HOW TO PREPARE FOR AND PRESENT A CLAIM AGAINST STATE AND LOCAL GOVERNMENTAL ENTITIES

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I. STEP ONE: Identifying Claims and Defendants

Perhaps the most crucial element of preparing a case against a governmental entity is identifying the claim early. Any claim against a governmental entity carries with it certain notice requirements that make it essential to investigate and articulate a claim at the earliest possible time. Thus, when reviewing what appears to be a straightforward wreck case, it is critically important to consider all possible causation theories to rule in or rule out involvement of a governmental entity. Under ante litem notice requirements, discussed more fully below, the lawyer has only six months to a year to notify the governmental entity, in a general way, of his or her client's claim against that entity.

As an example, consider the case of the garden variety head on collision. The client's husband is dead after an oncoming motorist, who also dies in the accident, inexplicably swerved into his lane of travel on a two-lane, 55 mph rural roadway. A witness traveling some distance behind the client's husband says she first noticed the striking vehicle because it looked as though the vehicle had been "slingshot" across the road. The investigating police officer prepares an unremarkable report, in which the cause of the collision is cited as the other driver's failure to maintain his lane and driving too fast for conditions. That driver purchased minimum automobile insurance limits. Drug and alcohol screens come back negative.

Your antennae are raised because you know that in everyday driving, automobiles do not "slingshot" across lanes of travel. You send your accident reconstructionist to the

accident site. He finds distinct gouge marks at the edge of the roadway some distance back from the point of impact. Those gouge marks line up with tire marks on the roadway which the police officer attributed to the striking vehicle in his accident report. He also observes scraping on the inside right tires of the striking vehicle. After a thorough investigation of the physical evidence, your accident reconstructionist concludes that the striking vehicle strayed a short distance (two or three inches) over the white fog line, where there was a four inch vertical drop-off at the edge of the roadway. His right side tires fell down in the drop-off, and when he instinctively attempted to steer his vehicle back on the roadway, his tires "scrubbed" against the vertical edge of the pavement, causing his vehicle to go into an unrecoverable yaw across the roadway.

Among the questions raised by this set of facts are: Is a four-inch drop-off alongside a 55 mph highway within acceptable standards? Who was responsible for inspecting and maintaining the road? Was it a state road? Was it a county road? Did the entity responsible for maintaining the road delegate that responsibility to anyone else (e.g., did the state delegate maintenance duties to the city for parts of the state highway within the city limits?)?

And now, this garden variety head on collision becomes a negligence claim against a governmental entity for failure to maintain the roadway edge. Because what seems like a simple auto wreck case can change so dramatically after a careful investigation, it is important to perform that investigation early. Otherwise, if too much time passes, potential claims against a governmental entity may be irretrievably lost through the procedural misstep of failing to provide an ante litem notice.

II. STEP TWO: Ante Litem Notices

Claims against governmental entities in Georgia require written ante litem notices at all levels of government – both state and local. Ante litem notices are conditions precedent to suit against a governmental entity. *Clark v. Board of Regents*, 250 Ga. App. 448 (2001); *Nicholas v. Van*, 252 Ga. App. 411 (2001). Thus, the failure to provide the ante litem notice as prescribed by statute is fatal to a case. *Dempsey v. Board of Regents*, 256 Ga. App. 291, 292-93 (2002); *Copeland v. Young*, 133 Ga. App. 54 (1974). Under the Georgia Tort Claims Act ("GTCA"), the failure to provide an ante litem notice in the time and manner provided by statute deprives the court of subject matter jurisdiction and requires dismissal of the case against the state. *Georgia Dept. of Juvenile Justice v. Cummings*, 281 Ga. App. 897 (2006), *cert. granted; Sylvester v. DOT*, 252 Ga. App. 31 (2001); O.C.G.A. § 50-21-26(a)(3).

A. Time Requirements.

The time within which ante litem notices must be provided varies depending on the nature of the governmental entity. Each is outlined below. Keep in mind that it never hurts to send an ante litem notice, and so, when in doubt, send the notice if you suspect a claim may ultimately be borne out by the facts.

State. Under the GTCA, a notice concerning a claim against the state must be "given in writing within 12 months of the date the loss was discovered or should have been discovered." O.C.G.A. § 50-21-26(a)(1). The GTCA defines "state" as "the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions." O.C.G.A. § 50-21-22(5). The term

"state" does not include counties and municipalities. *Id.* The notice must only be sent, not actually received, before the end of the 12-month period. *Norris v. DOT,* 268 Ga. 192 (1997).

Counties. Counties likewise have a 12-month notice period. An ante litem notice concerning claims against a county must be "presented within 12 months after they accrue or become payable." O.C.G.A. § 36-11-1. Bringing suit within the 12-month period constitutes sufficient presentation of the claim, but if not brought within the 12-month period, the lawsuit cannot serve as a substitute for the ante litem notice. *Taylor v. Richmond Co.,* 57 Ga. App. 586 (1938); *Newsome v. Treutlen Co.,* 168 Ga. App. 764 (1929).

Municipalities. A notice concerning a claim against a municipality must be presented "within six months of the happening of the event upon which the claim is based." O.C.G.A. § 36-33-5(b). This particularly short time frame makes it all the more important to determine whether governmental entities will be potential defendants in a lawsuit.

Municipalities must be given 30 days to respond to the claim before the plaintiff files suit, and therefore, the ante litem notice cannot be filed with the lawsuit. O.C.G.A. § 36-33-5(c). If the municipality does not respond to or act upon a claim, this failure to respond or act does not prevent the plaintiff from filing suit after the 30 days expires. *City of Atlanta v. Truitt,* 55 Ga. App. 365 (1937). Further, if the municipality denies the claim in less than 30 days, the plaintiff is free to move forward with filing suit immediately upon the denial. *Information Systems and Networks Corp. v. City of Atlanta,* 281 F.3d 1220 (11th Cir. 2002).

Finally, the city ante litem notice statute expressly provides that the "running of the statute of limitations shall be suspended during the time that the demand for payment is pending before such authorities without action on their part." O.C.G.A. § 36-33-5(d). Note, however, that an ante litem notice to a municipality does not have to include a "demand for payment" (discussed below), and so it would not be prudent to rely upon tolling of the statute of limitations based upon an ante litem notice that did not contain a demand.

Tolling. The time period allowed for providing ante litem notices may be tolled for a legal disability, such as minority or mental incapacity. *Jacobs v. Littleton,* 241 Ga. App. 403 (1999) (mental incompetence - city); *Howard v. State,* 226 Ga. App. 543 (1997) (minority – state); *Barnum v. Martin,* 135 Ga. App. 712 (1975) (minority – city); O.C.G.A. § 36-11-1 (county).

B. Contents of Notice

State. As expressly required by the GTCA, an ante litem notice addressed to the State must specify, to the extent known, the following:

(A) The name of the state government entity, the acts or omissions of which are asserted as the basis of the claim;

(B) The time of the transaction or occurrence out of which the loss arose;

(C) The place of the transaction or occurrence;

(D) The nature of the loss suffered;

(E) The amount of the loss claimed; and

(F) The acts or omissions which caused the loss.

O.C.G.A. § 50-21-26(a)(5).

County. The ante litem statute for counties does not specify the information which must be included in the presentation of a claim. However, cases have held the notice is sufficient if it shows who makes the demand, for what reason the demand is made, and the amount thereof; or where it contains sufficient information to afford an opportunity to investigate the claim and ascertain the evidence before suit. *Troup Co. v. Boddie*, 14 Ga. App. 434 (1914); *Sikes v. Candler Co.*, 247 Ga. 115 (1981). It is not necessary to state the amount of damages. *Sikes, supra.* The notice must be in writing. *Williams v. Lowndes Co.*, 120 Ga. App. 429 (1969).

City. By statute, an ante litem notice addressed to a city must be in writing and must contain "the time, place, and extent of the injury, as nearly as practicable, and the negligence which caused the injury." O.C.G.A. § 36-33-5(b). The term "extent of the injury" means the nature, character, and particulars of the injury. *Jones v. City of Austell*, 166 Ga. App. 808 (1983). The city need only be put on notice of the general character of the complaint, and in a general way, of time, place and extent of injury. *Carruthers v. City of Hawkinsville*, 171 Ga. 313 (1930). It is not necessary that the notice specify any amount of money damages. *Tanner v. City of Gainesville*, 162 Ga. App. 405 (1982). However, if the notice does contain a dollar amount of damages, the plaintiff is not bound by that number, and recovery of a greater sum is not barred. *Maryon v. City of Atlanta*, 149 Ga. 35 (1919).

C. Addressees and Manner of Delivery

State. The GTCA specifies in minute detail the persons to whom notice must be addressed and the manner in which it must be delivered. O.C.G.A. § 50-21-26(a)(2). Great care should be taken in following these mandated procedures, as strict compliance

is required, and substantial compliance is not sufficient. *Johnson v. E.A. Mann & Co.*, 273 Ga. App. 716 (2005); *McGee v. State*, 227 Ga. App. 107 (1997). Even actual notice of the government entity is not sufficient to overcome the failure to send the ante litem notice within the required period. *Williams v. DOT*, 275 Ga. App. 88 (2005).

The notice must be addressed to the Risk Management Division of the Department of Administrative Services ("DOAS"), with a copy sent to the state government entity whose acts or omissions are the basis of the claim. O.C.G.A. § 50-21-26(a)(2); *Welch v. DOT*, 276 Ga. App. 664 (2005) and *Shelnutt v. DOT*, 272 Ga. App. 109 (2005) (both dismissing case where notice sent to Commissioner of DOAS, not Risk Management Division of DOAS). The notice to DOAS must be delivered either (1) by certified mail or statutory delivery, return receipt requested, or (2) personally, with a receipt obtained from DOAS. *Id.* It is a good practice to serve the notice by both methods. As for personal delivery, DOAS has a receipt which it uses regularly for hand delivered notices. The recipient at DOAS may refuse to sign a receipt that the lawyer has created, but it never hurts to send a receipt with the notice.

The copy of the notice which is sent to the state government entity who performed the acts or omissions at issue must be delivered either (1) personally, or (2) via first class mail. *Id.* Again, sending the notice both ways is a good practice. Further, though the statute does not require it, obtaining a receipt from the state government entity confirming the personal delivery is also a good idea.

As already mentioned, substantial compliance with this provision is not sufficient. Accordingly, the Court of Appeals recently held that a complaint must be dismissed where the plaintiff sent her ante litem notice to the DOT, apparently because she believed

the public official who was driving the vehicle involved in the collision was employed by the DOT, when in reality, he was employed by the Department of Juvenile Justice ("DJJ"). *Georgia Dept. of Juvenile Justice v. Cummings*, 281 Ga. App. 897 (2006), *cert. granted.* This was the outcome despite the fact that the DOAS knew that the driver was an employee of DJJ and even made a settlement offer to the plaintiff (which was rejected) before the twelve-month period expired. The Georgia Supreme Court granted certiorari for this case on February 26, 2007.

County. An ante litem notice must be addressed to the chairman of the board of county commissioners. *Ellenberg v. DeKalb Co. (In re Maytag Sales & Serv., Inc.),* 23 Bankr. 384 (Bankr. N.D. Ga. 1982). There is no statute or case mandating the manner of delivery, but certainly the better practice is to deliver it in a method that entails a receipt.

City. An ante litem notice to a municipality must be addressed to the "governing authority of the municipal corporation." O.C.G.A. § 36-33-5(b). The notice must be addressed to and received by the municipality or one of its departments or officials. *Chiles v. City of Smyrna,* 146 Ga. App. 260 (1978). Delivery to the mayor is adequate. *Tanner v. City of Gainesville,* 162 Ga. App. 405 (1982). A cautious approach is to deliver the notice to the "City of _____" at city hall, the mayor, and the head of the city council or commission. As with counties, there is no mandated procedure for the manner of delivery, but prudence dictates a method that produces a receipt.

D. Substantial Compliance

Substantial compliance with the notice requirements of the GTCA, as already mentioned above, is inadequate. *See, e.g., Shelnutt v. DOT,* 272 Ga. App. 109 (2005). However, substantial compliance has been held sufficient in cases against both counties

and municipalities. *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta,* 281 Ga. 342 (2006); *Burton v. DeKalb Co.,* 202 Ga. App. 676 (1992).

III. STEP THREE: Identifying the Statute of Limitations

The GTCA has a particularized statute of limitations requiring that suit be brought against the state within two years "after the date that the loss was or should have been discovered." O.C.G.A. § 50-21-27(c). There is no particular statute relating to suits against counties or municipalities.

IV. STEP FOUR: Analyzing Immunity Issues

A claim against a governmental entity (and/or its individual employees or officers) may raise complex issues of sovereign and official immunity. Sovereign immunity is based upon the historical recognition that "the king can do no wrong." RESTATEMENT (SECOND) OF TORTS § 895 (special note on governmental immunity (1979); PROSSER & KEETON ON TORTS, Ch. 25, § 131, GOVERNMENTAL IMMUNITY (5th ed. 1984). A more modern justification for sovereign immunity is to preserve the "public purse." *Thomas v. Hosp. Auth. of Clarke Co.,* 264 Ga. 40, 43 (1994).

An analysis of immunity differs depending upon the governmental entity to be sued. Different rules pertain to state, county and city governments. The framework for each is set forth below.

A. State Immunity

The State of Georgia was absolutely immune from suit until 1983, at which time voters approved a constitutional amendment waiving the state's sovereign immunity in actions for which liability insurance was provided. *Georgia Forestry Comm'n v. Canady,* 280 Ga. 825 (2006). In 1991, a new constitutional amendment was approved by

voters which changed the framework for suing the state and its departments and agencies. Pursuant to that amendment, "sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is waived and the extent of such waiver." GA. CONST. ART. I, § II, ¶ IX(e). This amendment specifically authorized the General Assembly to pass a State Tort Claims Act. GA. CONST. ART. I, § II, ¶ IX(a).

In response, the Georgia Assembly enacted the GTCA in 1992. O.C.G.A. § 51-21-20, *et seq.* Under the GTCA, the state waived its sovereign immunity "for the torts of state officers and employees acting within the scope of their official duties or employment." O.C.G.A. § 50-21-23(a). The GTCA made the state liable for such torts "in the same manner as a private individual or entity would be liable under like circumstances." *Id*. However, this waiver is *limited*. Under O.C.G.A. § 50-21-24, which enumerates thirteen separate exceptions to the waiver of sovereign immunity, the state retains its sovereign immunity as to losses arising from these thirteen exceptions.

A party seeking to benefit from the waiver of sovereign immunity has the burden of proof to establish the waiver. *Murray v. DOT*, 284 Ga. App. 263, 265 (2007). Generally, the waiver of sovereign immunity is an issue of law based upon the face of the complaint. *DOT v. Dupree*, 265 Ga. App. 668, 673-74 (2002). However, under O.C.G.A. § 50-21-24 (enumerating the exceptions to waiver of sovereign immunity), the waiver of sovereign immunity may be a mixed question of law and fact for the trial court's determination. *Id.* The trial court should not make a final adjudication on the merits, but should make a preliminary determination that a material issue of fact exists

for the jury to decide. *Id.* at 674. Any pre-trial rulings by the trial court on factual issues necessary to decide a motion to dismiss on sovereign immunity grounds is reviewed on appeal under the "any evidence" standard. *Id.* at 676; *Murray*, 284 Ga. App. at 265.

Any claim against the state must involve a careful reading of the thirteen exceptions to the waiver of sovereign immunity. Many of these exceptions would never be implicated in an auto torts case. However, the Georgia Department of Transportation ("DOT") is often named a defendant in auto cases where some aspect of the roadway is involved, such as the design of an intersection, the maintenance of a shoulder or traffic control signage. In those cases, one can almost always expect sovereign immunity to be raised. The following section enumerates some recent auto torts cases in which an exception to the state's sovereign immunity was claimed and discussed.

(1) Discretionary Function Exception

The state shall have no liability for losses resulting from "the 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." O.C.G.A. § 50-21-24(2). A discretionary function is statutorily defined as a "function or duty requiring a state officer or employee to exercise his or her policy judgment in choosing among alternate course of action based upon a consideration of social, political or economic factors." O.C.G.A. § 50-21-22(2).[1] In other words, the discretionary functions exception applies only to policy decisions. *DOT v. Brown*, 267 Ga. 6, 7 (1996).

[1] Because the GTCA defines "discretionary function," decisions predating the GTCA concerning discretionary versus ministerial duties need no longer be considered. *DOT v. Brown*, 267 Ga. 6, 7 (1996). Further, keep in mind that this definition of "discretionary function" appears only in the GTCA and does not apply in cases against counties and municipalities. *See, e.g., Middlebrooks v. Bibb County*, 261 Ga. App. 382, n. 4 (2003).

In the context of a negligent design case against the DOT, the Georgia Supreme Court has held that the discretionary functions exception does not apply to allegations of negligence in traffic design or operations. *Id.* While a decision to build a road is a policy decision for which DOT is immune from suit, decisions about where and whether to install traffic lights or use stop signs are design decisions to which the discretionary functions exception does not apply. *Id.* Similarly, a decision to open an intersection without installing traffic lights is an operational decision to which the discretionary functions exception does not apply. *Id.*

(2) Administrative Action Exception

The state is immune as to losses arising from "administrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature." O.C.G.A. § 50-21-24(5). Thus, the DOT was protected by sovereign immunity where the plaintiff alleged it was negligent in posting an excessive speed limit in residential area, which led to a collision between a motorist and pedestrian. *DOT v. Watts,* 260 Ga. App. 905 (2003). In reaching this conclusion, the Court of Appeals observed that the DOT is authorized to exercise the quasi-legislative function of establishing speed limits on state highways under O.C.G.A. §§ 40-6-181 and 182. *Id.*

(3) Method of Providing Law Enforcement, Police or Fire Protection Exception

The state is immune for losses arising from "the failure to provide, or the method of providing law enforcement, police, or fire protection." O.C.G.A. § 50-21-24(6). Until very recently, this exception was applied to high speed chase cases to hold the Department of Public Safety immune from suit by those injured in car accidents with police. *See, e.g., Blackston v. Dept. of Public Safety,* 274 Ga. App. 373 (2005); *Hilson v.*

Dept. of Public Safety, 236 Ga. App. 638 (1999). However, in 2006 the Georgia Supreme Court reanalyzed the interpretation of this exception in *Georgia Forestry Comm'n v. Canady,* 280 Ga. 825 (2006). There, the issue was whether the Forestry Commission was immune from suit when, after it permitted a controlled burn, it did not notify other law enforcement agencies that the burn may cause reduced visibility in the area. In holding that the state was immune, the Georgia Supreme Court abrogated a number of cases, including *Blackston* and *Hilson,* and held that the law enforcement exception provides sovereign immunity only to the following:

> …the making of *policy decisions* by state employees and officers including those relating to the amount, disbursement, and use of equipment and personnel to provide law enforcement, police or fire protection services, and to the acts and omissions of state employees and officers executing and implementing those polices.

Canady, 280 Ga. at 830 (emphasis added). This decision changed the Court of Appeals' approach of applying this exception to virtually any act of police or fire officials performed in the course and scope of their employment. *Id.* at 827.

The court in *Canady* distinguished the type of policy decision that constitutes a "method" of law enforcement, police or fire protection from a policy decision that constitutes a discretionary function as defined under O.C.G.A. § 50-21-24(2). Discretionary functions under O.C.G.A. § 50-21-24(2) involve policy decisions that concern the amount, type, and disbursement of equipment and personnel "*in anticipation* of the needs of police, law enforcement, and fire protection services," while O.C.G.A. § 50-21-24(6) involves policy decisions concerning the amount, type, and disbursement of equipment and personnel "*in response to a need* for the immediate provision of police, law enforcement, or fire protection services." *Id.* at 839 (emphasis in original). It

remains to be seen whether the appellate courts will now treat high speed police chases differently in cases against the state given this new framework.

(4) Inspection Functions Exception

The state is immune for losses arising from its "inspection powers and functions, including failure to make an inspection or making an inadequate inspection of any property *other than property owned by the state* to determine whether the property complies with or violates any law, regulation, code or ordinance or contains a hazard to health or safety." O.C.G.A. § 50-21-24(8) (emphasis added). The DOT is not immune for claims of negligent inspection performed by the State of its <u>*own*</u> property. *Id.* "If there is a tortious inspection by the state of its own property, and someone is injured as a result, an action could be brought under the [GTCA]." David J. Maleski, "The 1992 Georgia Tort Claims Act," 9 GA. ST. U. L. REV. 431, 447, fn. 87 (1993); *see also Lewis v. Dept. of Human Resources*, 255 Ga. App. 805, 809 (2002).

This exception frequently arises in roadway construction cases involving the DOT, whether the construction involves a state highway, or whether it involves a county or city project that is being overseen by DOT. In the former instance, the DOT is not immune for actions relating to negligent inspection or maintenance of the state highway system – which is property owned by the state.[2] *DOT v. Carr*, 254 Ga. App. 781 (2002). The DOT has a statutory duty to maintain roads that are part of the state highway system under O.C.G.A. § 32-2-2(a)(1).

However, on roads within county and municipality road systems, the DOT is not responsible for maintenance. *Ogles v. E.A. Mann & Co.*, 277 Ga. App. 22, 27 (2005).

[2] The DOT has a statutory duty to maintain roads that are part of the state highway system under O.C.G.A. § 32-2-2(a)(1).

The DOT does not assume responsibility for maintenance simply by having inspection duties relating to a construction project involving a county or city road, and it is immune from suit under the inspection exception. *Id.; see also Comanche Constr., Inc. v. DOT*, 272 Ga. App. 766, 768-69, 613 S.E.2d 158 (2005) (finding inspection powers exception applied to bar claim arising from traffic collision in detour zone where the road in question was a county road, not owned by State); *see also Ogles v. E.A. Mann & Co.*, 277 Ga. App. 22, 26-28 (2005) (holding DOT immune for alleged negligent inspection of county road during road improvement project); *see also Magueur v. Dept. of Transp.*, 248 Ga. App. 575, 577, 547 S.E.2d 304 (2001) (also finding inspection powers exception applied to claims of inspecting design of roadway by county).

(5) Licensing Functions Exception

The state is immune from losses arising from "licensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization." O.C.G.A. § 50-21-24(9). The Court of Appeals, in construing the licensing functions exception, has made clear that a claim of negligent approval by the DOT of a permit is subject to sovereign immunity. *See, e.g., Dept. of Transp. v. Cox*, 246 Ga. App. 221, 540 S.E.2d 218 (2000) (holding DOT immune from suit for approving permit for construction of commercial driveway); *Dept. of Transp. v. Bishop*, 216 Ga. App. 57, 453 S.E.2d 478 (1994) (holding DOT immune from suit for approving permit for construction of decorative wall which obstructed motorist's view and allegedly caused accident).

In *Murray v. DOT*, 284 Ga. App. 263, 266 (2007), the Court of Appeals determined that the licensing functions exception was broad enough to include the DOT's allegedly negligent delay in requiring Gwinnett County to install a traffic signal at an intersection, after having approved the county's request for a traffic signal nearly one year before. This decision is in accord with a prior Court of Appeals decision, *Lewis v. Dept. of Human Resources*, 255 Ga. App. 805 (2002), which held that actions or inactions by state officials or employees to "enforce" regulations (on which a license was conditioned) fell within the licensing functions exception. Note that term "enforce" appears nowhere in the statutory exception.

(6) Design Exception

The state is immune for losses arising from "the plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design."[3] O.C.G.A. § 50-21-24(10). This exception is conditional. Immunity applies only if the plan, as initially designed, was in substantial compliance with then existing standards. However, the DOT has no duty to upgrade roadway design to make highways safer or to bring them in compliance with current standards. *Murray v. DOT*, 284 Ga. App. 263, 267 (2007); *DOT v. Cox*, 246 Ga. App. 221, 223 (2000).

When the DOT improves an existing state roadway, however, it is obligated to perform those improvements in accordance with current standards. *Steele v. DOT*, 271

[3] The Manual on Uniform Traffic Control Devices ("MUTCD") has the status of "generally accepted engineering or design standards," but it is not the exclusive source of such standards. *DOT v. Dupree*, 256 Ga. App. at 677.

Ga. App. 374 (2005). If the improvements are moderate (such as striping, moderate widening or resurfacing) and do not alter the geometrics of the road, the plan need not address road design issues which are not substantially affected and are outside of the scope of the improvement. *Id.* at 379. If, however, the improvements do alter the geometrics of the roadway (such as altering sight distance or shoulder slope), then the design issues so affected become part of the scope of the improvement plan or design and must therefore substantially conform to then existing design standards. *Id.*; *see also DOT v. Cox*, 246 Ga. App. 221 (2000); *Murray v. DOT*, 240 Ga. App. 285 (1999). For example, improvements involving a road widening need not take into account a review and upgrade of traffic control devices and signs in the same area. *Cox,* 246 Ga. App at 287.

The application of the design exception necessarily involves expert testimony, which the trial court must consider and rule upon as a fact question. *Ogles v. E.A. Mann & Co.*, 277 Ga. App. 22, 26 (2005). For instance, in *Steele v. DOT*, 271 Ga. App. 374 (2005), the trial court heard evidence from expert witnesses on the DOT's motion to dismiss and made a factual determination as to whether the design of various road improvements were in compliance with standards existing at the time of the design. Those findings were reviewed and upheld under the "any evidence" standard. *Id.* Similarly, in *DOT v. Dupree*, 256 Ga. App. 668 (2002), the trial court likewise made a preliminary determination that issues of material fact remained as to whether the DOT committed design malpractice, and thus denied the DOT's motion to dismiss on sovereign immunity grounds. *See also DOT v. Cox,* 246 Ga. App. 221 (2000) (granting DOT's motion to dismiss where DOT's expert opined that initial design was in accord

with then existing standards, and plaintiffs' expert agreed that compliance was "likely"); *Lennen v. DOT,* 239 Ga. App. 729 (1999) (reversing trial court's grant of DOT's motion to dismiss because the plaintiffs' expert's affidavit filed with the complaint, as supplemented, opined that DOT failed to comply with then applicable standards).

B. Local Government Immunity

Counties. Under O.C.G.A. § 36-1-4, a county "is not liable to suit for any cause of action unless made so by statute." There is no statutory authorization of the waiver of sovereign immunity generally through the purchase of liability insurance. The "mere existence" of a liability policy will not waive a county's sovereign immunity. *Crisp County School System v. Brown,* 226 Ga. App. 800 (1997). In *Gilbert v. Richardson,* 264 Ga. 744 (1994), the Georgia Supreme Court held that O.C.G.A. § 33-24-51 provides an express waiver of a county's sovereign immunity in matters involving liability insurance for losses arising from the use of a motor vehicle.

In general, "sovereign immunity is waived by any legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver." *Gilbert v. Richardson,* 264 Ga. at 748. Implied waivers of sovereign immunity are disfavored. *Norton v. Cobb County,* 284 Ga. App. 303, 306 (2007). The Court of Appeals has held that O.C.G.A. §§ 32-1-3 (pertaining to responsibility for county bridges) and 51-3-20 (the Recreational Property Act) do not waive a county's sovereign immunity. *Coweta County v. Adams,* 221 Ga. App. 868 (1996); *Norton, supra*.

Municipalities. Municipalities are immune from liability for damages pursuant to O.C.G.A. § 36-33-1(a). However, after declaring that municipalities are immune, O.C.G.A. § 36-33-1(a) provides: "A municipal corporation shall not waive its immunity

by the purchase of liability insurance, except as provided in Code Section 33-24-51 or 36-92-2 [both relating to the purchase of insurance for losses arising out of use of covered motor vehicle], or unless the policy of insurance issued covers an occurrence for which the defense of sovereign immunity is available, and then only to the extent of the limits of such insurance policy." *Id.* Accordingly, the immunity of municipalities may indeed be waived by the purchase of insurance. Note that many cities are self-insured, and so there is no waiver of sovereign immunity through the purchase of insurance in those instances. Participation in the Georgia Interlocal Risk Management Agency (GIRMA) constitutes the purchase of insurance for purposes of waiving sovereign immunity. *Gilbert v. Richardson,* 264 Ga. 744, 751 (1994)**;** *Heirs v. City of Barwick,* 262 Ga. 129 (1992).

Under subsection (b) of this statute, sovereign immunity is waived for negligence in the performance of ministerial functions, but is preserved for governmental or discretionary functions. O.C.G.A. § 36-33-1(b); *see also* O.C.G.A. § 36-33-2. Nonetheless, if liability insurance is available which covers a governmental function, sovereign immunity is waived. *Mitchell v. City of St. Marys,* 155 Ga. App. 642 (1980). The burden is on plaintiff to establish waiver of immunity. *City of Lawrenceville v. Macko,* 211 Ga. App. 312 (1993).

Note that liability of the municipality for torts of its "policemen or other officers engaged in the discharge of their duties" is specifically provided for by statute. O.C.G.A. § 36-33-2. However, this immunity can be waived as provided for in O.C.G.A. § 36-33-1. *McLemore v. City Council of Augusta,* 212 Ga. App. 862 (1994); *Ekarika v. City of East Point,* 204 Ga. App. 731 (1992).

Even where the city is immune from a negligence claim because a function is considered governmental, it may be liable under a nuisance theory. "Under a nuisance claim, the nature of the city's act is irrelevant, because a municipality may be liable for maintaining a nuisance regardless of whether the act or omission creating the nuisance was ministerial or discretionary in nature." *Id.* There are three factors which establish a claim of nuisance: (1) the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence; (2) the act must be of some duration, and the maintenance of the act or defect must be continuous or regularly repetitious; and (3) the city must have failed to act within a reasonable time after knowledge of the defect or dangerous condition. *Id.* at 99 (holding summary judgment for city on nuisance claim was improper, where city was repeatedly warned by police of danger of intersection, yet continued to delay installation even after tax referendum was collected to pay for it).

C. Official/Qualified Immunity

Under the GTCA, state employees and officials acting within the course of their official duties or employment are not subject to suit. O.C.G.A. § 50-21-25(a). If the plaintiff names an individual employee or official, the state shall be substituted and shall be the only defendant. O.C.G.A. § 50-21-25(b).

However, city and county employees and officials are frequently sued in their individual, personal capacities, particularly when there is no basis for a waiver of sovereign immunity of the county or city itself. When sued in their personal capacities, official immunity is invoked, as follows:

> The doctrine of official immunity, also known as qualified immunity, offers public officers and employees limited protection from suit in their personal capacity. Qualified immunity protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority,

> and done without willfulness, malice, or corruption. Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or an intent to injure.

Murray v. DOT, 284 Ga. App. 263, 268 (2007) (concerning liability of Gwinnett County DOT employees); *see also* O.C.G.A. § 36-33-4 (relating to city employees). The official immunity of an employee *cannot be waived.* Ga. Const., Art I, § II, ¶ IX(d); *Norton v. Cobb County,* 284 Ga. App. 303 (2007). The official immunity of an employee belongs only to the employee, and thus, the official immunity of a public employee does not protect the employer from liability under respondeat superior. *Gilbert,* 264 Ga. at 754.[4]

There has been considerable litigation concerning the difference between discretionary and ministerial functions in the context of official immunity, and a comprehensive treatment is beyond the scope of this paper. Note that the analysis of this issue is not the same as that under the GTCA, which contains a more narrow definition of a discretionary function. *Riggins v. City of St. Marys,* 264 Ga. App. 95, 101 (2003); *Middlebrooks v. Bibb County,* 261 Ga. App. 382, n. 4 (2003). The distinction for purposes of local government is described as follows:

> A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. Procedures or instructions adequate to cause an act to become merely ministerial must be so clear, definite and certain as merely to require the execution of a relatively simple, specific duty.

[4] While suit against a government employee in his *personal* capacity involves official immunity, suit against a government employee in his *official* capacity is, in reality, a suit against the government, and therefore involves sovereign immunity. *Gilbert,* 264 Ga. at 750. Accordingly, the public employee is entitled to the benefit of his employer's sovereign immunity defense, but if the governmental entity has waived its sovereign immunity, then immunity is waived for the employee defendant in his official capacity as well (but the employee has no personal liability). *Id.*

Happoldt v. Kutscher, 256 Ga. App. 96 (2002).

For instance, the decision by a police officer to engage in a high speed police chase has been held to be discretionary. *Phillips v. Hanse*, 281 Ga. 133 (2006) (holding police officer's decision was discretionary, even though he violated prohibitions contained in county manual). Similarly, a police officer's alleged recklessness in responding to an emergency call involves a discretionary function. *Gilbert*, 264 Ga. at 753. A decision regarding whether to install a particular traffic control device at a particular location is discretionary. *Riggins*, 264 Ga. App. at 101 (holding the passage of a sales tax referendum did not create ministerial duty to install traffic light within reasonable time). The failure of a county DOT to install a traffic signal in accordance with the DOT's authorization within a reasonable time is discretionary. *Murray*, 284 Ga. App. at 269 (holding DOT's authorization did not require action and set no time limits). The decisions of whether to build a road, how it is to be designed, and its general location are discretionary; however, the actual work of constructing it is ministerial. *Ross v. Taylor County*, 231 Ga. App. 473, 474 (1998) (holding county was immune regarding roadway plans, but road superintendent was not immune for carrying out physical details of work).

V. STEP FIVE: Filing and Serving the Complaint

State. The GTCA has a number of requirements relating to filing and service of the complaint. When the complaint is filed, a copy of the ante litem notice must be attached as an exhibit, along with the delivery receipts. O.C.G.A. § 50-21-26(a)(4). The failure to comply with this requirement is curable within 30 days of the State filing a motion raising such issue. *Id.* It is a prudent practice to allege in the complaint that

notice was provided, how it was provided, and that the notice requirements of O.C.G.A. § 50-21-26 have been met.

The GTCA's procedure for service of the complaint is similarly onerous. O.C.G.A. § 50-21-35. The plaintiff must serve both the defendant government entity (via its chief executive officer), as well as the Risk Management Division of DOAS. *Id.* Additionally, a copy of the complaint must be mailed via certified mail or statutory mail, return receipt requested, to the Attorney General, and a certificate must be attached to the complaint certifying that this requirement has been met. *Id.* However, several recent cases have held that a defect in compliance with this latter requirement may be cured by amendment, and that a dismissal is not proper unless the state shows actual prejudice. *Ingram v. DOT*, 07 FCDR 2198 (Ga. Ct. App. 6/29/07); *Backenstro v. DOT*, 284 Ga. App. 41 (2007); *Camp v. Coweta Co.*, 280 Ga. 199, 202 (2006); *Shiver v. DOT*, 277 Ga. App. 616 (2006).

County. Service upon a county is prescribed by statute. Under O.C.G.A. § 36-1-5, "service is sufficient if perfected upon a majority of the commissioners." Also refer to Rule 4 of the Civil Practice Act, set out below.

City. There are no particular statutes relating to the filing and serving of a complaint against a municipality other than Rule 4 of the Civil Practice Act, which provides that suits against "a county, municipality, city, or town" should be served upon "the chairman of the board of commissioners, president of the council of trustees, mayor or city manager of the city or to an agent authorized by appointment to receive service of process. If against any other public body or organization subject to an action, to the chief executive officer or clerk thereof." O.C.G.A. § 9-11-4(e)(5).

CONCLUSION

As the above hopefully makes clear, it is imperative that any consideration of governmental liability be investigated early so that the appropriate notices are sent. Moreover, suing the government can lead to many technical, legal issues -- so take care to understand all of them before embarking on such a journey.