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## Waiver of Sovereign Immunity: An Analysis of *Gilbert v. Richardson*

In *Gilbert v. Richardson*,<sup>1</sup> the Georgia Supreme Court addressed the issue of whether a county waives its sovereign immunity by purchasing liability insurance.<sup>2</sup> On September 1, 1991, Deputy Kathy Richardson responded to an emergency call and collided with Emma and Tommy Gilbert's vehicle. Both Gilberts were injured. The Gilberts brought suit against the Walker County Sheriff's Department, the sheriff, and a deputy sheriff. Plaintiffs alleged that Sheriff Millard, as the employer of the deputy sheriff, was liable for the acts of the deputy while she was acting within the course of her employment.<sup>3</sup> Walker County's Georgia Interlocal Risk Management Association ("GIRMA") coverage agreement protected the county against motor vehicle liability.<sup>4</sup> Through GIRMA, participating counties jointly purchase general liability, motor vehicle liability, or property damage insurance.<sup>5</sup> The trial court granted Richardson's and Millard's motion for summary judgment. The court held that Walker County's participation in GIRMA did not waive the sheriff's sovereign immunity or the deputy sheriff's official immunity.<sup>6</sup> The court of appeals affirmed.<sup>7</sup> The Georgia Supreme Court granted certiorari to determine if the doctrines of sovereign and official immunity barred the action against two Walker County officials.<sup>8</sup> The court held that official immunity barred the claims against Deputy Richardson but that the county and Sheriff Millard were liable to the extent of insurance.<sup>9</sup>

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1. 264 Ga. 744, 452 S.E.2d 476 (1994).

2. *Id.* at 751, 452 S.E.2d at 481.

3. *Id.* at 745, 452 S.E.2d at 478.

4. *Id.* at 751 n.8, 452 S.E.2d at 482 n.8.

5. *Id.* (citing O.C.G.A. § 36-85-2(a) (1993)).

6. *Id.* at 745, 452 S.E.2d at 477.

7. *Id.* (citing *Gilbert v. Richardson*, 211 Ga. App. 795, 440 S.E.2d 684 (1994)).

8. *Id.* at 744, 452 S.E.2d at 478.

9. *Id.* at 752-53, 452 S.E.2d at 482-83.

At the time of the American Revolution, sovereign immunity was a well-established doctrine in England's common law.<sup>10</sup> By an act of the General Assembly on February 25, 1784, Georgia adopted England's common law, including its doctrine of sovereign immunity.<sup>11</sup> A 1974 amendment to the Georgia Constitution authorized the General Assembly to create a state court of claims to exercise jurisdiction over personal injury or property damage claims against the State of Georgia.<sup>12</sup> The provision for a state court of claims did not constitute a waiver of sovereign immunity; therefore, the doctrine of sovereign immunity continued to protect the state and its entities.<sup>13</sup> In the 1980 case of *Hennessy v. Webb*,<sup>14</sup> the court held there was no question that sovereign immunity extended to the governmental unity itself: "The issue in this case was whether this immunity extended to an agent of the board carrying out its duties to provide public education by exercising custody and control over the school premises."<sup>15</sup> In *Hennessy* a student slipped on a rug; the school principal was allegedly negligent for allowing a rug and mat to be in front of the door.<sup>16</sup> The court upheld the common law rule that the nature of the public officials' acts determine whether an official is personally liable.<sup>17</sup> The court explained that officials, "invested with discretion and . . . empowered to exercise [their] judgment" to perform their duties, are immune from liability provided the officers acted within the scope of their authority and "without willfulness, malice, or corruption."<sup>18</sup> However, public officials are not immune when they fail to perform purely ministerial duties required by law.<sup>19</sup> According to the facts, "[d]efendant [was] alleged to have allowed a condition to exist which he knew or should

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10. *Crowder v. Department of State Parks*, 228 Ga. 436, 439, 185 S.E.2d 908, 911 (1971).

11. *Id.*

12. 264 Ga. at 745, 452 S.E.2d at 478 (citing 1973 Ga. Laws 1489).

13. 1973 Ga. Laws at 1490. "Nothing contained herein shall constitute a waiver of the immunity of the state from suit, but such sovereign immunity is expressly reserved except to the extent of any waiver of immunity provided in this Constitution and such waiver or qualification of immunity as is now or may hereafter be provided by act of the General Assembly." 1973 Ga. Laws 1489-90. The amendment was ratified in the 1974 General Election. 264 Ga. at 746 n.2, 452 S.E.2d at 478 n.2.

14. 245 Ga. 329, 264 S.E.2d 878 (1980).

15. *Id.* at 331, 264 S.E.2d at 879.

16. *Id.*

17. *Id.* at 329, 452 S.E.2d at 878.

18. *Id.* at 331, 452 S.E.2d at 880. See *Vickers v. Motte*, 109 Ga. App. 615, 618, 137 S.E.2d 77, 79 (1964) (Board of education was not liable for selecting a dangerous school bus route because the decision was a governmental act).

19. 245 Ga. at 331, 452 S.E.2d at 880.

have known was hazardous. This . . . is an allegation that he negligently exercised his authorized discretion."<sup>20</sup> Plaintiffs did not allege the defendant acted wilfully or outside the scope of his authority.<sup>21</sup> Therefore, the court held that the board of education and the school principal were protected from liability under the doctrine of governmental immunity.<sup>22</sup> The General Assembly finally modified sovereign immunity in 1982.<sup>23</sup> Under the constitutional amendment, the state and the departments and agencies of the state waive sovereign immunity to the extent of liability insurance.<sup>24</sup> In *Martin v. Georgia Department of Public Safety*,<sup>25</sup> the supreme court construed the amendment and held that the police department and its officers were liable to the extent of liability insurance.<sup>26</sup> The insurance waived the officers' official immunity and the police department's sovereign immunity against vicarious liability for the acts of its employees.<sup>27</sup> In 1987, the General Assembly proposed another amendment "provid[ing] for the purchase of liability insurance protection for state officers and employees to protect them from personal liability arising from the performance of the duties of their office or employment . . . [without] waiv[ing] the defense of sovereign immunity or the defense of official immunity."<sup>28</sup> Voters defeated the amendment; thus, state officers and employees could not assert their official immunity against claims that were covered under liability insurance.<sup>29</sup> In 1990, voters ratified an amendment that vested the General Assembly with the exclusive right to waive sovereign immunity by an act specifically providing for waiver and the extent of

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20. *Id.* at 332, 452 S.E.2d at 880.

21. *Id.*

22. *Id.*, 452 S.E.2d at 881.

23. GA. CONST. art. I, § 2, para. 9 editor's note (1983). The amendment was proposed at 1982 Ga. Laws 2546 and ratified that same year:

Sovereign immunity extends to the state and all of its departments and agencies . . . . Also the defense of sovereign immunity is waived as to those actions for the recovery of damages for any claim against the state or any of its departments and agencies for which liability insurance protection for such claims has been provided but only to the extent of any liability insurance provided. Moreover, the sovereign immunity of the state or any of its departments and agencies may hereafter be waived further by Act of the General Assembly which specifically provides that sovereign immunity is hereby waived and the extent of the waiver.

1982 Ga. Laws 2546.

24. GA. CONST. art. I, § 2, para. 9 editor's note (1983).

25. 257 Ga. 300, 357 S.E.2d 569 (1987), *cert. denied*, 484 U.S. 998 (1988).

26. 257 Ga. at 301, 357 S.E.2d at 571.

27. *Id.* at 303, 357 S.E.2d at 572.

28. GA. CONST. art. I, § 2, para. 9. The amendment was defeated in the November 8, 1988 general election. 1988 Ga. Laws 2121, 2128.

29. 1988 Ga. Laws 2121, 2128.

such waiver.<sup>30</sup> The General Assembly exercised its right and waived the state's sovereign immunity against the tort actions specified in the Georgia Torts Claim Act.<sup>31</sup> The Act lists twelve exceptions to state liability.<sup>32</sup> Among these exceptions, the state shall not be liable for the acts or omissions of its employees while performing discretionary functions.<sup>33</sup> The Act contains a detailed statement of legislative intent.<sup>34</sup> The General Assembly explained that, unlike private entrepreneurs who voluntarily engage in activities, the state must provide certain services to the public.<sup>35</sup> Consequently, the state involuntarily faces certain liability exposures.<sup>36</sup> The General Assembly further explained that "state officers and employees [must] be free to act and to make decisions, in good faith, without fear of thereby exposing themselves to lawsuits and without fear of the loss of their personal assets."<sup>37</sup> Therefore, sovereign immunity was the general rule and state liability became a limited exception.

In *Gilbert v. Richardson*,<sup>38</sup> the supreme court affirmed the trial court's ruling that official immunity barred all claims against Deputy Richardson, but the court reversed the trial court's ruling that sovereign immunity barred claims against the sheriff.<sup>39</sup> The court explained that official immunity protects governmental officers and employees.<sup>40</sup> The court interpreted the 1991 amendment to provide governmental officers and employees with immunity from personal liability when they negligently perform discretionary acts.<sup>41</sup> Such employees work in positions that require them to make policy decisions or exercise discretion.<sup>42</sup> The employees are not, however, immune from "ministerial [nondiscretionary] acts negligently performed or for ministerial or

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30. GA. CONST. art. I, § 2, para. 9 (1990 Ga. Laws 2435, § 1).

31. O.C.G.A. § 50-21-21 (1991).

32. *Id.* § 50-21-24.

33. *Id.* § 50-21-24(2) (1994). "The state shall have no liability for losses resulting from . . . (2) [t]he exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused." *Id.*

34. O.C.G.A. § 50-21-22 (1994).

35. *Id.*

36. *Id.*

37. *Id.*

38. 264 Ga. 744, 452 S.E.2d 476.

39. *Id.* at 748, 452 S.E.2d at 480 (with all justices concurring, except Hunt, C.J., who concurred in judgment only).

40. *Id.* at 749-50, 452 S.E.2d at 481.

41. *Id.* at 752, 452 S.E.2d at 483.

42. *Id.*

discretionary acts performed with malice or an intent to injure.<sup>43</sup> The court concluded that Deputy Richardson was exercising a discretionary function when she responded to the emergency call and, therefore, was immune from liability.<sup>44</sup> Thus, the court interpreted the 1991 amendment to subject "state officers and employees and those of its departments and agencies . . . to suit only when they negligently perform or fail to perform their 'ministerial functions' or when they act with actual malice or intent to cause injury in the performance of their 'official functions.'"<sup>45</sup> The court found that the 1991 amendment also granted sovereign immunity to counties.<sup>46</sup> The court explained that the 1983 amendment had effectively granted sovereign immunity to counties, as departments or agencies of the state; thus, the virtually identical language in the 1991 amendment continued to extend sovereign immunity to counties.<sup>47</sup> However, Walker County waived its sovereign immunity to the extent of liability insurance.<sup>48</sup> Sheriff Millard argued that the insurance did not waive the county's sovereign immunity; he contended that the Georgia Tort Claims Act was the exclusive way for the General Assembly to waive sovereign immunity.<sup>49</sup> The court rejected this argument and held that the language of the amendment did not restrict the General Assembly's authority to waive sovereign immunity by other means.<sup>50</sup> The court agreed with the court in *Curtis v. Board of Regents*<sup>51</sup> that the legislature enacted the 1991 amendment and the Georgia Tort Claims Act to "redefine the terms of the state's waiver of sovereign immunity, rather than withdraw the existing waiver."<sup>52</sup> The court found that a prior act which waived a county's "governmental immunity" to the extent of motor vehicle insurance remained effective after the passage of the 1991 amendment.<sup>53</sup> Thus, the sovereign immunity of the state and its departments and agencies can only be waived by an act of the General Assembly, but waiver is

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43. *Id.* at 753, 452 S.E.2d at 483.

44. *Id.*

45. *Id.* at 752-53, 452 S.E.2d at 483. Official functions are acts "performed within the officer's or employee's scope of authority, including both ministerial and discretionary acts." *Id.* at 753, 452 S.E.2d at 483.

46. *Id.* at 747, 452 S.E.2d at 479.

47. *Id.* at 747-48, 452 S.E.2d at 479-80.

48. *Id.* at 754, 452 S.E.2d at 484.

49. *Id.* at 747, 452 S.E.2d at 479.

50. *Id.* at 748, 452 S.E.2d at 480.

51. 262 Ga. 226, 416 S.E.2d 510 (1992).

52. *Id.* (citing *Curtis v. Board of Regents*, 262 Ga. 226, 227-28, 416 S.E.2d 510, 512 (1992)).

53. 264 Ga. at 748 n.6, 452 S.E.2d at 480 n.56.

achieved by any act which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.<sup>54</sup> The court explained that section 33-24-51(b) "provides both a waiver of sovereign immunity [by motor vehicle insurance] and the extent of such waiver and is, therefore, a legislative act waiving sovereign immunity as contemplated by the 1991 amendment."<sup>55</sup> Accordingly, the county's purchase of insurance waived sovereign immunity.<sup>56</sup> The court carefully explained that the county's insurance waived only governmental immunity, which is "synonymous with sovereign immunity and not an umbrella term encompassing both sovereign and official immunity."<sup>57</sup> The court approved the numerous cases that have used the term "governmental immunity" as a synonym for "sovereign immunity."<sup>58</sup> Therefore, the insurance coverage did not waive the official immunity that barred the claims against Deputy Richardson, but the insurance did waive the county and the sheriff's sovereign immunity to the extent of insurance.<sup>59</sup> The court ultimately held Sheriff Millard personally liable for the injuries sustained by the Gilberts.<sup>60</sup>

In *Woodard v. Laurens County*,<sup>61</sup> the court relied on its prior conclusion in *Gilbert* and again held that the 1991 constitutional amendment "provides no official immunity defense for ministerial acts negligently performed or for ministerial or discretionary acts performed with malice or an intent to injure. It, however, does provide immunity for the negligent performance of discretionary acts."<sup>62</sup> In *Woodard*, appellants filed suit against "five county commissioners in their official capacities and two county employees in both their official and individual capacities."<sup>63</sup> Appellants alleged that the county employees negligently inspected and maintained a stop sign that had become obscured by tree limbs. The county officers exercised discretion when they implemented

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54. *Id.* at 747-48, 452 S.E.2d at 479-80.

55. *Id.* at 751, 452 S.E.2d at 481-82.

56. *Id.*, 452 S.E.2d at 481.

57. *Id.* at 750, 452 S.E.2d at 481.

58. *Id.* at 749, 452 S.E.2d at 480. See *Hiers v. City of Barwick*, 262 Ga. 129, 414 S.E.2d 647 (1992); *Thigpen v. McDuffie County Bd. of Educ.*, 255 Ga. 59, 335 S.E.2d 112 (1985); *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878 (1980); *Knowles v. Housing Auth. of Columbus*, 212 Ga. 729, 95 S.E.2d 659 (1956); *Roberts v. Barwick*, 187 Ga. 691, 1 S.E.2d 713 (1939); *Schmidt v. Adams*, 211 Ga. App. 156, 438 S.E.2d 659 (1993); *Culberson v. Fulton-DeKalb Hosp. Auth.*, 201 Ga. App. 347, 411 S.E.2d 754 (1991); *Dekalb County Sch. Dist. v. Bowden*, 177 Ga. App. 296, 339 S.E.2d 356 (1985).

59. 264 Ga. at 754, 452 S.E.2d at 484.

60. *Id.*

61. 265 Ga. 404, 456 S.E.2d 581 (1995).

62. *Id.* at 406, 456 S.E.2d at 583.

63. *Id.* at 404, 456 S.E.2d at 582.

inspection and maintenance procedures.<sup>64</sup> Official immunity barred claims against the officers unless their acts were "wilful, malicious, or corrupt."<sup>65</sup> Therefore, the officers were entitled to summary judgment.<sup>66</sup> Next, the court addressed sovereign immunity.<sup>67</sup> Following *Gilbert*, the issue of whether a county waived its sovereign immunity against any claim covered by liability insurance remained unsettled. The Georgia Supreme Court resolved this issue in *Woodard*.<sup>68</sup> The court held that the statute waived "[a] county's sovereign immunity . . . but only 'to the extent of the amount of liability insurance purchased for the negligence of [county] officers, agents, servants, attorneys, or employees arising from the use of a motor vehicle.'"<sup>69</sup> Unlike *Gilbert*, liability of the county officers is "not predicated upon their alleged negligent use of an insured motor vehicle."<sup>70</sup> Thus, sovereign immunity was a viable defense to appellants' claims.<sup>71</sup> In *Woodard*, the court held that O.C.G.A. section 33-24-51(b) waives a county's sovereign immunity to the extent of motor vehicle liability insurance.<sup>72</sup> The court explained that "because the liability of appellees [wa]s not predicated upon their alleged negligent use of an insured motor vehicle[,] [i]t follows that . . . sovereign immunity has not been waived by the General Assembly and remains a viable defense to appellants' claims."<sup>73</sup> Although Laurens County had insurance, sovereign immunity protected the county against a claim that it negligently maintained an obscured stop sign.<sup>74</sup> Similarly, sovereign immunity will continue to protect counties and county employees against many claims that are covered by liability insurance. The court's interpretation of the 1991 amendment is consistent with the General Assembly's recognition that sovereign immunity should protect the state from certain liabilities because the state must provide certain services to the public and does not voluntarily assume these risks. The court's interpretation of the 1991 amendment is also consistent with the General Assembly's recognition that county

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64. *Id.* at 407, 456 S.E.2d at 584.

65. *Id.*

66. *Id.*

67. *Id.* at 405, 456 S.E.2d at 582.

68. *Id.*

69. *Id.*, 456 S.E.2d at 582-83 (quoting *Gilbert*, 264 Ga. at 749, 452 S.E.2d at 480) (emphasis in original).

70. *Id.*, 456 S.E.2d at 583.

71. *Id.*

72. *Id.*, 456 S.E.2d at 582.

73. *Id.*, 456 S.E.2d at 583.

74. *Id.*, 456 S.E.2d at 582-83.



officers and employees must be free to act and to make decisions, in good faith, without fear of losing their assets.

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