

Tort Immunity

for

**Arkansas Cities and Towns,
Their Officials and Employees**

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Purpose

The purpose of this publication is to give the reader a basic understanding of the principles and concepts used by the courts in analyzing municipal immunity from tort liability in the State of Arkansas. This publication covers state statutes granting immunity, principally Arkansas Code Annotated § 21-9-301. The subject of immunity from suit is also frequently associated with liability for civil rights violations. While this text briefly addresses civil rights immunities, its scope is limited by the nature of this booklet.¹

History and Overview

“An immunity is a freedom from suit or liability.”² Although governmental entities bear some responsibilities for wrongs to individuals harmed by their negligence, such entities must be protected from exposure to high judgments which would destroy them.³ Arkansas’ earliest tort immunity derived from the reception statute, which incorporated the common law of England as long as that law was consistent with the Constitution and the laws of Arkansas.⁴

The present Arkansas Constitution, adopted in 1874, provides in article 5, section 20 that “the State of Arkansas shall never be made defendant in any of her courts.” This immunity does not extend to municipalities, however. Nevertheless, the courts historically held under the common law that municipal governments were immune from liability in their “governmental” capacities, but were liable for wrongs committed in their “proprietary” capacities.⁵

In June 1968, in the case of *Parish v. Pitts*, the Arkansas Supreme Court overruled 150 years of common law tort immunity for municipalities operating in their “governmental” capacity.⁶ Before this ruling, the courts had supported tort immunity on the ground that lawsuits against municipalities would likely bankrupt the vast majority of Arkansas’ cities. However, the *Parish* court ruled that this potential financial burden was speculative, at best, and insufficient to justify municipal immunity.⁷ Further, the court held that, because municipalities were separate entities and not “the state,” they should not be entitled to governmental sovereign immunity.⁸

Within five months of the *Parish* decision, the 1969 session of the Arkansas General Assembly overturned *Parish v. Pitts* and replaced the former common law immunity with statutory tort immunity by the passage of Arkansas Act 165, effective on March 5, 1969, which, as amended, is codified by A.C.A. §§ 21-9-301 through 21-9-303.⁹

A.C.A. § 21-9-301. Tort Liability – Immunity Declared

- (a) (a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.
- (b) (b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees.¹⁰

1. For an excellent discussion of Arkansas civil rights law, see Michael Mosley, Robert Beard, and Paul Charton, *Sixteen Years of Litigation Under the Arkansas Civil Rights Act: Where We Have Been and Where We Are Going*, 32 U. ARK. LITTLE ROCK L. REV. 173 (2010).

2. W. Page Keeton et al., *Prosser and Keeton on Torts* § 131 (5th ed. 1984).

3. See *Thompson v. Sanford*, 281 Ark. 365, 367-68, 663 S.W.2d 932, 934 (1984).

4. See A.C.A. § 1-2-119.

5. See, e.g., *Patterson v. City of Little Rock*, 202 Ark. 189, 190, 149 S.W.2d 562, 563 (1941). This distinction was abolished by 1969 Ark. Act 165, as codified in A.C.A. § 21-9-301. See also *Augustine v. City of West Memphis*, 281 Ark. 162, 164, 662 S.W.2d 813, 814 (1984) (“the former distinction between governmental and proprietary actions was abolished by Act 165 of 1969 . . . [t]he positive language of that statute is inconsistent with the distinction formerly made by our case law.”).

6. 244 Ark. 1239, 1252, 429 S.W.2d 45, 51 (1968).

7. *Id.*

8. *Id.*

9. The Arkansas legislature later added A.C.A. § 21-9-304.

10. However, municipal tort immunity does not extend to “arms” of a city or municipality which are not a department or division of the city nor a political subdivision of the state. See *Masterson v. Stambuck*, 321 Ark. 391, 395, 902 S.W.2d 803, 806 (1995).

A.C.A. § 21-9-302. Tort Liability – Settlement of Claims¹¹

Each county, municipal corporation, school district, special improvement district, or any other political subdivision of the state is authorized to provide for hearing and settling tort claims against it.

A.C.A. § 21-9-303. Motor Vehicle Liability Insurance Requirement

- (a) All political subdivisions shall carry liability insurance on their motor vehicles or shall become self-insurers, individually or collectively, for their vehicles, or both, in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, A.C.A. § 27-19-101 *et seq.*
- (b) The combined maximum liability of local government employees, volunteers, and the local government employer in any action involving the use of a motor vehicle within the scope of their employment shall be the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, A.C.A. § 27-19-101 *et seq.*, unless the political subdivision has purchased insurance coverage or participates in a self-insurance pool providing for an amount of coverage in excess of the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, A.C.A. § 27-19-101 *et seq.*, in which event the maximum liability of the insurer or pool shall be the limits of the coverage provided for in the policy or agreement.
- (c) (1) Any person who suffers injury or damage to person or property caused by a motor vehicle operated by an employee, agent, or volunteer of a local government covered by this section shall have a direct cause of action against the insurer if insured, or the governmental entity if uninsured, or the trustee or chief administrative officer of any self-insured or self-insurance pool. (2) Any judgment against a trustee or administrator of a self-insurance pool shall be paid from pool assets up to the maximum limit of liability as provided in this section.

A.C.A. § 21-9-304. State Indemnification; Certain Actions

- (a) When any city of the first class, city of the second class, incorporated town, county, and its employees are called upon to assist the state and its employees and, as a result, are sued for their actions performed under the supervision of a state official or employee, the Attorney General shall defend the city of the first class, city of the second class, incorporated town, county, and its employees.
- (b) Should a judgment be rendered against the city of the first class, city of the second class, incorporated town, county, or its employees, the state shall pay actual, but not punitive, damages adjudged by a state or federal court, or entered by the court as a result of a compromise settlement approved and recommended by the Attorney General, based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his or her employment and in performance of his or her official duties.
- (c) (1) When cities of the first class, cities of the second class, incorporated towns, counties, and their employees are covered by any contract of insurance providing for legal defense, the cities of the first class, cities of the second class, incorporated towns, counties, their employees, and their insurers are not entitled to legal defense by the Attorney General. (2) Any judgment rendered against the cities of the first class, cities of the second class, incorporated towns, counties, their employees, or their insurers shall be paid by the state only to the extent that the judgment amount exceeds the limits of liability established in the contract of insurance.

11. To date, the courts have only construed A.C.A. § 21-9-302 once. In *Waire v. Joseph*, 308 Ark. 528, 530-31, 825 S.W.2d 594, 596-97 (1992), the Self-Insurance Fund of the Arkansas Department of Education (SIFADE) did not constitute an insurance policy because the Agreement's Memorandum of Intent expressly stated that it was not an insurance policy, contract of indemnity, etc. Although the entities named in A.C.A. § 21-9-301 are generally immune from tort liability, such entities *may* still choose to provide for a hearing and settlement of tort claims against them. *Id.* at 531, 825 S.W.2d at 597; See also *Bigelow v. Union County*, 287 Ark. 486, 701 S.W.2d 125 (1985) (holding county immune from tort claim even though county provided no means for settling tort claims against it as authorized, but not required, by Ark. Stat. Ann. § 12-2902); *Hardin v. City of DeValls Bluff*, 256 Ark. 480, 508 S.W.2d 559 (1974) (finding that Ark. Stat. Ann. § 12-2901 did not violate article II, section 13 of the Arkansas Constitution of 1874, and finding that the administrator of a deceased captive who suffocated in a jailhouse fire could not recover for negligent confinement). This statute has been addressed by Ark. Op. Att'y Gen. No. 2004-340 (Feb. 16, 2005): "Again municipal corporations have authority to hear and settle tort claims against them...The decision of whether to settle a particular claim is invested with city officials; presumably in consultation with the city attorney. City officials exercise discretion as to which, if any, claims to settle under [section] 21-9-302." Moreover, "[t]he authority to settle tort claims . . . clearly resides in the city council, [and] not the mayor." Ark. Op. Att'y Gen. No. 2005-277, at 6 n.5 (Mar. 15, 2006)

Constitutionality

After the passage of these statutes, litigants began to challenge their constitutionality.¹² In *Hardin v. City of DeValls Bluff*,¹³ the court rejected the argument that A.C.A. § 21-9-301 violated article 2, section 13 of the Arkansas Constitution.¹⁴ The court held that no well-established right to recovery from a city in a tort action existed at the time of the adoption of the Arkansas Constitution and that A.C.A. § 21-9-301 was, therefore, constitutional.¹⁵

Ten years later, the court upheld the statutes' constitutionality based upon the belief that "the drafters of the constitution never had in mind that one, without legislative authority, could receive redress for asserted wrongs against counties and cities acting in their governmental capacities."¹⁶ "Since statutes granting political subdivisions immunity or denying them immunity are legal, then statutes which limit that liability are legal for the same reasons..."¹⁷ The purpose for this, the court noted, was "to make these government entities bear some responsibility for wrongs to individuals harmed by their negligence, but also to prevent these same entities from exposure to high judgments which would destroy them."¹⁸

Tort immunity has also been challenged as violating article 5, section 32 of the Arkansas Constitution. That provision establishes the General Assembly's power to enact workers' compensation law. It further provides that "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." In *White v. City of Newport*,¹⁹ the court held that, because the legislature had acted responsibly in protecting municipalities from bankruptcy and protecting vital public services, the tort immunity statutes did not violate this provision.²⁰

In *White*, the plaintiff argued that, at the time of the adoption of the 1874 Constitution, a citizen had a common law right to sue a city for negligence committed while the city was acting in a proprietary capacity.²¹ Furthermore, the plaintiff argued that if an individual does, indeed, hold this common law right, then the legislature should be prevented from abrogating it.²² The court rejected this approach, stating that "the legislature must be permitted to alter the common law when it stands in the way of a reasonable public policy objective."²³ The court found that the enactment of the immunity statute was a reasonable means of achieving the permissible public policy objectives of protecting against the threat of municipal bankruptcy and the attendant possibility of interrupting the delivery of vital public services.²⁴

The tort immunity statutes have also been challenged on equal protection grounds.²⁵ One plaintiff argued that requiring political subdivisions to carry liability insurance on all of its motor vehicles or be self-insured, but not requiring the same subdivisions to carry general liability insurance, violated the equal protection clause.²⁶ This argument was rejected by the United States Court of Appeals for the Eighth Circuit.²⁷ The court in *Lacey* held that, "because the legislative classification of tort victims was not based upon a suspect criterion and the right to bring a tort suit against the government is not fundamental, the statutory scheme need only have an underlying rational basis."²⁸ The court upheld the scheme as "a valid legislative effort to provide a method and manner of relief to some victims of governmental tortfeasors."²⁹

12. See Ark. Const. art. 2, § 13 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character"); Ark. Const. art. 5, § 32 ("no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property").

13. 256 Ark. at 482, 508 S.W.2d at 561.

14. That section provides that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws." (Ark. Const. art. 2, § 13)

15. *Hardin*, 256 Ark. at 485, 508 S.W.2d at 563.

16. *Thompson*, 281 Ark. at 367, 663 S.W.2d at 934 (quoting *Hardin*, 256 Ark. at 485, 508 S.W.2d at 563).

17. *Id.* at 368, 663 S.W.2d at 934.

18. *Id.*, 663 S.W.2d at 934.

19. 326 Ark. 667, 933 S.W.2d 243 (1996).

20. See *id.* at 672, 933 S.W.2d at 803. The court also rejected the plaintiff's challenge under article 2, § 13.

21. *Id.* at 671, 933 S.W.2d at 802.

22. *Id.*, 933 S.W.2d at 802.

23. *Id.* at 672, 933 S.W.2d at 803.

24. *White v. City of Newport*, 326 Ark. 667, 672, 933 S.W.2d 800, 803 (1996).

25. See *Lacey v. Bekaert Steel Wire Corp.*, 799 F.2d 434 (8th Cir. 1986).

26. *Id.* at 436.

27. *Id.*

28. *Id.*

29. *Id.*

Application of Immunity to Negligence v. Intentional Torts

The Arkansas Supreme Court has repeatedly stated that A.C.A. § 21-9-301 extends immunity only for acts of negligence, but not for intentional torts.³⁰ The court has interpreted § 21-9-301 in this manner despite statutory language and policy goals to the contrary. A.C.A. § 21-9-301 speaks only of immunity for torts in general rather than a reference to negligence. Additionally, in *Thompson v. Sanford*, the court recognized that the legislative purpose of § 21-9-301 centered on the need to protect governmental entities “from exposure to high judgments which would destroy them.”³¹ Intentional tort claims may place cities under the burden of high judgments just as actions based on negligence may.

Furthermore, the court applied the “negligence only” rule inconsistently. In *Loren D. Buttolph Trust v. Jarnagan*, for example, the court, without discussion of the “negligence only” rule, held that a mayor/waterworks manager was immune under § 21-9-301 for “arbitrarily” refusing to extend water service to the plaintiff trust until the previous landowners’ delinquent water bill was paid in full.³²

In *Autry v. Lawrence*, the Arkansas Supreme Court, while reciting that the intent of the legislature was “to grant immunity to municipal agents and employees for acts of negligence committed in their official capacities,”³³ extended immunity to actions against a police officer for the tort of malicious prosecution.³⁴ In *Harrington v. City of Greenbrier*, the court held that a claim of “deliberate fraud,” which the court characterized as the tort of deceit, would be immunized under the statute.³⁵ In another case, the Arkansas Court of Appeals stated that actions for trespass, an intentional tort, would be immunized under § 21-9-301.³⁶ Finally, the court’s use of § 21-9-301 as a source for qualified immunity from civil rights actions further erodes its announced negligence limitation.³⁷ Conversely, however, in *Doe v. Baum*, the Arkansas Supreme Court appeared to infer that § 21-9-301 immunity would not extend to acts of gross negligence or reckless indifference.³⁸ In *City of Farmington v. Smith*, the court said it has consistently “held that section 21-9-301 provides city employees with immunity from civil liability for negligent acts, but not for intentional acts.”³⁹

In another decision, the Arkansas Supreme Court declined to address the issue of whether intentional torts are covered by § 21-9-301.⁴⁰ Noting that it had consistently held that the statute grants immunity for negligent acts but not intentional ones, the court declined to consider the argument that intentional acts actually are covered.⁴¹ Nevertheless, the court held that, notwithstanding the intentional nature of the claims of false arrest and false imprisonment, the record did not establish that the defendant law enforcement officer’s actions constituted anything more than mere negligence. Accordingly, the court reversed the trial court’s denial of summary judgment to the officer. This signals the court’s willingness to look beyond the pleadings and, on a motion for summary judgment, grant immunity when the plaintiff is unable to demonstrate a genuine issue of material facts as to whether the officer’s conduct was intentional in nature.

In *Harris v. Beth*, the Arkansas Court of Appeals affirmed the trial court’s ruling that a police officer was not acting in his official capacity when his K-9 partner escaped his yard and bit a neighbor.⁴² The court disposed of the case by holding that the officer failed to prove a prima facie entitlement to summary judgment, that the trial court did not err when denying him summary judgment, and that, therefore, the officer was not entitled to immunity.⁴³ While the case was ultimately decided on procedural grounds, it provides an additional wrinkle in that the Arkansas Supreme Court has definitively said that § 21-9-301 does provide immunity for municipalities from negligence claims, has declined to extend the immunity to intentional torts (but has inconsistently applied it to cover intentional torts in some cases) and has not addressed the issue of strict liability claims at all.

30. *City of Fayetteville v. Romine*, 373 Ark. 318, 321, 284 S.W.3d 10, 13 (2008); *Deitsch v. Tillery*, 309 Ark. 401, 407, 833 S.W.2d 760, 762 (1992); and *Battle v. Harris*, 298 Ark. 241, 245, 766 S.W.2d 431, 433 (1989).

31. 281 Ark. 365, 368, 663 S.W.2d 932, 934 (1984). See also *White v. City of Newport*, 326 Ark. 667, 672, 933 S.W.2d 800, 803 (1996).

32. 302 Ark. 393, 394-95, 789 S.W.2d 466, 467 (1990).

33. 286 Ark. 501, 503, 696 S.W.2d 315, 316 (1985) (interpreting A.C.A. § 12-2901, the predecessor statute to A.C.A. § 21-9-301).

34. See *Autry*, 286 Ark. at 502, 696 S.W.2d at 315.

35. 262 Ark. 773, 775-76, 561 S.W.2d 302, 304 (1978).

36. See *City of Alexander v. Doss*, 102 Ark. App. 232, 236, 284 S.W.3d 74, 78 (2008).

37. See, e.g., *Short v. Westark Community College*, 347 Ark. 497, 508, 65 S.W.3d 440, 448 (2002).

38. 348 Ark. 259, 277-78, 72 S.W.3d 476, 486-87 (2002). The court only held that the “appellants have failed to provide evidence . . . that [the appellee] intentionally failed to perform a manifest duty or act with disregard of a known or obvious risk,” as opposed to ruling that A.C.A. § 21-9-301 does not extend, as a matter of law, to actions for either gross negligence or reckless indifference. *Id.* at 278, 72 S.W.3d at 487.

39. 366 Ark. 473, 478, 237 S.W.3d 1, 5 (2006).

40. *Trammell v. Wright*, 2016 Ark. 147, 5, 489 S.W.3d 636, 639 (2016).

41. *Id.*

42. 2017 Ark. App. 186, 5, 518 S.W.3d 126, 128 (Ark. App. 2017).

43. *Id.*

Williams v. Mannis reiterated the ruling in *Trammell* as applied to a state law outrage claim.⁴⁴ Since the evidence failed to show the requisite intent to satisfy the elements of the claim, the defendant city employee was entitled to immunity.⁴⁵

In *Morley v. Medic One, LLC*, the court extended the application of the tort immunity statute to a volunteer fire department and a volunteer EMT in that department, holding that “[t]his public entity is immune from suit for the alleged negligence of the department’s firefighters and EMTs except to the extent insurance coverage exists,” and capped the plaintiff’s recovery at \$300,000, the amount of insurance coverage for the department.⁴⁶

Federal courts applying Arkansas state law consistently say that it is clear that § 21-9-301 only applies to negligent conduct and that municipalities would not be immune from intentional tortious conduct.⁴⁷ However, it should be emphasized that, due to the Arkansas Supreme Court’s inconsistent holdings when applying the statute, as discussed above, this is less clear than it seems.

Qualified Immunity under the Arkansas Civil Rights Act

The Arkansas Civil Rights Act of 1993 (ACRA) provides plaintiffs with a cause of action for constitutional violations committed by persons acting on behalf of “political subdivisions.”⁴⁸ It also provides for the payment of an injured plaintiff’s litigation costs and attorney’s fees.⁴⁹ The ACRA further directs Arkansas courts to refer to state and federal case law interpreting the federal Civil Rights Act of 1871 for guidance and persuasive authority.⁵⁰ Arkansas courts have thus far addressed qualified immunity for municipal officials in a variety of situations under the ACRA.⁵¹

Qualified immunity exists to “protect officials from the disruptions of going to trial as well as from liability for money damages.”⁵² As such, “it is effectively lost if a case is erroneously permitted to go to trial.”⁵³ Suits filed against employees in their individual capacities are filed against the public employee acting under the color of law.⁵⁴ “In order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity.”⁵⁵ Conversely, suits brought against individuals in their official capacities are suits against the governmental entity that employs the individual, not the individual personally.⁵⁶

Individual Capacity

The Arkansas Supreme Court, in *Smith v. Brt*, ruled that § 21-9-301, which addresses tort immunity, provides municipal officials with immunity from civil rights claims if certain factors are met.⁵⁷ The court addressed the qualified immunity of Mayor Brt who was sued by a former police chief under the ACRA for allegations of “retaliatory discharge in violation of his right to freedom of speech under the Arkansas Constitution.”⁵⁸ The circuit court analyzed Brt’s immunity under § 19-10-305, which provides immunity for *state* officers and employees.⁵⁹ The Arkansas Supreme Court attempted to correct this error but rather than look to state and federal case law as the source for municipal officials’ qualified immunity, the court held that qualified immunity for municipal employees stemmed from § 21-9-301.⁶⁰ The court then proceeded to analyze the qualified immunity of Mayor Brt under a similar rubric as it would a state employee under § 19-10-305. Accordingly, the court applied a two-part conjunctive test asking first whether there was a constitutional violation and second whether the constitutional right was clearly established.⁶¹ The court went on to hold that, although the former chief alleged a violation of a clearly established constitutional right, the plaintiff could not survive a summary judgment motion without showing the violation was one of which a reasonable person would have knowledge.⁶²

44. 889 F.3d 926, 932-33 (8th Cir. 2018).

45. *Id.*

46. 2018 WL 6031347 at 3 (E.D. Ark. 2018).

47. See *e.g.*, *Bates v. Simpson*, 2019 WL 1607320 at 10 (W.D. Ark. 2019); *Frazier v. City of Pine Bluff*, 2017 WL 3160563 at 9 (E.D. Ark. 2017); *Robinson v. Huskins*, 2014 WL 7184013 at 3 (W.D. Ark. 2014); *Edwards v. Byrd*, 2013 WL 12109474 at 1 (E.D. Ark. 2013).

48. A.C.A. § 16-123-105(a).

49. *Id.* § 16-123-105(b).

50. *Id.* § 16-123-105(c). The federal Civil Rights Act of 1871 is codified at 42 U.S.C. § 1983.

51. See, *e.g.*, *Sullivan v. Coney*, 2013 Ark. 222, 427 S.W.3d 682; *Graham v. Cawthorn*, 2013 Ark. 160, 427 S.W.3d 34; *City of Fayetteville v. Romine*, 373 Ark. 318, 284 S.W.3d 10 (2008); *City of Farmington v. Smith*, 366 Ark. 473, 237 S.W.3d 1 (2006); and *Smith v. Brt*, 363 Ark. 126, 211 S.W.3d 485 (2005).

52. *Wright v. S. Arkansas Reg’l Health Ctr., Inc.*, 800 F.2d 199, 202 (8th Cir. 1986) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985)).

53. *Wright*, 800 F.2d at 202 (quoting *Mitchell*, 472 U.S. at 511, 105 S.Ct. at 2815).

54. *Simons v. Marshall*, 369 Ark. 447, 452, 255 S.W.3d 838, 842 (2007). See also *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985).

55. *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999).

56. *Simons*, 369 Ark. at 451, 255 S.W.3d at 841-42.

57. 363 Ark. 126, 130, 211 S.W.3d 485, 488-89 (2005).

58. *Id.* at 126, 211 S.W.3d at 486.

59. *Id.* at 129, 211 S.W.3d at 488 (emphasis added). Section 19-10-305(a) provides that “[o]fficers and employees of the State of Arkansas are immune from liability and from suit, except to the extent that they may be covered by liability insurance, for damages for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment.”

60. *Id.*, 211 S.W.3d at 488.

61. *Id.* at 130, 211 S.W.3d at 489.

62. *Id.* at 131, 211 S.W.3d at 490.

A year later, the court again addressed the issue of qualified immunity for municipal employees in *City of Farmington v. Smith*.⁶³ There, the court denied qualified immunity to police officers and the mayor of Farmington when police engaged in a warrantless search of a home without informing the homeowners of their right to deny the officers access.⁶⁴ The court stated that the right was well established by prior precedent two years earlier.⁶⁵ The court further held that a reasonable officer should have known of the existence of the earlier announced right and modified his conduct accordingly. As such, the court denied qualified immunity to the officers.⁶⁶

The Arkansas Supreme Court further defined immunity for municipal employees when it distinguished the immunity analysis for municipal employees under § 21-9-301 from the immunity analysis for state employees under § 19-10-305 in *City of Fayetteville v. Romine*.⁶⁷ If malice is present, § 19-10-305 bars the court from granting qualified immunity to state employees.⁶⁸ In *City of Fayetteville*, the court held that despite the similar model of analysis under the two statutes, the presence or absence of malice is irrelevant in issues of qualified immunity against municipal officials under the ACRA.⁶⁹

Recently, the Arkansas Supreme Court has addressed qualified immunity in an action alleging violation of article 2, section 4 of the Arkansas Constitution, by and through the ACRA in *Graham v. Cawthorn*.⁷⁰ Iris Cawthorn alleged that Elmer Graham, an officer of the Des Arc Police Department, arrested her in violation of her right to remonstrate⁷¹ in petitioning the police department.⁷² Officer Elmer lawfully arrested Cawthorn's son for an outstanding warrant.⁷³ Cawthorn then arrived at the sheriff's office where her son was taken.⁷⁴ Cawthorn then proceeded to the lobby area where she began loudly objecting to her son's arrest and disrupting dispatchers.⁷⁵ After multiple warnings, Elmer placed Cawthorn under arrest for disorderly conduct.⁷⁶ Cawthorn later filed suit against Graham in his individual and official capacity under the ACRA for an alleged violation of her right to petition the government.⁷⁷

The court then addressed Graham's immunity under A.C.A. § 21-9-301, applying the same analysis used when addressing the issue of qualified immunity for state employees under § 19-10-305.⁷⁸ As directed by the ACRA, when analyzing qualified immunity statutes, the court looked to U.S. Supreme Court decisions addressing qualified immunity in federal civil rights cases.⁷⁹ Applying that framework, a qualified immunity defense under the ACRA is barred only when the plaintiff has claimed a violation of a constitutional right and shown that the constitutional right was clearly established at the time of the incident.⁸⁰

The U.S. Supreme Court, prior to *Graham*, clarified the two-part test adopted by the Arkansas Supreme Court in *Smith v. Brt*, *supra*, by stating that "courts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all."⁸¹ To be "clearly established," a right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right."⁸² "A Government official's conduct violates clearly established law when, at the time of the challenged conduct . . . existing precedent [has] placed the statutory or constitutional question beyond debate."⁸³

The Arkansas Supreme Court in *Graham*, following the reasoning of the U.S. Supreme Court, explicitly declined to analyze the first prong of the qualified immunity test.⁸⁴ The court stated that the lack of precedent in Arkansas on the right of remonstrance claim alone failed the "clearly established" prong, and thus would control the court's decision to grant qualified immunity to Officer Graham.⁸⁵ The second prong of the test could not be satisfied, and thus the court declined to address the question of whether a constitutional violation existed at all under the first prong.

63. 366 Ark. 473, 477, 237 S.W.3d 1, 4 (2006).

64. *Id.* at 480, 237 S.W.3d at 6.

65. *Id.*, 237 S.W.3d at 6. See *State v. Brown*, 356 Ark. 460, 473, 156 S.W.3d 722, 731 (2004) (overruling prior Arkansas case law and holding that under the Arkansas Constitution police must inform homeowners of their right to refuse consent for a warrantless search of their home).

66. 366 Ark. at 480, 237 S.W.3d at 6.

67. 373 Ark. 318, 326, 284 S.W.3d 10, 16 (2008).

68. See A.C.A. § 19-10-305(a).

69. 373 Ark. at 325, 284 S.W.3d at 16.

70. 2013 Ark. 160, 427 S.W.3d 34.

71. See Ark. Const. art. 2, § 4 ("The right of the people peaceably to assemble, to consult for the common good; and to petition, by address or remonstrance, the government, or any department thereof, shall never be abridged").

72. *Graham*, 2013 Ark. at 2, 427 S.W.3d at 37.

73. *Id.*, 427 S.W.3d at 37.

74. *Id.* at 3, 427 S.W.3d at 37.

75. *Id.*, 427 S.W.3d at 38.

76. *Id.* at 4, 427 S.W.3d at 38.

77. *Graham v. Cawthorn*, 2013 Ark. 160, at 8, 427 S.W.3d 34, 41.

78. *Id.* at 15-16, 427 S.W.3d at 46.

79. *Id.* at 16, 427 S.W.3d at 46.

80. *Id.*, 427 S.W.3d at 46 (citing *Smith v. Brt*, 363 Ark. 126, 130, 211 S.W.3d 485, 489 (2005)).

81. *Reichle v. Howards*, 566 U.S. 658, 132 S.Ct. 2088, 2093 (2012) (citing *Pearson v. Callahan*, 555 U.S. 223, 236-37, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009)).

82. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

83. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 2083 (2011) (emphasis added).

84. See *Graham*, 2013 Ark. at 17, 427 S.W.3d at 46.

85. *Id.* at 17, 427 S.W.3d at 46-47.

Official Capacity

As discussed above, an “official capacity” suit is in reality a suit against the municipality. The Arkansas Supreme Court has rarely had the occasion to address claims against municipal entities under the ACRA. In *Deitsch v. Tillery*, the court addressed the issue of official capacity against a school district in a pre-ACRA claim made under 42 U.S.C. § 1983.⁸⁶ There, the court stated “local governments can be sued directly under § 1983 if the alleged unconstitutional action implements or executes a ‘policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.’”⁸⁷ Additionally, a municipality’s informal customs may form the basis of a constitutional violation.⁸⁸

Although the “custom and policy” requirement is not cast in terms of an immunity as such, it does serve as a powerful defense against many claims against municipalities. Defense counsel are often successful in securing dismissal of such claims at the summary judgment stage when the plaintiff fails to offer sufficient facts to establish the existence of a custom or policy. A policy for the purposes of claiming a constitutional violation by a municipality has been held by the Eighth Circuit to be “an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters.”⁸⁹ Additionally, “a municipality may not be held vicariously liable for the unconstitutional acts of employees” but “may be held liable for the unconstitutional acts of its officials or employees when those acts implement or execute an unconstitutional municipal policy or custom.”⁹⁰

The more taxing standard needed to prove an unconstitutional custom, as distinct from a mandated policy, requires three elements: “(1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity’s employees; (2) [d]eliberate indifference to or tacit authorization of such conduct by the governmental entity’s policymaking officials after notice to the officials of that misconduct; and (3) the claimant must have been injured by an action resulting from the government entity’s custom.”⁹¹

Pleading and Proof of Immunity

In *Vent v. Johnson*, the Arkansas Supreme Court held that the immunity provided by A.C.A. § 21-9-301 is an affirmative defense that must be asserted and proven by the defendant.⁹² An important aspect of *Helena-West Helena School District v. Monday* was that the court stated that the school district may be immune from liability, but, because it had the burden to make its insurance policy a part of the record, and failed to do so, the court could not make that determination.⁹³ In the past, this burden has been on the plaintiff and not on the district.⁹⁴

Thus, without further clarification by the court, who holds the burden is left ambiguous. Possibly, the court in its decision meant that since the district was attempting to overturn the lower court’s decision, it was incumbent on the district to show that the trial court’s decision was incorrect. However, any such clarification is absent from the court’s opinion and it is foreseeable that plaintiffs might use that language to attempt to shift the burden to defendants in future cases. So, the bottom line is this: When pleading tort immunity, always attach coverage documents if you want to successfully argue that the city’s insurance does not cover the claim and thus the city is immune from liability.

86. 309 Ark. 401, 409, 833 S.W.2d 760, 764 (1992).

87. *Id.* 833 S.W.2d at 764 (quoting *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978)).

88. *Monell*, 436 U.S. at 691, 98 S.Ct. at 2036.

89. *Mettler v. Whittedge*, 165 F.3d 1197, 1204 (8th Cir. 1999).

90. *Id.*

91. *Id.*

92. 2009 Ark. 92, at 14, 303 S.W.3d 46, 53.

93. 361 Ark. at 87, 204 S.W.3d at 517-18.

94. See, e.g., *Augustine v. City of West Memphis*, 281 Ark. 162, 164, 662 S.W.2d 813, 815 (1984).

Repeated Negligence

Although a city may initially act negligently and cause injury to a plaintiff, a failure to correct that negligence may be construed as intentional. In *Robinson v. City of Ashdown*, the court found that the city's negligent operation of the sewer plant, which over a nine-year period caused sewage to flood a house, amounted to an inverse condemnation.⁹⁵ Even though the city initially had statutory tort immunity, the overflow continued long after the city was on notice. The court held that a taking occurred because the public benefitted from the use of the home as an overflow dump for sewage.⁹⁶ The court based its holding on article 2, section 22 of the Arkansas Constitution, which provides that "[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation." Thus, the court stated that "[w]hen a municipality acts in a manner which substantially diminishes the value of a landowner's land, and its actions are shown to be intentional, it cannot escape its constitutional obligation to compensate for the taking of property on the basis of its immunity from tort action."⁹⁷

Recently, the Arkansas Supreme Court addressed a similar issue in *City of Malvern v. Jenkins*.⁹⁸ There, the plaintiff stated claims for negligence and inverse condemnation arising from the city's installation of a sewer line across the Jenkins' property.⁹⁹ The plaintiffs claimed that this installation damaged the drainage culvert on their property, which led to three instances of flooding over a seven-month period.¹⁰⁰

The court held that even if the flooding was a proximate result of the city damaging the culvert, the plaintiff's suit was a negligence claim barred by § 21-9-301. Without expressly addressing the inverse condemnation claim, the court ruled for the city in granting statutory tort immunity.¹⁰¹

Insurance

A.C.A. § 21-9-301 bestows immunity on municipalities except to the extent that they may be covered by insurance. The purchase of liability insurance even in instances where it is not subject to tort liability is authorized under A.C.A. § 23-79-210. While this provision "does not require a municipality...to carry liability insurance, the statute does authorize and provide for a direct action against the insurer by the injured person in the event the municipality carries such insurance."¹⁰²

However, where a municipality operates a common carrier service, insurance may be required. In *Salley v. Central Arkansas Transit Authority*, the Arkansas Supreme Court held that the city bus is a common carrier, and, thus, has a duty to either carry uninsured motorist liability insurance or become a self-insurer under A.C.A. § 23-16-302.¹⁰³ In *Helena-West Helena School District v. Monday*, *supra*, Rose Monday sued the Helena-West Helena School District for slip-and-fall injuries sustained by her son, Elijah Monday, when he slipped on ice that had accumulated on the steps of the school bus.¹⁰⁴ The court held that, subject to the insurance exception recognized in *Carter v. Bush*,¹⁰⁵ the defendants could not be sued for negligence, and only the insurance exception was germane to the issue of the district's immunity.¹⁰⁶

95. 301 Ark. 226, 783 S.W.2d 53 (1990).

96. *Id.* at 227, 232, 783 S.W.2d at 54, 56.

97. *Id.* at 232, 783 S.W.2d at 56-57.

98. 2013 Ark. 24, 425 S.W.3d 711.

99. *Id.* at 10, 425 S.W.3d at 717.

100. *Id.* at 9, 425 S.W.3d at 716.

101. *Id.* at 10, 425 S.W.3d at 717.

102. *Little Rock Port Auth. v. McCain*, 296 Ark. 130, 131, 752 S.W.2d 44, 45 (1988).

103. 326 Ark. 804, 806, 934 S.W.2d 510, 511 (1996).

104. 361 Ark. at 83-84, 204 S.W.3d at 515.

105. 296 Ark. 261, 262-68, 753 S.W.2d 534, 534-38 (1988) (holding that an employee or a school district can be sued to the extent that a policy of insurance extends to applicable coverage).

106. *Helena*, 361 Ark. at 86-87, 204 S.W.3d at 517.

Motor Vehicles

Pursuant to A.C.A. § 21-9-301, cities enjoy immunity from liability and from suits for damages except to the extent that they are covered by liability insurance. With this basic principle in mind, we can look to § 21-9-303 for guidance on maintaining liability insurance in Arkansas' municipalities. The language of this statute states that cities, municipalities, and all other political subdivisions of Arkansas must carry liability insurance on their motor vehicles, or assume statutory responsibility as self-insured.¹⁰⁷ Two questions arise from this statement: (1) What is a motor vehicle, and (2) how much insurance is needed on such a vehicle?

What is a Motor Vehicle?

A.C.A. § 21-9-303(a) states that “all political subdivisions shall carry liability insurance on their motor vehicles” but does not provide a definition of “motor vehicle.” However, the Arkansas Supreme Court has held that an analysis of § 21-9-303(a) shall begin with the definition of “motor vehicle” contained in § 27-19-206.¹⁰⁸ This section defines a “motor vehicle” as “every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires but not operated upon rails.”¹⁰⁹ Such a definition “is a broad declaration that every self-propelled vehicle that does not operate on rails is a ‘motor vehicle.’”¹¹⁰

However, an analysis of the definition of a motor vehicle does not end with § 27-19-206. Instead, the court has looked to complete the analysis of § 21-9-303(a) by employing the Motor Vehicle Safety Responsibility Act (MVSRA), codified at §§ 27-19-101 *et seq.*¹¹¹ The court further held that the General Assembly did not intend the provisions of the MVSRA to require political subdivisions to purchase motor vehicle liability insurance for non-registered vehicles.¹¹²

With this in mind, the court determined that if a vehicle is exempt from registration under the MVSRA, then that vehicle is not required to comply with the security deposit or liability insurance provisions required under the MVSRA.¹¹³ Consequently, if the vehicle is exempt, it is not a “motor vehicle” for the purposes of either § 21-9-303(a) or tort liability.¹¹⁴ In *Cousins*, a student was injured by a bush hog mower being pulled by a tractor.¹¹⁵ The injured student argued that the tractor was a motor vehicle pursuant to § 21-9-303.¹¹⁶ The court reasoned that if § 21-9-303(a) required “political subdivisions” to be subject to the MVSRA provision that requires minimal insurance on all motor vehicles, then the political subdivisions should also be subject to all provisions of the MVSRA.¹¹⁷

In applying the registration laws of the MVSRA, the court found that vehicles not designed for transportation purposes are to be designated as special mobile equipment and exempt from registration.¹¹⁸ Thus, since they are exempt from registration, self-propelled motors and other equipment not designed or intended for transportation purposes are not required to comply with the liability insurance or security deposit provisions required under § 21-9-303(a).¹¹⁹

Further, under Arkansas' motor vehicle registration laws, particularly A.C.A. § 27-14-703(3), an implement of husbandry is not required to be registered. Since Arkansas law defines an implement of husbandry to be all vehicles “designed and adapted exclusively for... agricultural, horticultural, or livestock raising operations, or for lifting or carrying an implement of husbandry,”¹²⁰ the bush hog mower in *Cousins* was not subject to registration.¹²¹ As a result, it was not subject to the liability insurance requirements of § 21-9-303(a).¹²²

As noted above, some vehicles are exempt from registration because they are defined as “special mobile equipment.” In *Spears v. City of Fordyce*, the court considered whether the city's front-end loader was a “motor vehicle.”¹²³ The trial court determined that the loader was exempt from registration as “special mobile equipment” under the definition in A.C.A. § 27-14-211.¹²⁴ However, the injured party and the owner raised a genuine issue of material fact as to whether the operation of the

107. A.C.A. § 21-9-303(a).

108. *Cousins v. Dennis*, 298 Ark. 310, 314, 767 S.W.2d 296, 298 (1989).

109. A.C.A. § 27-19-206.

110. *Spears v. City of Fordyce*, 351 Ark. 305, 311, 92 S.W.3d 38, 42 (2002).

111. *Cousins*, 298 Ark. at 313, 767 S.W.2d at 297.

112. *Id.* at 315, 767 S.W.2d at 298.

113. *Id.*, 767 S.W.2d at 298-99.

114. *Id.*, 767 S.W.2d at 298.

115. *Id.* at 311, 767 S.W.2d at 296.

116. *Id.* at 312, 767 S.W.2d at 297.

117. *Cousins v. Dennis*, 298 Ark. 310, 313, 767 S.W.2d 296, 297 (1989).

118. *Id.* at 315, 767 S.W.2d at 298.

119. *Id.*, 767 S.W.2d at 298.

120. A.C.A. § 27-14-212. Note that A.C.A. §§ 27-14-212 through 216 were repealed by Acts of 2017, Act 448, § 3.

121. 298 Ark. at 314, 767 S.W.2d at 298.

122. *Id.*, 767 S.W.2d at 298.

123. 351 Ark. 305, 311, 92 S.W.3d 38, 42 (2002).

124. *Id.* at 313, 92 S.W.3d at 43.

loader on public roads was merely incidental, so as to fall within the definition of special mobile equipment, or frequent and regular.¹²⁵ Until this factual question was resolved, it was impossible to determine whether the loader was exempt from the statutory definition of a “motor vehicle” in § 27-19-206.¹²⁶

The “special mobile equipment” argument was furthered on appeal in *Southern Farm Bureau Casualty Insurance Company v. Spears*, where the court addressed the question of whether the front-end loader was special mobile equipment.¹²⁷ A.C.A. § 27-14-211 provides, in part:

“Special mobile equipment” means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus, and concrete mixers.¹²⁸

The court looked to the definition of “auto,” as set out in the insurance policy: This was “a motor vehicle, semi-trailer or trailer designed primarily to be used on public roads.”¹²⁹ The court reasoned that “a vehicle could be designed primarily to be used on public roads, even though it is not designed or used primarily for the transportation of persons or property over the highways.”¹³⁰ Therefore, the court rejected the appellant’s argument that, as a matter of law, the front-end loader could not be both “special mobile equipment” under Arkansas’ statutory laws and an “auto” under the terms of an insurance policy.¹³¹

After determining that the front-end loader could be both “special mobile equipment” under § 27-14-211, and an “auto” under the terms of an insurance policy, the court continued its analysis by explaining that Spears had the burden of proving that the front-end loader was an uninsured “auto” under the insurance policy.¹³² However, the court held “the evidence presented at trial failed to prove that the front-end loader was ‘designed primarily to be used on public roads’ and, thus, an ‘auto’ as defined in the insurance policy.”¹³³ Moreover, “[s]ince Spears failed to present sufficient evidence to prove that the front-end loader was an uninsured auto under the insurance policy,” the court concluded that there was not “substantial evidence to support the jury’s verdict in favor of Spears.”¹³⁴

How Much Insurance is Needed?

Once an object has been ascertained to be a motor vehicle, then the city, municipality or political subdivision must determine how much insurance is needed for that vehicle. The solution to this question comes from Arkansas’ Transportation Statutes and the Motor Vehicle Safety Responsibility Act, particularly A.C.A. §§ 27-19-605(a) and 27-19-713. The essential portions of these statutes provide that no policy or bond shall be effective unless the policy or bond is subject to not less than twenty-five thousand dollars (\$25,000) in personal liability per death and another twenty-five thousand dollars (\$25,000) in liability for property damages.¹³⁵

These standards are summarized by § 27-22-104(b), which reads:

The policy shall provide as a minimum the following coverage: (1) Not less than twenty-five thousand dollars (\$25,000) for bodily injury or death of one (1) person in any one (1) accident; (2) Not less than fifty thousand dollars (\$50,000) for bodily injury or death of two (2) or more persons in any one (1) accident; and (3) If the accident results in damage to or destruction of property, not less than twenty-five thousand dollars (\$25,000) for the damage to or destruction of property of others in any one (1) accident.

Arkansas courts have continuously held that A.C.A. § 21-9-303(a) requires insurance on motor vehicles in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act.¹³⁶ This holding is based on the reasoning that, by referring to § 27-19-101 *et seq.*, the General Assembly obviously intended that the insurance coverage required of political subdivisions under § 21-9-303(a) be subject to all of the provisions of the Motor Vehicle Safety Responsibility Act.¹³⁷ In this respect, the court stated that §§ 27-19-605 (amended by Act 910 of 2019) and 27-19-713 provided “the minimum amounts of liability insurance coverage for a security deposit or proof of further financial responsibility required under the Act.”¹³⁸

125. *Id.* at 315, 92 S.W.3d at 44.

126. *Id.*, 92 S.W.3d at 44.

127. 360 Ark. 200, 204-05, 200 S.W.3d 436, 439 (2004). The current definition of “special mobile equipment” is found in A.C.A. § 27-14-104.

128. A.C.A. § 27-14-211.

129. *Spears*, 360 Ark. at 205-06, 200 S.W.3d at 440 (emphasis in original) (internal quotation marks omitted).

130. *Id.* at 206, 200 S.W.3d at 440 (emphasis in original).

131. *Id.*, 200 S.W.3d at 440.

132. *Id.* at 207, 200 S.W.3d at 441.

133. *Id.*, 200 S.W.3d at 441.

134. *Id.* at 207-08, 200 S.W.3d at 441.

135. A.C.A. §§ 27-19-605(a); 27-19-713.

136. See *Cousins v. Dennis*, 298 Ark. 310, 312, 767 S.W.2d 296, 297 (1989).

137. See *id.* at 314-15, 767 S.W.2d at 298.

138. *Id.* at 313, 767 S.W.2d at 297.

The court continued by stating that a city, municipality or political subdivision becomes a self-insurer, if found liable, in an amount not to exceed those minimum amounts; which, subject to certain exceptions, “apply to the driver and owner of any vehicle of a type subject to registration under the motor vehicle laws of [Arkansas] and to persons who have been convicted of or forfeited bail or who have failed to pay judgments upon causes of action arising out of ownership, maintenance, or use of vehicles of a type subject to registration under the laws of [Arkansas].”¹³⁹ Thus, a municipality that fails to carry liability insurance for operation of its motor vehicles as required by statute would be liable in tort, up to an amount equivalent to the required policy limits, for injuries resulting from negligent operation of its vehicles, notwithstanding statutory governmental tort immunity.¹⁴⁰

Obtaining the required amounts of motor vehicle liability insurance under A.C.A. § 21-9-303 will limit a city’s liability to the insurance policy’s stated maximums.¹⁴¹ In *Fritzinger*, the plaintiff’s motorcycle struck a stop sign allegedly as the result of a city employee’s negligent operation of a city-owned garbage truck.¹⁴² On appeal, the court affirmed the circuit court’s reduction of the judgment against the city from \$92,500 to its insurance policy maximum of \$25,000.¹⁴³ In so ruling, the court found that § 21-9-303 clearly limits a city’s maximum liability to \$25,000, and that to hold otherwise would be a miscarriage of justice.¹⁴⁴ Moreover, *Fritzinger* also prohibits direct action against a city’s insurer unless the insurer may be liable for an amount in excess of \$25,000.¹⁴⁵

On the other hand, a city’s failure to maintain the requisite insurance essentially relegates the city to the status of a self-insurer. However, the court has distinguished the failure to maintain proper insurance from insolvency unknown to the city. This issue was discussed in *Taylor v. City of North Little Rock*, where the appellant was struck by a vehicle driven by an employee of the City of North Little Rock.¹⁴⁶ At the time of the accident, the city vehicle was insured by Reliance Insurance Company.¹⁴⁷ During the lawsuit, the city’s insurance carrier, Reliance, was declared insolvent.¹⁴⁸ The court found that, because coverage was in effect when the accident occurred, there was no evidence that the city should have anticipated its insurance carrier would become insolvent.¹⁴⁹ Given that the city could not buy insurance for an accident that had already happened, the city should not have been relegated to the status of a self-insurer.¹⁵⁰

Recovery under vehicular liability insurance is not available to an injured party who has workers’ compensation as a remedy available to them.¹⁵¹ In *Helms v. Southern Farm Bureau Casualty Insurance Company*, the court held that teachers acting within the scope of their employment at the time of a school bus accident were not entitled to the school district’s insurance proceeds but were limited to the exclusive remedy provided by the workers’ compensation statutes.¹⁵²

Emergency Vehicles

How do emergency vehicles differ from other municipal vehicles? In *City of Little Rock v. Weber*, the appellee was injured when a Little Rock police officer, driving a city police car with the lights flashing and siren running, ran a red light and struck her vehicle.¹⁵³ The city argued that it was absolutely immune from tort liability arising out of a city policeman’s negligent operation of an authorized emergency vehicle.¹⁵⁴ The court rejected the city’s reliance on earlier cases which held that immunity could be broached only when the public employee breached a duty imposed on him by law in common with all other people, as opposed to a situation in which the negligent conduct arose out of a duty peculiar to his or her employment.¹⁵⁵ As the *Weber* court explained, “[W]e see no reason why a person injured by an emergency vehicle should be left without a remedy while persons may seek redress against a municipality for its employees’ negligence in the operation of all other vehicles.”¹⁵⁶

The court noted that the officer made the decision to turn on his lights and siren prior to his collision, and that decision involved an exercise of discretion, and any actions taken subsequent to the decision were required by law to be taken with ordinary care.¹⁵⁷

139. *Id.* at 313-14, 767 S.W.2d at 297-98 (emphasis in original).

140. See *Sturdivant v. City of Farmington*, 255 Ark. 415, 500 S.W.2d 769 (1973).

141. *Accord Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

142. *Id.* at 419, 97 S.W.3d at 441.

143. *Id.* at 421, 97 S.W.3d at 442.

144. See *id.*, 97 S.W.3d at 442.

145. *Id.* at 423-24, 97 S.W.3d at 444.

146. 88 Ark. App. 48, 50, 194 S.W.3d 797, 798 (2004).

147. *Id.*, 194 S.W.3d at 798.

148. *Id.*, 194 S.W.3d at 798.

149. *Id.* at 51, 194 S.W.3d at 799.

150. *Id.*, 194 S.W.3d at 799.

151. See *Helms v. Southern Farm Bureau Cas. Ins. Co.*, 281 Ark. 450, 452-53, 664 S.W.2d 870, 871-72 (1984).

152. *Id.*, 664 S.W.2d at 871-72.

153. 298 Ark. 382, 383, 767 S.W.2d 529, 530 (1989).

154. *Id.*, 767 S.W.2d at 530.

155. *Id.* at 384-85, 767 S.W.2d at 530-31.

156. *Id.* at 385, 767 S.W.2d at 531.

157. *Id.* at 389-90, 767 S.W.2d at 533.

Prior to 2002, the court had only addressed the liability of a municipality when the driver of a municipal vehicle directly caused the injuries giving rise to the litigation. This changed with *City of Caddo Valley v. George*.¹⁵⁸ In *Caddo Valley*, the Arkadelphia Police Department set up a road block to stop a fleeing car thief whom the Caddo Valley Police Department was chasing.¹⁵⁹ A third party, George, was caught between the road block and the fleeing suspect.¹⁶⁰ Bringing suit, George alleged negligence on the parts of the pursuing officers, claiming the officers should have known that their high speed pursuit was likely to injure innocent victims.¹⁶¹ Further, George claimed the officers should have disengaged “from the pursuit when they knew, or should have known, that the Arkadelphia police were setting up a roadblock; and that they failed to end the pursuit when they knew, or should have known, it was no longer prudent to chase Sherman under the conditions.”¹⁶²

In response to these allegations, the Caddo Valley officers argued they were immune from liability or damages because they were acting in their official capacities as employees of Caddo Valley.¹⁶³ They further argued that their conduct was not the proximate cause of George’s injuries, on account of the intervening conduct of the suspect being pursued.¹⁶⁴

The Arkansas Supreme Court rejected both of these arguments and held the city jointly and severally liable for judgment rendered against it and against the suspect to the extent of the city’s liability insurance limits.¹⁶⁵ This was held even though the suspect was found to be ninety percent at fault and each officer was found to be only five percent at fault.¹⁶⁶ Further, the court held that the driver was entitled to recover up to the limits of liability insurance on each of the two city vehicles involved, rather than only one vehicle, even though the plaintiff’s injuries arose from only one incident, inasmuch as the city was required by the statute to obtain insurance on each vehicle.¹⁶⁷

158. 340 Ark. 203, 9 S.W.3d 481 (2000).

159. *Id.* at 206, 9 S.W.3d at 483.

160. *Id.* at 206-07, 9 S.W.3d at 483.

161. *Id.* at 207, 9 S.W.3d at 483.

162. *Id.*, 9 S.W.3d at 483.

163. *Id.*, 9 S.W.3d at 483.

164. *City of Caddo Valley v. George*, 340 Ark. 203, 207, 9 S.W.3d 481, 483-84 (2000).

165. *Id.* at 208-214, 9 S.W.3d at 484-88.

166. *Id.* at 207, 9 S.W.3d at 484.

167. *Id.* at 215, 9 S.W.3d at 488.

Summary Judgment

As a general rule, the denial of a motion for summary judgment is neither reviewable nor appealable, and without the ability to appeal, the right of immunity from suit would be lost if the case were permitted to go to trial.¹⁶⁸ This reasoning is based on Ark. R. App. P., Civ. R. 2, which provides that “[a]n appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from . . . [a]n order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action.”

Thus, when the principle defense is that the appellants are entitled to immunity from suit, there would be no further proceedings if the appellants were entitled to the claimed immunity, and the refusal to grant the motion would amount to a denial of the appellants’ claimed defense, which, if allowed, would discontinue the action. “The qualified immunity claim is a claim of right which is separable from, and collateral to, the rights asserted in the complaint.”¹⁶⁹ Moreover, “the refusal to grant a summary-judgment motion has the effect of determining that the appellants are not entitled to immunity from suit, as the right of immunity from suit is effectively lost if a case is permitted to go to trial.”¹⁷⁰ Thus, such appeals concerning the denial of a motion for summary judgment based on a claim of immunity from liability are allowed.¹⁷¹

Indemnification

In contrast with tort claims against political subdivisions, the courts do hear cases alleging contractual liabilities of municipalities and other subdivisions.¹⁷² These cases involve issues of void or voidable contracts, ultra vires or intra vires contracts, mandatory or directory statutory provisions, executed or executor contracts, ratification, and estoppels.¹⁷³ Often, the power is expressly granted by the legislature. For example, cities and incorporated towns, as well as school districts, have the power to enter into contracts and to sue and be sued.¹⁷⁴

The theory of unjust enrichment may also be appropriate for a party which has dealt with a government but cannot proceed on a contractual basis. For example, although a contract with a city for construction of a sewer may be unenforceable for failure to comply with government contract requirements, the contractor may recover on an unjust enrichment basis for the value of the benefit received by the city.¹⁷⁵

“Indemnity” arises by virtue of a contract and holds one liable for the acts or omissions of another over whom they have no control (or it allows someone to recover from a third party the whole amount which they themselves are liable to pay).¹⁷⁶ Contracts of indemnity are construed in accordance with the rules for the construction of contracts, generally.¹⁷⁷ The first rule of interpretation is to give the language employed by the parties the meaning they intended.¹⁷⁸ Given the nature of indemnification, our courts have held that the language imposing indemnity must be clear, unequivocal and certain, and indemnity agreements are to be construed strictly against the party seeking indemnification.¹⁷⁹

In *Cherry v. Tanda*, the City of Fort Smith entered into a contract for the construction of a sanitary landfill.¹⁸⁰ The contract included a provision whereby the construction company would indemnify the city for all claims and damages arising out of the performance of the contract.¹⁸¹ In addition, Tanda agreed to carry liability insurance, which it obtained through Transcontinental.¹⁸² When the landfill walls collapsed and killed Mr. Cherry, his estate sued Tanda and Transcontinental.¹⁸³ The court held, *inter alia*, that the contract between Tanda and the city did not transform Tanda’s insurance policy with Transcontinental into the city’s liability policy which could be the basis for suit pursuant to A.C.A. § 23-79-210.¹⁸⁴ Accordingly, the employee was found to be suing in tort, not contract, and, thus, was barred by the exclusivity provision of workers’ compensation.¹⁸⁵

168. See *supra*, note 45.

169. *Robinson v. Beaumont*, 291 Ark. 477, 482-83, 725 S.W.2d 839, 842 (1987).

170. *Helena v. West-Helena School Dist. v. Monday*, 361 Ark. 82, 84, 204 S.W.3d 514, 516 (2005).

171. *Trammell v. Wright*, 2016 Ark. 147, 3, 489 S.W.3d 636, 638 (2016)

172. See *Deason v. City of Rogers*, 247 Ark. 1061, 449 S.W.2d 410 (1970).

173. See A.C.A. § 14-54-101.

174. *Id.*

175. See, e.g., *Sanders v. Bradley Cty. Human Servs. Pub. Facilities Bd.*, 330 Ark. 675, 956 S.W.2d 187 (1997); *City of Damascus v. Bivens*, 291 Ark. 600, 726 S.W.2d 677 (1987); *McCouston v. City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d 233 (1980); and *Crawford v. Lee Cty. School Dist.*, 64 Ark. App. 90, 983 S.W.2d 141 (1998).

176. See *East-Harding, Inc. v. Horace A. Piazza & Assocs.*, 80 Ark. App. 143, 91 S.W.3d 547 (2002).

177. See *Nabholz Const. Corp. v. Graham*, 319 Ark. 396, 400, 892 S.W.2d 456, 459 (1995).

178. See *Koppers Co. v. Missouri Pacific R.R. Co.*, 34 Ark. App. 273, 277, 809 S.W.2d 830, 832 (1991).

179. *Nabholz*, 319 Ark. at 400, 892 S.W.2d at 459.

180. 327 Ark. 600, 605, 940 S.W.2d 457, 458 (1997).

181. *Id.*, 940 S.W.2d at 458.

182. *Id.*, 940 S.W.2d at 458.

183. *Id.*, 940 S.W.2d at 458.

184. *Id.* at 611, 940 S.W.2d at 461-62.

185. *Id.* at 616, 940 S.W.2d at 464.

As stated above, although municipalities generally have the power to enter into contracts, an agreement by the municipality to indemnify a private party is likely in conflict with several provisions of Arkansas law.¹⁸⁶ Specifically, the Arkansas Constitution prevents municipalities from donating or appropriating money to private individuals or associations.¹⁸⁷ Further, Arkansas courts have developed the broad public purpose doctrine stating that monies may only be spent on items that benefit the entire public.¹⁸⁸ Generally speaking, “a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all, or at least a substantial part of, the inhabitants or residents.”¹⁸⁹ The Arkansas Court of Appeals has held that indemnification of a private party is not an expenditure for the public welfare.¹⁹⁰ Although the state’s appellate courts have not squarely addressed the question with respect to cities and towns, it appears likely that municipalities would be precluded from contractually indemnifying or assuming the liability of a private party.

Legislative Immunity

Legislators enjoy the broadest generally available immunity of all: An absolute immunity not only from damages but also from declaratory and injunctive relief.¹⁹¹ This immunity extends to state, regional and local legislators.¹⁹² As with the absolute immunity of judges and prosecutors, this immunity shields only the “legislative functions” of legislators or, occasionally, others.¹⁹³ The Supreme Court has ruled that voting for proposed legislation, investigating committee topics, preparing committee reports and speaking before a legislative assembly are all legislative functions.¹⁹⁴ Activities outside the scope of legislative functions are the taking of bribes and disseminating press releases to the public.¹⁹⁵

The function of such immunity is “to insure that the legislative function may be performed independently without fear of outside interference.”¹⁹⁶ Legislative immunity applies to local legislators as well as to their state and federal counterparts, and it applies when these officials act “in a field where legislators traditionally have power to act.”¹⁹⁷ The administrative or executive actions of legislators are not entitled to protection.¹⁹⁸ “[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.”¹⁹⁹ An official’s improper motivation, or “unworthy purpose,” does not affect the immunity privilege so long as the actions fall within the ambit of protected legislative activity.²⁰⁰

In *Massongill v. County of Scott*, the Arkansas Supreme Court acknowledged legislative immunity as a “long-recognized principle in American law that legislators are absolutely immune from personal liability for their official and legislative activities.”²⁰¹ In conflict with this principle, a recent Arkansas Court of Appeals decision purported to find a lack of legislative immunity for local lawmakers.²⁰² *Robertson v. Daniel* involved a defamation suit against two members of the City of Hot

186. Although no court has held so thus far, Ark. Const. art. 12, § 4, which prohibits the city council and any municipal officer from binding the municipality to a monetary obligation in excess of that fiscal year’s revenue, could conceivably be violated by such an indemnification agreement.

187. See art. 12, § 5 (“No county, city, town or other municipal corporation, shall become a stockholder in any company, association, or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual.”).

188. See *Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.3d 378 (2001); *Bourland v. Pollack*, 157 Ark. 538, 249 S.W. 360 (1923); see also Ark. Atty. Gen. Op. Nos. 94-397, 94-317, 94-298, 93-416, 91-411, and 91-410 (opining on the application of the public purpose doctrine to various public expenditures).

189. 15 *McQuillin Mun. Corp.* § 39:25 (3d ed.).

190. *Entergy Arkansas, Inc. v. Arkansas Pub. Serv. Comm’n*, 2011 Ark. App. 453, at 7, 384 S.W.3d 674, 678 (applying article 12, section 12 which states: “Except as herein otherwise provided, the State shall never assume, or pay the debt or liability of any county, town, city or other corporation whatever; or any part thereof; unless such debt or liability shall have been created to repel invasion, suppress insurrection, or to provide for the public welfare and defense. Nor shall the indebtedness of any corporation to the State, ever be released, or in any manner discharged, save by payment into the public treasury.”).

191. See *Supreme Court of Va. v. Consumers Union, Inc.*, 446 U.S. 719, 730-34, 100 S.Ct. 1967, 1973-76 (1980).

192. See *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998); *Lake Cty. Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). For circuit authority, see *Carlos v. Santos*, 123 F.3d (2d Cir. 1997); *Trevino v. Gates*, 23 F.3d 1480 (9th Cir. 1994), *cert. denied*, 513 U.S. 932, 115 S.Ct. 327, 130 L.Ed.2d 286 (1994); *Executive 100, Inc. v. Martin City*, 922 F.2d 1536, 1539 (11th Cir. 1991), *cert. denied*, 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984); *Kuzinich v. Santa Clara Cty.*, 689 F.2d 1345, 1349 (9th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982); and *Gorman Towers, Inc v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980).

193. See *Hafer v. Melo*, 502 U.S. 21, 27-31, 112 S.Ct. 358, 363-64 (1991); *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732 (1982). *Cf. Tower v. Glover*, 467 U.S. 914, 920, 104 S.Ct. 2820, 2824, 81 L.Ed.2d 758 (1984) (“The Court has recognized absolute § 1983 immunity for legislators acting within their legislative roles”) (citations omitted); *Supreme Court of Va. v. Consumers Union, Inc.*, 446 U.S. 719, 731, 100 S.Ct. 1967, 1974 (1980) (judges enjoy legislative immunity with respect to their role in promulgating rules of conduct for lawyers); *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23 (1st Cir. 1996) (legislative committee counsel entitled to absolute immunity concerning conduct during committee hearings); *Redwood Village Partnership v. Graham*, 26 F.3d 839 (8th Cir. 1994), *cert. denied*, 513 U.S. 962, 115 S.Ct. 423, 130 L.Ed.2d 337 (1994) (state agency employees enjoy legislative immunity with respect to promulgation of health care rule). See also *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 8 (1st Cir. 2000) (recognizing that absolute legislative immunity might apply to local executive officials with respect to legislative functions).

194. See *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973); *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972); *United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); and *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

195. See *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

196. *Supreme Court of Va. v. Consumers Union of the United States*, 446 U.S. 719, 731, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); See also *Forrester v. White*, 484 U.S. 219, 223, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (“When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions”).

197. *Bogan v. Scott-Harris*, 523 U.S. 44, 56, 118 S.Ct. 966, 973 (1998) (reasoning, further, that the common law had afforded this protection and that the rationales for legislative immunity applied with equal force to local legislators). See also *Tenney v. Brandhove*, 341 U.S. 367, 379, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

198. *Bogan*, 523 U.S. at 52.

199. *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (emphasis in original).

200. *Tenney*, 341 U.S. at 377; see also *Rateree v. Rockett*, 852 F.2d 946, 951 (7th Cir. 1988) (“legislator may vote for legislation for seemingly improper reasons; nevertheless, the rule of absolute immunity shields this conduct”).

201. 337 Ark. 281, 285, 991 S.W.2d 105, 108 (1999).

202. *Robertson v. Daniel*, 2013 Ark. App. 160, at 5.

Springs Board of Directors. The suit arose from the directors' allegedly defamatory statements rather than their legislative actions.²⁰³ In addition, had the suit been based on a legislative action, the *Robertson* court's failure to cite *Massongill* as controlling would have been troublesome. Thus, the discussion of legislative immunity in *Robertson* should not be viewed as controlling on the subject in future Arkansas cases.

Good Faith Immunity

In *Gibbs v. Mahone*, the Arkansas Supreme Court held that an officer who acts in unchallenged good faith in making an arrest, who takes bills that were used in a pre-arranged buy, and who repays the person who furnished the money used in the buy, cannot be held personally liable for a tortious conversion of the bills if the arrested person proves to be innocent.²⁰⁴ The court stated that the general rule that "public officers are immune from liability for acts within the scope of their official authority and made this observation with respect to police officers."²⁰⁵ Moreover:

"The duties of law enforcement officers require action immediately and directly inimical to the self-interest of individuals, which is often of the same nature as action inspired by malice, and to permit inquiry into the officers' motives in every case would inject chaos into law enforcement. . . . Those principles are controlling here. The trial judge was right in observing that Gibbs's remedy is to apply to the State Claims Commission."²⁰⁶²⁰⁷

State officers and employees are immune from civil liability for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment. In *Carter v. Bush*, police officers were inspecting trucks along a highway.²⁰⁸ While they stopped a truck in the northbound lane, a truck in the southbound lane stopped on its own.²⁰⁹ A third vehicle collided with the rear of the southbound truck, and the driver died from his injuries.²¹⁰ The widow filed a wrongful death action against the police officers.²¹¹ The court held that the officers were immune from civil liability because their acts were neither malicious nor done in bad faith.²¹²

Other Sources of Immunity

Other Arkansas statutes providing varying degrees of governmental or official immunity include but most likely are not limited to: A.C.A. § 6-19-103 (school district directors); § 6-17-107 (teachers immune for reporting drug abuse by students); § 6-41-216 (hearing officers in status change hearings for children with disabilities); § 14-334-104 (public transit systems); § 14-362-104 (regional airport authorities); § 16-10-406 (Judicial Discipline and Disability Commission); § 16-93-1209 (agencies using offenders in community punishment programs); § 16-66-119 (law enforcement officers serving and executing writs of execution); § 16-120-702 (charitable immunity); § 19-10-305 (state officers and employees); and § 20-22-808 (fire departments).

203. *Id.*

204. See *Gibbs v. Mahone*, 281 Ark. 115, 661 S.W.2d 397 (1983).

205. *Id.* at 118, 661 S.W.2d at 398.

206. *Id.*, 661 S.W.2d at 398-99 (internal quotation marks omitted).

207. The type of immunity provided in *Gibbs* might have served to protect the officer in *Autry*, *supra* note 36, thereby avoiding the awkwardness of making the tort of malicious prosecution immune from suit by calling it negligence.

208. 296 Ark. 261, 263, 753 S.W.2d 534, 535 (1988).

209. *Id.*, 753 S.W.2d at 535.

210. *Id.*, 753 S.W.2d at 535.

211. *Id.*, 753 S.W.2d at 535.

212. *Id.* at 262-68, 753 S.W.2d at 534-38.



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