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Local Government Law

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I. INTRODUCTION

This Article reviews Georgia appellate decisions presenting new or instructive issues related to local government law during the survey period from June 1, 2012 to May 31, 2013.[1]

II. ANTI-SLAPP

The Georgia Court of Appeals in *Paulding County Board of Commissioners v. Morrison*[2] addressed the issue of whether a "wherefore" clause is a "claim" under the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute[3] if it prays generally for attorney fees and costs of litigation in the answer to a complaint.[4] The anti-SLAPP statute is intended "to prevent a 'chill[ing]' of 'the valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances . . . through abuse of the judicial process.'"[5] The statute is triggered when a claim is asserted against a person or entity

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1. For an analysis of Georgia local government law during the prior survey period, see Kirk Fjelstul & James E. Elliott, Jr., *Local Government Law, Annual Survey of Georgia Law*, 64 MERCER L. REV. 213 (2012).

2. 316 Ga. App. 806, 728 S.E.2d 921 (2012).

3. O.C.G.A. § 9-11-11.1 (2006).

4. *Morrison*, 316 Ga. App. at 806-07, 728 S.E.2d at 922; *see also* Hawks v. Hinely, 252 Ga. App. 510, 510, 556 S.E.2d 547, 548 (2001) (stating that anti-SLAPP means "[a]nti-Strategic Lawsuit Against Public Participation.").

5. *Morrison*, 316 Ga. App. at 810, 728 S.E.2d at 924 (alteration in original) (quoting O.C.G.A. § 9-11-11.1(a)).

arising from facts that could be construed as furthering free speech rights in order to "petition government for a redress of grievances" on an issue of public interest.[6] The person and the attorney asserting the claim are required to file a verification certifying that the claim is "well-grounded in law and fact, is not directed toward a privileged communication, and is not interposed for an improper purpose."[7] If the verification is determined to be false, the sanction is dismissal of the claim or attorney fees.[8]

The plaintiffs in *Morrison* owned land adjacent to two parcels that were approved for rezoning by the Paulding County Board of Commissioners in 2006. They each filed complaints in the Superior Court of Paulding County, appealing the board's decision and asserting claims for damages. The board of commissioners filed answers without any counterclaim, but the answers included wherefore clauses in response to each count, praying for costs, expenses, and attorney fees. The plaintiffs' lawyer sent a letter to the board contending that the wherefore clauses triggered the anti-SLAPP statute and that the required anti-SLAPP verifications were not included with the pleadings.[9]

The board of commissioners responded with a letter denying that the clauses invoked the statute, but they amended the pleadings to file verifications "under protest" and in an "abundance of caution." Two years of contentious litigation followed with no resolution to the cases. The plaintiffs filed motions to dismiss the defensive pleadings in 2008, contending that the wherefore clauses were anti-SLAPP counterclaims and the required verifications were not included with the pleadings. The superior court finally held a hearing on the motion in early 2010 and then issued nearly identical orders for the two cases in late 2010 and early 2011.[10]

The superior court concluded in its orders that the wherefore clauses constituted counterclaims subject to the anti-SLAPP statute.[11] Although it accepted that verifications were filed with the amended pleadings, the court concluded that they were false because the counterclaims were "neither grounded in fact nor warranted by law; that they were asserted for the improper purpose of suppressing the

6. *Id.* (quoting O.C.G.A. § 9-11-11.1(b)).

7. *Id.*

8. *Id.* (citing O.C.G.A. § 9-11-11.1(b)).

9. *Id.* at 807, 728 S.E.2d at 922. Although the defendants included verifications with the answer, they were not submitted for the purpose of complying with the anti-SLAPP statute. *Id.*

10. *Id.* at 807-08, 728 S.E.2d at 922-23.

11. *Id.*

[plaintiffs'] right to petition the government for the redress of grievances; and that the [plaintiffs] had incurred unnecessary legal expenses in defending them."[12] The superior court dismissed the prayers for relief and ruled that the plaintiffs were entitled to attorney fees. In July 2011, after a hearing, the plaintiffs were awarded over $265,000 in attorney fees based upon the testimony of the plaintiffs' attorney that all of the litigation was attributable to the wherefore clauses.[13]

The Georgia Court of Appeals noted that it could reverse the various superior court "rulings for any number of reasons," but that was unnecessary because it reversed the first ruling that the wherefore clauses were counterclaims.[14] The court of appeals held it was plain legal error for the superior court to conclude that the wherefore clauses constituted impermissible counterclaims, and then cited multiple established precedents in support of its finding.[15] Among the precedents, the court noted that a prayer for relief requesting attorney fees does not constitute a claim, that nothing in the anti-SLAPP statute requires a verification for purely defensive motions, and that the statute does not preclude a defendant from preserving the right to seek attorney fees and expenses if the litigation is later "determined to lack substantial justification."[16]

III. JUDICIAL SALARIES

Can the salary of a newly appointed magistrate judge be reduced from the salary of the elected magistrate who resigned? The Georgia Supreme Court in *Pike County v. Callaway-Ingram*[17] resolved this question.[18] Pike County's Chief Magistrate was elected to a four-year term of office beginning in 2009 and ending in 2012, at a salary of $63,139. She resigned in April 2010, and Callaway-Ingram was appointed to fill the position as of June 1, 2010. Callaway-Ingram agreed to a temporary reduction, down to $49,182, so she could work a reduced schedule while she closed her private law practice. When the practice was closed and she could work full-time, the salary was to return to $63,139.[19]

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12. *Id.* at 808-09, 728 S.E.2d at 923.
13. *Id.* at 809, 728 S.E.2d at 923.
14. *Id.* at 809-10, 728 S.E.2d at 924.
15. *See id.* at 810-11, 728 S.E.2d at 924.
16. *Id.* at 811, 728 S.E.2d at 925.
17. 292 Ga. 828, 742 S.E.2d 471 (2013).
18. *Id.* at 831, 742 S.E.2d at 474.
19. *Id.* at 828-29, 742 S.E.2d at 472-73.

Twenty-eight days later Callaway-Ingram assumed full-time responsibilities, but the County had adopted a budget permanently reducing her salary to $49,182. She objected to the salary change and later filed a complaint seeking a writ of mandamus directing the County to pay the salary set at the beginning of the 2009 term, and seeking back pay with interest and attorney fees.[20] The Superior Court of Pike County granted summary judgment to Callaway-Ingram and denied the County's summary judgment motion.[21]

The supreme court upheld the superior court's decision, relying on the Georgia Constitution and a statute.[22] The Georgia Constitution provides that "[a]n *incumbent's* salary, allowance, or supplement shall not be decreased during the incumbent's *term of office*."[23] The statute setting the salary for magistrates includes a similar prohibition against decreasing compensation and salary supplements "during any term of office."[24]

The court first determined that an incumbent is an individual who is qualified for and in possession of office, regardless of the method by which the office is obtained.[25] Callaway-Ingram was an incumbent, the court ruled, because she assumed the duties of chief magistrate before the County took formal action to permanently reduce the salary.[26] Second, the court determined that "term of office" is the time set by statute for the elective office.[27] It rejected the County's interpretation that term of office is the length of time an individual holds the office and that salary can be changed when a magistrate is appointed.[28] As a result, the County did not have authority to change Callaway-Ingram's salary during the statutorily-set four-year term.[29]

IV. EXHAUSTION OF REMEDIES

Exhausting administrative remedies, as a prerequisite to damage awards for inverse condemnation resulting from local land-use decisions, was the subject for resolution in *City of Suwanee v. Settles Bridge Farm,*

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20. *Id.* at 829-30, 742 S.E.2d at 473. There were a number of other claims related to the chief magistrate's budget and responsibilities that are not addressed in this Article. *Id.*

21. *Id.* at 830, 742 S.E.2d at 473.

22. *Callaway-Ingram*, 292 Ga. at 830, 742 S.E.2d at 474.

23. GA. CONST. art. VI, § 7, ¶ 5 (emphasis added).

24. O.C.G.A. § 15-10-23(d) (2012).

25. *Callaway-Ingram*, 292 Ga. at 830, 742 S.E.2d at 474.

26. *Id.* at 830-31, 742 S.E.2d at 474.

27. *Id.* at 831, 742 S.E.2d at 474.

28. *Id.*

29. *Id.*

LLC[30] by the Georgia Supreme Court.[31] The plaintiff, Settles Bridge Farm, LLC (Settles Bridge), accumulated land in an R-140 residential zoning district in the City. It subdivided the land and secured the necessary variances required to develop the land as a residential subdivision. Settles Bridge was subsequently contacted by a private school, and it abandoned the idea of residential development in favor of selling the property for use as a school. Once Settles Bridge and the school confirmed that a private school was a permitted use in the zoning district, the two parties entered into a contract for the sale of the property.[32]

The City's elected officials learned about the school's intention as they were preparing a new comprehensive land-use plan that called for remaining undeveloped land in the area to be developed as single-family or compatible uses. They realized that the school was a permitted use in the zoning district, without the requirement of any public review. As a result, the City adopted a three-month moratorium on "large" projects, which was defined to include projects such as the school.[33]

The zoning ordinance was amended at the conclusion of the moratorium, requiring large projects in residential zoning districts to secure special land-use permits. The amended ordinance included standards for consideration of a special land-use permit and required a planning commission recommendation, a public hearing, and city council approval. Projects having necessary approvals prior to enactment of the amended ordinance were exempt. Settles Bridge could, therefore, develop the residential subdivision it initially proposed without a special land-use permit, but a permit would be required for a proposed school.[34]

Settles Bridge and the school filed a lawsuit challenging the validity of the moratorium and the special land-use permit provisions of the amended ordinance, though the school later settled its claims. Settles Bridge contended that the actions of the City resulted in a taking of property. The Superior Court of Gwinnett County awarded damages for the reduced value of the property, plus interest, in excess of $2 million.[35] The decision was reversed by the supreme court because Settles Bridge did not first exhaust its available remedies by going

30. 292 Ga. 434, 738 S.E.2d 597 (2013).
31. *Id.* at 435, 738 S.E.2d at 598.
32. *Id.*
33. *Id.*
34. *Id.* at 435-36, 738 S.E.2d at 599.
35. *Id.* at 436, 738 S.E.2d at 599.

through the new special land-use permit process and, therefore, the court ruled that the case was not ripe for adjudication.[36]

A party seeking judicial relief is generally required to first apply to the local government for relief from a regulation that is unconstitutional as applied to the property, to promote judicial economy and to avoid unnecessary judicial intervention.[37] Thus, Settles Bridge did not exhaust its administrative remedies because it did not apply for a special land-use permit.[38]

There is an exception to the exhaustion requirement if a party can demonstrate that it would be futile to submit to the administrative process.[39] Futility can only be established in a zoning case, however, where the "review 'would result in a decision on the same issue by the same body.'"[40] The city council in *Settles Bridge* met the same-body requirement because it voted to approve the amended ordinance, and because it would decide whether to approve the special land-use permit.[41] The court, nevertheless, held that the futility exception did not apply because the issues associated with amending the ordinance were not the same as those associated with amending a permit.[42] The permit decision, had Settles Bridge submitted to the administrative process, would have been based on a site-specific assessment of the considerations required by the amended ordinance, which carried a very different standard than amending the ordinance.[43]

The court also noted that Settles Bridge's pessimism, based on past actions of the decisionmakers, did not trigger the futility exception.[44] As a result, evidence that the City targeted Settles Bridge when it adopted the amended ordinance was not relevant to the issue of futility.[45]

V. CONTRACTS

The case of *City of Baldwin v. Woodard & Curran, Inc.*[46] is a reminder to contractors that equitable remedies for work performed,

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36. *Id* at 437, 439, 738 S.E.2d at 599-601.
37. *Id.* at 437, 738 S.E.2d at 599.
38. *Id.* at 437, 738 S.E.2d at 599-600.
39. *Id.* at 437, 738 S.E.2d at 600.
40. *Id.* (quoting Little v. City of Lawrenceville, 272 Ga. 340, 342, 528 S.E.2d 515, 518 (2000)).
41. *Id.*
42. *Id.* at 438-39, 738 S.E.2d at 600-01.
43. *Id.*
44. *Id.* at 439, 738 S.E.2d at 601.
45. *Id.*
46. 293 Ga. 19, 743 S.E.2d 381 (2013).

namely in quantum meruit, may not be available if the government contract is not authorized in accordance with the law.[47] The City of Baldwin intended to apply for stimulus funds to improve its water treatment plant and engaged Woodward & Curran, Inc. (W&C) in 2009 to help prepare the necessary documents for $5000. There was no question that the contract was approved in May 2009, that work was completed, and that the invoice was paid.[48]

The stimulus-funding agency approved the application in June, and W&C sent a Proposal for Professional Engineering Design Services (the Proposal) to the City. The Proposal offered the services required to prepare plans and oversee the bidding process for a price not to exceed $210,000. It stated that W&C would begin work once the mayor signed the Proposal, authorizing W&C to proceed.[49]

When the Proposal was not signed in August, W&C sent an email to the mayor stating that it still needed city council approval. Shortly thereafter, the mayor and two council members met with W&C about the Proposal. Although the mayor subsequently signed it, he left the Proposal undated because he did not have authority to bind the City. He told W&C members at the meeting that the Proposal would not go into effect until it was reviewed by the city attorney and approved by the council. The Proposal was never dated by the mayor, but was dated by W&C employees at some point. The mayor did sign and date a "certificate of readiness" that was submitted to the funding agency, but it was not part of the Proposal document.[50]

W&C did all of the work outlined in the Proposal, even though the parties were clear that council action was never taken. It hired a surveyor, completed design work, prepared bid documents, advertised the bid, met with bidders, and secured approvals from the funding agency. W&C even met with the mayor at his request to provide a project update. Just before bids for the project were opened, the City was notified by the funding agency that stimulus funds had been exhausted on other projects and were no longer available. W&C sent a letter to the City in November notifying it that all work under the Proposal had been completed, and it attached an invoice for a little over $203,000.[51]

When the City refused to pay, W&C filed a lawsuit contending that the parties had two valid contracts that the City breached. The heart

47. *Id.* at 29, 743 S.E.2d at 389.
48. *Id.* at 20, 743 S.E.2d at 383.
49. *Id.* at 20-21, 743 S.E.2d at 383.
50. *Id.* at 21, 743 S.E.2d at 383-84.
51. *Id.* at 21, 743 S.E.2d at 384.

of the litigation, however, was the alternative theory that W&C was entitled to recover quantum meruit damages under the second contract (the Proposal) for services received by the City, regardless of the contract's validity.[52] The Superior Court of Habersham County granted summary judgment to the City on the breach of contract claim, ruling that the contract was ultra vires and void because it had never been approved by the city council.[53] The City of Baldwin's City Charter,[54] which was enacted by the Georgia General Assembly, provides that a contract is not binding unless it is in writing, reviewed and signed by the city attorney, approved by the council, and entered into the council journal.[55] The charter also specifies that official actions of the City require a vote of at least three council members,[56] which did not happen with the Proposal in the present case.[57]

Although the City prevailed on the breach of contract issue, the superior court denied the City's motion for summary judgment on the quantum meruit claim, holding that W&C could have relied on the signed Proposal in completing its work. The case proceeded to trial, a verdict was returned against the City in the amount of $203,000, and the Georgia Court of Appeals affirmed the verdict on appeal.[58] The Georgia Supreme Court reversed and ruled that the court of appeals properly held that the Proposal was ultra vires and not binding, but that it erred as a matter of law in ruling that W&C could still recover for work completed based on quantum meruit.[59]

Quantum meruit is an equitable principle that there is an implied promise to pay the reasonable value for services or property received.[60] The supreme court cited its earlier ruling in *PMS Construction Co. v. DeKalb County*[61] for the proposition that an express contract is required to prove breach of a county contract and quantum meruit is not

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52. *Id.* at 22, 743 S.E.2d at 384. W&C also argued that the Proposal was simply additional work authorized under the first contract that was voted on and approved by the council. *Id.* The court rejected that argument for reasons not addressed in this Article. *Id.* It further argued that the $5000 owed under the first contract was never paid, but later conceded that it was. *Id.*

53. *Id.*

54. Act of March 28, 1986, H.R. Bill 2053, Reg. Sess., 1986 Ga. Laws 5578 (reincorporating and providing a new municipal charter for the City of Baldwin in Habersham and Banks counties).

55. *Id.* §§ 2-1, 2-8, 2-13, 6-9, at 5579, 5581-82, 5589.

56. *Id.* § 2-8, at 5581.

57. *Woodard & Curran, Inc.*, 293 Ga. at 21, 743 S.E.2d at 383.

58. *Id.* at 22, 743 S.E.2d at 384.

59. *Id.* at 29, 743 S.E.2d at 389.

60. *Id.* at 23, 743 S.E.2d at 385 (quoting O.C.G.A. § 9-2-7 (2007)).

61. 243 Ga. 870, 257 S.E.2d 285 (1979).

available as a remedy because the language of section 36-10-1 of the Official Code of Georgia Annotated (O.C.G.A.)[62] requires that all county contracts be "in writing and entered on [their] minutes."[63] The court of appeals incorrectly concluded that municipal contracts are distinguished from county contracts on the basis that there is no similar statute for cities.[64]

The supreme court reasoned that while there is not a similar statute, a municipal charter is enacted by the General Assembly and carries the force of law, and a city can only exercise power to the extent delegated by the state.[65] As a result, municipal charter provisions that regulate contracts "have the same legal effect as the statutory requirements that govern county contracting."[66] The court relied on the reasoning in *H.G. Brown Family, L.P. v. City of Villa Rica* (*H.G. Brown*):[67] "Where a city charter specifically provides how a municipal contract shall be made and executed, the city may only make a contract in the method prescribed; otherwise, 'the contract is invalid and unenforceable.' A municipality's method of contracting, once prescribed by law or charter, is absolute and exclusive."[68]

The court recognized that quantum meruit was not argued in *H.G. Brown*.[69] The court in *H.G. Brown* simply considered whether the contract was ultra vires and void when it was executed by the mayor and two council members, but was not approved by a majority of the council as required by the charter.[70] The court concluded that the contract was ultra vires because it was not approved in accordance with the charter provisions and that the contractor could not seek even partial performance.[71] The court further concluded that the City was entitled to assert that the contract was invalid, even if the contractor relied on the document to its detriment.[72] Though the court in *Woodard & Curran, Inc.* recognized that *H.G. Brown* was not a quantum

62. O.C.G.A. § 36-10-1 (2012).

63. *Woodard & Curran, Inc.*, 293 Ga. at 23, 743 S.E.2d at 385 (quoting O.C.G.A. § 36-10-1).

64. *Id.* at 25-26, 743 S.E.2d at 386.

65. *Id.* at 25-26, 743 S.E.2d at 386-87.

66. *Id.* at 26, 743 S.E.2d at 387.

67. 278 Ga. 819, 607 S.E.2d 883 (2005).

68. *Woodard & Curran, Inc.*, 293 Ga. at 26, 743 S.E.2d at 387 (quoting *H.G. Brown*, 278 Ga. at 820, 607 S.E.2d at 885).

69. *Id.* at 24-25, 743 S.E.2d at 386 (citing *H.G. Brown*, 278 Ga. at 819, 607 S.E.2d at 885).

70. *H.G. Brown*, 278 Ga. at 820-22, 607 S.E.2d at 886.

71. *Id.*

72. *Id.* at 822, 607 S.E.2d at 886-87.

meruit case, it concluded that the result would have been the same because in *H.G. Brown* the court determined that "an ultra vires agreement can be given no legal effect whatsoever."[73]

The court in *Woodard & Curran, Inc.* was careful to distinguish an ultra vires act done in a total absence of power from an *irregular* exercise of a power that has been granted.[74] The irregular exercise of power may expose local governments to equitable claims, but equitable remedies are not available for ultra vires acts, such as failure to secure city council approval.[75] Consistent with this ruling, the court overruled three cases relied on by the court of appeals, *Walston & Associates v. City of Atlanta*,[76] *City of Dallas v. White*,[77] and *City of St. Marys v. Stottler Stagg & Associates, Inc.*,[78] to the extent they stand for the proposition that quantum meruit recovery is allowed when contracting requirements of a charter are not met.[79]

VI. HIGH-SPEED PURSUIT

The circumstances under which law enforcement officers can be the legal cause of injuries to third parties was visited in *Clayton County v. Austin-Powell*.[80] The Georgia Court of Appeals had already ruled in an earlier case arising from the same facts that immunity was waived by the purchase of automobile liability insurance.[81] That left the issue of the standard of liability for a county when the injured party was a passenger in a vehicle fleeing from law enforcement officers.[82]

Two wrongful death actions were brought in Clayton County by the parents of two passengers who died in a vehicle that crashed as the driver tried to evade police during a high-speed pursuit.[83] O.C.G.A. § 40-6-6(d)(2)[84] provides that a police officer cannot be the proximate cause of injuries sustained by a third party from a fleeing suspect while

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73. *Woodard & Curran, Inc.*, 293 Ga. at 24-25, 743 S.E.2d at 386 (quoting *H.G. Brown*, 278 Ga. at 822, 607 S.E.2d at 887).

74. *Id.* at 26-28, 743 S.E.2d at 387-88.

75. *Id.*

76. 224 Ga. App. 482, 480 S.E.2d 917 (1997).

77. 182 Ga. App. 782, 357 S.E.2d 125 (1987).

78. 163 Ga. App. 45, 292 S.E.2d 868 (1982).

79. *Woodard & Curran, Inc.*, 293 Ga. at 29, 743 S.E.2d at 388.

80. 321 Ga. App. 12, 15, 740 S.E.2d 831, 834 (2013).

81. McCobb v. Clayton Cnty., 309 Ga. App. 217, 221-22, 710 S.E.2d 207, 212 (2011). For a more detailed discussion of *McCobb* and the immunity issue, see Fjelstul & Elliott, *supra* note 1, at 224-27.

82. *Austin-Powell*, 321 Ga. App. at 12-16, 740 S.E.2d at 832-34.

83. *Id.* at 12, 740 S.E.2d at 832.

84. O.C.G.A. § 40-6-6(d)(2) (2011).

the officer is in pursuit of the suspect, unless the officer acted with reckless disregard in the decision to initiate or continue the pursuit:

> When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit.[85]

Although a third party is entitled to recovery if the officer acted with reckless disregard, a fleeing suspect is only entitled to recovery if the officer acted with actual intent to cause injury.[86] In *Austin-Powell*, the Superior Court of Clayton County granted summary judgment to the County, ruling that the passengers were considered fleeing suspects rather than injured third parties, and further ruling that there was no evidence of actual intent to cause injury. The superior court reasoned that the officer made the decision to continue pursuit of the vehicle when a dispatcher informed him that it was stolen.[87]

The court of appeals reversed the superior court's grant of summary judgment because it improperly relied on concepts of reasonable suspicion in the commission of a crime to "transform" passengers into fleeing suspects.[88] Instead, the superior court should have considered evidence of whether the passengers were innocent third parties or fleeing suspects.[89] Although the court noted that there was no Georgia precedent directly addressing innocent passengers, it relied on *City of Winder v. McDougald*[90] in reasoning that the public policy embodied in O.C.G.A. § 40-6-6(d)(2) equally balances the need to apprehend criminals against the need to protect innocent third parties.[91] Evidence of whether the passenger is an innocent third party is to be considered, therefore, regardless of whether there is reasonable suspicion of a crime.[92]

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85. *Austin-Powell*, 321 Ga. App. at 14, 740 S.E.2d at 833 (quoting O.C.G.A. § 40-6-6(d)(2)).

86. *Id.* at 15, 740 S.E.2d at 834.

87. *Id.* at 13-15, 740 S.E.2d at 833-34.

88. *Id.* at 15, 740 S.E.2d at 834.

89. *Id.* at 15-16, 740 S.E.2d at 834.

90. 276 Ga. 866, 583 S.E.2d 879 (2003).

91. *Austin-Powell*, 321 Ga. App. at 14-15, 740 S.E.2d at 833-34 (citing *McDougald*, 276 Ga. at 867, 583 S.E.2d at 880-81).

92. *Id.* at 15, 740 S.E.2d at 834.

When viewed in a light most favorable to the non-movant, the evidence showed that the decedent passengers did not know the driver. They got into the vehicle with other friends for the purpose of going to a movie. The vehicle was pulled over because it was being operated without headlights. When the officer used a public address system to instruct the driver to get out of the vehicle and show his license and insurance, the driver fled in the vehicle with the passengers. The passengers pled with the driver to pull over during the chase; the chase ended when the vehicle hit a tree, and the passengers later died from their injuries.[93]

VII. IMMUNITY

A. *Emergency Care*

In *Anderson v. Tattnall County*,[94] the court tested the emergency care provisions of O.C.G.A. § 31-11-8.[95] The plaintiff in *Anderson* suffered additional injuries while being transported in a Tattnall County ambulance that was involved in a collision with a third party. The plaintiff sued Tattnall County contending that emergency medical technicians (EMTs) were negligent in transporting her. The County asserted immunity in accordance with O.C.G.A. § 31-11-8, which provides immunity for anyone providing emergency care, so long as the person is licensed to provide ambulance service, the care is provided in good faith to a victim of an accident or emergency, and the services are provided for no remuneration.[96] Immunity for emergency care in these circumstances was authorized by the Georgia General Assembly as recognition that certain areas of the state may otherwise be unable to offer ambulance service, given the high cost of civil liability and insurance.[97]

The only issue in this case was whether the plaintiff was being provided emergency care as contemplated by the statute.[98] The plaintiff contended that her vital signs were stable at the time she was transported and she was not in need of immediate care.[99] The court

93. *Id.*

94. 318 Ga. App. 877, 734 S.E.2d 843 (2012).

95. *Anderson*, 318 Ga. App. at 877, 734 S.E.2d at 844; *see also* O.C.G.A. § 31-11-8 (2012).

96. *Anderson*, 318 Ga. App. at 878-79, 734 S.E.2d at 845 (citing O.C.G.A. § 31-11-8(a), (c)).

97. *Id.* at 879, 734 S.E.2d at 845.

98. *Id.*

99. *Id.* at 880, 734 S.E.2d at 846.

rejected this argument, pointing out that emergency care does not require a critical or life-threatening condition. [100] Instead, the Georgia Supreme Court defined emergency care as "the performance of necessary personal services during an unforeseen circumstance that calls for immediate action."[101]

When the EMTs in the present case arrived at the scene, the plaintiff's vehicle was in a ditch, and the plaintiff was inside complaining of head and back pain. She was placed on a spinal board and carried to the ambulance, and she accepted transport in an ambulance, while others at the scene declined.[102] The court reasoned that because of the nature of the complaints, the EMTs could not rule out potential internal injuries or fractures.[103] They treated the case as an emergency by immobilizing and monitoring the plaintiff during transport, so she could receive a proper diagnosis and treatment at the hospital. In the absence of information to exclude potential injuries, failure to treat the case as an emergency could have exposed the EMTs and the County to liability for failure to act. The court concluded that the County was entitled to statutory immunity based on the circumstances at the time of the incident rather than hindsight.[104]

B. Automobile Liability Insurance

Two cases considered a waiver of county immunity by the purchase of motor vehicle insurance.[105] The Georgia Supreme Court, in *Gates v. Glass*,[106] affirmed a court of appeals decision concluding that a tractor with a bush-hog mowing attachment was a "motor vehicle," subject to a waiver of local government immunity to the extent automobile liability insurance was purchased.[107]

The court recognized that the legislature created two tiers of immunity waiver for motor-vehicle accidents.[108] O.C.G.A. § 36-92-1[109] waives local government immunity up to prescribed limits, regardless of

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100. *Id.*

101. *Id.* at 880, 734 S.E.2d at 845 (quoting Anderson v. Little & Davenport Funeral Home, Inc., 242 Ga. 751, 753, 251 S.E.2d 250, 252 (1978)).

102. *Id.* at 880, 734 S.E.2d at 845-46.

103. *Id.* at 880-81, 734 S.E.2d at 846-47.

104. *Id.*

105. Gates v. Glass, 291 Ga. 350, 729 S.E.2d 361 (2012); Ankerich v. Savko, 319 Ga. App. 250, 734 S.E.2d 805 (2012).

106. 291 Ga. 350, 729 S.E.2d 361 (2012).

107. *Id.* at 352, 729 S.E.2d at 362-63.

108. *Id.* at 352, 729 S.E.2d at 363.

109. O.C.G.A. § 36-92-1 (2012).

whether automobile liability insurance has been procured.[110] O.C.G.A. § 33-24-51(b)[111] provides an additional waiver to the extent liability insurance is procured above the minimum limits specified in O.C.G.A. § 36-92-2.[112] Troup County contended that a more restrictive definition in O.C.G.A. § 36-92-1(6) should be used in interpreting O.C.G.A. § 33-24-51(b) because the two sections were revised at the same time.[113] The more limited definition restricted the term motor vehicle to "any automobile . . . designed or licensed for use on the public streets."[114]

The supreme court rejected the argument, opting instead for the broader definition of "any motor vehicle" traditionally used when examining the insurance immunity waiver.[115] The court reasoned that the General Assembly expressly limited the definitions in O.C.G.A. § 36-92-1 to that chapter, and the General Assembly further specified that the chapter "shall not be construed to affect any claim or cause of action otherwise permitted by law and for which the defense of sovereign immunity is not available."[116]

The second case, *Ankerich v. Savko,*[117] involved consideration by the court of appeals of whether an insured police cruiser was being "used" at the time of an incident, such that applicable automobile liability insurance would waive immunity.[118] The plaintiff contended that Hart County waived immunity because a deputy used a patrol car while negligently directing traffic. The vehicle was parked eighteen feet from an intersection with blue lights flashing while the deputy was directing morning school traffic. The deputy motioned a school bus into the intersection at the same time the plaintiff was approaching, and the vehicles collided.[119]

The Superior Court of Hart County denied the County's summary judgment motion on the immunity defense, ruling that there was a jury question on whether the covered police vehicle was being "used" at the time the deputy was directing traffic.[120] The court of appeals reversed

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110. *Gates*, 291 Ga. at 352, 729 S.E.2d at 363.
111. O.C.G.A. § 33-24-51(b) (2013).
112. *Gates*, 291 Ga. at 352-53, 729 S.E.2d at 363; *see also* O.C.G.A. § 36-92-2 (2012).
113. *Gates*, 291 Ga. at 351-52, 729 S.E.2d at 362.
114. *Id.* at 351-52, 351 n.5, 729 S.E.2d at 362, 362 n.5 (quoting O.C.G.A. § 36-92-1(6)).
115. *Id.* at 352-53, 729 S.E.2d at 362-63.
116. *Id.* at 353, 729 S.E.2d at 363 (citing O.C.G.A. § 36-92-1 and quoting O.C.G.A. § 36-92-2(b)).
117. 319 Ga. App. 250, 734 S.E.2d 805 (2012).
118. *Id.* at 250-51, 734 S.E.2d at 806.
119. *Id.* at 251, 734 S.E.2d at 806-07.
120. *Id.* at 252, 734 S.E.2d at 807.

the superior court after granting an interlocutory appeal.[121] The term "use" in the context of O.C.G.A. § 33-24-51(b) is held to mean "whether the injury originated from, had its origin in, grew out of, or flowed from the use of the motor vehicle *as a vehicle*."[122] The court concluded that neither having a patrol car in the vicinity as an ancillary prop warning motorists to be careful, nor using the blue lights, constituted use of a motor vehicle.[123] As a result, immunity was not waived.[124]

C. *Georgia Tort Claims Act*

Hagan v. Georgia Department of Transportation[125] considered the immunity protection available to the Georgia Department of Transportation (GDOT) and the City of Ila when a plaintiff allegedly fell and was injured on a sidewalk that she asserted was defectively designed and maintained.[126] The immunity rules for local government are different than those for the state, in part, because the Georgia Tort Claims Act's[127] immunity provisions for the state expressly do not apply to local governments.[128] Although this Article is generally intended to address local government issues, a discussion of the GDOT's immunity in *Hagan* may be of interest to local governments because, just as in *Hagan*, litigation and other conflict over GDOT's maintenance responsibility frequently impacts local governments.

The Georgia Tort Claims Act waives immunity for the state but provides statutory exceptions to the waiver.[129] The exercise or failure to exercise a discretionary function by a state officer or employee is among the exceptions to the waiver of immunity.[130] A discretionary function or duty is defined in the Act as "requiring a state officer or employee to exercise his or her *policy judgment* in choosing among alternate courses of action based upon a consideration of social, political, or economic factors."[131]

GDOT argued in its motion to dismiss that as a result of budget constraints, it made the discretionary decision not to maintain, inspect,

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121. *Id.* at 251, 734 S.E.2d at 806.
122. *Id.* at 253-54, 734 S.E.2d at 808 (quoting Gish v. Thomas, 302 Ga. App. 854, 861, 691 S.E.2d 900, 906 (2010)).
123. *Id.* at 255, 734 S.E.2d at 808-09.
124. *Id.* at 255, 734 S.E.2d at 809.
125. 321 Ga. App. 472, 739 S.E.2d 123 (2013).
126. *Id.* at 472-73, 739 S.E.2d at 125.
127. O.C.G.A. ch. 50-21 (2013).
128. O.C.G.A. §§ 50-21-22(5), -23.
129. O.C.G.A. §§ 50-21-21(a), -23.
130. O.C.G.A. § 50-21-24(2).
131. O.C.G.A. § 50-21-22(2) (emphasis added).

or repair sidewalks. It placed priority on the "operation, safety[,] and efficiency of the roadways" rather than sidewalks, particularly those within municipalities.[132]

The court of appeals recognized that the exception argued by GDOT is "limited to basic governmental policy decisions,"[133] and requires the exercise of "policy judgment in choosing among alternate courses of actions."[134] The court reviewed several cases but found no Georgia precedent directly on point.[135] It relied instead on an Oregon case, *Ramirez v. Hawaii T&S Enterprises, Inc.*,[136] as persuasive authority, because that state has a similar statutory immunity-waiver exception for discretionary acts.[137] *Ramirez* concluded that diverting funds from sidewalk repair and inspection towards more pressing needs caused by a flood amounted to an exercise of judgment in prioritizing perceived needs, and that the decision fell within the exception for discretionary acts.[138] The Georgia Court of Appeals in *Hagan* reasoned that GDOT's decision to prioritize its maintenance budget "is a basic governmental policy decision" that falls within the Georgia Tort Claims Act immunity-waiver exception, and it upheld the superior court's ruling in favor of GDOT's motion to dismiss based on immunity.[139]

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132. *Hagan*, 321 Ga. App. at 477, 739 S.E.2d at 127.

133. *Id.* at 475, 739 S.E.2d at 126 (quoting Dep't of Transp. v. Brown, 267 Ga. 6, 7, 471 S.E.2d 849, 851 (1996)).

134. *Id.* (emphasis omitted) (quoting Ga. Dep't of Transp. v. Miller, 300 Ga. App. 857, 859, 686 S.E.2d 455, 458-59 (2009)).

135. *Id.* at 476, 739 S.E.2d at 127.

136. 39 P.3d 931 (Or. Ct. App. 2002).

137. *Hagan*, 321 Ga. App. at 476, 739 S.E.2d at 127 (citing *Ramirez*, 39 P.3d at 932-33).

138. *Id.* (citing *Ramirez*, 39 P.3d at 934).

139. *Id.* at 477, 739 S.E.2d at 128.