedure clearly makes "no-opinion affirmances" non precedent setting. That rule provides that "an order of affirmance issued by the Supreme Court or the Court of Civil Appeals by which a judgment or order is affirmed without an opinion, . . . shall have no precedential value and shall not be cited in arguments or briefs." Presumably, in light of Rule 53, the defendants elected not to file an application for rehearing in the Stallworth case.

Morrow v. Caldwell, 2014 WL 982969 (Ala. March 14, 2014)

The most recent Alabama Supreme Court case dealing with the issue of whether the statutory cap on damages can be circumvented by suing a municipal employee individually came out of the Circuit Court of Montgomery County. That case involved a lawsuit including various defendants including Wayne Morrow, who was an electrical inspector for the City of Montgomery. In that case, an individual named Alice Yu leased a commercial building on Ripley Street in Montgomery. Before occupying the building, Yu sought to have Alabama Power Company restore electrical service in her name to that commercial building. Because the premises had been without power for approximately eight months, the City of Montgomery had to perform an electrical inspection of the premises before Alabama Power Company could restore electrical service. On January 29, 2009, Morrow inspected the premises and in doing so, noticed that there was a raised concrete pad at the back of the building and that there was an air conditioning system located on the raised concrete pad. In addition, there was a chain-link fence around the entire concrete pad and that entry to the system was by a locked gate, and that the top of the fence was also enclosed by a chain-link fence that went over the air conditioning system and was secured to the back of the building. Above the concrete pad, there was an electrical source that could be used to install a flood light. At the time of Morrow's inspection, an electrical source was covered by a circular, weatherproof junction box.

Upon inspection, Morrow did not find any electrical defects or any dangerous conditions with regard to the electric system and he approved the premises for the restoration of power. The next day, Alabama Power Company restored power to the premises. Approximately six months later, before the building became occupied by Yu, the plaintiff

Caldwell's son, who was staying with a relative next door to the building leased by Yu, was playing on the concrete pad on which the air conditioning system was located and was electrocuted when he came into contact with the chair-link fence. When the incident occurred, the gate in the fence was broken, the top part of the enclosure had been rolled back and was resting against the wall of the building, and the wires from the electrical source were not covered by a junction box. The wires from the electrical source had come into contact with a portion of the fence, and as a result, the fence had become electrified and Russell was electrocuted when he touched the fence.

Thereafter, Caldwell, as Russell's mother and next friend, filed a wrongful death action against multiple defendants. Morrow and Yu were later added as defendants. With regard to Montgomery building inspector Morrow, Caldwell alleged that Morrow had negligently, recklessly, and/or wantonly inspected the premises and had negligently, recklessly, and/or wantonly allowed electrical service to be restored to the premises. In his answer, Morrow asserted that he was entitled to state immunity, state agent immunity, and qualified immunity. Thereafter, Morrow again amended her complaint to state that Morrow was sued in his individual capacity for his individual acts of negligence and wantonness which caused or contributed to the death of Caldwell's son. In the second amended complaint, Caldwell alleged that this action is brought against Morrow specifically in his individual capacity. In his answer to the second amended complaint, Morrow again alleged that he was entitled state immunity, state agent immunity, and qualified immunity.

Thereafter, Morrow filed a motion for summary judgment claiming that he was entitled to state agent immunity under Ex parte Cranman. The trial court denied Morrow's

motion for summary judgment, and Morrow subsequently filed a petition for writ of mandamus with the Alabama Supreme Court in which he asked the Alabama Supreme Court to compel the trial court to enter summary judgment in his favor based on state agent immunity. The Alabama Supreme Court denied the petition for writ of mandamus without ordering an answer or briefs.

Approximately a year later, Morrow filed a motion asking the trial court for "a judgment declaring the statutory limitations of liability of $100,000, pursuant to Ala. Code (1975), § 11-47-190, are applicable to defendant Wayne Morrow in this case." Caldwell filed a response to Morrow's request for declaratory judgment in which he contended that the statutory cap on recovery set forth in § 11-47-190 for damages against municipalities would not apply to the claims in this case because the claims were brought against Morrow in his individual capacity and because she alleged that Morrow had acted recklessly, wantonly, or willfully. Thereafter, the trial court entered an order denying Morrow's request for judgment declaring § 11-47-190 applicable in which he stated in pertinent part:

> The law concerning caps on damages against municipalities and their employees appears to be unsettled at the present time. As best the court can discern the law, this court would find the issue in favor of (Caldwell) and hold that the caps would not apply to damages attributable to wanton conduct by Morrow when sued in his individual capacity.

Thereafter Morrow filed a motion in which he requested a trial court "certify the question of the extent to which any individual capacity claim against Morrow is limited to $100,000 under Ala. Code § 11-47-190, and to stay the proceedings pending the filing of a petition for interlocutory appeal, pursuant to Rule 5, Alabama Rules of Appellate Procedure."

The trial court provided the necessary certification for interlocutory appeal, and Morrow subsequently filed a petition for permissive appeal to the Alabama Supreme Court.

The trial court's certification included the following controlling question of law for the permissive appeal:

> Whether the claims against a municipal employee, sued in his individual capacity, are subject to the statutory cap of Ala. Code (1975), § 11-47-190, when those claims fall within the "willful or wanton" except to the doctrine of state agent immunity, under Ex parte Cranman, 792 So.2d 392 (Ala. 2000).

On March 14, 2014, the Alabama Supreme Court released the enclosed opinion indicating that the plain language of Ala. Code (1975), § 11-47-190, applicable to municipalities, does not limit the recovery on a claim against a municipal employee in his or her individual capacity, and the $100,000 statutory cap on recovery set forth set forth in § 11-47-190 would not apply to Caldwell's individual willful, wanton, and reckless claims against Morrow.

In its opinion, the Court stated that in answering the trial court's certified question, they were guided by the principles of statutory construction which were set out in detail in the opinion.

Next, the Court analyzed in detail Morrow's argument on appeal. The Court indicated that it was Morrow's position or argument that the plain language of § 11-47-190 clearly dictates that the $100,000 statutory cap on recovery would apply to claims against him even though he was being sued in his individual capacity and even though Caldwell is alleging that he acted recklessly, willfully, and wantonly. The Court noted that this was a case of first impression for them and that it had not yet addressed whether the statutory cap on recovery set forth in § 11-47-190 would apply to limit the liability of municipal employees sued in

their individual capacity. The Court further indicated that in the case of Suttles v. Roy, *supra*, that issue was not argued by the City of Homewood in Officer Suttles' original brief on appeal, and that those arguments could not be considered for the first time on an application for rehearing.

The Court then set out in full the text of § 11-47-190 and indicated that that statute basically consisted of two sentences. The Court indicated the first sentence of § 11-47-190 recognized the principle that municipalities are generally immune from suit but then provided an exception for actions seeking damages for the negligent acts of agents or employees of municipalities. The Court further noted in the first sentence of § 11-47-190 that there was no exception in the statute allowing an action against a municipality for the wanton or willful conduct of its agents or employees. The Court went on further to say that it had previously interpreted the first sentence of § 11-47-190 as limiting municipal liability to two distinct classes. The first classification was that a municipality may be liable under the doctrine of *respondeat superior*, for injuries resulting from the negligence, carelessness, or unskillfulness of its agents or officers in the line of duty. In the second classification, the municipality may be liable for injuries resulting from its failure to remedy dangerous conditions created or allowed to exist on streets, alleys, and in public ways.

The Court then noted that the second sentence of § 11-47-190, provided a cap on any recovery on a judgment resulting therefrom and that that second sentence began with the word "however." The Court then went on to state that the word "however" in the second sentence of § 11-47-190 created a situation where the second sentence modified the first sentence. Accordingly, the Court said that the second sentence sets a limit on recovery

stemming from a judgment or judgments that result from liability allowed by the exceptions contained in the first sentence. The Court held that, while the first sentence of § 11-47-190 provided that a municipality may be liable for the negligent or careless acts of its agents, servants or employees, the second sentence by starting with the word "however" limits the recovery from any such resulting judgment. In other words, any recovery is capped to $100,000 by the second sentence is the recovery for any liability in a negligence action allowed by the first sentence. The Court went on further to say that when the second sentence of § 11-47-190 is read in light of the first sentence, it is clear that the second sentence is meant to be a limitation on the amount of damages a person or corporation may recover from a municipality in those limited situations in which a municipality may be liable.

The Court noted that Morrow sought a different reading of the second sentence of § 11-47-190. Specifically, Morrow pointed to the language that "no recovery may be had under any judgment . . . against . . . any . . . employee . . . in excess of $100,000" and contended that this language in the statute provides a blanket cap on damages awarded against any municipality or employee in any action. In other words, Morrow interpreted the second sentence as limiting recovery from actions that are different, according to the Supreme Court, than those allowed by the first sentence, including recovery in actions alleging willful or wanton conduct against municipal employees in their individual capacities.

The Alabama Supreme Court indicated that Morrow's interpretation of § 11-47-190 improperly disconnects the second sentence from the context of the entire section and fails to

acknowledge the word "however" that links the second sentence to, and causes to modify, the first sentence.

The Court in Morrow went on further to explain that in Smitherman v. Marshall County Commission, *supra*, it held that, "Claims against county commissioners and employees in their official capacity are, as a matter of law, claims against the county and are subject to the $100,000 cap contained in 11-93-2." The Court in Morrow stated that similarly, claims that are brought against municipal employees in their official capacities are also, as a matter of law, claims against the municipality. The Court went on further to say that claims against employees in their individual capacities are in essence not claims against the municipality in which the protection of § 11-47-190 would apply. Finally, the Court noted that no language in § 11-47-190 suggested that it was intended to apply to claims against municipal employees who were sued in their individual capacities. The Court went on further to say that "rather, when the statute is read as a whole, it is clear that the limitation on recovery in the second sentence of § 11-47-190 is intended to protect the public coffers of the municipality, not to protect municipal employees from claims asserted against them in their individual capacity." The Court concluded that because the plain language of § 11-47-190 did not limit the recovery on a claim against a municipal employee in his or her individual capacity, the $100,000 statutory cap set forth in § 11-47-190 would not apply to Caldwell's individual claims against Morrow. The Court therefore affirmed the trial court's denial of Morrow's request for a judgment declaring that it would.

It is important to note that the Supreme Court's opinion in Morrow is *per curiam* opinion. Justice Murdock concurred specially and wrote to further explain the basis for his

concurrence. In his concurring opinion, Murdock indicated that until recently, he found the provisions of § § 11-47-190 and 191, Ala. Code (1975), confusing. He indicated the purpose of both sections appeared to be to address the liability of municipal governments, but they sought to accomplish this with unusual clauses and categories, the meaning, need, and consistency of which are not readily apparent. Justice Murdock found the second sentence of § 11-47-190 particularly difficult to understand.

Justice Murdock further noted that the doctrine of local governmental immunity was a doctrine concerned with protecting local governments, specifically the public coffers maintained by those governments and that it afforded no protection to local government employees when they might be sued in their individual capacity on the basis of some duty imposed upon them personally by tort law. As an example, Justice Murdock cited the duty of a governmental employee to use due care vis-à-vis other motorists while driving on public roadways on municipal or county business.

Justice Murdock concluded that the liability and the amount of liability of a municipal employee in his or her individual capacity were not and are not the proper, or intended, subjects of the Legislature's enactments of § § 11-47-190 and 191 or their predecessors.

Finally, and perhaps most importantly about Justice Murdock's concurring opinion was that he noted that the question before the Alabama Supreme Court in the Morrow appeal was limited to whether, if an employee of a municipality is personally liable for a tort he or she commits in the course of his or her employment by a municipality, that liability can exceed the $100,000 cap referenced in § 11-47-190. Justice Murdock went on to say that any such liability, however, would of course depend as a threshold matter on the existence of a

duty that was personal to the employee (not merely a duty of his or her employer) that ran to the plaintiff (and not merely from the employee to his or her employer). Justice Murdock carefully noted that this and other questions concerning the perspective liability of a municipal employee in Wayne Morrow's position were not before the Court on this appeal and that the Supreme Court's main opinion should not be understood as implying an answer to them.

CONCLUSION

It seems that the Supreme Court's opinions in Suttles and Morrow have left many more questions unanswered than answered, especially for counties who are not governed by Ala. Code (1975), § § 11-47-190 and 191. For example, the Alabama Supreme Court in Suttles clearly indicated that the issues raised by several of the amicus curiae were not decided in the Suttles appeal such as whether, under the general principles of agency law, a governmental employee can be sued in his individual capacity for actions done on behalf of his principal. In addition, the Supreme Court in Suttles specifically indicated in the context of § 11-93-2, that the issue of whether municipal or county employees could be held individually liable for actions taken while on the job and while engaged in the official duties or in the line and scope of their employment were not decided in the Suttles case and "will have to wait until they are actually presented to this Court by parties to a proceeding properly before the Court." Just as in the Suttles case, those same issues were not address in the Caldwell v. Morrow appeal. In addition, according to Justice Murdock, the Alabama Supreme Court in Caldwell v. Morrow did not decide whether or not an employee like Morrow owed a personal duty to Caldwell and her son different from the duty his employer,

the City of Montgomery, would have owed to the plaintiffs. Those very significant issues that go to the heart of individual liability for a governmental employee still remained unsettled and undecided.