

Appeal No.: 1200658

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IN THE ALABAMA SUPREME COURT

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EX PARTE GREG PINKARD

In re:       RONNIE TAYLOR, Plaintiff  
                  v.  
                  GREG PINKARD, et al., Defendants

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On Mandamus Review from the Circuit Court of Marion County  
Case No. 49-CV-2018-900089  
The Honorable Talmage Lee Carter presiding

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ANSWER BRIEF OF RESPONDENT RONNIE TAYLOR

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Respectfully submitted,

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- Oral Argument Requested -

## REQUEST FOR ORAL ARGUMENT

This Court should grant oral argument. While resolution of the first issue (whether there was substantial evidence to defeat the State-agent-immunity affirmative defense of the defendant, Greg Pinkard, at the summary judgment stage) can be decided on the briefs, consideration of the second issue (whether this Court should distinguish | limit | overrule four recent decisions (Barnhart | Anthony | Meadows | Cooper) should be scheduled for oral argument.

These decisions, which change the rules of immunity for tort suits against State-agents, are in direct conflict with the will of the Legislature (Ala. Code § 36-1-12, enacted in 2014) and over a century of decisions from this Honorable Court that were studied and explained in Cranman and the more recent decision in Wright. Specifically, Cranman | Wright held -- and gave good reasons why -- individual-capacity tort claims against State-agents are not converted to official-capacity claims against the State merely because the State-agent was acting pursuant to official duties acquired by State law.

With respect, Barnhart and its progeny are dangerous to Alabama citizens because they could require the dismissal of every tort suit against

every State-agent -- even those cases this Court has held are not subject to the State-agent-immunity affirmative defense. (See Addendum E)

Unfortunately, no one informed this Court of the contrary holdings in Cranman | Wright when it decided Barnhart and its progeny. More unfortunate, this Court only provided a single paragraph of analysis in Barnhart, and cited no authority, before issuing these opinions that conflict with law. While the undersigned has endeavored to lay out the conflict in the decisions within the word count limitations of this mandamus answer-brief, the undersigned believes the justices would be better served by a full and open discussion of the authorities, the public policy benefits of preserving the situational and partial immunity allowed by State-agent-immunity, and the dangers of not overruling | limiting | distinguishing Barnhart and its progeny.

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## STATEMENT OF JURISDICTION

The circuit court below has jurisdiction of these cases because the amount in controversy exceeds \$20,000.00.<sup>1</sup>

This Court "ha[s] authority ... [t]o exercise original jurisdiction in the ... determination of writs of ... mandamus in relation to matters in which no other court has jurisdiction."<sup>2</sup> Because this case is not within the jurisdiction of the other appellate courts,<sup>3</sup> this Court has jurisdiction to resolve Pinkard's mandamus petition.

"The presumptively reasonable time for filing a [mandamus] petition ... [is] the same as the time for taking an appeal,"<sup>4</sup> which is forty-two days.<sup>5</sup> The circuit court denied Pinkard's motion for summary judgment on May 8, 2021. (BB) Pinkard's mandamus petition filed on June 17, 2021, which was the fortieth day, was filed on time.

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<sup>1</sup> Ala. Code § 12-11-30(1).

<sup>2</sup> Ala. Code § 12-2-7(2); see also A.R.A.P. 21(a).

<sup>3</sup> Ala. Code § 12-3-10; Ala. Code § 12-3-9.

<sup>4</sup> A.R.A.P. 21(a)(3).

<sup>5</sup> A.R.A.P. 4(a)(1).

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## EVIDENTIARY CITATION GUIDE

Taylor uses the letter designations Pinkard used to tab his submissions, but only these materials are pertinent to the issues:

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## STATEMENT OF CASE

This tort case was brought to recover damages against a State fire investigator, Greg Pinkard, who lied to prosecutors to frame Ronnie Taylor for arson. The circuit judge denied Pinkard's summary judgment motion on immunity on Taylor's malicious prosecution, defamation, conspiracy, and outrage claims. (BB)

## STATEMENT OF ISSUES

1. Whether Taylor has proven the willful | malice | fraud | bad-faith exception to State-agent-immunity. The answer is yes.

2. Whether State-immunity applies in this case. The answer is no.

## STATEMENT OF FACTS

When Taylor arrived at his house in remote Marion County on July 31, 2016, he only found rubble. "[T]here was nothing." (Z-B/21) He immediately reported the fire to the Haleyville Fire Department (he was a volunteer firefighter), the Marion County Sheriff's Department, and Alabama Power (to disconnect power). His wife, Mandy, arrived in 15 minutes. She took photos showing all flames were out. (Z-C/11-13)

Taylor reported the fire loss to Traders and Farmers Bank (his mortgagee), American Modern Home (the casualty insurer), and Allstate

(on a car damaged by the fire). Because of a mistake that had nothing to do with Taylor, a month lapsed before Assurance Group (American's claims adjuster) hired adjuster Tommy Pennington to investigate the fire. (Z-E/7) Pennington and these companies concluded -- without any evidence -- that Taylor committed arson.

Tim Perkins of Assurance asked Chris Olsen at American whether they should do a full cause and origin investigation "given the possibility of arson." (Z-F-PX1/36) Olsen responded "it does not make sense to spend money doing an arson investigation" because it had to pay Traders for the loss regardless of arson. (Id.) So Pennington went to the scene on September 4, 2016, but did not question Taylor. After trying, without success, to convince the Haleyville Fire Marshal there was arson (Z-F-PX1/36), Pennington tried the State Fire Marshal's Office on September 15, 2016, misrepresenting these facts:

The fire was not reported to the fire department nor did they respond sir. It appears there was no power to the dwelling and a burn barrel was turned over in the right front corner of the dwelling on the date I inspected it.

(Z-F-PX1/34)

Pinkard, a deputy State fire marshal, received the assignment the next day (Z-F-PX1/33; Z-G/62-63) and began pushing the theory, without

evidence, that Taylor arrived while the fire was still burning and waited until it burned-out to call the Sheriff. (Z-G-13/25-26) That afternoon (Sept. 16), Pinkard secretly taped his interview with Taylor (Z-G/63), initially telling him he was only "helping insurance clear up some things." (Z-G/112; Z-G-13/3) Within ten minutes, however, Pinkard accused Taylor of (1) "maintaining a fire," (2) destroying evidence by not calling the fire department (even though Taylor called), and (3) putting a barrel of fuel onto an active fire to cover-up arson. (Z-G/135; Z-G-13/18-24) When Taylor tried to leave, Pinkard exploded in anger. He berated, interrupted, and ignored Taylor, and threatened to take him before the grand jury. The audio at 10:25-19:10 better illustrates Pinkard's caustic tenor than the transcript. However, both are attached. (Addendum A)

Pinkard first accused Taylor of not calling the fire department. (Z-G/116; Z-G-13/13-15) When Taylor informed him he had called -- and had phone records to prove it (Z-H/87,124-125; Z-G/65,119-120; Z-B/69-71,219-220) -- Pinkard began accusing Taylor of only calling to get a report so he could get insurance money. (Z-G-13/16,22-26) Both Taylor and Mandy told Pinkard the house was completely gone when they arrived. (Z-G-13/17,21,23,54,67; Z-D/¶¶8-10) Taylor also told Pinkard he

placed the burn barrel that Pennington saw against the foundation days  
after the fire when he thought he could clean-up the property:

I done that the other day when I was going to clean up. ... I was fixing to clean it all up cause I thought things were handled, and I'd got that letter from the bank.

(Z-G/217-218; Z-G-13/71-75) The photos in Pinkard's possession proved Taylor was telling the truth.

Photo1



Photo 2



Photo 1 taken by Mandy on July 31, 2016 (Z-B/245-246; Z-C/13-14; Z-D) shows no flames present and two burn barrels far away from the house.

Photo 2 taken by Pennington on September 4, 2016 shows a barrel resting on the structure where Taylor had been cleaning. (Z-G-9/1-2)

Pinkard admitted in deposition he had no proof when the barrel was placed against the structure, or when the items in the barrel had been burned, other than what Taylor told him. Pinkard also admitted he

had no proof of arson by Taylor or that any evidence had been destroyed.

Key excerpts from Pinkard's depositions are attached. (Addendum B)

Regardless, Pinkard told the district attorney Taylor had committed arson. He also lied to Assurance for the next three months "that he ha[d] sufficient evidence and is submitting the case against Mr. Taylor to the DA for arson and destruction of evidence." (Z-F-PX1/25,32) Pinkard even falsely wrote in his report to the DA that (1) Taylor "admit[ted] that he threw the barrel into the house after the structure had caught on fire," and (2) "[a]ccording to the evidence and witness statements Ronnie Taylor threw the barrel of fuel items onto the fire before any investigator ... was able to investigate." (Z-I-A) By filing this report with the DA, Pinkard "initiate[d the] prosecution."<sup>1</sup>

Assistant DA (now probate judge) Paige Vick relied on Pinkard's report to (1) present the case to the grand jury and (2) draft the indictment. (Z-I) The indictment falsely stated Taylor "[r]efus[ed] the service of the fire department" and "add[ed] a barrel of fuel items onto the burning structure, masking the fire cause or origin." (Z-I-B) Pinkard admitted he falsely told the grand jury that Taylor "added a barrel of fuel

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<sup>1</sup> Ex parte Harris, 216 So.3d 1201, 1215, n.2 (Ala. 2016).

items onto the burning structure masking the fire cause or origin." (Z-H/69-70) State Fire Marshal Pilgreen testified if Pinkard told the grand jury this without any evidence he violated department rules. (Z-A/80,89)

On December 14, 2016, the DA's office indicted Taylor for second-degree arson and tampering with evidence. Pinkard informed Assurance the next day. (Z-F-PX1/18)

Taylor's arrest was widely known and in the news. (Z-B-1) On January 23, 2017, American filed for restitution to recover \$36,475 from Taylor. (Z-K) It also delayed \$36,000 to Traders and asked it to hold another \$20,000 due to Taylor until after the criminal action concluded. (Z-F-PX1/3,10,17) Taylor suffered mental anguish during this time:

I like to just died, I liked to have melted. It was untruthful. ... All the information he had was wrong, and he was dead set from the get-go. ... I nearly had a nervous breakdown. I went to my doctor. It kept getting worse. ... I was to the point I couldn't even hardly get out of bed and go to work. ... He tore me to pieces and broke me in half. Broke my will to live.

(Z-B/191-193)

On August 3, 2017, the DA's office dismissed the charges after Pinkard was deposed and he admitted he had no evidence to support the statements in his report. (Z-L; Addendum B)

## STATEMENT OF STANDARDS OF REVIEW

The mandamus writ should be denied "on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court."<sup>2</sup>

"A [defendant] asserting State-agent-immunity bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle [him | her] to immunity."<sup>3</sup> "[T]he burden then shifts to the plaintiff to show [an] exception[] is applicable." Id. "If there is a genuine issue as to any material fact on [State-agent-immunity], the [defendant] is not entitled to a summary judgment."<sup>4</sup>

## SUMMARY OF ARGUMENT

Judge Carter correctly denied Pinkard's summary judgment motion on his State-agent immunity defense because Taylor produced substantial evidence that Pinkard, a deputy State fire investigator, lied to the prosecutor to have Taylor prosecuted for arson and tampering with evidence when he knew he had no arguable probable cause supporting these crimes, acted with ill-will and spite, tried to ruin Taylor

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<sup>2</sup> Ex parte Moulton, 116 So.3d 1119, 1132 (Ala. 2013).

<sup>3</sup> Ex parte Kennedy, 992 So.2d 1276, 1282-1283 (Ala. 2008).

<sup>4</sup> Ex parte Wood, 852 So.2d 705, 708 (Ala. 2002).

financially | professionally | emotionally, and willfully abandoned the rules for conducting State fire investigations.

This would be a relatively routine denial of mandamus review for this Court but for the other argument made by Pinkard -- that the individual-capacity claims against him should allegedly be converted to official-capacity claims -- and entitle him to absolute State-immunity -- merely because he contends his fire investigation duties "existed solely because of his official position in which he acted for the State." (p.12) This argument is dangerous for Alabama, and it is wrong. Since the Constitution of 1901, Alabama courts have denied these requests, holding individual-capacity claims against State-agents cannot be converted to official-capacity claims against the State unless the plaintiff was trying to collect from the State treasury. Moreover, the Legislature's codification of these principles in Ala. Code § 36-1-12 shuts-the-door on this argument. Because Taylor does not seek treasury money, his individual-capacity claims against Pinkard cannot be converted to official-capacity claims.

Regardless, State-agents like Pinkard are now filing of motions for summary judgment in State and federal courts in every case in Alabama



seeking absolute State-immunity based solely on Barnhart v. Ingalls, 275 So.3d 1112 (Ala. 2018) and its progeny.<sup>5</sup> In a single paragraph, and without citing any authority, Barnhart bypassed and overruled the long-standing State treasury rule with a rule that allows an ex mero motu conversion of all tort claims against State-agents to official-capacity claims whenever the State-agent was working in the scope of his|her official duties. Unfortunately, no one has yet informed this Court this new rule not only conflicts with § 36-1-12, it is directly contrary to a hundred or more years of interpretation that was set-forth in detail in Ex parte Cranman, 792 So.2d 392 (Ala. 2000). Specifically, Cranman traced this Court's decisions back to the Constitution of 1901 and set-forth authority that State-agents are not entitled to State-immunity for torts committed in the scope of employment -- regardless of whether the source of their duties derived from their official duties derived from the State.

Therefore, this Court should deny the mandamus writ and issue an opinion overruling | limiting | distinguishing Barnhart and its progeny. If it does not, and these cases are allowed to stand, Alabama's State-agent-

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<sup>5</sup> See e.g. Anthony v. Datcher, 321 So.3d 643 (Ala. 2020), Meadows v. Shaver, \_\_\_ So.3d, 2020 WL 6815066 (Ala. 2020), Ex parte Cooper, \_\_\_ So.3d \_\_\_, 2021 WL 4471018 (Ala. 2021).

immunity jurisprudence could be eviscerated, every tort claim against a State-agent could be dismissed, and bad State-agents will harm and abuse Alabama citizens without recourse and in violation of citizens' rights under § 13 of the Constitution.

STATEMENT WHY THE WRIT  
SHOULD BE DENIED (ARGUMENT)

Although Pinkard asserted other grounds below, only immunity arguments are reviewable by mandamus.<sup>6</sup>

I. There Are Fact Disputes on the State-Agent-Immunity Defense.

Because State-agent-immunity "[also] governs ... whether a peace officer is entitled to immunity under [Ala. Code] § 6-5-338(a),"<sup>7</sup> there is only one "burden-shifting" process" to consider.<sup>8</sup> While Taylor does not dispute Pinkard's conduct falls under Cranman category (4), summary judgment was properly denied because Taylor produced substantial evidence supporting the willful | malice | fraud | bad-faith exception.

While "poor judgment or wanton misconduct" alone does not prove the exception,<sup>9</sup> proof the State-agent acted "conscious[ly] ... with a design

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<sup>6</sup> Ex parte Hudson, 866 So.2d 1115, 1120 (Ala. 2003).

<sup>7</sup> Ex parte Tuskegee, 932 So.2d 895, 904 (Ala. 2005).

<sup>8</sup> Kennedy, 992 So.2d at 1282.

<sup>9</sup> Ex parte Montgomery, 272 So.3d 155, 168 (Ala. 2018).

or purpose to inflict injury ... [and] without justification" does.<sup>10</sup> Because wrongdoers seldom admit they acted consciously|intentionally, a defendant's state of mind may be proven by circumstantial evidence. (Addendum C) Indeed, circumstantial evidence is often "more certain, satisfying and persuasive than direct evidence."<sup>11</sup> This Court has identified three scenarios where circumstantial evidence meets the willful | malice | fraud | bad-faith exception. All three are present here.

First, the exception can be proven when the State-agent lies to charge the plaintiff with a crime. (Addendum D) Here, Pinkard presented a report to the DA falsely representing Taylor "admitted" throwing a barrel of fuel "onto the fire." (Z-I-A) This was a lie because Pinkard knew from the photos there was no "fire" when the Taylors arrived and the barrels were far away from the structure. Furthermore, Pinkard knew Taylor reported the fire to the fire department, the sheriff, and the power company. Pinkard admitted he had no evidence Taylor caused the fire or tampered with evidence.

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<sup>10</sup> Ex parte Price, 256 So.3d 1184, 1191 (Ala. 2018).

<sup>11</sup> Wiggins v. Mobile Greyhound, 294 So.3d 709, 723-724 (Ala. 2019).

Second, the exception is proven when the State-agent "had a personal ill-will against [the plaintiff]" and "maliciously or in bad-faith arrested him solely for purposes of harassment."<sup>12</sup> This is proven when the officer uses abusive | malicious language against the plaintiff.<sup>13</sup> Here, Pinkard angrily told Taylor, "don't you come in here with your smart mouth with me," he "could put [Taylor in jail]," "you're not going to make me look like a dummy," and he would make Taylor look like "a dummy in front of everybody." Taylor told Pinkard he asked the fire department, "What do I do," and even tried to get Pinkard to look at his phone records. Pinkard said he "could care less," and yelled, "don't come in here with your smart-mouth to me":

You come in there with your smart-mouth, but I'm not your local people. I'm not the one that's going to come in here and shut my mouth just because you say something. I don't care about these people right here. ... [Y]ou're not going to -- you're not going to get bold with me and it work. Cause I could care less. I don't -- I don't worry about that stuff.

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<sup>12</sup> Ex parte Tuscaloosa Cnty., 796 So.2d 1100, 1106 (Ala. 2000).

<sup>13</sup> Ex parte Montgomery, 99 So.3d 282, 296-298 (Ala. 2012) (officers made disabled suspect lay on the ground for 30 minutes, saying "I don't give a fu\*k about her being disabled," and shoving another in car, saying "get your ass on in there; ain't nobody fixing to put up with your sh\*t").

(Z-G-13/18-24) Pinkard kept switching his theory the angrier he got. He even told Taylor, "[Y]ou can't fight me." (Z-G-13/89) Again, this Court should listen to the recording and/or read the transcript. (Addendum A)

Third, the exception is proven when the State-agent goes beyond merely prosecuting the plaintiff and tries to ruin him|her.<sup>14</sup> Here, Pinkard told Allstate that Taylor had started the fire, which caused it to cancel its payment. (Z-J/14-15; Z-J-1/43-46; Z-G/184-186) Pinkard also tried to get Taylor suspended from the volunteer fire department. (Z-F-PX1/24-25) Pinkard was way too involved with Assurance, helping it seek restitution and keeping Taylor from his insurance benefits.

Finally, Pinkard disregarded NFPA Standards 921 and 1033, which applied to his investigation.<sup>15</sup> These standards require "[t]he compilation of factual data, as well as an analysis of those facts, [to] be accomplished objectively, truthfully, and without expectation bias, preconception, or prejudice" and "without presumption as to origin ... or responsibility ...

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<sup>14</sup> Slack v. Stream, 988 So.2d 516, 530-531 (Ala. 2008) (university chairman, with "intensity and vigor," called outsiders to "see to it that [the plaintiff] never worked in academia again").

<sup>15</sup> Ala. Admin. Code 360-x-5-.01; see also (Z-A/35-46,52-68; Z-G/13-14)

until ... the scientific method has yielded testable hypotheses, which cannot be disproved by rigorous testing." (Z-A-8/4.1,4.3.7-4.3.9) Further:

The investigator has to approach every incident with an open mind. There should be no preconceived determination as to what the cause of the fire was, for example. Any preconceived ideas will, consciously or unconsciously influence the investigator's efforts and should be avoided at all costs to maintain a proper level of objectivity during the investigation.

(Z-A-9/17) Pinkard knew these standards required him to not jump-to-conclusions. (Z-G/30-36) Yet he concluded Taylor was guilty ten minutes into his interview even though he knew no evidence supported that conclusion. Pilgreen testified if Pinkard made up his mind this early, he violated State rules. (Z-A/84-85)

Pinkard relies on cases that hold an officer's trickery | deception generally does not require exclusion of inculpatory statements from an accused. (p.23) However, we are concerned with whether Pinkard lied to prosecutors, not whether Taylor's statements are admissible.

Pinkard's reliance on the rule that arguable probable cause defeats the willful | malice | fraud | bad-faith exception (pp.8-9) is misplaced because Pinkard never argued this below.<sup>16</sup> (Y) Even if he had, there is

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<sup>16</sup> Ex parte Volvo, 954 So.2d 583, 587 (Ala. 2006).

abundant evidence -- including his own admissions -- that Pinkard had no evidence Taylor committed arson, or dumped fuel on a fire, or tampered with evidence. And regardless, lying to prosecutors is incompatible with arguable probable cause. (Addendum D)

Pinkard's reliance on Harris is misplaced. Although there was some evidence of spite and ill will, there was undisputed evidence of arguable probable cause because it was undisputed the plaintiff did not have a license to sell alcohol and the defendant saw people drinking at plaintiff's business.<sup>17</sup> Furthermore, there was no evidence the arresting officer intentionally lied to the prosecutor as Pinkard has done.

## II. Pinkard Is Not Entitled to Absolute State-Immunity.

### A. The Difference Between Official and Individual-Capacity.

"[T]he State [is absolutely] immune from suit under [Ala. Const. 1901] § 14," and "cannot be sued indirectly by suing [a State-agent] in his or her official-capacity."<sup>18</sup> Thus, "State[-agents] cannot be sued for damages in their official-capacities."<sup>19</sup> This makes sense because "claims

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<sup>17</sup> 216 So.3d at 1213 (qtg. Wood v. Kesler, 323 F.3d 872 (11<sup>th</sup> Cir. 2003)).

<sup>18</sup> Moore v. Tyson, \_\_ So.3d \_\_, 2021 WL 649155, \*7 (Ala. 2021) (quoting Ex parte Montgomery Cnty., 88 So.3d 837, 842 (Ala. 2012)).

<sup>19</sup> Ex parte Dangerfield, 49 So.3d 675, 681 (Ala. 2010).

against state officers in their official-capacity are 'functionally equivalent' to claims against the entity they represent"<sup>20</sup> and just "another way of pleading an action against an entity of which an officer is an agent."<sup>21</sup> Thus, claims against municipal | county employees in their official-capacity is a suit against the municipality | county, respectively, and "[a] suit against ... State-agents in their official-capacities is a suit against the State."<sup>22</sup>

An official-capacity claim "constitutes an attempt to reach the public coffers."<sup>23</sup> "[H]owever, individual-capacity claims" -- such as those against Pinkard -- only "seek to hold [the State-agent] personally liable," and only "seek a monetary recovery against the individual that can be collected only from his personal assets."<sup>24</sup> For these reasons, damage caps that apply against municipalities | counties<sup>25</sup> also apply to official-capacity claims against municipal | county employees, but caps do not to

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<sup>20</sup> Haley v. Barbour Cnty., 885 So.2d 783, 788 (Ala. 2004); Hinson v. Holt, 776 So.2d 804, 810 (Ala. Civ. App. 1998).

<sup>21</sup> Monell v. Dept. Social Servs., 436 U.S. 658, 690, n.55 (1978); Hafer v. Melo, 502 U.S. 21, 25 (1991).

<sup>22</sup> Burgoon v. ADHR, 835 So.2d 131, 133 (Ala. 2002).

<sup>23</sup> Wright, 255 So.3d at 192, 195.

<sup>24</sup> Id.; see also Kentucky v. Graham, 473 U.S. 159, 166-167 (1985).

<sup>25</sup> Ala. Code §§ 11-47-190, 11-93-2.



individual-capacity claims asserted against municipal | county employees<sup>26</sup> or State-agents like Pinkard.<sup>27</sup>

The official/individual-capacity dichotomy was created when States, municipalities, and counties had absolute immunity for all claims, but a plaintiff needed a person to sue -- primarily for declaratory | injunctive | mandamus relief -- to make government do something required by law. However, now that municipalities | counties can be sued directly, there is no need for official-capacity suits against counties | municipalities.<sup>28</sup> The only real need today for official-capacity claims is when a plaintiff needs to make the State do something that is required by law, which was the case in Barnhart | Anthony, but not here.

B. No Money Is Sought, or Can Be Obtained, from the Treasury.

As stated by Justice Sellers, "[t]he immunity afforded the State by § 14 also applies ... when an action against the State officer is effectively an action against the State," which only occurs when "a favorable result for the plaintiff would directly affect a contract or property right of the

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<sup>26</sup> Suttles v. Roy, 75 So.3d 90, 98 (Ala. 2011); Ala. Mun. v. Allen, 164 So.3d 568, 579-580 (Ala. 2014).

<sup>27</sup> Ravi v. Coates, 662 So.2d 218, 223 (Ala. 1995); Wright v. Cleburne Cnty., 255 So.3d 186, 193 (Ala. 2017).

<sup>28</sup> Kentucky, 473 U.S. at n.12.

State or would result in the plaintiff's recovery of money from the State."<sup>29</sup> Here, collecting a judgment against Pinkard's personal assets/resources will not "affect a contract or property right of the State" or "result in the .... recovery of money from the State." Pinkard's contention otherwise (p.14) is without any factual or legal basis and is plain wrong. If a judicial admission is necessary, the undersigned gives it here -- Taylor will not seek or collect money from the State treasury.<sup>30</sup>

While the undersigned will keep his word, there is no need for the courts to be concerned about litigants breaking such promises. A plaintiff can only (1) obtain a judgment against the State-agent and (2) force payment from the State-agent through execution. No plaintiff can obtain a judgment against the State, or execute against State assets with only a judgment against a State-agent. And even if the latter were possible,

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<sup>29</sup> Sellers, Why Appellate Courts ... , 82 Ala. Law. 413, 419 (2021).

<sup>30</sup> Smith v. Daugherty, 840 So.2d 152, 161 (Ala. 2002) ("express waiver ... by ... attorney conceding ... some alleged fact is ... a judicial admission"); Ex parte Jackson, 167 So.3d 324, 334 (Ala. 2014) ("judicial admissions conclusively binding on ... who made them").

the State can quash any execution against the State treasury<sup>31</sup> and/or sue to recover its assets.<sup>32</sup>

C. Barnhart and Its Progeny Were Wrongful Decided.

Pinkard next contends Taylor's claims should have been converted to official-capacity claims because Pinkard's conduct occurred "during the course of an official investigation" and "within the line and scope of [his] law-enforcement duties," and he "had no duty or authority in his individual-capacity to conduct official investigations." This argument derives from Barnhart and its progeny, which were incorrectly decided, and should be distinguished | limited | overruled.

1. The Decisions Conflict With Statute.

In 2014, the Legislature codified the Cranman principles for State-agent-immunity in Ala. Code § 36-1-12 and preserved the longstanding rules that State-agents (1) are only entitled to State-immunity for claims in their official-capacity<sup>33</sup> and (2) can only claim the State-agent-immunity affirmative defense when their conduct falls into a Cranman

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<sup>31</sup> Atkinson v. State, 986 So.2d 408 (Ala. 2007) (sovereign immunity cannot be waived).

<sup>32</sup> Ala. Code § 6-5-4.

<sup>33</sup> Subsection (b) (State-agent "acting in his or her official-capacity is immune from civil liability in any suit pursuant to [§]14").

category<sup>34</sup> and no exception applies.<sup>35</sup> Because the Legislature has acted, this Court lacked power to change the immunity of State-agents in Barnhart or otherwise.<sup>36</sup>

2. The Decisions Conflict With a Century of Interpretation.

Moreover, not only did Barnhart and its progeny cite no authority for the new rule that State-agents are absolutely immune for acts committed in the scope of employment pursuant to "duties [that] existed solely because of their official positions," the new rule is in direct conflict with this Court's decisions dating back to 1901 that firmly hold the source of the State-agent's duty is irrelevant to the distinction between individual-capacity and official-capacity claims.

Over two decades ago, the Cranman court examined all decisions after the Constitution of 1901 at length and clarified the difference between (1) State-immunity, which covers claims against the State and official-capacity claims against State-agents (and is a matter of subject-

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<sup>34</sup> Subsection (c) (State-agent "is immune from civil liability in his or her personal-capacity [for the] agent's doing [acts within the six categories]").

<sup>35</sup> Subsection (d) ("[n]otwithstanding subsection (c), a [State-agent] is not immune from civil liability in his or her personal-capacity if [a Cranman exception applies]").

<sup>36</sup> Cavalier v. Jackson, 823 So.2d 1237 (Ala. 2001) ("the Legislature is endowed with the exclusive domain to formulate public policy").

matter jurisdiction that cannot be waived) and (2) State-agent-immunity, a situational immunity that often, but not always, bars suits against State-agents in their individual-capacity (and is an affirmative defense). Cranman held the distinction between official-capacity and individual-capacity claims has nothing to do with "how we would classify the activity in which [State-agents] are engaged."<sup>37</sup> The Barnhart rule is in direct conflict with this and six more holdings from Cranman.

First, Cranman stated State-immunity only protects State-agents "where the suits [involve] a state obligation."<sup>38</sup> While "the individual is not liable while acting for the state if the suit directly affects the state treasury, ... the agent is liable for torts committed within his authority and cannot escape personal liability through the immunity shield." Id.

Second, Cranman stated State-agents are never entitled to State-immunity for committing torts because, "[s]ince the state 'can do no wrong,' any tort committed by an employee is without authority and the employee cannot set up a defense to escape liability that he was acting within his authority."<sup>39</sup>

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<sup>37</sup> 792 So.2d at 396-398.

<sup>38</sup> 792 So.2d at 399-400.

<sup>39</sup> 792 So.2d at 401.

Third, Cranman stated because § 14 "speaks only to a prohibition of lawsuits against the State and does not mention lawsuits against individuals, ... the express provisions of § 13 establishing the right to a remedy through a lawsuit against [a State-agent] must ... stand above [any] implications from § 14." Id.

Fourth, Cranman followed DeStafney v. Univ. of Ala., 413 So.2d 391 (Ala. 1981), which held damages "caused by [tortious] conduct of a State employee, even when that conduct is committed in the line and scope of her employment, is not within the ambit of [State-immunity]."<sup>40</sup>

Fifth, Cranman followed Taylor v. Shoemaker, 605 So.2d 828 (Ala. 1992), which held:

[State-immunity] does not relieve [State-agents] from their responsibility for [a] tort on the rights of an individual, even though they act pursuant to authority attempted to be conferred by the state. ... When a person commits a tort, it is wholly immaterial upon the question of his liability, whether he was acting officially or personally.<sup>41</sup>

Sixth, Cranman concluded "[w]e decline to label all discretionary acts by [a State-agent] as 'immune' simply because the State has empowered the agent to act" because "[s]uch an expansive view of the

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<sup>40</sup> 792 So.2d at 402-403.

<sup>41</sup> Quoting Finnell v. Pitts, 132 So. 2 (Ala. 1930).

power of the State to act with immunity for its agents would be inconsistent with the rights secured by § 13." Id.

More recently, in Wright v. Cleburne Cnty., 255 So.3d 186, 192 (Ala. 2017), this Court again rejected the notion that "the terms 'line and scope of employment' [are] synonymous with 'official-capacity.'" Wright is important because it holds (1) the source of the State-agent's duty is not important as long as the State-agent has a duty and (2) the question of duty is separate from immunity.<sup>42</sup>

Barnhart and its progeny is also contrary to the Wright rule that a court cannot convert an individual-capacity claim to an official-capacity claim against the plaintiff's will.<sup>43</sup> This rule is just and wise. Taylor only sued Pinkard in his individual-capacity. No official-capacity claims are asserted. (D/1) And as stated in Section II-B, there is no need for the courts to be overly-concerned with whether the plaintiff will later try to collect damages from the treasury from a tort suit against a State-agent.

The only exception to these rules is when a constitutional officer (those listed in Ala. Const. § 112) is sued. "[O]ur cases distinguish

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<sup>42</sup> 255 So.3d at 192 and n.2; and see Suttles (officers working in scope of employment not entitled to State-immunity).

<sup>43</sup> 255 So.3d at 192, 195 (citations omitted).

between ... state-agents ... whose positions exist by virtue of legislative pronouncement and those who serve as the constitutional officers."<sup>44</sup>

While the "State-agent-immunity [defense] may bar an action against [the former under] Cranman ... a claim ... made against a constitutional officer in the officer's individual-capacity is barred by State-immunity whenever [he | she] acts ... within the ... scope of [her | his] employment."

Id. Pinkard concedes he is a statutory officer, whose power derives from the Legislature, and not a constitutional officer (like a sheriff or the governor) under § 112. (p.12)

### 3. The Barnhart Rule Could Immunize Every Employee.

No one pointed-out Cranman | Wright when this Court decided Barnhart or any of its progeny. However, if they are allowed to continue, all State-agents could be absolutely immune because every State-agent gets his | her power to act from the State. As stated in Wright, this has not been, and cannot be, the law.<sup>45</sup> Taylor has produced twenty post-Cranman cases where this Court has held there was a question of fact on

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<sup>44</sup> Ex parte Davis, 930 So.2d 497, 500-501 (Ala. 2005).

<sup>45</sup> 255 So.3d at n.2.



the question of State-agent-immunity. (Addendum E) All these cases would have been dismissed if the rule from Barnhart had been applied.

4. Barnhart and Its Progeny Should Be Overruled | Limited.

In Barnhart, employees of the Alabama Space Science Exhibit Commission ("ASSEC") brought claims for backpay against the ASSEC and its commissioners after they were not paid wages | benefits required by statute. Barnhart correctly recognized "whether [(1)] a claim asserted against a State officer is effectively a claim against the State hinges on whether a result favorable to the plaintiff would directly affect a contract or property right of the State, [(2)] the defendant is simply a conduit through which the plaintiff seeks recovery of damages from the State, [(3)] a judgment against the officer would directly affect the financial status of the State treasury, [and (4)] the nature of the suit or the relief demanded, not the character of the office of the person against whom the suit is brought."<sup>46</sup> It also properly recognized "claims asserted against State officials seeking backpay allegedly owed are claims against the State." Id. This makes sense. After all, only an employer can pay wages,

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<sup>46</sup> 275 So.3d at 1122 (qtg. ALDOT v. Harbert, 990 So.2d 831 (Ala. 2008)).

and the employer in Barnhart was the State. Because the action was an equitable one to compel the commissioners to do what State law commanded, and not a claim for damages, the backpay claim was not barred by State-immunity."<sup>47</sup>

The Barnhart court should have stopped there because clearly (1) a claim for backpay from the State "directly affect[ed] a contract or property right of the State," (2) the ASSEC commissioners were "simply a conduit" through which the plaintiffs could get money from the State, (3) any would "directly affect the financial status of the State treasury" (the State, not the officer, would have to pay the backpay). Most critical, "the nature of the suit" (equitable relief) and "the relief demanded" (backpay), and "not the character of the office of the person against whom the suit is brought" drove the conversion.

However, Barnhart created a new rule in a single paragraph without citing any authority (or even referencing Cranman | Wright) -- i.e. that because "the duties allegedly breached by the Commission officers were owed to the [employees] only because of the[ir] positions [as] Commission officers," they were allegedly "acting only in their official-

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<sup>47</sup> 275 So.3d at 1125.

capacities when they allegedly breached those duties." Barnhart then overruled all previous cases (a century of jurisprudence) that made the State treasury | property-right distinction. Id. The Anthony court followed Barnhart in another backpay case filed against State officials.<sup>48</sup>

Because Barnhart | Anthony were cabined to a tight fact pattern that ultimately allowed the relief sought (i.e. equitable back-pay relief), there was no significant harm. However, when Meadows incorrectly extended these incorrect principles to tort cases for damages, wronged plaintiffs began seeing erroneous dispositive motions on State-immunity filed by State-agents throughout the courts of Alabama, including the one Pinkard filed below.

In Meadows, an inmate sued a circuit court clerk for not properly calculating his end-of-sentence date. Applying Barnhart | Anthony, the Meadows court converted these classic tort claims to official-capacity claims and granted her State-immunity because her duties "arose solely out of [her] position as circuit clerk." More unfortunate, the Meadows court made the ruling ex mero motu even though no one raised | briefed

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<sup>48</sup> 321 So.3d at 655.

it. No one apprized this Court of Cranman | Wright. More unfortunate, the clerk was already entitled to absolute judicial immunity.<sup>49</sup>

While Meadows is not binding (only two justices concurred in the opinion), eight justices concurred in Cooper, which extended Barnhart | Anthony | Meadows even further. There, the plaintiffs sued the director of ALDOT for personal injuries caused by a collision resulting from a slick road caused by ALDOT employees. The director was not personally involved in the work, and was sued solely for negligently supervising and training employees. The Cooper court followed Barnhart | Anthony | Meadows and granted the director State-immunity because he was sued "solely because of his official position as director of ALDOT." Again, no one informed this Court about Cranman | Wright. The ruling was also unnecessary because supervisors | administrators like the director are entitled to State-agent-immunity because (1) supervising | training falls under the first two Cranman categories and (2) merely supervising employees who violate policy does not meet the beyond-authority exception.<sup>50</sup>

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<sup>49</sup> Ex parte Greensboro, 948 So.2d 540 (Ala. 2006).

<sup>50</sup> Gowens v. Tys.S., 948 So.2d 513, 531-532 (Ala. 2006); Ex parte Watson, 37 So.3d 752, 765 (Ala. 2009).

D. Barnhart and Its Progeny Are Distinguishable.

While the undersigned strongly submits Barnhart and its progeny were wrongfully decided and should be limited | overruled, these cases are factually distinguishable from Taylor's case against Pinkard. Specifically, Barnhart and its progeny only apply when the State-agent's duties "only" | "solely" arise from their governmental authority. Here, all people have a duty to not defame others, institute malicious prosecutions, lie to prosecutors, and/or conspire with others to commit torts, whether they are State-agents or not.<sup>51</sup> The writ should be denied for this alternative reason.

III. Valid Lawsuits Against State-Agents Promote Public Policy.

Pinkard foments about officers worrying about liability, an alleged chilling effect on investigation of crimes, the inability to attract talented officers, etc. Cranman rejected these arguments long ago.

Prudent State-agents are in no danger of liability in Alabama. This Court's existing State-agent-immunity jurisprudence requires immunity for all tough governmental decisions and only allows liability against in

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<sup>51</sup> Garcia v. Casey, 2021 WL 4326900, \*19 (N.D. Ala. 2021) (Barnhart inapplicable because "everybody owes a duty to not defame [everyone]"); Robinson v. Montgomery, 2021 WL 3200988 (M.D. Ala. 2021) (similar).

narrow but clear scenarios where State-agents should know better -- when there is no governmental discretion; when they violate the Constitution, statutes, regulations, or bright-line rules; and/or when they commit intentional/awful acts. Only a score of cases have made it past appellate review in the past 22 years. (Addendum E)

However, a system that allows all State-agents to commit torts and damage citizens without any check-and-balance only hurts careful and devoted public servants because it would encourage the least qualified and most sinister enter and remain in government work. It would also ensure that more and more citizens are abused because tortfeasor State-agents will be emboldened by power and lack of accountability. These folks make it harder for law-abiding, professional, State-agents with the servant's heart to do their job. And they degrade the public's confidence in good government.

Alabama's State-agent immunity jurisprudence already provides more protection to State-agents than other States. In fact, most States not only allow more lawsuits against State-agents, most States have waived sovereign immunity against the State and replaced it with damage caps and legislation similar to the Federal Torts Claims Act.

(Addendum F) Taylor does not advocate these changes for Alabama. He simply urges this Court to protect Alabama citizens and safeguard the rights the Legislature and this Court have determined they already have.

State-agent-immunity is a good check-and-balance against the abuse of power. Our tort laws do not require employment of government regulators or enforcers, statisticians or bean counters. Our taxes do not need to increase to make the tort system work because it finances itself. And our tort laws represent hundreds of years of the collective wisdom of this Court -- one of the oldest institutions in our nation devoted to the public good. These principles articulated in Cranman | Wright should be preserved and not sub silentio cast-away by a mistake -- a single paragraph with no citation to authority.

### CONCLUSION

This Court should deny the writ. Pinkard's summary judgment motion was properly denied, and he was not deprived of any legal right.

Respectfully submitted for  
Respondent Ronnie Taylor,

/s/ Richard Riley

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### CERTIFICATE OF COMPLIANCE

This document used Century Schoolbook 14 type-style and font. It contains 5,998 countable words, which is less than the 6,000 limit allowed by A.R.A.P. 21(d),32(b)(3). Microsoft Word made this computation.

/s/ Richard Riley  
Richard Riley



CERTIFICATE OF FILING AND SERVICE

On December 15, 2021, I electronically filed the foregoing via the ACIS system. On December 16, 2021, I will place ten paper copies with an efileing receipt in the U.S. Mail, postage prepaid, and addressed to the Alabama Supreme Court Clerk, 300 Dexter Ave., Montgomery, AL 36104.

On December 15, 2021, I electronically served foregoing on Brad Chynoweth Esq. at [brad.chynoweth@alabamaag.gov](mailto:brad.chynoweth@alabamaag.gov), which he uses for court business. On the same day, I served the circuit judge with a paper copy by placing it in the U.S. Mail, postage prepaid, and addressed:

The Honorable Talmage Lee Carter  
Marion County Circuit Court  
132 Military Street South  
Hamilton, Alabama 35570

/s/ Richard Riley  
Richard Riley

ADDENDUM A  
Excerpt from Secret Recording

The audio at 10:25 to 19:10 (on the CD provided) better illustrates the tenor of the meeting than the transcript. The justices need to hear Pinkard's caustic and malicious tone during this conversation:

Pinkard ("P"): This meeting might not be over because I could put you--

Taylor ("T"): All right. Arrest me then.

P: You maintained a fire so don't tell me when the meeting [i]s over.

T: I ain't going to say nothing else unless I got a (inaudible).

P: Okay. Well, that's fine. It's going to grand jury.

T: Uh-huh.

P: I've been in touch with the DA's office, I was (inaudible) to records where you're behind on bills.

T: Uh-huh.

P: You never called --

T: I called --

P: -- the fire department.

T: I called --

P: No, no, no. Hold on.

T: That's what (inaudible)

P: You never called the fire department to call them out to the fire, and I will show you the statute of arson, which is starting or maintaining a fire. I think you did do something to that fire, and when I prove it, you're going to look like a dummy in front of everybody.

T: That's fine.

P: I'm here to work with you, but you're not going to treat me like a dummy. I do this for a living. You --

T: (Inaudible) --

P: Hold on. Hold on. Hold --

T: -- Philip Pratt's the one (inaudible).

P: It don't matter if you called -- it don't matter if you called him. You didn't call him dispatched out to a fire. You are a volunteer firefighter at Haleyville.

T: Uh-huh.

P: You're a volunteer firefighter. You never called a fire department to this scene. When you walked -- when you drove up on this fire and you had insurance on this fire and you had a mortgage, you are bound by law to call a fire department to that scene to have it put out. I don't care how much is involved and how much was not. You're a volunteer firefighter at Haleyville.

T: Have you got just a minute to walk out to the van with me? Let me see if my phone records is there.

P: I'll (inaudible) your phone records. It ain't a big deal. But the difference is you didn't call the fire department when you found the fire and it was on fire. Because by the time you called the deputy out there, he said it was cold and there wasn't a bit of fire or smoke. Now, if you're going to sit here and say all the fire department and police department is liars, that's your deal. I don't think that's going to be accepted.

T: (Inaudible.) That's fine.

P: But the deputy, I talked to him also, and he says the house was completely out and no smoke or no fire when he got there. He said he just did a report for you just because y'all asked him to. But I'm going to tell you this, and you can go get anybody you want to to look it up, you don't have to start that fire to be guilty of arson. If you got there, whether it was intentionally set or not intentionally set and you did not call the fire department to come put it out for whatever was still left, you're guilty of arson.

T: There was nothing left.

P: It don't matter. That's not your decision. You had insurance. You had a 36-thousand dollar reason not to call it in to get the rest of it put out, and you have an obligation to call. I've already talked to my bosses in Montgomery which is the state fire marshal. I've already talked to the district attorney's office, and you're lucky you got out of that case back in 2012 where you stole the stuff and you paid the stuff out in a theft. So I don't want you to play awful innocent with me cause I'm not your local department. I don't know you, and I could care less. But what you did do is make a mistake, and whether you admit you did anything or not, which I'll be able to find when I get out there -

T: I've got the phone records right now.

P: You've got the what?

T: I've got the phone records in my truck.

P: The difference is you didn't call them when --

T: Yes, I did.

P: -- you come up on the scene to come out and put out the fire.

T: Yes, I did.

P: That ain't what you just told me.

T: Uh-huh.

P: You told me you called for them to do a report. You did not call them to come put out the fire.

T: I asked him, I said, "It's gone. What do I do?" There was nothing.

P: You did not call to report a fire or 911, I've done checked, for them to come out and to put out a fire that you had that was insured and mortgaged at a bank.

T: Okay.

P: And that is neglect, and that is also maintaining a fire. So don't come in here with your smart-mouth to me. Cause I'm --

T: I ain't. I'm just saying --

P: Yes, you did.

T: -- I called them.

P: No, you didn't.

T: (Inaudible.)

P: You come in there with your smart-mouth, but I'm not your local people. I'm not the one that's going to come in here and shut my mouth just because you say something. I don't care about these people right here. I'm here for the law, and I'm here for the insurance investigation by law as a deputy state fire marshal.

T: Uh-huh.

P: But you're not going to -- you're not going to get bold with me and it work. Cause I could care less. I don't -- I don't worry about that stuff. I didn't mind working with you because I feel like you sit there and whether it was intentionally said or not --

T: Sir, you called me liar, said --

P: I do.

(Z-G-13/18-24)

ADDENDUM B  
Excerpts from Pinkard Depositions

Pinkard testified to the following during his August 2, 2017 deposition:

Q. So you would have had [the photos] when you met [on September 16, 2016] with [Taylor]?

A: Yes.

Q. Did that raise some suspicion to you when you saw that?

A. I don't know. It just -- it's -- it's -- [the barrel] just shouldn't have been there and that's the reason I had to clear it up with [Taylor] and ended up Mirandizing.

Q: And he did clear it up with you, didn't he?

A. He talked to me about it, yes.

Q. And he told you when it was there, right?

A. He told me when he was cleaning up around the house. That's all I remember about it, is he told me he did it.

...

Q. Yes, sir. And all I'm trying to establish is you knew why that barrel was present and when it was present on September the 16th, 2016, correct?

A. I knew what he said why it was present and I know that it was there at the time the adjuster did the scene [on \_\_\_\_]. That's the only two things I know about the barrel.

Q. Yes, sir. And you have no other evidence in your investigation in this case to prove otherwise, correct?

A. Correct.

...

A. The evidence that I have, it was there and the items inside of it were burned on. That's the only evidence I have.

Q. And you have no evidence to establish when the items in that barrel were actually burned, do you?

A. No.

...

Q. ... So as far as him being associated with intentionally setting the fire, you have no evidence of that?

A. No.

...

Q. ... Do you have any knowledge or evidence of what would have been left around some time after 2:00 p.m. [on July 31, 2016] that a fire department would have been needed to extinguish or put out on this fire?

A. I do not know.

(Z-H/64-65,68-69,95,121,135)

Pinkard also testified to the following in his January 12, 2021 deposition:

Q. So you didn't have any evidence that the burned stuff in the burn barrel that was on the front of the structure ... that we just talked about, that that stuff had been burned either during or after this [July 31, 2016] fire, do you?

A. It was burned at some point, but I do not have the exact [time] of when it was burned because a fire can burn for days. So no, I don't know exactly. But I presented what evidence I had.



Q. But it could have been burned [in the barrel] before the [July 31, 2016] fire; right? The burned stuff in the burn barrel could have been from before the fire.

A. Could have been.

Q. ... [Y]our only proof ... when this barrel ... was up against that house, ... you know that it was there as early as September 4[, 2016] right? And that's the date of Tommy Pennington's pictures?

A. Yes. Sometime between when Pennington got there and before to the [July 31, 2016] fire, that's correct.

Q. And that's over 30 days after the fire took place, isn't it?

A. Somewhat, yes.

Q. So that burn barrel could have been placed there at any point in time between that 30-day span; right?

A. Yes.

Q. It could have been placed there the day before [September 4, 2016] right?

A. Yes.

Q. And [Taylor is] telling you [on September 16, 2016] that he moved that burn barrel there when he's starting to clean up; right?

A. Yes.

Q. And he said that he started to clean up when he got a letter from the bank [days after the fire] and he thought everything had already been handled; right?

A. Yes.

Q. And you understood that he had already reported a claim to Allstate and they had already been out there?

A. Yes.

Q. And [Taylor] told you, in fact, ... that he put the burn barrel there later when he was trying to clean up after he thought everything had been taken care of. We listened to that part, didn't we?

A. Okay. Yes.

Q. And [Taylor] told you that he called the fire department [on July 31, 2016], and [on September 16, 2016] he provided you with cell phone records during the interview?

A. Yes.

Q. [Taylor] told you [on September 16, 2016] that he called the dispatch [on July 31, 2016] to cut off power?

A. Yes.

Q. [Taylor] told you [on September 16, 2016] that he had placed the burn barrel against the house later after he had begun cleaning up the property?

A. He told me he put a burn barrel, that's correct.

Q. And he told you ... he did it later when he was cleaning up the property?

A. Yes.

Q. You had records by the 20<sup>th</sup> showing [Taylor] had called dispatch?

A. Yes.

Q. You had no evidence that the fire had been started intentionally?

A. The only evidence I remember that was left out of it was some broken glass that didn't have char or smoke on it. But other than that, nothing else could be looked at. It was charred.

Q. But you are not maintaining that the fire was started intentionally?

A. No. I couldn't determine the point of origin of the original fire.

Q. And you can't point to any specific evidence that any evidence was actually destroyed?

A. Just putting a burn barrel on it itself could have destroyed evidence.

Q. But you don't know whether it did or didn't? Do you?

A. I don't know.

(Z-G/98,105-106,168-169,205,217-219)

## ADDENDUM C

### Cases -- Intent Proven By Circumstantial Evidence

Target Media v. Specialty Mktg., 177 So.3d 843, 867 (Ala. 2013) ("defendant's intent to deceive can be established through circumstantial evidence that relates to events that occurred after the alleged misrepresentations were made")

Ravenel v. Burnett, 5 So.3d 592, 600 (Ala. Civ. App. 2008) ("malice may be inferred from circumstances surrounding and attending prosecution because malice is incapable of positive, direct proof and must out of necessity be rested on inferences and deductions from facts")

Nat'l Sec. v. Bowen, 447 So.2d 133, 140 (Ala. 1983) ("malice being a fact which in the nature of things is incapable of positive, direct proof, it must of necessity be rested on inferences and deductions from facts")

Ex parte Grand Manor, 778 So.2d 173, 182 (Ala. 2000) ("[a] plaintiff may ... prov[e] fraudulent intent through circumstantial evidence")

Hammonds v. Turnipseed, 709 So.2d 39, 42 (Ala. Civ. App. 1997) ("well settled circumstantial evidence may be used to prove fraudulent intent")

Ex parte Parker, 136 So.3d 1092, 1095 (Ala. 2013) ("[a] conspiracy need not be proven by direct and positive evidence but may be proven by circumstantial evidence")

Luck v. Primus Auto., 763 So.2d 243, 247 (Ala. 2000) ("[i]n order to prove a conspiracy, a plaintiff may present circumstantial evidence")

Ex parte Pilley, 789 So.2d 888, 893 (Ala. 2000) (circumstantial evidence can be used to prove intent to kill)

AmSouth Bank v. Spigener, 505 So.2d 1030, 1039 (Ala. 1986) ("[i]ntent may be established by circumstantial evidence")

Jefferson Standard v. Pate, 274 So.2d 291, 297-298 (Ala. 1973) ("the intent with which the act was done is a question for the jury, to be determined from all the facts and circumstances")

Hinson v. Bias, 927 F.3d 1103, 1118 (11<sup>th</sup> Cir. 2019) ("[w]here circumstantial or other evidence, if believed, would tend to discredit the police officer's story, ... we do not simply accept the officer's account")

Glob. Quest v. Horizon Yachts, 849 F.3d 1022, 1030 (11<sup>th</sup> Cir. 2017) ("intent and knowledge may be, and often are, proven by circumstantial evidence")

Farmer v. Brennan, 511 U.S. 825, 826 (1994) ("[w]hether an official had the requisite knowledge is a question of fact subject to demonstration in the usual ways," including "it was obvious")

U.S. v. Santos, 553 U.S. 507, 521 (2008) (knowledge is "provable (as knowledge must almost always be proved) by circumstantial evidence")

Colonial v. FTC, 450 F.2d 733, 744-745 (5<sup>th</sup> Cir. 1971) (if otherwise, "the only direct evidence of a state of mind must come from the testimony of the individuals who have broken the law")

Plantation Key v. Colonial, 589 F.2d 164, 172 (5<sup>th</sup> Cir. 1979) ("intent to deceive may be proved by circumstantial evidence")

Am. Fed'n v. Miami, 637 F.3d 1178, 1191 (11<sup>th</sup> Cir. 2011) ("[t]he existence of such a conspiracy may be proved by circumstantial evidence")

## ADDENDUM D

### Cases -- Exception Proven by Lying to Prosecutors

Ex parte Tuskegee, 932 So.2d 895, 907 (Ala. 2005) (plaintiff "alleges [officers] acted in bad faith in arresting her in that they may have 'fabricated' or 'concocted' the warrant after she was arrested"; plaintiff also "complained to the district attorney and the attorney general's office about [the officer's] work on [a previous] case"; the officers "have no clear legal right to the order sought as to [plaintiff's] claims [the officers] acted with malice and bad faith in arresting her")

Ex parte Harris, 216 So.3d 1201 (Ala. 2016) (State-agent-immunity does not apply if defendant acted maliciously)

Williams v. Aguirre, 965 F.3d 1147, 1165-1167 (11<sup>th</sup> Cir. 2020) (following Tuskegee and Harris and holding officers were not entitled to State-agent-immunity on Alabama law malicious prosecution claims because the jury could "infer that the officers' accusations [of attempted murder] were intentionally false" and "find that the officers lied when they accused [the plaintiff] of pointing a gun at them")

Grider v. Auburn, 618 F.3d 1240, 1258 (11<sup>th</sup> Cir. 2010) (plaintiff established exception to State-agent-immunity to Alabama tort law claims by proving the officers "knew no bribery occurred, knew they had no arguable probable cause to arrest [the plaintiff]," and "fabricated the bribery ... as an effort to close [the plaintiff's business]")

Todd v. Hicks, 2021 WL 1601750, \*\*5-6 (M.D. Ala. 2021) (Huffaker), (plaintiff established willful | malice | fraud | bad-faith exception to State-agent-immunity on Alabama law claims when the officer "grossly ignored the probable cause standard, mischaracterized and misstated evidence, ignored other evidence, failed to interview several eyewitnesses, ... formulated a speculative and factually unsupported finding about [the plaintiff's] role in [the] death[, and] then logged his theory and finding in an investigative report that was provided to the district attorney's office and then to the grand jury with a recommendation that [the plaintiff] be found criminally liable")

Harris v. Gunter, 2018 WL 1410838, \*\*4-5 (M.D. Ala. 2018) (Watkins) (plaintiff could establish willful|malice|fraud|bad-faith exception to State-agent-immunity on Alabama law claims when officer "swore out the complaint knowing that [the p]laintiff was innocent" and to "illegally and improperly collect money from [the plaintiff]")

Kingsland v. Miami, 382 F.3d 1220, 1232 (11<sup>th</sup> Cir. 2004) ("falsifying facts to establish probable cause is patently unconstitutional")

Riley v. Montgomery, 104 F.3d 1247, 1253 (11<sup>th</sup> Cir. 2004) ("fabricating incriminating evidence violated constitutional rights")

Eloy v. Guillot, 289 Fed.App'x 339, 347 (11<sup>th</sup> Cir. 2008) (officer who "intentionally lied in the arrest affidavits and fabricated evidence in order to effect [the plaintiff's] arrests and prosecution anyway" violates the constitution)

## ADDENDUM E

### Cases - Question of Fact on State-Agent-Immunity

Walters v. De'Andrea, 312 So.3d 430 (Ala. 2020) (officer not entitled to State-agent-immunity; non-emergency driving not governmental decision-making that falls under Cranman categories)

Ex parte Kelley, 296 So.3d 822 (Ala. 2019) (DHR caseworker not entitled to State-agent-immunity because jury could find she failed to follow department rules)

Williams v. Aguirre, 965 F.3d 1147 (11<sup>th</sup> Cir. 2020) (police officers not entitled to State-agent-immunity because jury could find they lied in their reports to charge plaintiff with murder)

Taylor v. Hughes, 920 F.3d 729 (11<sup>th</sup> Cir. 2019) (prison guard not entitled to State-agent-immunity because jury could find he violated U.S. Constitution by being deliberately indifferent to serious medical needs)

Ex parte Venter, 251 So.3d 778 (Ala. 2017) (firefighter not entitled to State-agent-immunity; non-emergency driving not governmental decision-making that falls under Cranman categories)

Ex parte Ingram, 229 So.3d 220 (Ala. 2017) (teacher not entitled to State-agent-immunity because jury could find she violated school policies)

Kendrick v. Midfield, 203 So.3d 1200 (Ala. 2016) (police officer not entitled to State-agent-immunity if jury concludes he violated statute)

Ex parte Montgomery, 99 So.3d 282 (Ala. 2012) (police officer not entitled to State-agent-immunity if jury concludes he forced disabled citizens to stay on the ground for 30 minutes, which is evidence of malice)

Ex parte Jones, 52 So.3d 475 (Ala. 2010) (DHR caseworker not entitled to State-agent-immunity if jury finds she violated department rules)

Ex parte Watson, 37 So.3d 752 (Ala. 2009) (same)



Ex parte Lawley, 38 So.3d 41 (Ala. 2009) (conservation workers not entitled to State-agent-immunity if jury concludes they violated federal regulations)

Ex parte Yancey, 8 So.3d 299 (Ala. 2008) (school employee not entitled to State-agent-immunity if jury concludes he violated school rules)

Slack v. Stream, 988 So.2d 516 (Ala. 2008) (university employee not entitled to State-agent-immunity if jury concludes he violated school rules and acted maliciously)

Gowens v. Tys. S., 948 So.2d 513, 531-532 (Ala. 2006) (DHR caseworker not entitled to State-agent-immunity if jury concludes she violated department rules)

Blackwood v. Hanceville, 936 So.2d 495 (Ala. 2006) (police officer not entitled to State-agent-immunity if jury concludes he violated a statute)

Giambrone v. Douglas, 874 So.2d 1046 (Ala. 2003) (teacher/coach not entitled to State-agent-immunity if jury concludes he violated mandatory school rules)

Wilson v. Manning, 880 So.2d 1101, 1109 (Ala. 2003) (jail employee not entitled to State-agent-immunity if jury concludes she violated a statute)

Norris v. Montgomery, 821 So.2d 149 (Ala. 2001) (police officer not entitled to State-agent-immunity if jury concludes he violated a statute).

Ex parte Rizk, 791 So.2d 911 (Ala. 2000) (physician not entitled to State-agent-immunity for malpractice; medical care is not governmental decision-making that falls under Cranman categories)

Wimpee v. Stella, 791 So.2d 915 (Ala. 2000) (same)

ADDENDUM F  
Survey of Immunity Laws of Other States

The various State systems vary in detail, but the common thread of "liability, not immunity" runs through most. Some have broadly waived sovereign immunity and also subject state and local governments to suit without capping damages. Most have waived sovereign immunity while placing limits on the kinds of cases that can be brought and capping the damages for which the state is liable. States that waive sovereign immunity with a cap on damages often style the waiver as a "Tort Claims Act" modeling the Federal Tort Claims Act.

Alaska

The general rule in Alaska regarding state sovereign immunity is that the government is liable for its wrongs. Sea Hawk Seafoods, Inc. v. State, 215 P.3d 333, 337 (Alaska 2009); Const. Art. 2, § 21 ("The legislature shall establish procedures for suits against the State."); Alaska Stat. §§ 09.50.250-.300 (abolished sovereign immunity and made State liable for its torts, with limited exceptions, including discretionary functions). Any person or corporation having a tort claim may bring an action against the State. Alaska Stat. § 09.50.250. A tort claim may not be brought when the claim is an action for a tort based upon an act or omission of a State employee in the execution of a statute or regulation or performance or failure to perform a discretionary function or duty. Id. Damages awarded by a court for all claims arising out of a single injury or death may not exceed \$400,000. Alaska Stat. § 09.17.010. No punitive damages against the State. Alaska Stat. § 09.50.280.

Arizona

Public entities are granted absolute immunity for exercising a judicial, legislative, or discretionary function. Ariz. Rev. Stat. § 820.01. A public entity is not liable for losses that arise out of an act or omission determined to be a criminal felony by a public employee unless the public entity knew of the employee's propensity for that action. This subsection does not apply to acts or omissions arising out of the operation or use of a motor vehicle. Ariz. Rev. Stat. § 12-820.05. If absent proof of a public

employee's gross negligence or intent to cause injury, public entities have qualified immunity for: (1) failing to make an arrest or to retain an arrested person; (2) an injury to the driver of a vehicle caused by a violation by another driver; and (3) preventing the sale of a handgun to a person who may lawfully possess a handgun. Ariz. Rev. Stat. § 12-820-02 contains other exceptions. No law shall limit the amount of damages to be recovered for causing the death or injury of any person. Ariz. Const. Art. II, § 31. No punitive damages against the State. Ariz. Rev. Stat. § 12-820.04.

### Arkansas

No TCA. Arkansas shall never be made a defendant in any of her state courts. Ark. Const. Art. V, § 20. The Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State and its several agencies. Ark. Code § 19-10-204. The State's sovereign immunity is waived when: (1) the State is the moving party seeking relief; (2) an act of the legislature creates a specific waiver of immunity; and (3) where a State agency's actions are illegal, or when a public employee refuses to do a ministerial act required by statute. Few exceptions to immunity granted by the Constitution. State officials are not immune to the extent that they are covered by liability insurance. Ark. Code § 19-10-305. Arkansas requires all political subdivisions to carry the minimum amounts of motor vehicle liability coverage. Thereforewith a car accident, all political subdivisions may be held liable up to the minimum limits. Ark. Code § 21-9-303. No damage caps. No punitive damages against the State. Ark. Code § 21-9-203.

### California

The California Tort Claims Act, Cal. Gov. Code §§ 810 to 998.3, was enacted shortly after a landmark decision of the California Supreme Court virtually abrogating the doctrine of governmental tort immunity in the state. Because of that decision and the subsequent enactment of the TCA, there is no more common-law governmental tort liability in California. The Act broadly permits suits against employees of public entities (the state and local government bodies) while permitting but not requiring indemnification of the employee in some circumstances. Except as otherwise provided by statute, public entities are not liable for an

injury, arising from an act or omission of the public entity or their employee. Cal. Gov. Code § 815. Numerous immunities are provided. Cal. Gov. Code §§ 815-996.6. Public employees are liable for injury to the same extent as a private person. Cal. Gov. Code § 815. A public entity (e.g., state) is liable for injuries proximately caused by their employee's acts or omissions except when that employee is immune from liability. Cal. Gov. Code § 815.2. A public entity is liable for death or injury proximately caused by a negligent or wrongful act or omission in operating any motor vehicle by a public employee acting within the scope of his employment. Cal. Veh. Code § 17001. A public employee is not liable for an injury resulting from his act or omission where the act or omission resulted from a discretionary act. Cal. Gov. Code § 820.2. Public entities are not liable for injuries caused by misrepresentation. Cal. Gov. Code § 818.8. Public entities are not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law. Cal. Gov. Code § 818.2. No damage caps. No punitive damages against the State. Cal. Gov. Code § 818.

### Colorado

Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-101 to 24-10-120. A public entity is immune from liability in all tort claims for injury except as otherwise provided. The Act generally bars action against the State and public entities for tort claims. A public entity, by resolution, may waive immunity. Colo. Rev. Stat. § 24-10-104. The Act specifically waives immunity in six areas: (1) the operation of a motor vehicle, owned or leased by the public entity, leased by the public entity, by a public employee while in the course of his employment, except emergency vehicles; (2) the operation of any public hospital, correctional facility, or jail; (3) a dangerous condition of any public building; (4) a dangerous condition of a public highway, road, or street that physically interferes with the movement of traffic on the portion used for travel by motor vehicles, or of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway part of the federal interstate highway system, the federal primary highway system, or the federal secondary highway system, and state highway systems on portions of them that are designed and intended for public travel or parking; (5) a dangerous condition of any public hospital, jail, public facility in any park or recreation area maintained by a public entity, or

of any public water, gas, sanitation, electrical, power, or swimming facility; (6) the operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity. Colo. Rev. Stat. § 24-10-106. Damage caps of \$350,000 per person; \$900,000 per occurrence with no one person receiving more than \$350,000. Colo. Rev. Stat. § 24-10-114(4) (public entity may not be held liable either directly or by indemnification for punitive damages); Colo. Rev. Stat. § 24-10-118(5) (public entity may defend a public employee against a claim for punitive damages or pay or settle any such claim but only if it determines by resolution it is in the public interest).

### Connecticut

Under Conn. Gen. Stat. 4-153, et seq, it is possible for the state government to waive sovereign immunity on a case-by-case basis as determined by the Claims Commissioner. Conn. Gen. Stat. § 4-160 (authorization of actions against the state); Conn. Gen. Stat. § 4-165 (suit versus state officer or employee barred; immunity does not apply if the official acted willfully and wantonly, or with malice, bad faith, or corrupt motive; suit before Claims Commissioner must name state).

### Delaware

Delaware Tort Claims Act, Del. Code tit. 10, § 4001 et seq, codified existing common law principles of sovereign immunity and set forth legislatively authorized exceptions to the doctrine. The TCA provides that no claim shall arise against the State, public officer/employee if the act/omission: (1) arose out of an official duty requiring discretion; (2) was done in good faith and for the best interest of the State; and (3) was done without gross negligence. Del. Code. tit. 10, § 4001-4005. Bringing a tort claim against the State requires a party to prove that the action is not precluded by the State TCA or the doctrine of sovereign immunity. Marvel v. Prison Indus., 884 A.2d 1065 (Del. Super. 2005). Sovereign immunity is waived where insurance coverage exists by statute. Del. Code tit. 18, § 6511. Where a State employee is negligent in performing routine functions, they may be held personally liable. Simon v. Heald, 359 A.2d 666 (Del. Super. 1976). No damage limitations.

## Florida

Florida's Constitution has a section "authorizing the legislature to make provision for bringing suits against the state as to all liabilities now existing or hereafter originating. Fla. Const., Art. X, § 13. Fla. Stat. § 768.28 is the statute dealing generally with the waiver of sovereign immunity in actions in tort against state governmental bodies and has been referred to as the Florida Tort Claims Act. Government entities may be liable for damages resulting from negligent or wrongful action of public employees in the scope of their employment if a private person would be liable in similar circumstances. Fla. Stat. § 768.28(1). The state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to the statute generally waiving sovereign immunity of the state, its agencies or subdivisions for tort liability. Fla. Stat. § 768.28(16)(a). It is also provided by statute that laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of the statute generally waiving sovereign immunity of the state, its agencies, and subdivisions for tort liability. Fla. Stat. § 768.28(13) This statute has been construed as waiving sovereign immunity to the extent of the insurance purchased. The State shall not be liable to pay a claim to any one person which exceeds the sum of \$200,000 or \$300,000 for any claim arising out of the same incident or occurrence. No punitive damages against the State. Fla. Stat. § 868.28(5).

## Georgia

Georgia's Constitution permits the General Assembly to waive the state's sovereign immunity from suit by enacting a state Tort Claims Act, providing by law for procedures for the making, handling, and disposition of actions or claims against the state and its departments, agencies, officers, and employees. Ga. Const. Art. I § II, para. IX(a). The General Assembly has done so and has declared it to be public policy that the state will be liable only in tort actions within the limitations of the Georgia TCA, because the exposure of the state treasury to tort liability must be

limited, while strictly applying the traditional doctrine of sovereign immunity is recognized as producing inherently unfair and inequitable results. Sovereign immunity is waived for torts of State officers and employees while acting within the scope of their employment and shall be liable for such torts in the same manner as a private individual would be liable under like circumstances. Ga. Code §§ 50-21-20; 50-21-37. The GTCA constitutes the exclusive remedy for any tort committed by a state officer or employee. Campbell v. Cirrus Education, Inc., 845 S.E.2d 384 (2020); Ga. Code § 50-21-25(a). Georgia does not waive immunity for losses arising from: (1) an act or omission by a State employee exercising due care in the execution of a statute, regulation, or rule; (2) the exercise or the failure to exercise a discretionary function; (3) the collection of any tax; (4) legislative or judicial action; and (5) methods of providing law enforcement. See Ga. Code § 50-21-24 for other exceptions. Except as provided, Georgia is not liable for damages exceeding \$1 million for single occurrence and the State's liability shall not exceed \$3 million. Ga. Code § 50-21-29. No award for damages under the GTCA may include punitive or exemplary damages. Ga. Code § 50-21-30.

### Hawaii

Hawaii State Tort Liability Act, Haw. Rev. Stat. §§ 662-1 to 662-16. Immunity waived for State employees to the same extent as private individuals under similar circumstances unless excepted. Cootey v. Sun Inv., Inc., 718 P.2d 1086 (Haw. 1986). As a no-fault state, no claim arises against a liable State employee for negligently operating a motor vehicle until the accident is deemed to be "serious" (medical expenses over \$5,000, use of body part permanent, in death). Property claims allowed. Haw. Rev. Stat. § 431:10C-306. Immunity is also waived to the extent of insurance. Haw. Rev. Stat. § 661.11. Hawaii does not waive immunity for any claim arising from (1) an act or omission in the execution of a statute or a discretionary duty; (2) any claim arising in the collection of any tax; and (3) any claim arising out of assault, battery, false imprisonment. Haw. Rev. Stat. § 662-15. Non-economic damages are capped at \$375,000. Haw. Rev. Stat. § 663-8.7. No punitive damages against the State. Haw. Rev. Stat. § 662-2. Any judgment over \$1 million against State may be paid over five years. Haw. Rev. Stat. § 657-24.

## Idaho

Idaho Tort Claims Act, Idaho Code §§ 6-901 to 6-929. Every governmental entity is subject to liability arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the scope of employment to the same extent a private person would be liable. Idaho Code § 6-903. "Exceptions to Governmental Liability" are in Idaho Code § 6-904. Idaho and its employees while acting within the scope of their employment and without malice shall not be liable for (1) an act or omission in the execution of a statute or a discretionary duty; (2) any claim arising out of assault, battery, misrepresentation, false imprisonment; and (3) arises out of the collection of any tax or fee. See Idaho Code § 904, § 904(a), and § 904(b) for other specific exceptions. Idaho shall not be liable for damages from a single occurrence exceeding \$500,000. This limit does not apply if the State has purchased liability insurance in excess of or if the action is caused by willful or reckless conduct. Idaho Code § 6-926. No punitive damages against the State. Idaho Code § 6-918.

## Illinois

Illinois Constitution provides "that except as the General Assembly may provide by law, sovereign immunity in Illinois is abolished." Ill. Const. Art. 13, § 4. Illinois enacted statutes, collectively called the Local Governmental and Governmental Employees Tort Immunity Act, which govern whether and in what situations local government units are immune from civil liability. All claims against the State for damages sounding in tort, if like cause of action would lie against a private person or corporation shall be heard before the Court of Claims. Tort claims made against the State involving the negligent operation of a State vehicle are to be heard in the Court of Claims and are not limited to the \$100,000 cap. 705 Il. Stat. § 505/8(d). Claims for tort damages are limited to \$100,000 if it does not involve the operation of a State motor vehicle. If State-owned vehicle operated by State employee, no limit. 705 Il. Stat. § 505/8.



## Indiana

Indiana Tort Claims Act -- Governmental entity can be subject to liability for their own tortious conduct or conduct of their employees acting within the scope of employment, unless the conduct is within an immunity granted by statute. Ind. Code § 34-13-3-3. The TCA sets forth 24 actions or conditions for which a “governmental entity or an employee acting within the scope of the employee's employment is not liable.” Some exceptions include (1) discretionary functions; (2) the adoption and enforcement of or failure to adopt and enforce a law; and (3) the act or omission of anyone other than the governmental entity or their employee. Ind. Code § 34-13-3-3 ("Immunity of Governmental Entity or Employee"). Damages are limited to \$700,000 to a single claimant and \$5,000,000 per occurrence. Punitive damages are not available. Ind. Code § 34-13-3-4 ("Limitation on Aggregate Liability; Punitive Damages Prohibited").

## Iowa

Iowa Tort Claims Act -- The state may be held liable for its negligence and the negligence of its employees while acting with the scope of employment. Iowa Code § 669.5. The State shall defend, indemnify, and hold harmless any employee against the claim so long as the employee's conduct was not willful or malicious. Iowa Code § 669.21. Liability is the rule and immunity is the exception. Walker v. State, 801 N.W.2d 548 (Iowa 2011). Iowa shall be liable to the same extent as a private individual. Iowa Code § 669.4. Iowa retains immunity for claims arising out of (1) acts or omissions of a State employee in the execution of a statute; (2) discretionary functions; and (3) any claim arising out of an intentional tort. Iowa Code § 669.14. No punitive damages against the State. Iowa Code § 669.4.

## Kansas

Kansas Tort Claims Act, Kan. Stat. §§ 75-6101 to 75-6120. Under the Kansas TCA, liability is the rule and governmental immunity is the exception. Patterson v. Cowley County, 307 Kan. 616, 413 P.3d 432 (2018). Governmental entities shall be liable for damages caused by a negligent act or omission of any of its employees while acting within the

scope of employment under circumstances where a private person would be liable. Kan. Stat. § 75-6103. No liability for legislative functions; judicial functions; failure to enforce a law; failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee. Kan. Stat. § 75-6104. State's liability shall not exceed \$500,000 for claims arising out of a single occurrence or accident. Governmental entity or its employees acting within the scope of employment shall not be liable for punitive damages. Kan. Stat. § 75-6105.

### Kentucky

Kentucky Board of Claims Act -- The Board of Claims has jurisdiction over civil actions brought against the Commonwealth, its agencies, officers, and employees, while acting within the scope of their employment. Ky. Rev. Stat. §§ 44.070 and 44.072. The Board of Claims preserves sovereign immunity for acts involving: (1) discretionary acts or decisions; (2) executive decisions; (3) ministerial acts; (4) actions in the performance of obligations running to the public as a whole; (5) governmental performance of a self-imposed protective function to the public or citizen; and (6) administrative acts. Ky. Rev. Stat. § 44.073. Jurisdiction of the Board is exclusive; and a single claim may not exceed \$200,000. If a single act results in multiple claims, the total award may not exceed \$350,000, equally divided among the claimants, but no one claimant may receive more than \$200,000. Ky. Rev. Stat. § 44.070.

### Louisiana

Louisiana Governmental Claims Act, La. Rev. Stat. §§ 13:5101-5113. Louisiana's Constitution provides "[n]either the State, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property." La. Const. Art. XII, § 10. For a State employee to be a "covered individual," the employee must present the Attorney General with a copy of the complaint, who will then determine whether the individual was within their scope of employment during the cause of action. La. Rev. Stat. § 13:5108.1. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or the failure to exercise their policymaking or discretionary acts when such acts are within the scope of their lawful powers and duties

except for acts not reasonably related to governmental objectives and acts which constitute criminal fraudulent, or intentional misconduct. La. Rev. Stat. § 9:2798.1. \$500,000 per person for personal injury or wrongful death. La. Rev. Stat. § 13:5106(B). Money for medical care post-judgment placed in reversionary trust which goes back to political subdivision if not used. La. Rev. Stat. § 13:5106(B)(3).

### Maine

Maine Tort Claims Act, Me. Rev. Stat. tit. 14 §§ 8101-8118. “Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. If immunity is removed by the TCA, a claim for damages must be brought subject to the limitations contained in the Act. Me. Rev. Stat. tit. 14, § 8103. A governmental entity is liable for its negligent acts or omission in its ownership, maintenance or operation of: (1) motor vehicle; (2) unimproved land; and (3) land, buildings, structures, facilities or equipment designed for use primarily by the public. Me. Rev. Stat. tit.14, § 8104-A. Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims. Me. Rev. Stat. tit.14, § 8103. A governmental entity is not liable for any claim which results from: (1) legislative acts; (2) judicial acts; (3) discretionary acts (except if the act involves operating a motor vehicle). See Me. Rev. Stat. tit.14, § 8104-B for more exceptions. Damage cap of \$400,00 per single occurrence. Me. Rev. Stat. tit. 14 § 8105. Except as otherwise provided, personal liability of an employee is limited to \$100,000 for any such claims arising out of a single occurrence. Me. Rev. Stat. tit. 14 § 8104-D. No judgment against governmental entity shall include punitive damages. Me. Rev. Stat. tit. 14 § 810-5.

### Maryland

Maryland Tort Claims Act, Md. Gov't Code §§ 12-101 to 12-110. The immunity of the State and of its units is waived as to a tort action in a court of the State. Md. Gov't Code § 12-104. Immunity of the State is waived for tortious acts of State personnel while acting within the scope of public duties which shall include, but not be limited to: (1) any authorized use of a State-owned vehicle by State personnel, including,

but not limited to, commuting to and from the place of employment; (2) services (defined by 12-101) to third parties performed by State personnel in the course of participation in an approved clinical training or academic program. Md. Gov't Code § 5-522. Immunity of the State is not waived for any tortious act or omission of State personnel that is not within the scope of the public duties of the State personnel or is made with malice or gross negligence. Md. Gov't Code § 5-522. The liability of the State and its units may not exceed \$400,000 to a single claimant for injuries arising from a single incident or occurrence. Md. Gov't Code § 12-104. The State and its officers and units are not liable for punitive damages. Md. Gov't Code § 5-522.

### Massachusetts

Massachusetts Tort Claims Act, Mass. Gen. Laws ch. 258, § 2 to § 14. One of the major purposes of the Massachusetts TCA is to allow plaintiffs with valid causes of action to recover in negligence against governmental entities. A second, and equally important purpose is to preserve the stability and effectiveness of the government by providing a mechanism that will result in payment of only those claims against governmental entities which are valid, in amounts that are reasonable and not inflated. State shall be liable for injury or loss of property caused by the negligent or wrongful act or omission of any public employee while acting within the scope of employment, in the same manner and to the same extent as a private individual under similar circumstances. Mass. Gen. Laws ch. 258, § 2. The State shall not be liable for any claim based upon an act or omission: (1) in the execution of a statute; (2) discretionary acts; or (3) arising out of an intentional tort, assault, libel, slander or misrepresentation. Other exceptions at Mass. Gen. Laws ch. 258, § 10. TCA is not to be construed restrictively for motor vehicles. Officer driving vehicle owned and registered to State, caused accident while "on call." TCA was held not to apply since officer was not acting within scope of employment. Clickner v. City of Lowell, 663 N.E.2d 852 (1996). State not liable for interest before judgment or for punitive damages. Liability of the State shall not exceed \$100,000. Mass. Gen. Laws ch. 258, § 2.

## Michigan

Governmental Tort Liability Act, Mich. Comp. Laws §§ 691.1401 to 691.1419. Governmental agency (including State) is immune if engaged in a governmental function (activity mandated or authorized by constitution, statute, local charter or ordinance, or other law). Mich. Comp. Laws § 691.1407(1). Governmental immunity is to be broadly construed, unless a narrowly drawn exception applies to a claim. The State is immune from tort liability if engaged in the exercise or discharge of a governmental function. A State employee will be immune from tort liability if: (1) acting or reasonably believes they are acting within the scope of employment; (2) the governmental agency is engaged in exercising a governmental function; or (3) does not involve gross negligence or an intentional act. Mich. Comp. Laws § 691.1407. Immunity does not apply when engaged in a proprietary function (any activity conducted primarily to produce a pecuniary profit for the governmental agency). Mich. Comp. Laws § 691.1413. Specific exceptions to immunity: (1) maintenance of public highways (know or should have known of defect) Mich. Comp. Laws § 691.1402; (2) negligent operation of a government-owned motor vehicle Mich. Comp. Laws § 691.1405; (3) public building defects, Mich. Comp. Laws § 691.1406; (4) performance of proprietary functions by governmental entities Mich. Comp. Laws § 691.1413; (5) medical care or treatment provided to a patient Mich. Comp. Laws § 691.1407(4); and (6) sewage disposal system events Mich. Comp. Laws § 691.1417. No compensatory damage limitations. Punitive damages are generally not recoverable unless authorized by statute. Casey v. Auto Owners, 729 N.W.2d 277 (2006).

## Minnesota

Minnesota Tort Claims Act, Minn. Stat. § 3.736. State will pay for property damage or personal injury caused by an act or omission of a State employee while acting within scope of employment under circumstances where the State, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Minn. Stat. § 3.736. State and its employees are not liable for losses caused by: (1) an act or omission of a state employee exercising due care in the execution of a statute or rule; (2) discretionary functions; or (3)

conditions of highways or public buildings, except if caused by employee negligence. See Minn. Stat. § 3.736 for other exclusions. Damage caps \$500,000 per person; \$1,500,000 per occurrence. No punitive damages. If liability insurance, limits are the maximum. Minn. Stat. § 3.736.

### Mississippi

Mississippi Tort Claims Act, Miss. Code §§ 11-46-1 to -23. State waives immunity for tort and contract claims, subject to statutory exceptions. Miss. Code § 11-46-5. The immunity of the State and its political subdivisions from claims arising out of the torts of such governmental entities and the torts of their employees while acting within the scope of their employment is waived. Miss. Code § 11-46-5. The State and its employees preserve their immunity for claims caused by (1) a legislative or judicial action or inaction; (2) an act or omission of a State employee exercising due care in the execution of a statute or rule; (3) police/fire protection (unless reckless); (4) discretionary function (official required to use judgment or discretion). See. Miss. Code § 11-46-9 for other exceptions. The State's liability shall not exceed \$500,000 for all claims arising out of a single occurrence. The State will not pay punitive damages. Miss. Code § 11-46-15.

### Missouri

Missouri Tort Claims Act, Mo. Stat. §§ 537.600 to .650. Tort immunity not waived. The immunity of the State is waived in these instances: (1) injuries resulting from State employee's negligent act or omission while operating a motor vehicle within the scope of employment; (2) injuries caused by the dangerous condition of a State-owned property; and (3) contract claims. Mo. Stat. § 537.600. The Commissioner of Administration and the governing body of each political subdivision of the State may purchase liability insurance for tort claims, made against the State or the political subdivision. Immunity is waived up to the extent of the coverage provided in the policy or self-insurance plan. Mo. Stat. § 537.610. Claims shall not exceed \$2,000,000 for claims arising out of a single occurrence and shall not exceed \$300,000 for any one person in a single accident or occurrence. The State will not pay punitive damages. Mo. Stat. § 537.610.

## Montana

Montana Tort Claims Act is found at Mont. Code §§ 2-9-101 to 2-9-114. The State is subject of liability for its torts and those of its employees acting within the scope of employment or duties whether arising out of a governmental or proprietary function. Mont. Code § 2-9-102. The State shall not be liable for certain legislative, judicial and gubernatorial actions. Mont. Code §§ 2-9-111 to -113. See Mont. Code § 2-9-108 for other exceptions. The State is not liable for tort claims in excess of \$750,000 for each claim and \$1.5 million for each occurrence. Mont. Stat. § 2-9-108 The State and other governmental entities are immune from exemplary and punitive damages. Mont. Code § 2-9-105.

## Nebraska

Through the Nebraska Tort Claims Act, the legislature has waived the state's immunity regarding certain, but not all, types of tort actions. Neb. Rev. Stat. §§ 81-8,209 to 81-8,239.11. The Act waives the state's sovereign immunity for tort claims against the state on account of personal injury caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for the injury. Moser v. State, 307 Neb. 18, 23, 9488 N.W.2d 194 (2020). The State "shall be liable in the same manner and to the same extent as a private individual under like circumstances ...." Neb. Stat. § 81-8,215. Injury to any innocent third party proximately caused by the action of a law enforcement officer employed by the State during vehicular pursuit, damages shall be paid to such party by the State employing the officer. Neb. Rev. Stat. § 81-8,215.01. The State does not waive its immunity for claims involving: (1) a discretionary function or due care in the execution of a statute; or (2) assault, battery, false imprisonment, or misrepresentation. See Neb. Rev. Stat. § 81-8,219 for other exceptions. No limitations on damages.

## Nevada

Nevada Tort Claims Act, Nev. Rev. Stat. 41.031 to 41.0337. Nevada "waives its immunity from liability and action and consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons, except as otherwise provided." N.H. Rev. Stat. § 41.031. No action may be brought against the State or its employees based on: (1) an act or omission of an officer or employee exercising due care, in the execution of a statute, or in the performance of a discretionary act; (2) failure to inspect any building, structure, vehicle, street, public highway or other public work, to determine any hazards, deficiencies or other matters, whether or not there is a duty to inspect; (3) an injury sustained from a public building or public vehicle by a person engaged in any criminal act. N.H. Rev. Stat. § 41.3, § 41.033 and § 41.0334. Damages against the State may not exceed \$100,000. The State will not pay punitive damages. N.H. Rev. Stat. § 41.035.

## New Hampshire

Claims Against State, N.H. Rev. Stat. §§ 541-B:1 to 541-B:23. Sovereign immunity deeply entrenched. Krzyszczalowski v. Fortin, 230 A.2d 750 (N.H. 1967). State generally waives its immunity to tort liability. N.H. Rev. Stat. § 541-B:2, § 541-B:9, § 541-B:9-a. Immunity also waived as to contract liability. N.H. Rev. Stat. § 491:8. A claim against the State for the negligent use of a motor vehicle is allowed since the State has purchased insurance. State v. Brosseau, 470 A.2d 869 (N.H. 1983). State does not waive its immunity for claims involving: (1) the exercise of a legislative or judicial function; (2) an act or omission of a State employee, or official when exercising due care in the execution of any statute; (3) discretionary function (involves executive or planning function); and (4) an intentional tort, assault, libel, slander, misrepresentation. N.H. Rev. Stat. § 541-B:19. All claims arising out of single incident shall be limited to an award not to exceed \$475,000 per claimant and \$3,750,000 per any single incident, or the proceeds from any insurance policy, whichever amount is greater. The State will not pay punitive damages. N.H. Rev. Stat. § 541-B:14.



## New Jersey

New Jersey Tort Claims Act, N.J. Stat. §§ 59:1-1 to 59:12-3. "Public entity" includes all counties, municipalities, districts, and other political subdivisions. N.M. Stat. § 59:1-3. Immunity waived. A "public entity" is liable for injury caused by an act or omission of a public employee in the same manner and to the same extent as a private individual unless there is exception in Act. N.M. Stat. § 59:2-2. Public entity liable for: (1) condition of property if dangerous condition and failure to take action "palpably unreasonable" N.M. Stat. § 59:2-3; (2) sewer back up if maintenance was palpably unreasonable or negligence in performance; or (3) ministerial or operational functions. Limitations on liability: (1) a discretionary function (involves policy judgment or determining resources or when or whether to purchase equipment, construct or maintain facilities, hire personnel or provide adequate services (N.J. Stat. § 59:2-3); (2) adopting or failing to adopt a law or by failing to enforce any law (N.J. Stat. § 59:2-4); (3) failure to make an inspection or negligent inspection of any property (N.J. Stat. § 59:2-6); (4) crime, actual fraud, actual malice or willful misconduct (N.J. Stat. § 59:2-10); or (5) discretion in decision-making or prioritizing needs when faced with budgetary issues. See N.J. Stat. § 59:2-5 for other exceptions. No Dollar Caps. No subrogation allowed against "a public entity or public employee." N.J. Stat. § 59:9-2(e). No recovery for pain and suffering, but this limitation on recovery unless permanent loss of bodily function, permanent disfigurement or dismemberment when medical expenses exceed \$3,600. Punitive damages cannot be awarded. N.J. Stat. § 59:9-2(c) and (d).

## New Mexico

Tort Claims Act, N.M. Stat. § 41-4-1 to -30. TCA shields the State and public employees from liability for torts unless immunity is specifically waived. N.M. Stat. §§ 41-4-1 and 41-4-4. Exclusions to the TCA include: (1) negligence of public employees within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft (N.M. Stat. § 41-4-5); and (2) negligence of public employees within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings (N.M. Stat. § 41-4-6). Other exceptions are at N.M. Stat. § 41-4-4 to -12. Damage Caps:

Liability of State for a single occurrence shall not exceed: (1) \$200,000 for damage to or destruction of real property; (2) \$300,000 for past and future medical expenses; (3) \$400,000 for all damages other than real property damage and medical expenses; and (4) total liability for a single occurrence shall not exceed \$750,000. State will not pay punitive damages. N.M. Stat. § 41-4-19.

### New York

New York State has what is undoubtedly the oldest public entity liability system in the United States. The system stems from the enactment in 1929 of § 8 of the Court of Claims Act. State waives immunity and consents to being sued in the same manner as a private person would, so long as requirements of the Court of Claims Act are complied with. State immune when performing governmental act (legislating, judging, or making discretionary decisions) as opposed to proprietary act (act substitutes for or supplement traditionally private enterprises). Proprietary acts include rents real property; health care; operating school; and operating vehicle. Morell v. Balasubramanian, 514 N.E.2d 1101 (1987). If governmental act involved, no liability even if there was malice or special duty owed to plaintiff as opposed to mere public duty (Public Duty Defense). Special duty formed in three ways: (1) statute for class of persons; (2) assumption of duty toward person (most common); and (3) assume direction and control in face of known safety violation. If ministerial act, plaintiff must still show a special duty existed. If governmental act and special duty exists, no immunity of act was ministerial. If discretionary, government must actually have exercised its discretion to be immune. Damage Caps: None. No punitive damages allowed.

### North Carolina

North Carolina Tort Claims Act, N.C. Gen. Stat. §§ 143-291 to 300. The TCA covers all claims arising because of the negligence of any officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency or authority. N.C. Gen. Stat. § 143-291. Contributory negligence by the claimant bars recovery under the TCA. Intentional acts are not compensable. Claims

are brought before the Industrial Commission, reviewable by Superior Court. N.C. Gen. Stat. § 143-291. Damage Caps: Claim for injury and damage to any one person capped at \$1,000,000 less any commercial liability insurance purchased by the State applicable to the claim. N.C. Gen. Stat. § 143-299.2.

### North Dakota

Claims Against the State, N.D. Code §§ 32-12-2.2-01 to -18. State waives immunity for both tort and contract claims. State liable for an injury caused by: (1) negligence of employee acting within scope of employment (including operating motor vehicles); or (2) use or condition of tangible property, if employee would be personally liable if a private person would be liable under the circumstances. N.D. Code § 32-12.2-02. Employee cannot be personally liable. This includes operation of a motor vehicle. N.D. Code § 32-12.2-03. N.D. Code § 32-12.2-03(3) lists claims for which a State employee is not liable. (e.g., legislative, quasi-legislative, public duties, collection of taxes, environmental contamination, liability assumed under contract except for rental vehicles, etc.). Damage Caps: Recovery limited to \$250,000 per person and \$1,000,000 for any number of claims arising from a single occurrence and prohibits punitive damages in actions against the State. N.D. Code § 32-12.2-02.

### Ohio

"Suits may be brought against the State, in such courts and in such manner as may be provided by law." Ohio Const., Art. 1, § 16. Court of Claims Practice and Procedure, Ohio Rev. Code § 2743.11 to 2743.20. State waives immunity and consents to be sued and have its liability determined in the Court of Claims by the same rules as a suit between private parties. Ohio Rev. Code § 2743.02(A)(1). Claims allowed against State for negligent operation of motor vehicle driven by State employee, even if driving own personal vehicle. Ohio Rev. Code § 2743.16(B). State employee cannot be sued personally unless not in scope of employment. Suits versus Ohio officers and employees for acts in scope of employment barred. Ohio Rev. Code § 9.86. No jury trial in Court of Claims. Ohio Rev. Code § 2743.11. Settlements must be approved by Attorney General and the Court of Claims. Ohio Rev. Code § 2743.16. State immune from

liability for claims arising out of the performance or nonperformance of a public duty. Ohio Rev. Code § 2743.02(3)(a). Subrogation claims not permitted. Ohio Rev. Code § 2744.05(B). Damage Caps: Damages reduced by other collateral source recovers received by the claimant. Ohio Rev. Code § 2743.02(D). No punitive damages. State may, but is not required to, insure its employees for operation of motor vehicles. Any such insurance must be provided by the Department of Administrative Services through the Office of Risk Management. Ohio Rev. Code § 9.83.

### Oklahoma

Oklahoma Governmental Tort Claims Act, Okla. Stat. tit. 51 § 151 to 172. Okla. Stat. tit. 51 § 152.1(A) (TCA Act adopts sovereign immunity and the limited waiver for the state and its political subdivisions); Okla. Stat. tit. 51 § 152.1(B) (waives immunity as provided in the Act). State employee acting in scope of employment is liable for loss unless falls under exceptions. (General Waiver of Immunity). Okla. Stat. tit. 51 § 152.1(A) No subrogation claims allowed against State. Okla. Stat. tit. 51 § 155(28) Liable for operation of motor vehicles. However, liability limited to amount of liability insurance purchased. Okla. Stat. tit. 51 §§ 157.1-158.2. There are 37 exceptions where State not liable for torts of State employees acting in scope of employment: (1) legislative functions; (2) discretionary acts such as policy decisions (limited). "Planning-operational" approach to understanding the scope of this exception to liability; (3) natural snow or ice conditions; (4) absence, condition, location or malfunction of traffic sign unless not corrected within reasonable time after notice; (5) subrogation claim; and (6) any loss to person covered by workers' compensation. See Okla. Stat. tit. 51 § 155 for more exceptions. Damage Caps: Property Claims, \$25,000; Other Losses, \$175,000 per person. \$200,000 for medical negligence. \$1 million per occurrence. 51 Okla. Stat. § 154(A). No punitive damages. Several liability only. 51 Okla. Stat. § 154. If insurance, policy terms govern rights and obligations of State. 51 Okla. Stat. § 158. No subro claims. Okla. Stat. § 155(28).

### Oregon

Oregon's Constitution states that provision may be made by general law, for bringing suit against the State, as to all liabilities originating

after, or existing at the time of the adoption of this Constitution; but no special act authorizing such suit to be brought or making compensation to any person claiming damages against the State, shall ever be passed. Or. Const. art. IV, § 24. Tort Actions Against Public Bodies a/k/a Oregon Tort Claims Act, Or. Rev. Stat. § 30.260 to 30.300. TCA is limited waiver of sovereign immunity. Every public body subject to liability for its employees' and agents' torts committed within the scope of their employment, including operation of motor vehicles. Or. Rev. Stat. § 30.275. Exceptions to liability: (1) injury covered by workers' compensation; (2) exercise of discretionary function or duty; and (3) act under apparent authority of law. Or. Rev. Stat. § 30.265(6). Discretionary function is policy-making decision (policy judgment). Negligent implement of policy is not immune. No immunity if duty to act. Damage Caps: Personal injury--\$2,073,600 per person; \$4,147,100 per occurrence. Property damage--\$113,400 per person; \$566,900 per occurrence. Or. Rev. Stat. § 30.271(4), 30.272(4), 30.273(3). Claims which are not subject to the TCA are not subject to Or. Rev. Stat. § 30.710, setting limit of \$500,000 for non-economic damages in civil actions. Or. Rev. Stat. § 30.269(2).

### Pennsylvania

Pennsylvania Sovereign Immunity Act, Pa. Cons. Stat. tit. 42, § 8501, et seq. Commonwealth Court has jurisdiction over civil actions brought against the "Commonwealth government" with four specific exceptions. Pa. Cons. Stat. tit. 42, § 761. PA has obligation to defend commonwealth employees. Pa. Cons. Stat. tit. 42, § 8525. Sovereign Immunity Act waives Commonwealth immunity for damages arising out of a negligent act where the damages would be recoverable by a private person. Pa. Cons. Stat. tit. 42, § 8522(a). It includes: (1) motor vehicle operation; (2) medical profession; (3) care, custody, control of personal property; (4) real estate, highways, sidewalks; (5) potholes and dangerous conditions; (6) control of animals; and (7) vaccines. Pa. Cons. Stat. tit. 42, § 8522(b). Exceptions to sovereign immunity. Plaintiff cannot recover under motor vehicle exception if fleeing apprehension of resisting arrest by police officer. Pa. Cons. Stat. tit. 42, § 8522(b) and 8542(b). No property damage recoverable under potholes and dangerous conditions. Pa. Cons. Stat. tit. 42, § 8528(c)(5). Damage Caps: \$250,000 per person; \$1,000,000 per occurrence. Can only recover: (1) past and future loss of earnings; (2)

pain and suffering; (3) medical expenses; (4) loss of consortium; and (5) property losses. Pa. Cons. Stat. tit. 42, § 8528. The same approach is adopted by Pennsylvania for local government employees and local government employers. Pa. Cons. Stat. tit. 42, § 8545. Pa. Cons. Stat. tit. 42, § 8522 (sovereign immunity waived) and Pa. Cons. Stat. tit. 42, § 8528 (damages capped at \$1,000,000 in the aggregate and \$250,000 per person).

### Rhode Island

Governmental Tort Liability Act, R.I. Gen. Laws §§ 9-31-1 to 9-31-13. State liable for all actions of tort in the same manner as a private individual or corporation unless exception. R.I. Gen. Laws § 9-31-1 (“The state of Rhode Island and any political subdivision thereof, including all cities and towns, shall ... hereby be liable in all actions of tort in the same manner as a private individual or corporation ...”). State's sovereign immunity as to tort actions and its 11<sup>th</sup> Amendment immunity both waived. Laird v. Chrysler, 460 A.2d 425 (R.I. 1983). Does not apply to proceedings against State before administrative agencies. State to be substituted if acts in question in suit determined to be in scope of employee's employment. R.I. Gen. Laws § 9-31-12. Damage Caps: Damages may not exceed \$100,000. R.I. Gen. Laws § 9-31-2. Limit not applicable if State was engaged in a proprietary function or has agreed to indemnify the federal government or any agency. R.I. Gen. Laws § 9-31-3. State must secure \$75 million insurance policy covering operation of commuter rail service. R.I. Gen. Laws § 9-31-3.

### South Carolina

South Carolina Tort Claims Act, S.C. Code § 15-78-10, et seq. Limited waiver of sovereign immunity, subject to exceptions. State is liable for torts to same extent as private individual, subject to limitations. S.C. Code § 15-78-40. Statute lists non-exclusive list of 40 exceptions to the general waiver of State sovereign immunity, including, among others: (1) legislative, judicial actions; (2) discretionary acts; (3) natural snow or ice conditions; (4) authorized entry on property; (5) absence or condition of traffic sign or barrier unless given reasonable notice to repair; (6) claim against DOT allowed for improper maintenance but not faulty design; and (7) any judicial proceeding. S.C. Code § 15-78-60. Damage Caps:

\$300,000 per person; \$600,000 per occurrence. No punitive Damages: S.C. Code § 15-78-120.

### South Dakota

S.D. Codified Laws §§ 21-32-1 to 21-32-21. South Dakota common law and Constitution prohibit that "governing acts" of State, its agencies and other public entities can't be attacked in court without the State's consent. S.D. Const. Art. III, § 27. Whether a State employee, who is sued in an individual capacity, is entitled to immunity depends on the function performed by the employee. Immune discretionary function (involves policy-making power), but not when they perform ministerial function ("absolute, certain, and imperative" act simply carrying out of a policy already established). Even if discretionary function involved, State may purchase liability insurance. S.D. Code § 12-32-15. Purchase of insurance waives immunity and its consent to be sued. S.D. Code § 21-32-16. State and its employees immune except as provided in § 21-32-16; § 21-32-17. Factors to be considered in determining a discretionary function include: (1) nature and importance; (2) extent to which passing judgment on exercise of discretion passes judgment on branch of government; (3) would liability impair free exercise of discretion; (4) likelihood of harm to members of public if action taken; (5) nature and seriousness of harm; and (6) availability of other remedies. Discretionary: highway construction and maintenance; allocating plows, resource and equipment for snow removal. Ministerial: Once it is determined that act should be performed, subsequent performance is ministerial. (e.g., operating motor vehicle). No immunity for breach of contract claims. S.D. Code § 21-32-1 establishes the Office of Commissioner of Claims, which hears contract and tort claims against the State. No damage caps. Under S.D. Code § 3-21-1(2) (public entity in South Dakota includes "all public entities established by law exercising any part of the sovereign power of the state, including ... municipalities [etc.]"); S.D. Codified Laws § 21-32-17 (South Dakota employees immune within scope of employment) and S.D. Codified Laws § 21-32A-2 (Public entity employees in South Dakota immune); "Except insofar as a public entity participates in a risk sharing pool or insurance is purchased pursuant to § 21-32A-1, any public entity is immune from liability for damages whether the function in which it is involved is governmental or proprietary." S.D. Codified Laws § 21-32A-3. See also, S.D. Codified Laws § 21-32-16 (state deemed to have waived

immunity by purchasing insurance) and S.D. Codified Laws § 21-32A-1 (public entities deemed to have waived immunity by purchasing insurance).

### Tennessee

Tennessee Claims Commission created to hear and adjudicate claims against State. Tenn. Code §§ 9-803 to 307. Established State's liability in tort based on traditional concepts of duty and reasonably prudent persons' standard of care. Act restricts State to the defense of absolute immunity only as an exception to Act's broad abrogation of sovereign immunity. Claims Commission has exclusive jurisdiction to hear claims against State, it is limited to those claims listed in § 9-8-307(a). Common law negligence rules apply. Otherwise, State is immune. Claims Allowed: (1) operation of motor vehicle; (2) nuisances; (3) dangerous conditions on real property (foreseeable and notice); (4) legal/medical malpractice; (5) negligent care of persons or property; (6) negligent construction of sidewalks/buildings; (7) design and construction of roads; (8) highway conditions; (9) negligent operation of machinery; and (10) many others. Purchase of liability insurance does not waive sovereign immunity. Tennessee Governmental Tort Liability Act § 9-8-307 is not applicable to State. If State is liable, employee is immune, unless outside scope of employment, intentional, or done for personal gain. § 29-20-310(b). Damage Caps: \$300,000 for bodily injury or death of any one person in any one accident, occurrence or act. \$700,000 for bodily injury or death of all persons in any one accident. § 9-8-307(3)(e). No punitive damages. If claim exceeds \$25,000, TN Claims Administration turns it over to the State AG to investigate. "No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds or property, and all such suits shall be dismissed as to the state or such officers ..." Tenn. Code § 20-13-102. Tenn. Code § 9-8-307(a)(1)(D); Tenn. Code § 29-20-201(a); Tenn. Code § 29-20-109. Commission has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees "falling within one or more of the following categories ... legal malpractice or health care liability by a state employee; provided, that the state employee has a professional/client relationship with the claimant." Tenn. Code § 9-8-307(a)(1)(D). The



statute permits claims in court in the health care context under limited circumstances, however: "No claim may be brought against an employee or ... for damages for which the immunity of the governmental entity is removed by this chapter unless the claim is one for health care liability brought against a health care practitioner. No claim for health care liability may be brought against a health care provider or judgment entered against a health care practitioner for damages for which the governmental entity is liable under this chapter, unless the amount of damages sought or judgment entered exceeds statutory limits or the amount of insurance coverage actually carried by the governmental entity, whichever is greater, and the governmental entity is also made a party defendant to the action." Tenn. Code § 29-20-310.

### Texas

Texas Tort Claims Act found at Tex. Civ. Prac. & Rem. Code §§ 101.001 to 111.006. Absent a waiver of immunity, governmental entities are generally immune from liability. TCA is a limited waiver of sovereign immunity (qualified immunity) for certain torts. Unless there is a waiver of immunity in the TCA, there is sovereign immunity. State's immunity is waived for: (1) use of motor vehicle (State only liable if employee operating vehicle would have been liable). Tex. Civ. Prac. & Rem. Code § 101.021(1); (2) injury caused by condition or use of tangible personal or real property (liable only if private person would have been liable; precludes suit predicated solely on respondeat superior; involves activities conducted on real property, not defects in the real property) Tex. Civ. Prac. & Rem. Code § 101.021(2); (3) claims arising from premises defects (claims involving premises liability brought under this section) Tex. Civ. Prac. & Rem. Code § 101.021(2). State employees enjoy either absolute immunity (e.g., judges) or qualified immunity (e.g., jailers, sheriffs, and other public officers or employees). State employees' qualified immunity applies only to discretionary actions taken in good faith within the scope of the employee's authority. No qualified immunity for ministerial (mandatory) actions. State involved in joint enterprise is liable for the torts of other members of the joint enterprise. Tex. Civ. Prac. & Rem. Code § 101.022 says two additional liability limitations apply: (1) special defects (e.g., unusual danger); and (2) absence, condition or malfunction of traffic signs. Tex. Civ. Prac. & Rem. Code §

101.060. Damage Caps: Bodily Injury/Death - \$250,000 per person; \$500,000 per occurrence. Damage to Property - \$100,000 per occurrence. Tex. Civ. Prac. Rem. Code § 101.023. The Act provides a limited waiver for certain suits against governmental entities and caps recoverable damages. Univ. of Texas Health Ctr. v. Rios, 542 S.W.3d 530 (Tex. 2017). The Texas TCA begins broadly, expressly waiving sovereign immunity for all governmental entities and granting permission to sue to the extent of the waiver. Individuals may not be sued under the Texas TCA since it does not govern suits brought directly against an employee of the state. The legislature directs that the Act “shall be liberally construed” to effectuate its purpose. Then, a very substantial list of exceptions follows. The result is essentially waiver in three general areas: use of publicly owned automobiles, premise defects, and injuries arising out of conditions or use of property. To protect the fiscal integrity of the governmental entities, authority is given to purchase insurance. The Texas Act is unique in waiving immunity only for personal injuries or death, making no provision for damage to property or intangible personal or business interests; the acts in other states generally include all classes of injury and damage. Tex. Civ. Prac. & Rem. Code 101.023(a). See Tex. Civ. Prac. & Rem. Code 101.023(b), (c), (d) providing for limitations of liability for municipalities, local governments, and emergency service organizations. A major provision of the Act is its limit on the liability of the state government. Compared to the Federal Tort Claims Act and the acts of several states, which have no dollar limits, the Texas limits are limited. Tex. Civ. Prac. & Rem. Code § 101.023.

### Utah

Utah Governmental Immunity Act is in Utah Code. §§ 63G-7-101 to 63G-7-904. The official title of the Act is misleading because it greatly expands the area of governmental liability sharply curtailing former immunities. "Governmental Entity" and its employees retain immunity for all "governmental functions" (defined as "activity, undertaking, or operation of a governmental entity") no matter how labelled, unless expressly waived in Act. "Governmental Entity" includes State and all its political subdivision. Immunity waived as to (1) any act by employee in scope of employment; (2) contractual obligations; (3) defective, unsafe condition of road, sidewalk, bridge, etc.; (4) defect or condition of building,

structure, etc.; and (5) injury or damage resulting from employee driving or being in control of a vehicle. Utah Code 63G-7-202(3)(c)(2). Three-part test to determine whether governmental enjoys immunity under the Act: (1) whether the activity is a governmental function; (2) whether governmental immunity was waived for the particular activity; and (3) whether there is an exception to that waiver.

Property Damage Cap: \$233,600, Utah Code § 63G-7-604(1)(c). Personal Injury Damage Cap: \$583,900, Utah Code § 63G-7-604(1)(a). \$2 million limit to aggregate amount of individual awards for single occurrence. Utah Code § 63F-7-604(1)(d). Utah Code § 63G-7-101 (all functions of government, no matter how labeled); Utah Code § 63 G-7-201(3)(a) (discretionary function immunity preserved) Utah Code § 63 G-7-902 (state may defend and indemnify upon request of employee); Utah Code § 63 G-7-101, et seq. Utah Code § 63 G-7-301 (2) (i). Utah Code § 63 G-7-604. The Utah Act initially declared all public entities to be immune from tort liability arising out of their “governmental” functions except as otherwise provided in the Act itself. (By implication, liability for “proprietary” functions is left for judicial development as is further delineation of the distinctions between “governmental” and “proprietary” functions.) Broad statutory exceptions to the general immunity rule were then set forth, including acceptance of tort responsibility of all governmental entities for negligent operation of motor vehicles and for dangerous or defective conditions of public streets, sidewalks, buildings, and other structures. In addition, the Act declared all governmental entities liable, on the theory of respondeat superior, for the negligent acts or omissions of their employees except where the injury arose out of any of 11 categories of exempt activities (including discretionary functions, property inspection activities, license and permit issuance, and penal incarceration). Punitive damages were always forbidden. The insurance provisions of the Utah statute are significant and sophisticated. It authorizes but does not require public entities to secure liability insurance covering the entity and its employees. If entity liability insurance is secured, however, the policy must have limits of coverage. In negligence cases involving the defense of governmental immunity, courts first determine whether the defendant owed a duty of due care to the plaintiff before deciding whether the defendant is entitled to the affirmative defense of governmental immunity. A tort judgment against a public entity generally may not exceed these mandatory policy limits.

It has been held that when insurance coverage is provided, the insurer is required to waive the defense of sovereign immunity, the substantive limitations upon tort responsibility in the Act becoming inapplicable.

### Vermont

Vermont Tort Claims Act, Va. Stat. 12, §§ 5601-5606. State and its employees liable to same extent as private individual unless exception listed in insurance policy. Vt. Stat. 12, § 5601(3). Exclusive right of action is against State not employee (except for gross negligence, willful act). Vt. Stat. 12, § 5602(a)(b). Excepts to waiver of immunity set forth in § 5601(e): (1) discretionary function: (a) involves either an element of judgment/choice or a statute or regulation prescribes a course of action, and (b) is it type of act protected by the exception (presumption can be rebutted)? (2) any claim arising from selection of or purposeful deviation from standards for planning and design of highways; and (3) above exceptions do not apply if there is policy of insurance purchased by Commissioner of Buildings and General Services or if employee purchased policy covering gross negligence. Maximum liability of the State is \$500,000 to one person and maximum aggregate is \$2,000,000. Vt. Stat. 12, § 5601(b).

### Virginia

Virginia Tort Claims Act, Va. Code §§ 8.01-195.1 to 195.9. Provides a limited right to sue State employee when a private entity or individual would be liable, provided the State employee is acting in course and scope. Only partial waiver of sovereign immunity. Commonwealth is immune from tort liability for acts of employees, unless an express statutory or constitutional provision waives that immunity. Immunity of judges, attorneys, and public officers of Commonwealth is preserved. Commonwealth employee is immune if act ministerial but not discretionary. Exceptions to waiver of immunity are listed in Va. St. §§ 8.01-195.3. Immunity waived only for ministerial acts (obedience to authority without regard to or the exercise of his or her own judgment) but not for discretionary acts, which have these characteristics: (1) an authorized individual or agency was given the power and duty to decide; (2) the decision was made from a set of valid alternatives; and (3) the individual or agency exercised independent judgment in making the

selection. No exception for intentional acts. No immunity if intentional tort or actions outside scope of employment. Messina v. Burden, 321 S.E.2d 657 (Va. 1984). Immunity is waived up to \$100,000 or the amount of the State's insurance coverage, whichever is greater, exclusive of interest and costs. Va. St. 801-195.3. Immunity is waived up to \$100,000 or the amount of the State's insurance coverage, whichever is greater, exclusive of interest and costs. Va. St. § 8.01-195.3.

### Washington

The Washington Tort Claims Act can be found at Wash. Rev. Code 4.92.005 to 4.92.280. State has broadly waived sovereign immunity subjecting state and local governments to suit without capping damages. Wash. Rev. Code § 4.96.010 ("all local governmental entities . . . liable for damages arising out of their tortious conduct ..."). Whether acting in governmental or proprietary capacity, State and its employees liable for torts the same as a private person. Wash. Rev. Code § 4.92.090. One of the broadest waivers of sovereign immunity in the country.

### West Virginia

"The State of West Virginia shall never be made a defendant in any court of law or equity." W. Va. Const., Art. VI, § 35; Governmental Tort Claims and Insurance Act, W. Va. Code § 29-12-1. State entities and officials are absolutely immune from policy-making acts and have qualified immunity for discretionary acts that do not violate clearly established rights and laws. Discretionary acts that do violate clearly established laws which occur outside of the public official's scope of employment strip the official of his or her qualified immunity, but the State entity retains its immunity. If the official's offending acts or omissions occur within the scope of the official's employment, both the State entity and the official lose their immunity. Damage Caps: State authorized to purchase liability insurance covering State "property, activities and responsibilities. W. Va. Code 29-12-5. State Board of Risk and Insurance Management must purchase insurance which "shall provide that the insurer shall be barred and estopped from relying upon immunity." Limited by insurance coverage purchased by State Board of Risk and Insurance Management.

## Wisconsin

Claims against governmental bodies, officers and employees. Wisc. Stat. §§ 893.80 to 893.83. Qualified immunity for acts done in exercise of legislative, quasi-legislative, judicial or quasi-judicial functions (i.e., discretion). The State and its employees may be sued for "an act growing out of or committed in the course of the discharge of the officer's, employee's or agent[s] duties." Wis. Stat. § 893.82(3). Regarding claims against governmental entities, "so far as governmental responsibility for torts is concerned, the rule is liability -- the exception is immunity." Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962). Three exceptions to immunity: (1) Known danger exception: Situation so dangerous that it is clear the police officer or State employee required to act in certain way; (2) Ministerial duty exception: State employee required by law to act in specific way; and (3) Willful and wanton acts. Damage caps: \$50,000 for claims against municipal entities and their employees; no punitive damages allowed. Wis. Stat. § 893.80(3). \$250,000 for claims against the State and its employees; no punitive damages allowed. Wis. Stat. § 893.82(6). \$250,000 limit for negligent operation of any municipal vehicle. Wis. Stat. § 345.05.

## Wyoming

Wyoming Governmental Claims Act, Wyo. Stat. §§ 1-39-101 to 121. WGCA is a closed-end tort claims act, meaning it bars any claim against a governmental entity or its employees unless it falls within one of the statutory exceptions. Varela v. Goshen Co. Fairgrounds, 2020 WY 124, 472 P.3d 1047 (Wyo. 2020). Except as provided in the WGCA, a governmental entity is granted immunity for liability for any tort. Wyo. Stat. § 1-39-104. Claims are allowed for: (1) Operating motor vehicle; Wyo. Stat. § 1-39-105; (2) operating building or park; Wyo. Stat. § 1-39-106; (3) airport; Wyo. Stat. § 1-39-107; (4) operating public utilities and ground transportation; Wyo. Stat. § 1-39-108; (5) operating a hospital; Wyo. Stat. § 1-39-109; and (6) torts of police; Wyo. Stat. § 1-39-112. The WGCA abolishes all judicially created categories such as governmental or proprietary functions and discretionary or ministerial acts used by the courts to determine immunity or liability. Exclusions from the waiver of

liability are listed at Wyo. Stat. § 1-39-120. Damage caps for personal injury \$250,000 per person; \$500,000 per occurrence. State can purchase liability insurance in which case limits are extended to match limits of policy. Wyo. Stat. § 1-39-118. Damage cap for property damage less than \$500. Wyo. Stat. § 1-39-118(f).