LIABILITY OF PUBLIC OFFICIALS AND THE COUNTY

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Advancing Georgia's Counties.

INTRODUCTION

It is inevitable that counties will get sued, along with their elected officials and employees. Our judicial system regards individual citizens and government entities as equals in the eyes of the law, which means people who believe they have been harmed by the county can go to court to seek relief. Sometimes those lawsuits are decided in the county's favor, and sometimes the county is ordered to pay damages or provide other types of relief to the injured party. The purpose of this chapter is to explain

- situations that can lead to lawsuits;
- whether a county and its officials are entitled to immunity from specific types of claims;
- the types of relief and amount of damages that can be recovered against a county and its officials if they lose the case; and
- situations in which a county commissioner or a county official could be ordered to pay a monetary judgment out of personal assets.

OVERVIEW OF THE CIVIL JUSTICE SYSTEM

The United States has a dual court system that consists of state courts and federal courts. Both systems include trial and appellate courts (courts of appeal). Trial courts are where a case is first heard and the jury process takes place. In Georgia, for purposes of this chapter, there are two different trial courts where plaintiffs may file – a superior court or a state court. The party who loses at this level has a right to appeal,[1] usually to the Georgia Court of Appeals where a panel of three judges will review the case. In rare instances an appeal can be taken directly to the Supreme Court of Georgia, but in most matters the Supreme Court of Georgia is permitted to choose whether it will hear an appeal or not.

At the federal level, Georgia is divided into three districts – Northern, Middle, and Southern. A case will be filed in one of these district courts and initially heard there. The losing party has a right to file an appeal to the Eleventh Circuit Court of Appeals, based in Atlanta, and a panel of three judges will decide the appeal. The U.S. Supreme Court can then review the case if it chooses to do so, but few cases are selected compared to the number of requests made each year.

To determine if a state court or a federal court can hear a lawsuit against a county or its officials, there must be basis for a court to have *subject matter jurisdiction* over the dispute. The Georgia General Assembly has passed laws giving state courts subject matter jurisdiction over certain types of claims; the U.S. Congress has enacted statutes giving federal courts subject matter jurisdiction over other types of claims. Although there is some overlap, the state and federal courts generally hear different types of

lawsuits where a local government is a party to the litigation. Lawsuits will generally be heard in state court if the suit arises from the following:

- A motor vehicle accident.
- An injury sustained on county property.
- A contract signed by the county.
- Because the county is alleged to have violated a specific *state* law.

If the lawsuit is based on an alleged violation of a federal law – such as federal laws that protect civil rights guaranteed under the U.S. Constitution or prevent discrimination in employment – those suits will normally be filed in federal court.[2]

Two areas of jurisdictional overlap are:

1. Diversity of citizenship – if the party bringing the suit lives in a state other than Georgia. An out of state resident can file suit in federal court in Georgia even if the claim is one that would normally be filed in state court (such as a car wreck case).

2. Removal action – if a federal civil rights claim is filed in state court initially. If a federal civil rights claim is filed against a county in state court, the county under some circumstances has the right to "remove" that case to federal court if it chooses.

The type of court – state (magistrate, state, or superior court) or federal – in which the case is filed is governed by the subject matter jurisdiction laws discussed above. The location of the court – the particular county if suit is filed in state court or the particular federal district if suit is filed in federal court – is determined by the residence of the party against whom the case is filed (defendant). This is called personal jurisdiction and venue. A defendant generally has the right to be sued in the county or district of his or her residence. However, there may be multiple plaintiffs or multiple defendants. If there are multiple defendants who reside in different counties or federal districts, the party filing the suit and seeking relief (plaintiff) can choose to file suit where any one defendant resides. This can be an advantage for the plaintiff, as the "target" defendant (sometimes meaning the defendant with the best ability to pay a judgment)[3] may lose the ability to have the case heard by a local jury.

While the parties are typically represented by attorneys, if a party chooses to represent himself, he is proceeding *pro se*. For example, it is common for inmates at the county jail to file lawsuits without an attorney – such cases are called pro se prisoner lawsuits. The county is a local governmental entity and not a person. Therefore, a non-lawyer cannot represent the county in court; the county must be represented by counsel.

How Lawsuits Begin

A lawsuit is started by filing a document called a complaint (or occasionally, a *petition*). The complaint consists of allegations stating why the plaintiff contends the defendant is liable and how the plaintiff has been injured or damaged. If the complaint has multiple theories of recovery, they are usually broken down into separate counts. Except for pro se prisoner lawsuits filed in federal court, a judge **does not** screen a complaint and decide if it is meritorious or frivolous before it gets filed and served on the defendant. If a plaintiff wishes to file a complaint and pays the filing fee, the clerk of court must accept it. It is up to the defendant, after being served, to raise any and all defenses and point out to the court why the case should not be allowed to proceed.

A complaint can be served on the defendant in one of three ways:

1. Through voluntary waiver of personal service by mail.
2. By personal service through a deputy sheriff or a process server.
3. By publication.

If the complaint is received by mail, the defendant can choose not to waive personal service and the plaintiff must have the defendant served in person. However, if the defendant did not have a legitimate reason for refusing to waive personal service, the defendant may be required to pay the costs of service. Service by publication is proper only when the defendant cannot be found after diligent effort, which is very uncommon when the suit is against a county or its officials.

Once the complaint has been served, the defendant is required to file a document in court that responds to everything asserted in the complaint (the *answer*). The time limit for filing this document is 30 days in state court and 21 days in federal court. It is critical that a written response is filed on time. The answer must be a written document filed with the clerk of court prior to the deadline. Assuming that there will be a hearing or trial one day and waiting to make a response at that time would be a very serious mistake. If a defendant ignores these deadlines and fails to respond by filing an answer, then the defendant is in default. A default can mean losing the right to contest liability, with the only remaining issue being the amount of damages that must be paid.

How a Lawsuit is Conducted Prior to Trial

Once the complaint and answer have been filed, but before trial, the case goes into a motions and discovery phase. A motion is a written request to the judge to make a ruling on a legal issue. For example, a defendant may file a motion to dismiss, arguing that the complaint was filed too late – beyond the statute of limitations. Motions are best prepared by lawyers because successful motions almost always require a citation to legal authorities (statutes, regulations, and prior case law) supporting or opposing the motion. The written documents containing the arguments for and against a motion are called briefs. The judge may or may not allow oral argument on the motion, and at some

time prior to the trial will rule on the motion, usually by issuing a written order. In addition to motions of dismissal, other types of motions include:

- Motions in limine –designed to keep certain evidence out of the trial of the case (meaning the jury will not hear it).
- Motions to compel – designed to force an opponent to produce documents, records, or other evidence sought in discovery.
- Motions for summary judgment – similar to a motion to dismiss; the party filing the motion asks the court to rule in his or her favor as a matter of law on one or more of the claims asserted in the complaint. A motion for summary judgment is a powerful device – if granted, a jury will never be asked to decide the claim. The judge essentially takes the claim away from the jury and "throws the case out" for legal reasons. However, a judge cannot decide which witness is telling the truth and who is not; nor can the court resolve (or decide) disputed issues of material fact. Summary judgment can only be granted based on legal defenses where the losing party is given the benefit of the doubt on all disputed factual matters of importance.

Discovery in a civil lawsuit means each side is entitled to know what evidence the other side has that may be relevant to the case. As a general rule, parties to a civil suit are not allowed to hide their evidence and reveal it for the first time at trial. Within certain limitations, each party is entitled to see the "playbook" of their opponent. The theory behind this rule is that if each side knows the strengths and weaknesses of his or her adversary, the case (1) is more likely to settle out of court (which courts generally encourage) and (2) if the case is tried, it will be tried more efficiently because there will not be any last-minute surprises.

Discovery takes two broad forms: written discovery and depositions. Written discovery includes interrogatories (written questions), request for production of documents and things, and requests for admission. Written discovery is used by both sides in almost every case. There are also provisions for a request for inspection (to go upon the other side's property) and a request for an independent medical examination. A deposition is where a party is allowed to question – under oath – the opposing party or a witness. A deposition is usually a face-to-face meeting in which the questions and answers are given with a court reporter present. The court reporter takes down and later transcribes everything that is said. Deposition testimony often becomes a critical part of a case. Once the deposition is transcribed, it is the permanent record of what a witness has testified to under oath. Should the opposing party or witness testify at trial differently or inconsistently with his or her deposition testimony, that conflict can be pointed out to the jury with an argument that the witness has told two different stories under oath. This is called impeaching a witness with a prior inconsistent statement. In some

instances, a jury may decide the witness is not telling the truth, which could have a major impact on the jury's ultimate decision or verdict.

When the discovery completion period is over (generally four to six months, but often extended) and if the case cannot be decided on a motion for summary judgment (usually because of disputed material factual issues), the case moves toward a trial. The parties may agree – or the judge may require – that the case go to mediation before a jury is empaneled to decide the matter. At mediation, a third-party neutral (usually a very experienced lawyer in the type of case at hand) attempts to get each side to see the strengths and weakness of the case and tries to get the parties talking about ways the case might be resolved out of court. The mediator does not decide the case and cannot make either side do anything against their will. A good mediator is a persuader, but he or she is not a judge. Cases frequently settle at mediation or shortly after because at that point the parties still have some control over their fate. Once a case is given to a jury to decide, that control is gone.

Trial of a Lawsuit

If the case cannot be resolved by agreement, then a jury will be empaneled and the case will go to trial. Jury selection is called voir dire. Contrary to popular belief, the parties involved do not get to pick who they want to be on the jury. It is more accurate to say that they are allowed to eliminate some (but perhaps not all) potential jurors they do not wish to be on the jury. Each side gets a limited number of strikes (sometimes called preemptory challenges) – persons removed from the panel – and the jury consists of whoever remains. The jury may be as few as 6 or as many as 12, depending upon the court. Normally, the jury's verdict must be unanimous, but the parties can mutually agree to a less than unanimous verdict.

Having the burden of proof, the plaintiff is allowed to present his or her evidence first. Every witness can be cross-examined by the opposing party. The parties may offer into evidence documents, records, videos, tape recordings, bills, and other relevant materials. If the opposing party believes the evidence should not be admitted, he or she must make an objection based on the rules of evidence, such as hearsay, relevancy, or unfair prejudice. The judge rules on whether the evidence will or will not be admitted.

In addition to the testimony of the parties and fact witnesses, trials sometimes involve testimony by expert witnesses. An expert witness generally has no first-hand knowledge about the case; most everything they testify to is an opinion. However, experts are allowed to give opinions if their testimony will help a jury understand things that are not commonly understood – provided that the trial judge agrees the witness has the proper expertise and has relied on accepted scientific or technical principles. Most expert witnesses are paid to testify. This may have a bearing on their opinions and neutrality, which the opposing party is allowed to point out. Some expert witnesses make their

living by testifying on a regular basis. With extensive experience on the witness stand, they can be very effective and smooth in their presentation, but it does raise the impression of being a "hired gun."

Once all the evidence has been produced, the lawyers for each side are allowed to make closing arguments. At the conclusion of those arguments, the judge will instruct the jury on the law that must be applied to the case. This is called the charge to the jury. The judge will explain what the law requires in the way of evidence for the plaintiff to win the case, and what the law requires in the way of evidence for the defendant to win on any defenses that have been asserted. It is for the jury to resolve any conflicts in the evidence and to decide which version is most likely true, credible, or believable.

In most civil cases, the plaintiff must prove his or her claim by a preponderance of evidence, meaning that their version of facts, causes, damages, or fault is more likely than not the correct version. Unlike a criminal case, the plaintiff need not prove his or her case beyond a reasonable doubt. The jury deliberates in secret and can never be forced to reveal what was discussed in the jury room. The jury may have a question for the judge; the judge decides if and how to answer the question. When the jury reaches its verdict, it is written down on a verdict form. The form is returned or published in open court and the trial is over.

As a normal rule, each party is required to pay his or her own costs and attorney's fees. However, there are some types of cases where if the defendant (which could be a county) loses, the defendant must pay the plaintiff's costs and attorney's fees. This is almost always the case with respect to federal civil rights and employment discrimination cases. It can also be the case in a limited number of cases filed in state court. Specific examples are provided later in this chapter. The potential of having to pay not only the county's defense costs, but the plaintiff's as well, raises the stakes considerably when evaluating a case for settlement purposes. It is perfectly legal – and not uncommon – for an award of attorney's fees to be more than the amount of damages the plaintiff recovers.

Appeals

As discussed earlier, the losing party normally has the right to at least one appeal. It can take a year or more for the appeal to complete the process. The appellate court can reverse the judgment of the trial court only if there was a legal error in the way the trial was conducted (e.g., if the appellate court determines the trial court judge made an incorrect ruling to admit or exclude a vital piece of evidence). The appellate court will not overturn a jury's verdict because it disagrees with its wisdom or because the jury chose to believe one witness and not another.

PERSONAL INJURY CLAIMS

Many lawsuits filed against county officials are personal injury claims, sometimes referred to as tort claims (although a tort includes more than personal injury claims). If someone gets hurt on county property or on a county-maintained road, a lawsuit can be filed seeking recovery based on negligence – a county official failing to keep the premises reasonably safe. There are four main elements to any negligence suit:

1. The party filing the action must establish that a county official or employee had a duty to exercise reasonable care.
2. A county official or employee breached that duty by acts of omission or commission.
3. An act or omission caused the damage.
4. Damage must be actual, like physical, financial, or emotional harm, and not hypothetical.

Upon proof of these elements, the plaintiff can recover medical expenses, lost wages, damage to his or her own property, and compensation for pain and suffering. The purpose of awarding these damages – called compensatory damages – is to make the injured party whole. A jury is to use its enlightened consciousness in deciding what pain and suffering is worth in a particular case. If the plaintiff was partially at fault in causing his or her injuries, the jury may reduce the award in proportion to the fault the plaintiff bears, provided the county official was more at fault than the plaintiff.[4]

Punitive damages (sometimes called exemplary damages) are designed to punish a defendant for intentional or malicious misconduct and serve to deter such acts from being repeated. Punitive damages may not be awarded against a county itself, whether the claim is based on state or federal law,[5] but punitive damages can be awarded against a county official or employee sued in his or her individual capacity. Punitive damages may be awarded when there is clear and convincing evidence "that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences."[6] For state law claims, punitive damages are capped at $250,000, but there is no cap if it is proven the defendant acted with specific intent to cause the harm inflicted or where the defendant was impaired by alcohol or illegal drugs.[7] For federal claims that permit punitive damages against county officials, there is no cap.

Motor Vehicle Accidents

The most common personal injury claim filed against counties involves motor vehicle accidents. These accidents fall into two categories:

1. Cases where a county vehicle is involved in a wreck.

2. Cases where the plaintiff wrecks on a county-maintained road and claims a defect in the roadway caused it.

With respect to county vehicles involved in accidents, the law will allow an injured party to recover if the driver of the county vehicle was negligent (e.g., speeding, failed to yield, following too close, or improperly crossed the center line). A subset of this type of lawsuit involves public safety vehicles engaged in emergency responses or pursuits. Although emergency vehicles generally have the right-of-way and are allowed to exceed the speed limit and disregard traffic signals, they must be operated with due regard for the safety of all persons.[8] Lawsuits involving emergency vehicles often turn on whether the emergency vehicle was operated with due regard.

Even if a county vehicle is not involved in a collision, an injured motorist may bring a claim against county officials upon a theory that the county road upon which the accident occurred was defective or negligently maintained. To establish liability, the plaintiff must show that

- a particular county employee had a duty to maintain the road;
- the road was not properly maintained and presented an unreasonable risk of harm to the motoring public; and
- the plaintiff's wreck and injuries were the result of the county employee's breach of this duty.

In addition, the plaintiff must show the county employee charged with this responsibility had actual notice of the problem before the accident occurred.[9] These suits are frequently based upon allegations of an excessive edge of pavement drop off that caused the plaintiff to overcompensate when trying to get back on the pavement; excessive runoff or standing water on the road; loose gravel, ruts, holes, or obstructions on the roadway (trees being a frequent example); inadequate sight distance; and either no signs or incorrect signs to warn of a hazard. These lawsuits can be quite serious if someone is killed or permanently injured (particularly a vehicle passenger, as the driver's negligence generally cannot be transferred or attributed to a passenger).

Special Rules for Automobile Liability Claims

With respect to motor vehicle accidents involving county vehicles, Georgia law has set forth specific provisions that include a limited waiver of immunity, caps on damages, and provisions protecting individual county officials and employees from suit.[10] The statute provides that if the county does not have automobile liability insurance coverage, the county's sovereign immunity is waived up to $500,000 for bodily injury or death of one person per occurrence, or $700,000 for bodily injury or death of two or more persons per occurrence, and up to $50,000 for property damage.[11] If there is insurance coverage, sovereign immunity is waived to the extent (or the limits) of such coverage.[12] The person driving the county vehicle is not to be named as a party to the suit.[13] The

county (or the constitutional officer in cases where the driver is an employee of the constitutional officer) is the only party that may be sued. The case must be filed in the county where the county vehicle is owned or leased, regardless of where the accident happened or where any other person involved in the collision may reside.[14] No punitive damages may be awarded in such cases.[15]

Injuries in County Buildings or on County Facilities

County officials can also face liability for injuries occurring in a county building or on county facilities. These claims can arise from slip and falls, inadequate security, or hazards in parks and playgrounds. An important defense available to counties and their officials with respect to injuries on county property is found in the Georgia Recreational Property Act.[16] This statute holds that a landowner (which includes counties) who opens its land to the public for recreational purposes – without charging a fee for such use – is generally shielded from liability, except in cases of willful or malicious conduct. This defense applies to injuries sustained at county parks and recreational facilities, including swimming pools and trails, if no admission fee is charged for use of the facilities.[17] The statute may still protect the county if a parking fee is charged to park a vehicle on the property, but it must not be an admission fee.

Defamation

Defamation is another type of tort claim to guard against. This can include libel (a written false statement about someone) and slander (a verbal false statement). Even truthful statements can lead to a lawsuit if the statement involves an unlawful invasion of privacy. County officials should be careful when making statements about others that could injure their reputations, including statements on social media. There are numerous state and federal laws that make certain information confidential and private.[18] Commissioners should always obtain legal advice before disseminating information about a person's medical or financial condition or criminal history.

EMPLOYMENT RELATED CLAIMS

Georgia is an at-will employment state. This means – as a matter of state law – county employees may be terminated with or without cause. In the absence of the exceptions or protections discussed below, employees have no recourse for an alleged wrongful termination.

Exceptions

Commissioners should understand that there are many circumstances where a county employee does have a right to sue. First, federal law takes priority over state law – under federal law, it is unlawful for a county to discriminate against its employees on the basis of race, color, religion, sex, national origin, age (over 40), or disability.[19] Under certain circumstances, federal law also protects county employees from retaliation because they exercised their right of free speech or political affiliation,[20] or for supporting those who

have made a claim for unlawful discrimination.[21] Additionally, federal law mandates that many county employees be paid overtime compensation after working a specified number of hours in a pay period.[22] These federal employment laws are discussed in more detail later in this chapter and in the Personnel Management chapter.[23]

Whistleblower Protection Act

Georgia law provides specific protection to county employees who expose fraud, waste, or abuse in government offices under the Whistleblower Protection Act.[24] If a county employee reports a violation of a law, rule, or regulation either to a supervisor or another government agency and is then unlawfully retaliated against, the employee is entitled to sue and recover compensation. Even though a county employee may otherwise serve at-will, the employee cannot be punished for making these reports, which means they cannot be demoted or fired. As an employer or supervisor, county officials should be mindful of this limitation.

Merit System or Civil Service Protection

Under Georgia law, county employees who are otherwise at-will can be granted merit system or civil service protection, including employees of elected officials and constitutional officers.[25] The county governing authority, elected official, or constitutional officer may choose whether a merit system is put in place over their respective employees. Should a county wish to have a merit or civil service system, it may adopt an appropriate ordinance establishing the terms and conditions of the system. These ordinances typically provide that after satisfying a probationary period of employment, rank-and-file employees become vested with a right to continued employment, which may be terminated by the county only for cause. The covered employee has a property right to his or her job, which may be taken by the government only if due process is provided.[26] In this context, due process means that before the employee is terminated, suspended without pay, or demoted, the employee is entitled to notice of the basis for the disciplinary action and a hearing before such action becomes final. The hearing need not be as elaborate as a trial in a court of law. However, it does have to provide a meaningful opportunity for the employee to be heard and to ensure that no mistaken information has been relied upon to take the adverse action. A county may choose to give employees these protections in order to recruit and retain the best qualified individuals.[27]

Where a county has established a civil service or merit system for its employees, the employees of elected officials and constitutional officers **are not** automatically covered. Rather, the elected official or constitutional officer must make written application requesting that designated positions within his or her office be covered. The governing authority, by resolution, must agree to make those employees part of the system.[28] If those steps are properly taken and recorded in the minutes of the governing authority,

then all persons working in covered positions are protected and cannot be removed from coverage by an elected official or constitutional officer taking office thereafter.[29]

ZONING, LAND USE, PERMITTING, AND LICENSING

County officials may also face litigation over zoning/land use decisions and licensing/permitting matters. In each of these instances, the local government is regulating – and perhaps restricting – the property rights and business interests of private citizens. Ordinances on these subjects must comply with state law and be uniformly applied. Commissioners should also be very careful about potential conflicts of interest where they have the authority to approve or deny the request.[30]

Zoning decisions can be one of the most contentious matters a commissioner will face. A controversial zoning hearing may draw an overflow crowd, with emotions running high. Commissioners may be bombarded with calls from constituents on the issue. There will be a strong impulse to side with the majority view in the community. While this is certainly understandable, commissioners should remember it is their role to apply the terms of the zoning ordinance to the question.[31] Does the proposal satisfy, or not satisfy, all requirements set forth in the zoning ordinance? Is the proposal consistent or inconsistent with the county's future land use plan and comprehensive plan? Are objections based upon provisions contained within the ordinance, or are they subjective and personal opinions? If there are concerns about an increase in traffic and congestion, or the impact on the school system, what data underlies these arguments? Does the zoning ordinance establish objective criteria for evaluating the data? What role does the enactment of an impact fee ordinance play in the decision?

Commissioners are allowed to do their homework on a re-zoning or special use request before the hearing. It is permissible for commissioners to speak with the proponents and opponents in order to gain information, but this should be done openly and transparently. Commissioners should be careful not to prejudge the matter or make any public statements before the hearing that could later be used to show bias. Commissioners should especially remember that it is the record developed at the public hearing that matters in the event litigation ensues. They should operate under the premise that if it is not in the record, it did not happen. If a motion is made to deny the request, the motion should articulate the provisions within the zoning ordinance that have not been met. If there is a motion to approve with conditions, the conditions must be spelled out in the minutes of the meeting to be enforceable. Take care to make sure the minutes include the basis for the action taken.

When counties lose zoning cases, it is frequently because the county failed to follow its own ordinance and procedures to the letter or failed to make a clear explanation of its actions and decisions in the written record. In other words, these cases are sometimes

lost on procedural grounds, so it is important that counties be deliberate about following the procedures correctly.

IMMUNITY DEFENSES

Whenever litigation against a county or a county official occurs, the defense of immunity invariably arises. This can be a very confusing area, because immunity rules differ

- in state court versus federal court;
- depending upon whether the county is the named defendant, as opposed to a county official or employee; and
- depending upon whether a county official or employee has been sued in his or her official capacity or in an individual capacity.

Sovereign immunity applies to the government and to government officials and employees when sued in their official capacities. When a government official or employee is sued in his individual capacity, there is no sovereign immunity defense. *Official immunity* applies when a state law claim is asserted and *qualified immunity* applies in cases involving a federal law claim.

Sovereign Immunity

Sovereign immunity is a broader and more protective defense. It bars a lawsuit based upon a state law tort claim (but not a contract claim or an inverse condemnation claim), unless there is a state statute or constitutional provision that expressly waives that immunity.[32] Under Georgia law, sovereign immunity has been waived for these types of claims:

- Motor vehicle accidents arising from the use of county vehicles.[33]
- Whistleblower claims by county employees.[34]
- Condemnation and inverse condemnation claims (taking of private property for public use, which can include claims of maintaining a nuisance).[35]

Lawsuits based upon state law claims other than these, when filed against a county itself or against officials and employees of the county sued in their official capacities, are generally barred by sovereign immunity. Sovereign immunity **is not** a defense to federal claims, such as claims for a violation of federally protected civil rights and claims for employment discrimination. In those instances, the county can be sued directly.

Official Immunity

If a county official or employee is sued on a state law claim in his or her individual capacity, the state constitution affords official immunity[36] – a limited type of immunity from suit and damages. This immunity applies where the person was performing a discretionary function without malice, even if the act was performed negligently. It

does not apply if the person was performing a ministerial function and acted negligently or with an intent to cause harm.[37] A discretionary function exists when the county official performs a task where there is no specific policy, law, or rule that dictates the manner in which the task must be performed.[38] A ministerial function, on the other hand, is a task that must be done in a specified way, based on instructions from supervisors or established policies, rules, or law.[39] The fact that some discretion may be used will not prevent a task from being classified as ministerial, if the official's overall judgment and discretion has been restricted.[40]

Most cases are decided on a case-by-case basis where the courts look at the specific policies, rules, or laws that govern the situation. For example, even though a building inspector may exercise judgment in determining whether construction work satisfies the building codes, the inspector may not have the discretion to omit an inspection required by the code, and thus could lose immunity in a lawsuit for damages arising from faulty construction.[41] Conversely, when a paramedic goes to a call with a person complaining of chest pains, established protocols for assessing the patient may still leave significant room for the paramedic to use judgment and discretion, so that immunity protects the paramedic from a lawsuit where the patient later succumbs to a heart attack.[42] Courts have differed in granting official immunity to county road superintendents, depending upon the exact nature of the circumstances in which it was alleged the road superintendent failed to maintain the roadway properly.[43] This is a complex area of the law and one that does not yield easy answers. Therefore, all county officials and employees should clearly understand the policies, rules, and laws that govern the performance of their duties and make every effort to adhere to them.

Federal Claims

In the federal court arena, counties and their officials can be sued for alleged violations of the U.S. Constitution and federal statutes regulating local governments. Many suits are filed under 42 U.S.C. § 1983, which is a federal statute that allows any person to seek redress for a deprivation of rights guaranteed under the U.S. Constitution by persons acting under color of state law. These suits can arise from the following:

- Claims against the police for excessive force or unreasonable searches and seizures (rights protected under the Fourth Amendment).
- Claims by jail inmates based on conditions of confinement, including inadequate medical care (rights protected under the Eighth and Fourteenth Amendments).
- Claims alleging that the county has infringed upon someone's First Amendment rights (relating to free speech, political expression, or government establishment of a religion), Second Amendment rights (relating to restrictions on firearms), or the Fourteenth Amendment's equal protection

clause (prohibiting treatment of similarly situated persons differently without a qualifying reason).

Employment practices are another way in which counties can be sued in federal court. Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on race, color, religion, sex, or national origin.[44] Other federal laws prohibit discrimination against persons with disabilities[45] and persons over the age of 40.[46] Federal labor laws guarantee many county employees the right to overtime compensation[47] and leave from work in the event the employee or a family member has a qualifying medical reason (the leave is unpaid, but the position must be held for the employee's return, and all benefits continued during the leave).[48]

There are also federal voting laws that apply to county election offices, regulating matters such as voter registration and the process for removing inactive voters from the rolls.[49] Citizens have the right to sue if they are harmed by a violation of these statutes.[50]

A very important consideration with respect to almost all federal claims against counties and county officials is the risk of an award of attorney's fees to a prevailing plaintiff. In many civil rights cases, there are actual and compensatory damages that may be awarded (e.g., lost wages and benefits in an employment discrimination claim, or medical bills and pain and suffering for excessive use of force claims). In some, however, there may be little or no monetary damage, but the plaintiff seeks to vindicate a right as a matter of principle (e.g., claims challenging religious symbols on government property). Even if there are no actual damages, a plaintiff can still be awarded nominal damages – perhaps as little as $1 – to validate a symbolic victory. If the plaintiff in these cases recovers any relief whatsoever, the plaintiff is almost always entitled to a separate award of attorney's fees, which must be paid by the defendant.[51] The amount of the award is for the judge to decide, not a jury.

The calculation of fees is generally based on the number of hours reasonably spent on the case multiplied by a reasonable hourly rate. But the courts recognize that

- many of these cases are unpopular and lawyers who take them should receive "market" rates for doing so; and
- the hourly rate awarded to the plaintiff's attorney will reflect the amount of experience the attorney has and the complexity of the case – the hourly rate or number of hours spent by the defendant's attorney are largely irrelevant.

At this time, federal courts in Georgia routinely award attorneys in civil rights cases hourly rates as high as $350 to $400 per hour[52]. It is not unusual for the plaintiff to be represented by more than one lawyer, each of whom will be compensated in a fee award. A civil rights case can be worth a lot more in attorney fees than in compensation due the person bringing the lawsuit.[53] Fee awards of several hundred thousand dollars are very

common. This exposure becomes a very important factor in settlement negotiations before the case goes all the way through the court system.

Qualified Immunity

Qualified immunity is a legal defense that protects public officials[54] for alleged violations of the U.S. Constitution that have not been clearly established. The U.S. Supreme Court first introduced the qualified immunity doctrine in 1967 because it recognized that constitutional law is constantly changing, and public officials could not be "expected to predict the future course of constitutional law."[55] Since then, the U.S. Supreme Court has repeatedly stated that the goal of qualified immunity is to protect public officials who make reasonable, but mistaken, judgments about constitutional questions and also to alleviate the injustice of subjecting public officials to liability when they are required to exercise discretion. Put simply, the doctrine of qualified immunity has sought to eliminate the danger that public officials would be deterred from executing their public duties with decisiveness and discernment if they faced the constant threat of personal liability.

Qualified immunity, however, is not absolute immunity. Indeed, qualified immunity does not protect public officials who are plainly incompetent, knowingly violate the law, or violate another's clearly established statutory or constitutional rights. Most cases are litigated when a public official has violated clearly established law. The U.S. Supreme Court has held that the highly fact-specific analysis must be done on a case-by-case basis in light of existing case law, i.e., binding legal precedent. The relevant inquiry asks if there is a prior, factually analogous[56] U.S. Supreme Court or U.S. Court of Appeals decision that would have put the public official on notice that their conduct/decision/action was unlawful. If so, the public official is not afforded qualified immunity, but if there is not a sufficiently similar case, they will be protected.

Qualified immunity has come under attack by critics who claim it unjustifiably insulates public officials. Those in favor of doing away with it most frequently cite shocking uses of force by police as their motivation. They contend qualified immunity prevents officers from being held accountable when they abuse their power. There are essentially two paths for eliminating qualified immunity:

1. The U.S. Supreme Court [57] created qualified immunity, so it could do away with it at any time.
2. The U.S. Congress, with the President's signature, could end qualified immunity through legislation.

Notably though, neither path is simple. In June 2020, the U.S. Supreme Court considered accepting as many as eleven qualified immunity appeals; in the end, it took none, effectively inviting congressional action. Meanwhile, bills aimed at doing away with qualified immunity have been introduced in Congress during recent years. Votes

tend to fall along party lines and, as of the date of this publication, no bill has managed to pass both the House and the Senate.[58]

Eleventh Amendment Immunity

The Eleventh Amendment to the U.S. Constitution prohibits federal courts from entertaining money damages claims against states (i.e., states are immune from being sued in federal courts for money damages). For this purpose, a "state" includes state agencies and state officers in their official capacities. An official capacity claim is simply a claim against the government entity. Georgia sheriffs in their official capacities have been held to be state actors for most functions.[59] Because of Eleventh Amendment immunity, federal courts routinely dismiss many types of damages claims against Georgia sheriffs sued in an official capacity. The Eleventh Amendment does not protect individual defendants, including a sheriff sued personally. It also does not apply in Georgia courts and does not protect counties.

There are three significant exceptions to the Eleventh Amendment's bar on official capacity money damages claims against Georgia sheriffs in federal court:

1. Congress can specifically override immunity, also known as abrogation.[60]
2. A sheriff's office can waive its Eleventh Amendment immunity.[61]
3. Federal courts can grant injunctive and/or declaratory relief against a sheriff's office relating to future action, and award attorney's fees and expenses to the prevailing plaintiff.[62]

CLAIMS FOR INJUNCTIONS, MANDAMUS, AND DECLARATORY RELIEF

In some cases, brought in either state or federal court, the plaintiff does not ask for monetary relief; instead, the plaintiff wants the judge to order the county to do or not do something. Such actions – called affirmative relief – usually take two forms, injunction or mandamus. In both actions, if the plaintiff wins, the plaintiff can be awarded attorney's fees.

Injunctions

A lawsuit seeking an injunction (sometimes preceded by a temporary restraining order) typically asks the court to stop the county from undertaking an action. For example, if a county's sign ordinance regulating billboards runs afoul of the First Amendment, an outdoor advertising company can obtain an injunction to prevent enforcement of the ordinance.[63] In order for an injunction to issue there must be no other adequate remedy, meaning if the action is not stopped it will be too late to restore the parties to the status quo later.

Mandamus

If the plaintiff contends the county has failed to do something it is legally required to do, then an action for mandamus can be filed, seeking an order that compels the county to

follow the law. For example, a constitutional officer who believes the county governing authority has failed to fund his or her budget according to law can request a writ of mandamus, asking the court to force the county to fund the budget in an amount legally required.[64] Mandamus will not issue unless the party requesting it has a clear legal right to what is being requested. If the defendant by law has discretion to take the action or not, then mandamus normally is not available.

Declaratory Relief

A declaratory judgment is a claim where a party contends there is uncertainty in the legal rights and responsibilities between the party making the claim and the opposing party. The suit requests the court to rule on the question. This can occur when a state law, local ordinance, or local policy is unclear in terms of its application to a particular situation or person, and the court is asked to clarify the law before action is taken to enforce it.[65]

RECALL AND REMOVAL FROM OFFICE

County commissioners should be aware of two other forms of affirmative relief – a recall petition and removal from office.

Recall Petition

Citizens can request and receive an election to recall a commissioner from office by following a procedure under state law.[66] This process starts with an application signed by at least 100 citizens represented by the commissioner whose continued service is being challenged. The petition must allege grounds spelled out in the statute that would authorize a recall (e.g., violation of the State Code of Ethics for Government Service).[67] The election supervisor first determines if the petition has the required signatures. If it does, then the commissioner being challenged has the right to have a superior court judge review the sufficiency of the alleged grounds. If sufficient grounds have been asserted, then a recall petition may be circulated. If 30% or more of the voters served by the commissioner being challenged sign the petition, there will be an election to determine if the commissioner shall remain in office. A majority of those voting determines the outcome.

Removal from Office

A commissioner can also be removed from office by order of a court for violating a state statute addressing conflicts of interest. Any taxpayer may file suit requesting a commissioner's removal from office if it is shown the commissioner sold goods or property to the county without the approval of a majority of the commissioners, or unless it can be shown the goods or property could not have been purchased elsewhere for less.[68]

RISK MANAGEMENT IN COUNTY GOVERNMENTS

Management of risk is critical to the reputation, efficiency, and financial stability of county governments. When given priority within the organization, the benefits of risk management expand far beyond the prevention of losses. Risk management can help the county to

- minimize the interruption of vital services;
- maximize the effectiveness of risk control strategies;
- prepare for and respond to catastrophic situations;
- reduce uncertainty; and
- seize opportunities in alignment with the organization's strategic goals.

Effective risk management protects assets – tangible and intangible – and people. On a broader scale, risk management can help counties fulfill the mission of service to the community.

Used in this context, risk refers to something undesirable (such as an accident, a claim, an injury, or a lawsuit). Risk management helps to manage these adverse outcomes, making them less likely, less severe, or easier to predict. While the term conjures up words like liability, safety, insurance, and others, active risk management encompasses much more than buying insurance and conducting safety training – though both are crucial to most counties. When applied deliberatively, risk management enables an organization to identify potential risks, decide how to best prepare for them, and implement practices and techniques to reduce or eliminate the impact. The risk management process also requires monitoring and, if necessary, adjusting to ensure the most favorable outcome.

A foundational question in the risk management process is "What can go wrong?" Comprehensively answering this question should involve activities such as the following:

- Analyzing claims, accidents, injuries, and near-misses that are more likely to be repeated if the cause is unaddressed.
- Communicating with employees and department heads to assess morale and identify any concerns about safety or liability.
- Reviewing citizen and employee complaints and grievances to detect patterns that could indicate problems or potential future legal action.
- Visiting departments and inspecting worksites to assess actual working conditions, safety practices, and work habits.

- Monitoring changes in legal and regulatory requirements that impact governance, human resources, law enforcement, and other functions to ensure understanding and avoid gaps in compliance.
- Consulting with experts, including ACCG, insurance providers, attorneys, and professional associations to learn best practices and hear the experiences of others with similar risk potential.

Once risks are identified, there are several techniques available to manage them. When determining which risk treatment techniques to employ, the county may need to consider such variables as cost, benefit, availability of insurance coverage, stakeholder input, and any applicable statutory obligations.

The nuances of local government operations – including a county's unique revenue sources and budget requirement – impact the practice of risk management in county governments. Similarly, the wide variety and essential nature of county services demands that risk management is broad and complex. Although risk management duties and responsibilities can be split among several employees working in conjunction with the county's insurance providers, employing a professional risk manager (or, in larger counties, a risk management department) can be very effective and reinforces the county's commitment to managing risk. No matter who is involved in the risk management function, collaboration with (and buy-in from) county leadership, legal representatives, and department heads will be critical to the program's success.

Risk Avoidance

Risk avoidance, which involves eliminating a program, activity, or hazard, is undoubtedly the most effective risk management option, but not always the best choice. A county may decide to remove a specific piece of playground equipment to avoid the risk of a child being injured on that apparatus – a practical decision for risk avoidance. However, risk avoidance is not always a realistic option. For example, selling all the county's vehicles would eliminate the risk of automobile accidents, but many employees would be unable to perform their duties without one.

Risk Transfer

Risk transfer shifts the risk of loss from the county to another organization. This transfer can be accomplished by contracting with third parties to perform specific services or functions. However, the contractual transfer of risk is only useful if the contract includes – and the parties enforce – insurance requirements, hold harmless provisions, indemnity clauses, or other protections in favor of the county. The purchase of insurance is another risk transfer technique, whereby the insurance provider assumes the financial risk of loss in exchange for the county's payment of insurance premiums. Because insurance does not cover every claim scenario, the purchase of insurance is not a stand-alone solution.

Risk Control

Risk control includes a variety of strategies to minimize the frequency and severity of loss. Programs that employ safety procedures and educate employees about hazards are essential risk control strategies, so training and communication are critical. Safety committees and accident review panels can help reinforce safety practices among the entire employee population. However, risk control is much broader than safety. Other risk control tools include, for example, personnel policies to protect the organization from workplace harassment claims, and business continuity plans to help the organization become more resilient and recover more quickly following a natural disaster or other crisis.

Like any other successful initiative, counties need a strong risk control culture to have long-term sustainable results. Ultimately, leadership at every level of the organization is required to build and reinforce that risk control culture. Local Government Risk Management Services (LGRMS) – a service program jointly sponsored by the Georgia Municipal Association and the Association County Commissioners of Georgia (ACCG) – is available to counties that participate in the ACCG Interlocal Risk Management Agency (IRMA) program. LGRMS provides best practices and training for risk control; for more information, visit lgrms.com.

Risk Financing

Because risk exists in every organization, county leadership must determine how to fund the financial impact of claims and losses that do occur. Risk financing options include the purchase of commercial insurance, participation in a group self-insured pool (such as offered by ACCG), direct funding of claims and reserves (self-insurance), or some combination. Insurance or group self-insurance coverage is available to cover, among other things:

- General liability losses arising from government operations (e.g., slips and falls on county premises, damages from mowing/weed-eating, pothole damages, claims from recreational programs).
- Automobile and equipment losses (e.g., auto accidents, theft of equipment).
- Workers' compensation claims (e.g., employee injuries, job-related illnesses).
- Claims arising from the actions and omissions of public officials and law enforcement staff (e.g., zoning claims, excessive force claims, wrongful termination claims, open meetings/open records claims).
- County property damage claims (e.g., hurricane damage, fire damage).

Other more specialized coverage can also be purchased, including excess liability coverage, which provides an additional layer of financial protection. The selected risk financing option should also offer some protection for county employees who otherwise could have personal liability in the event of claims related to the performance of their

duties. It is important to note that insurance may not cover every type of loss and – even when covered by insurance – it is possible for a verdict or judgment to exceed the insurance limits purchased by the county. The cost of insurance is tied directly to claims history, so counties should not merely purchase insurance and hope for the best. Insurance costs can be minimized with the implementation of robust and comprehensive risk management programs that successfully control losses.

Reputational Risk

No discussion on risk management is complete without a mention of reputational risk. The widespread use of social media and other electronic communication can convey news rapidly and reach audiences well beyond jurisdictional boundaries. Cell phone cameras are often used to capture events as they unfold, and, in some cases, a viral video can have more impact than traditional media. It can be challenging to recover from the reputational damage that can result from a high-level sexual harassment scandal, a "bad shooting" during a citizen encounter with law enforcement, or similar injustices or perceived injustices. This type of damage to reputation can also harm the county in other ways, such as impairing employee morale or hindering economic development. When these types of crises occur, a systematic and professional approach to communication with citizens and the media, funneled through a single spokesperson, can help reassure the public and lessen reputational damage that can otherwise occur.

INSURANCE AND INDEMNIFICATION POLICIES

As discussed earlier, there are claims for which a county and its officials do not have sovereign immunity, official immunity, or qualified immunity. To summarize, these claims include:

- Traffic accidents involving county vehicles.
- Claims of inverse condemnation (the taking or damaging of property by government action or inaction).
- Claims where a county employee negligently performed a ministerial act or maliciously performed a discretionary act.
- Whistleblower claims.
- Most all claims based on federal law where qualified immunity or Eleventh Amendment immunity are ruled inapplicable.

If there is no immunity and an adverse judgment is entered against the county or the county official – including attorney's fees in some instances – then the county or county official will be required to pay the judgment. Except for a few, limited exceptions, there generally are no caps or limits on how much the damage award may be.

For these reasons, many counties purchase insurance coverage to protect the county's funds from court losses. These coverages may include automobile and general liability,

errors and omissions, and police or law enforcement liability. Coverage may be obtained from commercial insurance companies or through IRMA. Most policies have a deductible that must be paid from county funds on each claim. After the deductible is satisfied, the carrier will assume all costs to defend the case and pay any judgment for a covered loss up to the limits of coverage applicable under the policy. Except for the case of motor vehicle liability, the county remains responsible for any judgment in excess of the policy limits where the judgment is entered against the county itself.

A county may elect not to purchase insurance and to self-fund or self-insure against potential losses. Counties that elect to do this sometimes buy excess coverage from a commercial insurer to protect against catastrophic losses. Under this arrangement the county negotiates and settles many claims before they turn into lawsuits; if suit is filed the county pays all defense costs and any adverse judgments up to a certain amount, but if the judgment exceeds that amount the excess carrier will pay the remainder. Counties choosing to self-insure should be prepared to set up and operate a claims department that processes, monitors, and attempts to resolve claims before they go to court and while in litigation. This will include analyzing and paying medical bills, bills to repair third-party vehicles and property, and bills from attorneys hired to defend the county.

Due to the way immunity rules apply, in some instances the county itself will not be a party to the case, but a county official or employee will be a defendant. If the county official or employee loses the case, is the county required to pay the judgment? Technically the answer could be "no," but counties generally consider it their responsibility to stand by their officials and employees when they are sued for an incident arising out of the performance of their county duties. If liability insurance has been procured, the coverage will normally apply to the county **and** its agents and employees. Therefore, the insurer will typically pay the judgment entered against the county employee. If the county does not have insurance for the risk – or chooses to self-insure – then the county should consider adopting an indemnification policy that sets forth the terms under which the county will pay (or not pay) a judgment entered against one of its officials or employees. While not legally required, such policies will provide a measure of security to county officers and employees, letting them know that the county will protect them from losing their personal assets or having to file for bankruptcy.

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[1] Zoning cases are sometimes an exception; in many instances the losing party must file an application for appeal, but whether that application is granted, and whether the appeal will be heard, is within the discretion of the appellate court. O.C.G.A. § 5-6-35. *Trend Development Corporation v. Douglas County.*, 259 Ga. 425 (1989).

[2] Lawsuits filed under 42 U.S.C. § 1983 alleging a violation of rights protected under federal law can be filed in state courts and sometimes are, but most are either filed in federal courts by the plaintiff or removed to federal court by the defendant.

[3] Lawyers frequently refer to such parties as having "deep pockets," usually meaning the party with the most insurance coverage.
[4] Georgia follows the law of contributory and comparative negligence. Stated simply, if the plaintiff was 50% or more at fault in causing his or her injuries, the plaintiff loses and recovers nothing. If the plaintiff was at fault to some degree, but less than 50% − say 20% − then the verdict for the plaintiff is reduced by 20%. The jury determines the proportionate fault of each party. It bears remembering that passengers in an automobile (excluding the driver) are generally never at fault, even if the driver was.
[5] *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981); *Martin v. Hospital Autority of Clarke County*, 264 Ga. 626 (1994).
[6] O.C.G.A. § 51-12-5.1.
[7] O.C.G.A. § 51-12-5.1. There are separate rules for product liability claims, but such claims are not typically filed against counties.
[8] O.C.G.A. § 40-6-6(d)(1).
[9] See, e.g., *Barnard v. Turner County*, 306 Ga. App. 235 (2010). The requirement of actual notice is necessary to overcome official immunity, which is discussed later in this chapter.
[10] O.C.G.A. §§ 36-92-1 to -5.
[11] O.C.G.A. § 36-92-2(a).
[12] O.C.G.A. § 36-92-2(d).
[13] O.C.G.A. § 36-92-3.
[14] O.C.G.A. § 36-92-4(g).
[15] O.C.G.A. § 36-92-4(b).
[16] O.C.G.A. §§ 51-3-20 to -26.
[17] *Quick v. Stone Mountain Memorial Association*, 204 Ga. App. 598 (1992).
[18] This is by no means a complete list, but the following information about county employees may not be released to the public: home address and unlisted telephone numbers, names of immediate family members and dependents, date of birth, social security number, mother's maiden name, medical and health insurance records, bank account and credit/debit card information, utility account numbers, credit reports, passwords to county accounts. O.C.G.A. § 50-18-72 (a)(20). Additionally, information obtained in a criminal history report from the GCIC may not be publicly disseminated. O.C.G.A. § 35-3-38.
[19] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; Age Discrimination in Employment Act, 29 U.S.C. § 621; Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117.
[20] *Pickering v. Board. of Education.*, 391 U.S. 563 (1968) (speech); *Elrod v. Burns*, 427 U.S. 347 (1976) (patronage).
[21] 42 U.S.C. § 2000e-3.
[22] 29 U.S.C. § 207.
[23] Counties that are members of the ACCG Property & Liability Program (ACCG-IRMA) have access to employment law specialists who can provide professional guidance on employment issues, ideally before final decisions are made. This value-added HR Legal Service, provided at no additional charge, helps staff abide by the law and reduce the risk of claims due to employment decisions. Information on this program is available on the ACCG Insurance HR Legal Services website.
[24] O.C.G.A. § 45-1-4.
[25] O.C.G.A. § 36-1-21.
[26] *Camden County v. Haddock*, 271 Ga. 664 (1999); *Brownlee v. Williams*, 233 Ga. 548 (1975).
[27] It is not uncommon for local governments to enact personnel policies that disavow the creation of a property right to continued employment, but nonetheless provide an opportunity for review or appeal of an adverse action. The wording of such policies becomes critical, and legal counsel should review the language to make sure the intended result is accomplished.
[28] O.C.G.A. § 36-1-21(b).
[29] *Wayne County. v. Herrin*, 210 Ga. App. 747 (1993).

[30] O.C.G.A. § 36-67A-2 requires county commissioners to disclose any financial interest they may have in a rezoning matter, and to disqualify themselves from participating in the rezoning decision.
[31] O.C.G.A. § 36-66-5(b) requires counties to adopt objective standards for making zoning decisions: "Each local government shall adopt standards governing the exercise of the zoning power, and such standards may include any factors which the local government finds relevant in balancing the interest in promoting the public health, safety, morality, or general welfare against the right to the unrestricted use of property."
[32] Ga. Const. art. I, § II, para. IX.
[33] O.C.G.A. § 36-92-2.
[34] *Fulton County. v. Colon*, 294 Ga. 93 (2013).
[35] *Columbia County. v. Doolittle*, 270 Ga. 490 (1999); *Howard v. Gourmet Concepts International*, 242 Ga. App. 521 (2000).
[36] Ga. Const. Art. I, Sec. II, Para. IX(d).
[37] *Gilbert v. Richardson*, 266 Ga. 744, 753 (1994).
[38] *Wyno v. Lowndes County*, 305 Ga. 523, 527 (2019).
[39] *Roper v. Greenway*, 294 Ga. 112, 114-115 (2013).
[40] *Lincoln County v. Edmund*, 231 Ga. App. 871, 875 (1998).
[41] *Clive v. Gregory*, 280 Ga. App. 826, 843 (2006).
[42] *Polk County v. Ellington*, 306 Ga. App. 193, 200-201 (2010).
[43] Compare *Barnard v. Turner County*, 306 Ga. App. 235 (2010) (no immunity where road superintendent had actual knowledge of water hazard on the road before accident occurred) with *Kennedy v. Mathis*, 297 Ga. App. 295 (2009) (immunity granted to road superintendent where policy allowed judgment in determining how far to cut vegetation that obstructed view of approaching vehicles).
[44] 42 U.S.C. § 2000e-2. These are generally referred to as "Title VII" claims.
[45] 42 U.S.C. § 12112 (Americans with Disabilities Act, or "ADA").
[46] 29 U.S.C. § 623 (Age Discrimination in Employment Act, or "ADEA").
[47] 29 U.S.C. § 207 (Fair Labor Standards Act, or "FLSA," enforced by the U.S. Dept. of Labor, Wage & Hour Division).
[48] 29 U.S.C. § 2612 (Family and Medical Leave Act, or "FMLA").
[49] 52 U.S.C. § 20507 (National Voter Registration Act).
[50] Id. at § 20510.
[51] See, e.g., 42 U.S.C. § 1988(b); 42 U.S.C. § 2000e-5(k).
[52] *Georgia State Conference of NAACP v. Hancock County Board of Elections and Registration,* 2018 U.S. Dist. LEXIS 54155 (M.D. Ga. 2018); *Cheney v. Fulton County*, 2017 U.S. Dist. LEXIS 227171 (N.D. Ga. 2017).
[53] *Riverside v. Rivera*, 477 U.S. 561 (1986) (attorney's fees are not required to be directly proportional to the amount of damages recovered).
[54] The term "public officials" basically means anyone employed by a government. This includes sheriffs, fire chiefs, county managers, commissioners, administrative assistants, etc.
[55] *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).
[56] The concept of factually analogous is a bit like beauty: it is all in the eye of the beholder – and for qualified immunity, the "beholder" is the trial judge or maybe even an appellate panel. So, while the facts of the case need not be identical, qualified immunity will not protect a public official if "the unlawfulness of the conduct [was] **apparent** from pre-existing law." *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011) (*en banc*) ("The critical inquiry is whether the law provided [defendant officers] with fair warning that [their] conduct violated the Fourth Amendment.").
[57] Justice Thomas has long been perceived as the most vocal U.S. Supreme Court critic of qualified immunity. Despite being one of the more conservative members of the Court, his anti-judicial activist philosophy makes qualified immunity an easy target. See Kaylee McGhee. "Clarence Thomas is right about qualified immunity," Washington Examiner, June 15, 2020, https://www.washingtonexaminer.com/opinion/clarence-thomas-is-right-about-qualified-immunity.
[58] See, e.g., SB 492 117th Congress (2021-2022); H.R.1280 — 117th Congress (2021-2022).
[59] See, e.g., *Lake v. Skelton*, 840 F.3d 1334 (11th Cir. 2016).

[60] An example would be federal employment discrimination claims, which are not subject to Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). If a Georgia sheriff is sued in his/her official capacity for employment discrimination, Eleventh Amendment immunity will not help them.

[61] There are two significant circumstances where waivers occur. First, where a sheriff's office participates in removal of a lawsuit from state court to federal court, or perhaps initiates its own claim in federal court. *Lapides v. Board of Regents of University Systems of Georgia,* 535 U.S. 613 (2002) (waiver by removal). Second, Congress often conditions federal funding on a waiver of Eleventh Amendment immunity, so that acceptance of federal funds creates a waiver of immunity to certain types of federal claims. 42 U.S.C. § 2000d–7.

[62] *Ex parte Young*, 209 U.S. 123, 126 (1908). For example, a federal court could order a sheriff's office to provide necessary medical care to inmates.

[63] *Union County Board of Zoning Appeals v. Justice Outdoor Displays*, 266 Ga. 393 (1996).

[64] *Board of Commissioners v. Saba*, 278 Ga. 176 (2004).

[65] *Lawson v. Lincoln County*, 292 Ga. App. 527 (2008) (declaratory judgment filed by county against sheriff with respect to sheriff's authority to retain funds from jail operations).

[66] O.C.G.A. §§ 21-4-1 to -21.

[67] The Recall Statute, O.C.G.A. §21-4-3(8), explicitly includes a violation of the State Code of Ethics for Government Service within its definition of misconduct in office and therefore grounds for recall of an elected official. The State Code of Ethics for Government Service is found at O.C.G.A. §45-10-1.

[68] O.C.G.A. § 36-1-14.