

A LEGAL ANALYSIS OF LITIGATION AGAINST GEORGIA EDUCATORS AND  
SCHOOL DISTRICTS UNDER THE GEORGIA GOVERNMENTAL  
TORT CLAIMS ACT

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This dissertation examines the impact of the 1992 Georgia Tort Claims Act on educators in court decisions involving liability cases against Georgia school districts and/ or their respective employees. By examining pertinent court cases in which Georgia educators were, for the first time, subjected to potential litigation, the researcher outlines circumstances in which educators can and should be held liable for their actions. Additionally, the researcher analyzes the Tort Claims Acts of Texas, Oklahoma, and Mississippi as well. This analysis allows the researcher to contrast the types of litigious actions that educators in each of these states are held liable. Findings include the types of actions in which educators in each of the respective states are subject to liability. Case study analysis of randomly selected court cases involving tort liability, provides the infrastructure for in-depth research allowing the following questions to be addressed: (1) How have Georgia courts interpreted the Georgia Tort Claims Act in litigation against school personnel and school districts? (2) How do tort liability rulings, involving school personnel or districts, in other states within the United States compare with similar cases filed in Georgia since 1992? The Georgia Tort Claim Act of 1992 propelled an array of circumstances in which educational entities would be held liable for their actions. This research clearly explains the types of actions in which educators in the state of Georgia are subject to suit and to what degree they are subsequently held liable. Case study research also uncovered specific areas in which

Georgia educators can be held liable. Specific research involving actions deemed either ministerial or discretionary are detailed specifically through case analysis. Additionally, the degree to which liability insurance provides protection for educational entities or their respective employees is also addressed in this research in order that state-by-state comparisons can be understood.

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## CHAPTER 1

### BACKGROUND OF THE STUDY

#### Introduction

“You’ll be hearing from my lawyer!” said the angry mother as she stormed from the principal’s office. All too often, the world of the 21<sup>st</sup> century educational administrator is filled with angry threats such as this one. Even worse, these threats often lead to sleepless nights of worry and in some extreme cases have even led educators to leave the very profession they love, simply because they cannot handle the inherent stress involved when every decision made has litigious potential. According to Dougherty (2004), tort claims are the most common litigation brought against school districts and employees, although many of the cases are unwarranted.

This dissertation analyzes tort law as it currently is applied in Georgia and furthermore understood and applied through the Georgia court system. Identification and analysis of cases involving individuals or districts that have come under suit by outside entities are provided. Furthermore, and perhaps most importantly, this paper addresses the question, to what degree, if any, are school personnel covered from liability through governmental immunity laws in Georgia? When one looks at the laws as they are written in the state of Georgia as well as Texas, Mississippi, and Oklahoma, it is somewhat comforting to know that most school officials and the subsequent teachers they supervise are afforded more protection than most are even aware.

The state of Georgia has adopted the Governmental Tort Claims Act of 1992, effectively ending the sovereign immunity protection the state had enjoyed against tortuous law suits. In their law review article, Zirkel and Clark (2009) noted that state



courts across America have provided substantial protection from tort suits against school districts and their employees under the concept of sovereign immunity. However, the authors noted that the issue of sovereign immunity for educators has received little attention in the school law community, and they identified a need for a “systematic state-by-state study of governmental immunity” (Zirkel and Clark, 2009, p. 360). States throughout the United States have passed tort claims acts that allow for individuals to bring suit against governmental employees and institutions, including but not limited to educators and their respective school districts.

The Georgia Tort Claims Act (1992) is a set of statutes that determine when a governmental entity may be liable for tortuous conduct under state law. Prior to the adoption of the Act, individuals could not recover damages from state or local governmental units for injuries resulting from the actions of a government employee or officer in the performance of a governmental function. The interpretation of laws involving liability issues in the day-to-day operations of an educator definitely vary from state to state. Many factors determine the degree of liability to which educators may be held accountable, including but not limited to, prior rulings and interpretations of statutes by the courts.

In the field of educational administration, the scope of issues involving liability is an ever-increasing and expansive one. For example, personnel management is an area that is potentially litigious and one in which educators should possess a thorough knowledge of state laws. In states, such as Georgia, cases involving defamation have been filed by plaintiffs in an attempt to gain monetary settlement as a result of disciplinary actions that may have resulted in suspension or even termination. Claims

such as this confirm the fact that today's educational leaders need to make it a point to thoroughly know and understand prior cases involving tort liability and sovereign governmental immunity.

For further confirmation of the need for interpretation of the law, one needs to look no further than cases involving injury. Throughout history, in public schools across America, events have occurred on campuses that led to the bodily injury of a student or others. The question of whether or not a public school employee, regardless of the scope of their position, is responsible for such injuries has always been a matter educators have had to respond to. In the eyes of an emotional parent, whose child has been injured, the first logical thought is to figure out who is responsible, followed closely by how could it have been prevented. Needless to say, the claims of negligence often expand past the individual or individuals responsible for actually inflicting the damage upon their child. The blame for such actions will, at times, be directed higher up the line at the teacher or principal, especially if the parents feel that these individuals, acting within the scope of their position, should have or could have prevented such action from happening in the first place.

Interpretation of law is a subjective thing for sure and it is not the intention of the research in this paper to prompt change in current laws or to even present a case for change. This dissertation is an analysis of the scope of educational tort liability as it currently exists in the state of Georgia. Additionally, surrounding states in the southern part of the country, many of which have similar statutes involving governmental immunity, were compared, contrasted and analyzed.

## Statement of the Problem

School employees in the state of Georgia enjoy tremendous protection from tort liability claims involving negligence within the scope of their respective duties as professional employees. This dissertation analyzes school governmental and official immunity cases within the public school system in the state of Georgia. Current literature reflects the need for greater understanding of school responsibility in regard to teacher and administrator duties and roles pertaining to the scope of their respective jobs. Maher, Price and Zirkel (2010) concluded in their state-by-state analysis of immunity and public schools that the “current literature reflects insufficient knowledge about the topics of governmental and official immunity within the context of public schools, contributing to a skewed perception of its present extent” (p. 247). As was noted in Lacefield’s dissertation (2010), liability issues and legal proceedings involving school educators have become the norm. This dissertation includes case study analysis of public court decisions involving Georgia school districts and their respective employees in claims filed under the Georgia Governmental Tort Claims Act.

The Governmental Tort Claims Act of 1992 opened the door for litigation to be brought against school districts and/or school district personnel. Georgia case study reveals that government and school officials in the state are afforded a significant degree of protection from tort liability suits. A school district in the state of Georgia is eligible for qualified immunity protection. The degree in which school districts and personnel are protected in Georgia needs to be analyzed and compared with other states. Case studies and rulings that have occurred since Georgia adopted the Governmental Tort Claims act of 1992 are important to educators. Understanding these

cases will help educators that find themselves walking the fine line of when and how to respond in cases of potential negligence.

### Significance of the Study

Cases involving the interpretation of laws offering immunity to school personnel, as well as school districts, have been historically supportive of both the individual and the district in terms of degree of liability. However, it is important to note that even though case studies have been completed in southern states surrounding Georgia, further research is still needed to complete contrast and compare these laws in an effort to more fully interpret sovereign immunity laws as well as the exceptions to these statutes.

Of equal importance is the concept of cases involving personal injury. Plaintiffs in states surrounding Georgia have made the case that public school officials have at times had their constitutional rights violated. Still, interpretation of laws involving liability, or misinterpretation by the plaintiffs, has at times resulted in frivolous law suits. On occasion, suits against educators involving personal injury have been filed by plaintiffs in the federal courts as well. In their law review article, Zirkel and Clark (2009) noted that state courts across America have provided substantial protection from tort suits against school districts and their employees under the concept of sovereign immunity. However, the authors noted that the issue of immunity for educators has received little attention in the school law community, and they identified a need for further research. Maher, Price and Zirkel (2010) concluded in their state-by-state analysis of immunity and public schools, that the “current literature reflects insufficient knowledge about the topics of governmental and official immunity within the context of

public schools, contributing to a skewed perception of its present extent” (p. 247). As a result, the primary focus of this dissertation was to narrow the scope of cases down to those filed specifically in the state of Georgia in which cases of tort liability claims were made against either school districts or school personnel in the state of Georgia.

### Research Questions

The following questions were addressed in this study:

1. How have Georgia courts interpreted the Georgia Tort Claims Act in litigation against school personnel and school districts?
2. How do tort liability rulings, involving school personnel or districts, in other states within the United States compare with similar cases filed in Georgia since 1992?

### Definitions of Important Terms

- Administrative discretion - The power to choose between courses of conduct in the administration of an office or a duty pertaining thereto (Ballentine’s Law Dictionary, 2010)
- Claim - refers to any demand to recover damages from a governmental entity as a compensation for injuries
- Claimant - refers to any person seeking compensation under the provisions of the Georgia Tort Claims Act, whether by administrative duty or by the courts
- Discretionary power – Involves the exercise of judgment in reaching a decision; deciding whether to do something

- Employee - any officer, employee or servant of the state of Georgia or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or political subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision whether with or without compensation
- Injury - death, injury to a person, damage or loss of property or any other injury that a person may suffer that is actionable at law or in equity
- Law - all species of law including, but not limited to any and all constitutions, statutes, case law, common law, customary law, court order, court decisions, court opinion, court judgment or mandate, administrative rules or regulation, executive order, or principle or rule of equity
- Ministerial powers - refers to powers of a public officer which require no exercise of judgment or discretion
- Motion for summary judgment - a motion for summary judgment is not a trial; on the contrary it assumes that scrutiny of the facts will disclose that the issues presented by the pleadings need not be tried because they are so patently insubstantial as not to be genuine issues at all. Consequently, as soon as it appears upon such a motion that there is really something to try, the judge must at once deny it and let the cause take its course in the usual way (Ballentine's Law Dictionary, 2010)
- Negligence - refers to want of care (Black's Law Dictionary, 2009)
- Proprietary governmental Power- power exercised by the government as sovereign, being distinguished from power exercised by the government in a

- proprietary or business capacity (Ballentine's Law Dictionary, 2010)
- State - the state of Georgia and any office, department, agency, division, bureau, commission, board, institution, hospital, college, university, airport authority or other instrumentality thereof, whether or not such body or instrumentality thereof has authority to levy taxes or to sue or be sued in its own name

### Summary of Chapters

Chapter 2 provides a comprehensive review of literature surrounding the history of governmental sovereign immunity in the United States as well as states in the southern part of the United States such as Mississippi, Texas, and Oklahoma, all of which adopted similar statutes. Cases involving tort law and the application of immunity principles in the state of Georgia are also thoroughly examined in this chapter. Review of literature pertinent to the subject and application of immunity laws in Georgia are also included in this chapter.

Chapter 3 focuses specifically on the methodology utilized in answering the two initial driving questions. This dissertation is a case study involving the comparison and contrast of cases involving the application of governmental sovereign immunity statutes in states of the southern part of the United States. This contrast and comparison of cases as well as research techniques are both described in length in Chapter 3.

Chapter 4, by design, concentrates on Georgia cases and discusses, with the intention of fully analyzing the applicability of the tort claims act, several court rulings ranging from district courts all the way to the Georgia Supreme Court.

Chapter 5 offers implications and findings from the cases referenced in Chapters 2 and 4 discussed with an articulation of just what these rulings represent for today's educators. A comparison of liability issues unique to each of the states in this study are presented as well. Additional analyses of specific limitations to sovereign immunity, as it relates to each of the states reviewed, are also included in Chapter 5.

School districts and school employees will, as a result of this dissertation, be able to form an educated action plan in terms of their own respective responsibilities as professional educators. It is also the intent of this chapter to challenge future educators with the need for further research into the matter of official governmental sovereign immunity. Current trends in the field of education are always changing and rulings are often times driven by forces other than precedent. While case law and precedent are indeed important, Chapter 5 presents the reader with an option for further research.



## CHAPTER 2

### REVIEW OF LITERATURE

This study analyzes court decisions in the state of Georgia involving districts and their respective employees in terms of liability issues and interpretation of the Georgia Governmental Tort Claims Act of 1992. In Georgia, the state legislature adopted the Governmental Tort Claims Act in 1992, effectively ending the sovereign immunity protection the state had enjoyed against tortuous lawsuits. In Lacefield's dissertation (2010) he notes the doctrine of sovereign immunity can be traced back to a point in time in which English common law made its way to the United States in the early nineteenth century. Over time, the concept of sovereign immunity began to lose its significance as states began a push to ensure that the rights of injured parties were protected and could be resolved through litigation, even if those responsible were governmental state and local officials.

Chapter 2 examines tort liability as well as different types of negligence. Additionally, the historical concept and evolution of governmental sovereign immunity in the United States is reviewed leading up to the passage of the Federal Tort Claims Act of 1946, which, in turn, was the catalyst for other states to pass their own respective versions of tort claims acts. Analyses of the Federal Tort Claims Act of 1946 as well as the Tort Claims Acts of Oklahoma, Texas, Mississippi, and Georgia, are all addressed in this chapter in order to provide sufficient understanding as a prelude to analyzing cases in this chapter. Further analysis of cases involving tort liability specific to Texas, Oklahoma, and Mississippi is presented in this chapter in order that proper contrasts and comparisons to cases in Georgia be made in Chapter 4.

## Tort Liability and Types of Negligence

Tort liability, as defined in Alexander and Alexander, (2009), refers to liability incurred when a civil wrong against a person is caused by malicious intent or negligence and the overall disregard for human rights. According to Keeton, Dobbs, Keeton, and Owen (1984), a tort is defined as a civil wrong, other than for breach of contract, for which the court will provide a remedy in the form of an action for damages. Tort law is based on the legal premise that individuals are liable for the consequences of their own conduct (or lack of conduct) when such actions result in injuries to others. Grounds for actions in tort can be divided into three categories: (1) intentional interference; (2) strict liability; and (3) negligence. Although it is possible that each of these three can, at times, be applied to cases in public schools, it should be noted that in most education-related civil lawsuits there are two main categories of tort liability relevant to professional educators; intentional and negligent torts.

According to Alexander and Alexander (2009), a prerequisite must exist before and action or inaction can be determined negligence. They are: “a duty to protect others, a failure to exercise an appropriate standard of care, the existence between a causal connection between the act and injury, called proximate or legal cause, and an injury, damage, or loss” (p. 646).

The principle of sovereign immunity is based solely on the premise that a governmental entity cannot be sued in the very courts that they themselves have established. The United States Supreme Court articulates this as such, “A sovereign is exempt from suit, not because of any formal conception or obsolete theory but on the logical and practical ground that there can be no legal right as against authority that

makes the law on which the right depends” (*Kawananakoa v. Polyblank*, 1907, p. 353).

Scholars believe the concept of sovereign immunity “was a product of the Dark Ages, when custom established that the lord of the fief was also the lawmaker and judge.” Alexander and Alexander (2009) note that “since the lord was singly responsible for all laws and justice, and since he made and implemented the laws, he could not be sued without his permission” (p. 731).

According to the commentary of the Restatement of the Law (Second) of Torts § 895A (1965), the acceptance of the “feudal and monarchistic doctrine of sovereign immunity in the United States is obscure” (p. 396). It should come as no surprise that the American legal system would support the concept of governmental sovereign immunity from its inception, especially since the American legal system is based largely upon English common law.

One important Supreme Court case in the early nineteenth century supported the concept of sovereign immunity. The case of *Cohens v. Virginia* (1821) specifically supported the doctrine of sovereign immunity. In this case, the Supreme Court reaffirmed the fact that suits cannot be brought against the United States without the consent of the government, thereby reaffirming the principle of sovereign immunity.

As a result of precedent, the national government was afforded a wide degree of protection against tort claims, due in large part to the principle of sovereign immunity. Around the midpoint of the nineteenth century, in 1855, Congress created a court of claims for hearing claims against the government. In 1877, Congress adopted the Tucker Act which conferred jurisdiction on a federal Court of Claims to resolve various claims against the United States. Both the court of claims and the adoption of the

Tucker Act paved the way for the passage of the Federal Tort Claims Act of 1946 whereby Congress permitted suits to be brought against the federal government for personal injury claims based on negligence (Second Restatement of Torts § 895A, 1979, pp. 896-897).

State rulings involving the application of governmental sovereign immunity are often decided according to the degree in which state legislation recognizes the principle. For this reason, a general articulation of the expression of sovereign immunity, as it applies to the states, can be found in the Second Restatement of Torts § 895B (1979):

§ 895B States:

1. A State and its governmental agencies are not subject to suit without the consent of the state.
2. Except to the extent that a State declines to give consent to tort liability, it and its governmental agencies are subject to the liability.
3. Even when a State is subject to tort liability, it and its governmental agencies are immune to the liability for acts and omissions constituting;
  - a. The exercise of a judicial or legislative function, or
  - b. The exercise of an administrative function involving the determination of fundamental governmental policy.

Consent to suit and repudiation of general tort immunity do not establish liability for an act or omission that is otherwise privileged or is not tortuous (Second Restatement of Torts § 895A, 1979, p. 396).

## History of Sovereign Immunity in the United States

In terms of historical context, the overall doctrine of sovereign immunity as an element of English common law first appeared in the United States in the early nineteenth century. As the twentieth century began, the rights of individuals injured as a result of negligence began to supersede the previously unquestioned protection offered through sovereign immunity laws transported over from England as part of the English common law practice. As most are aware, the Eleventh Amendment prohibits suits from being levied against states in federal courts. Chapter 2 reviews pertinent literature centered largely on historical cases filed in Texas, Oklahoma, Mississippi, and Georgia involving legal litigation brought against either educational entities or its employees. As an introduction to these cases, the Federal Tort Claims Act of 1946 must first be explained in depth, followed by the individual tort claims acts of each the states previously mentioned.

### Federal Tort Claims Act

The Federal Tort Claims Act (1946) (60 Stat. 842) removed the inherent immunity of the federal government from most tort actions brought against it and established the conditions for the commencement of such suits. The Federal Tort Claims Act permits persons to sue the government of the United States in federal court for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. In passing the Federal Tort Claims Act, Congress allowed the federal government to be sued.

The Federal Tort Claims Act has its limitations. Under the FTCA, the United States is liable in the same manner and the same extent as a private individual under like circumstances, but is not liable for interest prior to judgment or for punitive damages. Federal courts have jurisdiction over such claims, but apply the law of the State where the act or omission occurred. Thus, both federal and state law may impose limitations on liability. The FTCA exempts, among other things, claims based upon the performance, or failure to perform a discretionary function or duty. The FTCA also exempts a number of intentional torts. However, the FTCA does not exempt intentional torts for investigative or law enforcement officers, allowing aggrieved individuals to bring lawsuits. The Supreme Court affirmed this so-called "law enforcement proviso" in *Millbrook v. United States* (2012) where a federal prisoner was allowed to bring a claim against the United States for intentional torts committed by federal prison guards in the scope of their employment.

The Federal Tort Claims Act was passed following the 1945 B-25 Empire State Building crash, where a bomber piloted in thick fog by Lieutenant Colonel William F. Smith, Jr. crashed into the north side of the Empire State Building. As National Public Radio (NPR) reported, eight months after the crash, the U.S. government offered money to families of the victims. Some accepted, but others initiated a lawsuit that resulted in the landmark legislation ultimately leading to the Federal Tort Claims Act of 1946, which, for the first time, gave American citizens the right to sue the federal government. Although the crash was not the initial catalyst for the bill, which had been pending in Congress for more than two decades, the statute was made retroactive to 1945 in order to allow victims of that crash to seek recovery. This historical event,

without question, played a large part in establishing a need for individuals to rightfully file claims, via legal means, against the federal government for tortuous acts. As a result, the Federal Tort Claims Act of 1946 was enacted, which ultimately led to other states in the union adopting similar Tort Claims Acts.

The following paragraphs describe the Tort Claims Acts of Oklahoma, Texas, Mississippi, and Georgia, including pertinent tort liability cases in each of the respective states. Purposeful descriptions of each of the respective tort claims acts are provided as an approach to fully understanding the contrasts and comparisons of each. Furthermore, each of these state tort claims acts provides a baseline of understanding, in order that commonalities may be evidenced in relation to the Georgia Tort Claims Act of 1992.

#### Oklahoma Tort Claims Act

At the prompting of the Oklahoma Supreme Court, the Oklahoma legislature enacted the Oklahoma Governmental Tort Claims Act in 1978 (OKLA. STAT. tit. 51 § 151 et seq.). This statute clearly outlined the specific circumstances in which entities of the state would be exempt from liability. The new Oklahoma Act defined the specific circumstances under which the state and its entities could be exempt from liability. The Oklahoma Tort Claims Act legislatively affirmed the traditionally accepted concept of sovereign immunity of the government and its entities, arising from British common law, by stating:

The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts. The liability of the state or

political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise. (OKLA. STAT. tit. 51 § 151)

According to Lacefield (2010), involving Tort Law Analysis in the state of Oklahoma, the Oklahoma Tort Claims Act affirmed the concept of sovereign immunity for the state of Oklahoma and its political subdivisions; it also sought to limit its scope by providing thirty-three specific exemptions from liability. These exemptions define the instances in which a governmental entity of the state of Oklahoma could not be held liable. All other circumstances could be subject to tort claims and liability. Specifically:

A state or political subdivision shall not be liable if a loss of claim results from:

1. Legislative functions;
2. Judicial, quasi-judicial, or prosecutorial functions;
3. Execution or enforcement of the lawful orders of any court;
4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;
5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;
6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;
7. Any claim based on the theory of attractive nuisance;
8. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision;
9. Entry upon any property where that entry is expressly or implied authorized by law;
10. Natural conditions of property of the state or political subdivision;
11. Assessment or collection of taxes or special assessments, license or registration fees, or other fees or charges imposed by law;
12. Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority;
13. Inspection powers or functions, including failure to make an inspection, review or approval, or making an inadequate or negligent inspection, review or approval of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety, or fails to conform to a recognized standard;



14. Any loss to any person covered by any workers' compensation act or any employer's liability act;
15. Absence, condition, location or malfunction of any traffic or road sign, signal or warning device unless the absence, condition, location or malfunction is not corrected by the state or political subdivision responsible within a reasonable time after actual or constructive notice or the removal or destruction of such signs, signals or warning devices by third parties, action of weather elements or as a result of traffic collision except on failure of the state or political subdivision to correct the same within a reasonable time after actual or constructive notice. Nothing herein shall give rise to liability arising from the failure of the state or any political subdivision to initially place any of the above signs, signals or warning devices. The signs, signals and warning devices referred to herein are those used in connection with hazards normally connected with the use of roadways or public ways and do not apply to the duty to warn of special defects such as excavations or roadway obstructions;
16. Any claim which is limited or barred by any other law;
17. Misrepresentation, if unintentional;
18. An act or omission of an independent contractor or consultant or his employees, agents, subcontractors or suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred;
19. Theft by a third person of money in the custody of an employee unless the loss was sustained because of the negligence or wrongful act or omission of the employee;
20. Participation in or practice for any interscholastic or other athletic contest sponsored or conducted by or on the property of the state or a political subdivision;
21. Participation in any activity approved by a local board of education and held within a building or on the grounds of the school district served by that local board of education before or after normal school hours or on weekends;
22. Any court-ordered or Department of Corrections approved work release program; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;
23. The activities of the National Guard, the militia or other military organization administered by the Military Department of the state when on duty pursuant to the lawful orders of competent authority in an effort to quell a riot, respond to either a natural disaster, military attack, or when participating in a military mentor program ordered by the court;
24. Provision, equipping, operation or maintenance of any prison, jail correctional facility, or injuries resulting from the parole or escape of a prisoner or injuries by a prisoner to any other prisoner; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated

- by the Department of Corrections;
25. Provision, equipping, operation or maintenance of any juvenile detention facility, or injuries resulting from the escape of a juvenile detainee, or injuries by a juvenile detainee to any other juvenile detainee;
  26. Any claim or action based on the theory of manufacturer's products liability or breach of warranty, either expressed or implied;
  27. Any claim or action based on the theory of indemnification or subrogation;
  28. Any claim based upon an act or omission of an employee in the placement of children;
  29. Acts or omissions done in conformance with then current recognized standards;
  30. Maintenance of the state highway system or any portion thereof unless the claimant presents evidence which establishes either that the state failed to warn of the unsafe condition or that the loss would not have occurred but for a negligent affirmative act of the state;
  31. Any confirmation of the existence or nonexistence of any effective financing statement on file in the office of the Secretary of State made in good faith by an employee of the office of the Secretary of State as required by the provisions of Section 1-9-320.6 of Title 12A of the Oklahoma Statutes;
  32. Any court-ordered community sentence; or
  33. Remedial action and any subsequent related maintenance of property pursuant to and in compliance with an authorized environmental remediation program, order, or requirement of a federal or state environmental agency. (OKLA STAT tit. 51 § 155 (2009))

Analysis of the Oklahoma Tort Claims Act provides insight into the fact that the State of Oklahoma had, for the first time in its history, enacted a law enabling governmental entities to be held responsible for acts of negligence. On June 25, 1993, Oklahoma adopted the *Standards of Performance and Conduct for Teachers* contained in Oklahoma Administrative Code, OKLA. ADMIN. CODE § 210:20-29-3. Oklahoma educators are charged by statute to protect the safety and well-being of their students. As a result of this administrative code, cases involving varied degrees of negligence by school officials in Oklahoma were evidenced. One such case involving sovereign immunity granted to school officials is the *Hull v. Wellston Independent School District* (2000), in which a Wellston high school football player, Ty, suffered a brain injury, broken collar bone, and a punctured lung during a practice football game. Ty's mother

filed suit against the school district and the Board of Education claiming that the coaches knew that Ty did not have parental consent to play and had not received the required medical examination. Furthermore, Ty's mother claimed he had been experiencing undiagnosed medical problems prior to the incident. Lastly, she claimed that the coaches were not trained to recognize and treat head injuries.

Her suit was dismissed by the trial court due to the fact that the Governmental Tort Claims Act prohibits suits against political subdivisions of the state of Oklahoma relating to any athletic contest. The attorney for Ty's mother in this case claimed that the district was at fault for the hiring of the football coaches. Once again, the trial court dismissed her suit based upon the fact that the Act prohibited her claims. This case eventually made it to the appellate court which affirmed the ruling from the trial court for the very reasons rendered originally.

In the Oklahoma tort liability case of *Curtis v. Board of Education of Sayre Public Schools* (1995), Clifton Curtis, a 12 year-old student in the Sayre public school system, sustained injuries to the head while participating in a physical education class at school. While playing catcher one day in physical education class, Clifton was struck in the mouth with a baseball bat, severely injuring him. Clifton Curtis' parents filed a case based upon negligent care, due to the fact that the teacher had not asked Clifton to put on a mask to play catcher.

The school district moved to have the case dismissed due to sovereign immunity and was granted dismissal at the trial court, only to have the appellate court reverse that decision and hold the school district responsible, due largely to the fact that "It held that competitive activities in which student participation is required as part of the educational

curriculum do not fall within the immunity protection of §155(20)” (*Curtis v. Board of Education of Sayre Public Schools*, 1995, p. 454).

The intermediate appellate court’s ruling was then appealed to the Oklahoma Supreme Court and was overturned by the court based upon the interpretation of the exceptions from immunity contained in the Governmental Tort Claims Act, which included all sports activities held on a school campus, whether or not they are competitive. The Oklahoma Supreme Court expanded district and educator immunity by broadly interpreting the exemption for sports activities contained in the Act.

Another case involving potential liability of an educator occurring in Oklahoma was the case of *Herweg v. Board of Education of the Lawton Public Schools* (1982), in which Gregory Herweg; a junior high football player broke his leg during football practice at school in which no adult supervision was present. Even though the students were waiting for practice to begin, the parents of Gregory Herweg contended that the coaches failed to lookout for the students.

The Herwegs also claimed that the coaches “failed to keep a proper lookout for the safety of the students, failed to maintain proper supervision and control, allowed reckless and dangerous activity, failed to act when alerted to the unsafe, failed to use reasonable judgment in directing the course, acted with total, utter, and reckless disregard for the right and safety of this minor and in a grossly negligent manner” (*Herweg v. Board of Education of Lawton Public Schools*, 1982, p. 673).

The district filed a motion to dismiss at the trial court level on the grounds that it was not liable under the Political Subdivision Tort Claims Act. The trial court agreed with the school district and dismissed the case. The appellate court overturned the trial courts’ dismissal of the case holding that:

The dismissal implied that there were no circumstances involving interscholastic high school athletics giving rise to a legal right of action against a school board

and its employees. The court held that the Political Subdivision Tort Claims Act, Okla. Stat. tit. 51 § 151 et.seq. (1978 Supp.), had not superseded the pre-Act exceptions to the immunity doctrine. (*Herweg v. Board of Education of the Lawton Public Schools*, 1982, p. 673)

On further appeal, the Oklahoma Supreme Court determined that the accepted method of raising the issue of sovereign immunity came in the form of a general demurrer, OKLA. STAT. tit. 12, § 267 (1981), and reversed the decision of the appellate court, thereby affirming the decision of the trial court.

### Mississippi Tort Claims Act

The State of Mississippi passed a Tort Claims Act in 1993 and for the first time allowed some degree of tort liability claims to be brought against school districts and/or their respective employees. The first case to be heard on the grounds of negligence after the passage of the Mississippi Tort Claims Act, involving a school, was *Prince v. Louisville Municipal School District* (1999). The case involves perceived negligence on the part of the two high school educator/coaches and showcases the need for deeper understanding this issue.

The facts of the case involve Richard Prince, a member of the Nanih Waiya High School Football Team. Richard Prince suffered a heat stroke while practicing and was subsequently hospitalized. He later filed suit claiming that his coaches Bowman and Chambliss were negligent in monitoring his health, failed to provide liquids, and did not seek out medical care in a timely manner, ultimately leading to his hospitalization. The trial court ruled in favor of the two coaches in granting summary judgment based upon the principal of governmental immunity. Consequently, Richard Prince filed an appeal to the Court of Appeals of Mississippi which concluded that the district and coaches

qualified for immunity. The Supreme Court of Mississippi ultimately heard this case and found the actions of the coaches to be discretionary, just as the lower courts had deemed. Consequently, this case, just as the others mentioned in Texas and Georgia based its initial ruling primarily around the fact that discretionary acts by employees of a school district are considered to be acts that, according to southern state statutes, provide a wide scope of immunity from torts involving claims of liability.

Another Mississippi case addressed the issue of liability when it comes to excessive corporal punishment when disciplining a student. In the 1998 Supreme Court of Mississippi case, *Duncan v. Chamblee*, (1998), a parent argued against the rulings of the lower courts in a suit against a teacher for excessive force in the manner in which she administered corporal punishment. This case is important, because it answers the question that many administrators and teachers have asked over the years in terms of how much is too much when using corporal punishment as a means of discipline. The facts of this case involve Raymond Duncan, a student at Leake County School District. Raymond Duncan claims that on consecutive days, February 27 and 28, 1996, he was physically injured when Ms. Lynn Chamblee, a teacher, administered excessive corporal punishment to him while in the course and scope of her employment. On April 5, 1996, Raymond and his mother, acting on his behalf, filed a complaint against the Leake County School District. The Defendants, Chamblee and Leake County School District filed their answer to this complaint in which one of their defenses was Duncan's failure to provide the 90 day notice of claim as required by Mississippi Code Ann. § 11-46-11(1) (Supp.1998). Secondly, they claimed in their response that they, along with the teacher were not liable for any injuries due to sovereign immunity. This case made its

way eventually to the Mississippi Supreme Court and after a lengthy review of the school district's policy manual, hospital records, as well as his disciplinary records, the defendants re-filed a Motion to Dismiss, again raising sovereign immunity as their absolute defense according to Mississippi Code Ann. § 11-46-11(1) and (2).

Final judgment in this case was eventually rendered by the Supreme Court of Mississippi and the court ruled that Ms. Chamblee was acting within the course and scope of her employment, thus according to Miss. Code Ann. § 11-46-7(2) (Supp.1998), she cannot be held personally liable. One point of particular interest is the fact that the Plaintiff, Duncan, while in the act of appealing the case to the Supreme Court of Mississippi, motioned for the case against the district to be dropped. Consequently, since the employee, Ms. Chamblee, was acting within the scope and duty of her employment with the district, the case against Ms. Chamblee was rendered moot by the court, albeit not due to sovereign immunity, but instead due to the granted motion to drop the School District from her suit.

#### Texas Tort Claims Act

In Nathaniel's dissertation (2009), his description of the Texas Tort Claims Act describes the degree to which governmental entities are protected in Texas.

As a general rule, governmental entities, such as school districts, are immune from liability due to the doctrine of sovereign immunity....With regard to school districts and community colleges, liability can be imposed only when the injury arises from the negligent use of or operation of motor vehicles operated by a school officer or employee within the scope of their employment. (Kemerer, Walsh, & Maniotis, 2005, p. 378)

"Hence, unless motor vehicles are involved, a school district is shielded by Texas law from tort liability" (Kemerer, Walsh, & Maniotis, 2005, p. 378). "Common Law

asserts that government is inherently immune unless the legislature specifically abrogates the privilege” (Alexander & Alexander, 2005 p. 632). The Texas Education Code provides professional school employees with qualified immunity from tort liability. This provision provides that a professional employee of a school district is not;

personally liable for an act that is incident to or within the scope of the duties of the employee’s position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students. (Texas Education Code Section 22.0511(a), 2009))

The Texas Supreme Court has established that the only exception to immunity for professional employees under the statute relates to the use of excessive force in disciplining students or being negligent in disciplining students so as to cause an injury (Kemerer et al., 2005). Only professional employees are covered by this provision. This statute (T.E.C. Section 22.051(a), 2003)), however, defines this term to include the following: superintendents, principals, teachers, substitute teachers, supervisors, social workers, counselors, nurses, teacher’s aides, student teachers, DPS-certified bus drivers, school board members, teachers employed by a third party that contracts with the school district, and anyone else whose employment requires certification and the exercise of discretion.

The following cases involving tort liability in Texas after the passage of the Texas Tort Claims Act are interesting in that they involve an assortment of negligence claims against school officials and/or districts. As has been the case throughout history, especially in the United States, state court systems have interpreted the conceptual idea of governmental immunity one way, only to have a ruling challenged to a higher level appellate court. Such was the case in *Pulido v Dennis* (1994) when a LaPorte,



Texas High School student, Jose Pulido, was a student in teacher James Fairleigh's vocational education class. During class, Pulido was allegedly assaulted by another student, Billy Collins. As a result, Pulido received a broken jaw. Pulido sued James Fairleigh and Jerry Dennis, principal of La Porte High School, for negligence that ultimately led to his injuries. Pulido's claims were based on the accusation that both Fairleigh and Dennis "knew or should have known that Collins was a delinquent minor with a propensity for violence and assaultive behavior and that their failure to discipline Collins was the proximate cause of Pulido's injuries" (*Pulido v. Dennis*, p. 48, 1994). When Fairleigh and Dennis filed for a motion for summary judgment and were awarded immunity under T.E.C. Section 21.912 by the trial jury, Pulido appealed the trial court's decision to the Court of Appeals of Texas. His argument centered on claims that the immunity laws in Texas do not apply when professionals are negligent and their negligence results in bodily injury. However, his argument also centered on the interpretation of the current immunity laws. If a person is provided immunity based upon his or her actions, does this apply when a person omits an action or fails to act in the appropriate manner? The answer, according to this case, is yes, a person is protected by governmental immunity protection, in part because the system, as is evidenced in this case, suggests that the protection can be applied to both acts and/or omissions of actions, as long as the individual is acting within the scope of their job. In other words, the word "negligence" encompassed both acts and omissions.

Another high profile case occurred in 1997 when a Calhoun, TX female student was fatally stabbed at school after a long series of arguments over the affections of a male student, also enrolled at Calhoun High School. In this case, the following facts

occurred: *Johnson v. Calhoun (1997)* Sheryl Hall, Cle Archangel, and Owen Dorsey were students at Calhoun High School in the spring of 1991. Hall and Archangel both sought Dorsey's affection, which led to several altercations over the week of spring break. After classes resumed on April 2, Archangel's grandmother and custodian, Marlene Archangel, went to the school and told the principal, Jim Collins, about the problems between the two girls. Jim Collins passed along the information to Vice-Principal, Ettie Kana, who spoke with the two girls separately and then sent them back to class. In between classes, the two girls had a verbal confrontation that was broken up by the school security guard. Archangel threatened to kill Hall during the confrontation. While walking to class after the confrontation, Archangel told Dorsey she had a knife in her purse. Dorsey testified that he thought a teacher overheard him ask Archangel to give him the knife. Kana polled the teachers after the incident and stated that none of the teachers knew about the knife. During lunch that day, Hall and Archangel again confronted each other. Archangel fatally stabbed Hall with the knife she had in her purse. Hall's mother, Olivia Johnson, filed a wrongful death suit against Calhoun CISD, Kana, and Collins.

Given the facts of this case, it would be easy to say that the principal, or vice principal could have prevented this death had they done something outside of just meeting and talking with the young ladies. However, as is often the case, it is impossible to know the potential for degree of harm, between individuals in dispute. In other words, the assistant principal, in this case, did indeed meet with both parties in an attempt to resolve the issue. Therefore, the claim of deliberate indifference does not apply. In the case of *Johnson v. Calhoun County I.S.D. (1997)* both the vice principal

and the principal were considered immune based upon section 25.051 of the Texas Education Code. The trial court granted summary judgment for all parties. Johnson appealed the lower court's decision, stating that the negligent failure to discipline Archangel led to her daughter's fatal stabbing. "The issue here is whether the negligent failure to discipline is actionable to the same degree as negligent discipline. The supreme court has answered this question in the negative" *Johnson v. Calhoun County I.S.D.* (1997). This court's ruling demonstrates that if a public school employee is negligent in failing to discipline a student, and the failure to administer discipline subsequently leads to bodily injury of a student, that employee is still immune from liability under T.E.C. Section 21.051.

Another relevant Texas case was heard by the Court of Appeals in 1980, *Wagner v. Alvarado*, (1980) and was based upon an appeal from a summary judgment. In this case, the Plaintiff-Appellants James E. Wagner and his daughter Susan K. Wagner, sued Defendant-Appellees Alvarado Independent School District, Susan's physics teacher, Arthur Rasmussen, Jay Martin, principal of Alvarado High School, and David Wilkinson, Superintendent of the Alvarado Independent School District, for damages sustained by Susan when she tripped and fell while carrying a glass jar full of acid at Alvarado High School. On May 24, 1977, Susan Wagner, a junior at Alvarado High School, was attending Appellee Rasmussen's physics class. On that day, the class was scheduled to review for the final exam to be given a few days later, but the review did not take the full class period. Alvarado Independent School District had just completed a new building at the high school and the science classes were to be conducted in the new building the next fall. Since many of the students had asked to see the new

classrooms and since there was some class time left, Mr. Rasmussen agreed to take those students who so desired to see the new building. All of the science lab equipment and supplies had been moved to the new building except twelve one-gallon jars of assorted acids which remained in the physics classroom at the time. Mr. Rasmussen further suggested that each of the students going on the tour carry one of these bottles with them. All but one of the students agreed to carry a bottle. Susan, like the majority, volunteered to carry a jar of acid. Mr. Rasmussen instructed the students to be very careful in the way they handled these bottles, explaining that they contained dangerous chemicals, and the class remained in a group, under his supervision, as the trip was made to the new building. All the students and the bottles arrived safely at the new laboratory. Sometime later Susan and a friend, without the express request or permission of Mr. Rasmussen, returned to the old classroom to get two remaining bottles of acid. On the second trip to the new building, Susan fell on the stairs, the bottle of acid broke, and Susan received the injuries which form the basis of this suit.

Mr. Wagner, Susan's father, argued that all Defendant-Appellees were negligent in: (1) directing and permitting his daughter to engage in such inherently dangerous activity without the consent of her parents; (2) in failing to hire professional and experienced contractors to move the dangerous materials; (3) in failing to use adult employees of Alvarado I.S.D. to move the dangerous materials; (4) in failing to provide his daughter with protective clothing to prevent injury while transporting the dangerous substances; and (5) in failing to flush her skin with water immediately after the accident.

The Defendants in this case, Alvarado Independent School District moved for summary judgment claiming its common law governmental immunity. Appellees

Rasmussen, Martin, and Wilkinson also moved for summary judgment claiming immunity under Sec. 21.912, Texas Education Code, as construed in *Barr v. Bernhard*, (1978). All motions for summary judgment were granted and Wagner's immediately appealed the summary judgment. Shortly thereafter, the Wagner's conceded that Alvarado Independent School District is immune from suit but they continued to prosecute the appeal as to the other district employees originally named. In this case, the Appellate court ruled once again that the judgments rendered in the initial trial court ruling of summary judgment, as to the remaining Appellees, must also stand.

The primary point raised on this appeal is whether the Appellees, as professional school employees, were, as a matter of law, immune from suit in this case. The Appellate Court was of the opinion that the Supreme Court's decision in *Barr v. Bernhard* (1978) is definitely controlling in this case. The Wagner family argued that to apply *Barr* to the facts in this case would be to establish a policy that when we send our children to school for purposes of education, we submit them to any and all acts, however dangerous or irresponsible. The Wagner family refused to accept this argument based upon Sec. 21.912 of the Texas Education Code, stating that *Barr* does not create an absolute immunity for professional school employees. Rather it creates a "qualified" immunity. *Barr v. Bernhard* (1978). The school employee is not immune from liability for all acts, but is only immune from liability so long as:

The acts are *not* acts of discipline, which through the use of excessive force or negligence, resulted in bodily injury;

The acts fall within the scope of employment; and

1. The acts involve the exercise of judgment and discretion of the employee.

The Wagner family argued whether in this case the acts meet these three requirements and thus the qualified immunity of Sec. 21.912, as construed in *Barr*, does protect the Defendant-Appellants. It is undisputed that the alleged acts of negligence were in no way disciplinary in nature. There is also no controversy regarding the fact that Mr. Rasmussen exercised his judgment and discretion in the complaint. Finally, the Appellants' own pleadings unconditionally allege that "at the time of the incident in question, Defendants Arthur Rasmussen, Jay Martin, and David Wilkerson were acting within the course and scope of their respective employments as agents, servants and employees of the Alvarado Independent School District. As a result of all three of these very important conclusions, the Appellate Court ruled that these pleadings are judicial admissions; and, as such, they remove from this case any issues related to whether or not the alleged acts were committed in the scope of employment. Consequently, the Appellate Court determined that the immunity created by Sec. 21.912, of the Texas Education Code, is applicable in this case and as a result, the summary judgment of the trial court was affirmed.

Another very important case in Texas involving the issue of sovereign immunity, as it relates to employees of a school district, is the Supreme Court of Texas case, *Hopkins v. Spring ISD*, (1987). This case was brought to the Supreme Court of Texas on an appeal from a summary judgment rendered for Spring Independent School District and several of its employees. In this case, the Texas Court of Appeals affirmed the trial court's judgment and as a result the plaintiffs in this case filed an appeal to the Supreme Court of Texas, where the Justices affirmed the ruling of the Court of Appeals. The detailed description of this case is as follows:

Celeste Adeline Hopkins, a student at an elementary school in the Spring Independent School District, suffered from cerebral palsy. Her mother, Celeste Eugenia Hopkins, alleged that while the students were left unsupervised, Celeste was pushed into a stack of chairs and sustained a head injury. Additionally, the mother claims that Celeste had mild convulsions, developed cold sweats and became dazed and incoherent. Celeste Eugenia Hopkins also claims that the teacher was negligent in that she did not call for help or send her to the school nurse. Later that day, an occupational therapist noticed the girl's condition and took her to the nurse, who, in turn, told Celeste that she was clear to stay at school. The nurse did not contact her mother, an employee of the school district, and did not contact her doctors, although the school knew the names of the doctors.

At the end of the school day, Celeste Adeline rode on the school bus to the day care center. She suffered severe convulsions while on the bus. The bus driver contacted a supervisor, requesting a school nurse be provided at the next stop, but none was provided. The driver was told to take her to the day care center, where she finally received medical treatment.

Two years later Celeste Adeline's mother sued Spring I.S.D., the bus supervisor, the school principal, the school nurse and the teacher. She claimed the school personnel's negligence and gross negligence in failing to provide adequate care dramatically decreased Celeste Adeline's life expectancy. Summary judgment was rendered for the school district and the employees based on the immunity granted the school district under the Tort Claims Act and the Texas Education Code. This ruling is significant because of the fact that the Supreme Court of Texas would have had to

overrule or abolish the immunity enjoyed by school district employees already established in the recent Supreme Court case of *Barr v. Bernhard* (1978) as a result of section 21.912 of the Texas Education Code.

The Texas Supreme Court case of *Barr v. Bernhard*, (1978), is a summary judgment case in which the question of liability is the central issue. This case involves whether or not the Kerrville Independent School district and certain members of its individual employees were responsible for personal injuries sustained by Mark William Bernhard, a student at Tivy High School of the Kerrville Independent School District. The trial court granted the school district's plea in bar on the basis of governmental immunity and granted the individual defendants' motion for summary judgment. Interestingly, the court of civil appeals affirmed the holding of the trial court regarding the school district, but reversed the judgment granting the individual defendants' motion for summary judgment and sent the case back to the trial court for a new trial. Once again, the trial court granted the school district protection on the basis of governmental sovereign immunity and also granted summary judgment for the individual employees. Consequently, this case eventually made it to the Texas Supreme Court where the final ruling reversed the judgment of the court of civil appeals and affirmed that of the trial court.

The facts of this case are as follows: Mark Bernhard was a student at Tivy High School and was enrolled in a vocational-agricultural course that called for him to raise a calf in order to satisfy the course requirements. The school district maintained a 73-acre facility, referred to as the Ag Farm, where the students in the course could keep or raise their animals. It was not mandatory that the students keep their animals at the Ag Farm;



but they could do so after obtaining permission from their instructors.

The Saturday, on which the accident occurred, Mark was at the Ag Farm with his parents and some friends to care for his calf. There were no school personnel present at that time. After weighing his calf, Mark and his friends attempted to lead the calf back into an old army barracks that was used as a barn. The calf struck a metal pole which supported a gable roof over the entrance to the barn. The pole gave way and the roof collapsed, pinning Mark underneath the structure and severely injuring him. The Bernhard family brought suit against the Kerrville Independent School District and certain of its individual employees alleging that they were negligent in several respects: by failing to properly inspect the facility, by failing to maintain or supervise the facility and by allowing the facility to be used while in a condition of disrepair.

The central question in this case and the major point of emphasis centered on the degree, if any, the school district should be held liable for the accident. According to the final ruling of the Texas Supreme Court, and in accordance with Section 3 of the Texas Tort Claims act of 1970, the School District is provided a waiver of government immunity for the use of publicly-owned motor vehicles, premises defects, and injuries arising out of conditions or use of property. However, with respect to the liability of a school district, the Legislature of Texas provided a more limited waiver of immunity, limiting the district's liability to only actions resulting from the use of motor vehicles. Therefore, the Supreme Court was unable to grant the waiver to the school district and as a result the district was granted immunity based upon the initial summary judgment. This ruling was a clear result of the fact that, in Texas, the law is well established in that an independent school district is an agency of the state and, while exercising

governmental functions, is not answerable for its negligence in a suit based upon tort (*Braun v. Trustees of Victoria I.S.D.*, 1938). Of particular interest in this case is the fact that Bernhard argued that this Court should abolish the provisions of section 19A that restrict a school district's amenability to suit. He also argued that the school district should waive any governmental immunity by the purchase of general liability insurance.

In Bernhards first argument, he tried to urge the Court to abolish section 19A of the Texas Tort Claims Act which limited the waiver of immunity for school districts to only cases involving negligent tort claims resulting from motor vehicle usage. The Bernhards based their argument that school districts should be placed on the same basis as other governmental units in waiving their immunity to the extent provided under Section 3 of the Texas Tort Claims Act, claiming that a case, *Lowe v. Texas Tech University*, (1976), ruled that any waiver of governmental immunity is a matter to be addressed by the Texas Legislature.

Bernhard then argued that the school district waived its governmental immunity by purchasing liability insurance, pointing out that several states have adopted this "insurance-waiver theory" in order to relieve unjust results that are sometimes produced by the doctrine of governmental immunity. The Texas Supreme Court was not swayed by this argument and consequently upheld the decision to grant immunity to the school district.

In support of his argument, Bernhard cited the case of *Christie v. Board of Regents*, (1961). Unfortunately for Bernhard, that court merely held that a trial court did not abuse its discretion by requiring the production of a liability insurance policy obtained by the Board of Regents as possible admissible evidence that the Board had

waived its immunity to the extent of the policy limits. In fact, there have been several Michigan decisions have held that there is no waiver of immunity when a governmental unit purchases liability insurance. (*Sayers v. School District No. 1*, 1962).

Bernhard also furthered his argument, relying on the case of *Schoening v. United States Aviation Underwriters* (1963). The Schoening case is relevant to a degree in that it deals with the collapse of a hangar at the municipal airport and that Governmental immunity was not held to be a defense to the extent that the municipality had purchased *liability insurance* to cover such risks. In this case, certain aircraft owners sued the municipality and its insurer for damages to the aircraft resulting from the collapse of a hangar at the municipal airport. Governmental immunity was held not to be a defense to the action to the extent that the municipality had purchased liability insurance to cover such risks. As a result, in reaching its decision, the court relied on a statute that explicitly stated that governmental immunity was waived to the extent of the coverage of the liability insurance policy that was purchased, (Minn. Stat. Ann. § 466.06, 1977). This is an important ruling because, as was the case in Minnesota, several states were beginning to include statutes that waived governmental immunity to the extent of the liability insurance purchased. This soon became known as the “insurance waiver theory.” *Holmes v School Board*, (1974), addressed the waiver of governmental immunity by statutes, expressing in clear and unambiguous terms that such immunity is waived only to the extent of the liability insurance purchased’ appears to be the trend among those states adopting the “insurance-waiver theory.” *Holmes v. School Board*, (1974). This “theory”, when applied to Section 9 of the Texas Tort Claims Act does not hold up, primarily due to the fact that language of Section 9 only *authorizes* individual

units of the government to purchase liability insurance. This provision in no way expresses intent on the part of the Legislature to waive governmental immunity based solely on purchase of insurance.

For that matter, other Texas cases, involving governmental agencies, have rejected the argument that just because an entity purchases liability insurance, they are waived of any governmental immunity. One such case, involving damage to property due to negligence is the case of *Sears v. Colorado River Municipal Water District*, (1972). The plaintiffs sued the water district for damages resulting from a fire that the water district started on lake property. The trial court did not award damages and instead rendered summary judgment based upon the district's claim of governmental immunity. As a result, the plaintiffs claimed that the district had waived its defense of governmental immunity because it had purchased liability insurance. Interestingly, this case eventually was heard by the Texas Court of Civil Appeals, which ruled that the trial court was correct in rendering summary judgment to the defendants. More importantly, the Civil Court of Appeals made the ruling "that just because a district purchases liability insurance, this cannot create liability where none exists in the absence of such insurance" (*Watkins v. Southcrest Baptist Church*, 1966). The final ruling of the court in *Sears v. Colorado River Municipal Water District*, (1972), stated that the school district is immune from liability under the doctrine of governmental immunity and the trial court was correct in granting their initial judgment.

While all five of the aforementioned Texas cases have shown the courts are more than willing to support individuals in the field of education when it comes to cases involving governmental immunity, it must also be pointed out that these varied levels of

protection may also apply to claims in which a school employees were said to have issued extreme levels of discipline. This brings into question the very definition of discipline as it pertains to the issue of governmental immunity for school employees.

One of the most cited cases involving discipline and liability of school employees occurred in Texas on March 10, 1989. The case of *Doria v. Stulting*, (1989) involves a situation in which a student Michael Doria refused to leave a classroom after the teacher repeatedly directed him to do so. The student had been in a verbal altercation with another student that had allegedly thrown a piece of fruit and hit his girlfriend. After several directives by the teacher, Don Stulting, the student repeatedly refused to leave the classroom and report to the vice principal. Mr. Stulting informed Michael Doria that if he did not leave, he was going to have to physically remove him from class. Doria responded by stating that if he was going to leave, then he was going to have to be physically removed by Stulting. Mr. Stulting then grabbed Doria by the arm and hair and escorted him out of the classroom and to the vice principal's office. Vice Principal Dewey Smith then administered punishment by placing Doria in alternative school for the remainder of the semester.

As a result of this incident, Michael Doria's parents filed suit claiming that their son had been injured as a result of Mr. Stulting physically removing him from class. Of particular interest in this case is the question of whether or not Mr. Stulting, acting in his role of teacher, was actually "disciplining" Michael Doria by removing him from class? The trial court granted Stulting's motion for summary judgment under Section 21.912 of the Texas Education Code.

Doria then appealed the trial court's decision to the Court of Appeals of Texas.

This court upheld the trial court's decision to grant summary judgment and concluded that Stulting did indeed have personal liability immunity in this case, based upon the fact that he was not actually administering punishment by simply removing Doria from his class. This case, in turn, set a precedent for further cases involving potential liability as it relates to school employees and student discipline.

As noted in Dobbs, Keeton, and Owen (1984), and furthermore supported in the Texas cases reviewed, some state legislatures have modified their governmental immunity doctrine by allowing lawsuits against governmental units that have procured liability insurance to cover judgments against them for negligence. North Carolina is an example of a state that has adopted this policy by statute. Section 115C-42 of North Carolina General Statutes provides:

Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

As the statutory language indicates, a North Carolina school district will only be deemed to have waived its governmental immunity if the liability insurance that it purchased actually provides coverage for the claim that was brought against the school district. For example, in the case of *Craig v. New Hanover County Board of Education* (2009), a school district was sued by a mentally disabled student who alleged that he had been sexually assaulted by another student while he was at school. The school district's liability policy explicitly provided that it did not provide coverage for sexual abuse claims and the liability insurance carrier refused to pay any money on the

student's claim. Under those circumstances, the school district had not waived its governmental immunity (Fossey & Carman, 2009).

### The Georgia Tort Claims Act of 1992

This review provides an overview of sovereign immunity in Georgia. It begins by outlining the history of sovereign immunity from statehood, specifically focusing on how Georgia first adopted the concept of sovereign immunity for governmental employees and political subdivisions, and how it has legislated and enforced the concept throughout its history.

Like most states, Georgia was protected from liability in all litigation brought specifically against the state and enjoyed the cloak of sovereign immunity up until the Georgia Tort Claims Act was passed in 1992. According to Maleski (1992), the history of the Georgia Tort Claims Act is one of complexity. In order to fully understand the current law, it is imperative that the complete historical perspective of governmental sovereign immunity be understood. In Maleski's 1992 article published in the Georgia State University Law Review, he stated "A complete understanding of the policy reasons for the enactment of the state tort claims act requires familiarity with that history" (p. 431). This article references the fact that the immediate cause of the 1992 Georgia Tort Claims Act can be attributed to a controversial 1991 amendment to the Georgia Constitution. Specifically paragraph 9 of that Amendment says that:

Except as specifically provided in this paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly, which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. (GA. CONST. art. I, § 2, ¶ 9, 1991)

During the 1990 Session the Georgia General Assembly approved House Resolution 777, which had the effect of restoring sovereign immunity until such time as the General Assembly approved a state tort claims act. The resolution, H.R. 777 (1990) which was adopted in the House and Senate, was sponsored in the House of Representatives by Representatives Thomas, Groover, Walker, and Murphy. The proposed constitutional amendment had many expressed purposes: to provide for waiver of sovereign immunity by enactment of a state tort claims act; to authorize the General Assembly to provide by law for procedures for the making and disposition of claims against the state and its agencies, officers, and employees; to waive sovereign immunity as to any action for the breach of a contract entered into by the state; to provide the circumstances under which officers and employees of the state may be subject to suit; to reserve sovereign and official immunity for the performance or nonperformance of official duties; and to permit waiver of sovereign immunity only by an Act of the General Assembly which specifically provides that sovereign immunity is waived and the extent of that waiver.

According to Maleski (1992), this resolution was presented to the Georgia voters in the form of a referendum on the November 1990 ballot and 53% of the voters said yes to this proposed constitutional amendment. As result, it became effective January 1, 1991, in effect changing the state's liability laws and giving the General Assembly the authority to specify under what circumstances the state could be sued. However, Georgia voters soon discovered that after the amendment's approval they were still unable to file claims against the state, its agencies, or political subdivisions unless and until the General Assembly adopted a tort claims act procedure.



According to Maleski (1992), the motivation for this constitutional provision is a matter of some debate and that the change in the constitution was at least partially attributable to the concerns of the Attorney General of Georgia. The Attorney General was concerned that official immunity would be waived under the existing 1983 version of the Georgia Constitution as interpreted by the Georgia Supreme Court in two recent cases. The Attorney General drafted a proposed tort claims act patterned after the Federal Tort Claims Act, and this draft legislation was introduced to the 1989 General Assembly. Some members of the General Assembly felt that specific constitutional authority was needed before a state tort claims act could be enacted, however, the Attorney General also assisted in the drafting of the proposed constitutional amendment, which was eventually adopted as House Resolution 777.

Maleski (1992) also states that shortly after passage of the amendment, lawsuits were brought in the United States Court of Appeals for the Eleventh Circuit and the Georgia Supreme Court. Among the plaintiffs, the public interest group Common Cause, with support from the Georgia Trial Lawyers Association, argued in federal court that the ballot summary of the constitutional amendment ratified in 1990 misled voters into thinking the measure would make it easier to sue the state, when the opposite was true. But U.S. District Judge J. Owen Forrester ruled against Common Cause and allowed the passing vote in the November 1990 election to be certified.

Legislation was introduced in the 1990 Session of the General Assembly because of concerns about the pending litigation in state and federal court. As a result, the Georgia General Assembly did not vote on the Georgia Tort Claims Act bill in 1990. However, prior to the 1991 Session, members of the General Assembly asked for

assistance from the State Bar of Georgia in drafting a state torts claims act to be considered during that session. Eventually, with the assistance of an advisory committee and the active involvement of members of the Attorney General's office, the General Assembly adopted the current version of the Georgia Tort Claims Act (Maleski, 1992).

As a result of the passage of the 1992 Georgia Tort Claims Act, several new features to Georgia laws involving governmental sovereign immunity were introduced.

Legislative intent is addressed as follows:

The General Assembly recognized the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the General Assembly recognizes that, while private entrepreneurs voluntarily choose the ambit of their activity and can thereby exert some control over their exposure to liability; state government does not have the same flexibility. In acting for the public good and in responding to public need, state government must provide a broad range of services and perform a broad range of functions throughout the entire state, regardless of how much exposure to liability may be involved. The exposure of the state treasury to tort liability must therefore be limited. State government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of this state that the state shall only be liable in tort action within the limitations of this article and in accordance with the fair and uniform principles established in this article. (O.C.G.A. § 50-21-21)

According to Maleski (1992), this legislation specifically addresses the fact that the state fully intends to limit the degree to which they may be held liable in terms of exposure to the state treasury. Additionally, this opening paragraph addresses the state's declaration that it shall only be liable within certain limitations to be determined and established throughout the remainder of the article.

Maleski (1992), also addressed the question of applicability of the act in his summary of (O.C.G.A. § 50-21-27 (a)), stating that this section clearly outlines the legislature's intent to define exactly what claims may be brought under the act.

According to Maleski (1992), if the loss or injury occurred on or after January 1, 1991, the claim must be brought under the Act. But, if the loss or injury occurred prior to that date, the Act does not apply, even if suit was filed after January 1, 1991. Thus, it is when the loss or injury occurred or should have been discovered that determines the applicability of the act.

Other procedural issues addressed under the Georgia Tort Claims Act include the specific rules of jurisdiction. Jurisdiction of claims under the Act lies in the state or superior court (O.C.G.A. § 50-21-28). The state explicitly limits its waiver of immunity to actions brought in the courts of the State of Georgia, and specifically does not waive the state's immunity under the Eleventh Amendment with respect to actions brought in the federal courts. Claims against the state must be brought in federal court as pendent claims or even as diversity claims.

Venue is normally in the Georgia County where the loss occurs (O.C.G.A. § 50-21-28). However, in any case in which a state officer or employee "may be included as a defendant in his individual capacity," (O.C.G.A. § 50-21-28) the action may be brought in the county where the officer or employee resides. For losses sustained in another state, suit must be brought in the Georgia County of residence of the state officer or employee whose actions or omissions are the basis of the claim against the state. This provision in the act describing the proper venue for losses sustained in another state makes it uncertain whether suit may be brought against the state for the acts of officers and employees who reside outside the state. The act provides for a jury trial by a judge without a jury (O.C.G.A. § 50-21-27 (a)), in which both the plaintiff and the defendant are subject to the ruling of the presiding judge.

Maleski (1992), clearly outlines the fact that when a person brings an action against the state under the provisions of this act, the state refers to the state government as an entity and does not allow for action specifically against the state officer or employee whose acts or omissions are put forth as the basis of the claim. If the plaintiff attempts to name a state officer or employee as a defendant, the agency must be substituted as the party defendant (O.C.G.A. § 50-21-25 (b)). If the conduct complained of did not occur within the scope of the officer's or employee's official duties or employment, the state has no liability for any resulting losses, and the complaint against the state must be dismissed (O.C.G.A. § 50-21-23 (a)).

The Georgia Tort Claims Act requires a claimant to file an anti-litem notice of a tort claim with the state before bringing suit (O.C.G.A. § 50-21-26 (a)). State courts will have no jurisdiction unless and until this notice has been timely and properly presented to the state (O.C.G.A. § 5-21-26 (a) (3)). Also, the anti-litem notice must be filed in writing within 12 months after the date of the loss was discovered or should have been discovered (O.C.G.A. § 50-21-26 (a)(1)). According to Maleski (1992), under the Georgia Tort Claims Act, the state and only the state is liable for money damages for a loss caused by the torts of its officers and employees committed while acting within the scope of their official duties or employment (O.C.G.A. § 50-21-23 (a)). The Act attempts to protect state officers and employees from individual lawsuits. Most negligence tort actions, as well as some intentional tort actions, may be brought against the state under the act.

The Georgia Tort Claims Act most certainly brought about significant changes to the concept of sovereign immunity and opened the door for suits to be brought against

governmental entities. In order to gain a more complete understanding of the impact of the Georgia Tort Claims Act of 1992, this dissertation asserts to analyze the following tort liability cases that occurred prior to the passage of the act.

#### Georgia Cases Involving Tort Liability Prior to the 1992 Georgia Tort Claims Act

Supreme Court cases involving torts and the issue of liability prior to the passage of the 1992 Georgia Tort Claims Act clearly outline the thinking of the Georgia Supreme Court Justices at the time. One such case is that of *Dugger v. Sprouse* (1988), in which a high school student, Darrin Dugger, a student at Murray County School system, was thrown from the back of a pickup while delivery wrestling mats to another school system. Appellee Anthony Plavich, an employee of the Murray County School system, motioned for a summary judgment based on defense of sovereign immunity, and it was granted. The fact that in this case the government entity was allowed to waive its sovereign immunity, by virtue of insurance obtained, is relevant. In this case, the trial court found that the policy did not provide coverage for the appellant's claim. And where there is no insurance coverage, there is no waiver of sovereign immunity. As a result, all of the justices concurred and the judgment was affirmed.

Another case of extreme relevance in terms of historical precedent involves the case of *Martin v. Georgia Department of Public Safety* (1987), in which the Georgia Supreme Court was called upon to re-examine the status of sovereign immunity in the state after the enactment of the 1983 Constitution, which provided for the waiver of sovereign immunity for the state or its agencies where liability insurance has been purchased (1983 Ga. Const., Art I, Sec. II, Par. IX). In this particular case, State

Patrolman D. E. Cochran initiated a high-speed chase to apprehend Charles Brewer, who was detected by Cochran to be speeding on Georgia Highway 400 in Lumpkin County. The subsequent chase covered 23 miles and two counties. It lasted 22 minutes and involved speeds in excess of 100 miles per hour, officers from three counties and the State Patrol. During the chase, Cochran was in radio contact with Alan Seabolt, a Lumpkin County Deputy Sheriff. The plan was that Seabolt would attempt to block an intersection ahead of Brewer and Cochran, thus ending the chase. At one point, Cochran requested Seabolt to hurry because Brewer was rapidly approaching the intersection in question. In that effort, Seabolt lost control of his car on a curve and crashed into a car driven by Martha Collins, knocking it down an embankment into a creek. She was killed, and her five-year-old grandson was rendered quadriplegic.

This tort suit was filed on behalf of the child against the Department of Public Safety, then Commissioner Hugh Hardison, State Patrolman D. E. Cochran, Lumpkin County Deputy Sheriff Alan Seabolt, his superior Sheriff Kenneth Seabolt, and Charles Brewer. Claims against Commissioner Hardison were based upon negligence, alleging that he failed to set out guidelines for high-speed chases and to train officers properly in that regard. The Department, Hardison and Cochran argued that, notwithstanding the provisions of the 1983 Constitution, they were immune from the prosecution of this claim under the principle of sovereign immunity. Georgia Supreme Court justices disagreed based upon the following issues. According to Art. I, Sec. II, Par. IX of the 1983 Constitution, the defense of sovereign immunity is waived as to those actions for the recovery of damages for any claim against the state or any of its departments or agencies for which liability insurance protection for such claims has been provided but

only to the extent of any liability insurance provided. In other words, the constitution of Georgia, even prior to their Tort Claims Act of 1992, allowed for sovereign immunity to be granted, in the event that the state agency had insurance and even then only to the degree that the policy covered. Of course, the state is not required to provide insurance protection either through purchasing coverage from a private carrier or through the establishment of a self-insurance fund. But if it does either, the waiver operates and the proceeds of a self-insurance fund would stand on the same footing as those available from a policy issued by a private carrier.

As pointed out by Justice Charles L. Weltner in his special concurrence in *Toombs County, Ga. v. O'Neal* (1985), when a public entity has purchased liability insurance, there is no need for the protection afforded by sovereign immunity. This opinion reflects the will of the people at the time and clearly sets up a system in which people harmed due to tortuous actions would be compensated for damages to the degree the insurance policy was set up to provide. Judge Weltner's concurrence in this case is significant because it clearly outlines the fact that the public's interest at the time took precedent over the pending costs to insurance companies.

#### Ministerial Versus Discretionary Acts

In cases involving possible liability of school districts and/or their respective employees involving acts in which a student was injured, it is important to understand the difference between acts considered ministerial versus an act that is considered to be discretionary. A ministerial duty refers to the official duty of a public officer wherein the officer has no room for the exercise of discretion, and the performance being

required by direct and positive command of the law. An act deemed to be discretionary, however, is an act that involves the exercise of judgment in reaching a decision.

The powers and duties of public officers are, in general, classified as ministerial and discretionary. The character of a duty as ministerial or discretionary is to be determined by the nature of the act to be performed, and not by the office of the performer. Official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts; that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature.

For example, the Georgia Supreme Court recently revisited the concept of discretionary versus ministerial distinction as it applies to school board policy. In the case of *Grammens v. Dollar* (2010), the Supreme Court of Georgia recently held that a public school teacher who allegedly failed to provide eye protection to her student during a science experiment exercised her discretion and was therefore protected by official immunity. The facts of the case are as follows:

David Dollar, a student in a science class taught by Patricia Grammens, suffered an eye injury while conducting an experiment that involved “launching” a plastic soda bottle by means of water and air pressure. Dollar filed suit against Patricia Grammens, alleging she violated the school board’s eye-protection policy, which required individuals to wear appropriate eye protection while participating in any course of instruction involving, among other things, “caustic or explosive materials.” The trial court granted summary judgment to Grammens on the ground that her actions were discretionary and protected by official immunity. The Court of Appeals of Georgia reversed, determining



that the eye-protection policy required a ministerial act. This case is important because the Court of Appeals makes a clear delineation between acts of discretion versus ministerial duties in making their ruling. The teacher in this case, did not follow the school board's eye-protection policy and consequently her inaction was one of ministerial duty. As a result, the Court of Appeals ruled that summary judgment could not be awarded to Patricia Grammens. If this policy had not clearly spelled out the expectations of the teacher, then the act of omission in regards to protective eyewear might have been deemed discretionary, thus affording the teacher immunity from liability.

Official immunity protects public agents from personal liability for "discretionary" actions taken within the scope of their official authority and done without willfulness or malice. However, public agents may be liable for "ministerial" acts performed with negligence. A ministerial act is commonly one that is simple, absolute, and definite, requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation or judgment, which involves examining facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. Where there is an established policy requiring an official to take a specific action in a specific situation, the policy creates a ministerial duty.

In reversing the Court of Appeals of Georgia, the Supreme Court of Georgia held that an official may exercise discretion in deciding whether the condition that is a necessary prerequisite to the ministerial act exists. Here, the ministerial duty requiring the use of eye protection depended on the use of "caustic or explosive materials." However, the policy did not define "explosive materials." Therefore, the policy required

Grammens to exercise her judgment, i.e., to engage in a discretionary act, in determining whether it was applicable to this particular experiment. The Court held that where a written policy requires the individual to exercise discretion in the implementation of the policy, the policy does not require a ministerial act, and the individual will be shielded by official immunity.

Cases involving the degree to which individuals or state entities are covered due to governmental sovereign immunity have been presented in this chapter in order that a baseline understanding could be established, in preparation for the comparison analysis of chapter 4. A review of the Tort Claims Acts of Texas, Oklahoma, Mississippi, and Georgia provide an opportunity to contrast the characteristics unique to each of the statutes. Chapter 4 provides a thorough understanding of cases involving tort liability and sovereign immunity in Georgia after the passage of the 1992 Georgia Tort Claims Act.

CHAPTER 3  
METHODOLOGY  
Research Design

The main focus of this dissertation was to provide legal analysis of the manner in which Georgia courts have applied the Governmental Tort Claims Act in court cases brought against school districts and public school educators. I used a qualitative case analysis of randomly chosen cases involving tort liability. The major objective of this dissertation was to analyze cases already filed and settled in the state of Georgia in determining answers to the two essential questions noted in the introduction. The following questions were addressed in this study: (1) How have Georgia courts interpreted the Georgia Tort Claims Act in litigation against school personnel and school districts; and (2) How do tort liability rulings, involving school personnel or districts, in other states within the United States, compare with similar cases filed in Georgia since 1992.

Throughout Chapter 2, this study examined qualified immunity for educators and public school employees in the state of Georgia. Additionally, for the sake of comparison, the issue of qualified immunity was also researched in cases settled in Texas, Oklahoma, and Mississippi. For complete understanding, a review of the Tort Claims Acts adopted by of each of the States previously mentioned, served as a basis of understanding in order that proper comparisons to the Georgia Tort Claims Act might be made.

## Data Analysis

In order to obtain and analyze data in a systemic manner, while reviewing multiple court cases, I used a method of data reduction, which I identified and pulled legal constructs from the respective cases in order that patterns and trends could be organized systemically. In this research, the trends identified and characterized as important to me involved the identification of cases involving litigation filed against school districts and employees in Georgia in which the actions of the defendants could be deemed as ministerial or discretionary. Cases in which litigation was filed post 1992 Georgia Tort Claims Act was also another criterion. According to Hughes (1989), data reduction analysis “is a form of research that sharpens sorts, focuses, discards, and organizes data in such a way that final conclusions can be drawn and verified. Reduced data can then be displayed in a manner that becomes usable to the practitioner” (p. 77). The data gathered from each of the cases researched was deemed relevant to the study by way of the actions of the defendants. All cases involved some type of tort action and are chronicled in table format in terms of which level of the court system made the final ruling. Another relevant trend involving the identification of ministerial versus discretionary acts, in each of the reviewed cases, is also referenced in Chapter 4. Research compiled in this study was gathered by analyzing case transcripts in order that trends could be narrowed down and properly illustrated, allowing the reader to draw comprehensive conclusions in regards to the application of immunity laws in Georgia as well as other states in the United States.

Cases specific to Georgia prior to the passage of the 1992 Georgia Tort Claims Act were intentionally reviewed in Chapter 2. Rulings involving liability issues and the

concept of sovereign immunity and subsequent exceptions to the law, particularly in the state of Georgia, were also examined. Sovereign immunity, as it is applied to educators in several other states was also examined for the sole purpose of comparison to the interpretation of laws in Georgia.

Legal research was performed by securing and analyzing law review articles, legal manuals, law texts, and secondary sources such as Findlaw and Westlaw. These sources allowed me to obtain familiarity with the specific legal topic of sovereign immunity for educators in the state of Georgia. Historical case studies involving the two research questions were analyzed, contrasted with similar court cases in surrounding states, and consequently fully interpreted.

Setting the foundation for a clear understanding of the concept of sovereign immunity as applied to states such as Georgia required me to obtain and analyze the following texts: *Prosser and Keeton on Torts* (Keeton et. al., 1984), Restatement (Second) of the Law of Torts (1965), a text of common law principles of tort law as it has developed over time in the United States of America. Additionally, I consulted the work of Walsh, Kemmerer, and Maniotis (2005) in order to develop a clear understanding of how governmental immunity had evolved in the state of Texas. The work of Walsh et al. (2005), is highly respected and provided the foundation of understanding necessary to analyze similar historical precedent in cases involving immunity provisions applied to Georgia educators and school districts. It is important to note that a comprehensive review of Georgia Educational Law comparable to the Walsh et al. (2005), work does not exist. As a result, the authors work was analyzed to examine the governmental immunity laws in other states within the United States.

By way of background, it is of the utmost importance to recognize that this study is a continuation of the research done by Carman (2009), which fully analyzed governmental immunity, as applied by the state and federal courts, for Texas educators, and the published article which directly resulted from the dissertation (Carman & Fossey, 2009). As a follow up to Carman (2009), the dissertation by Lacefield (2010), suggested the need for better understanding of the application of sovereign immunity issues in states bordering Oklahoma. Further research involving the issue of sovereign immunity and litigation against educators in the state of Mississippi were referenced in the dissertation by Kriesel-Hall (2013). Therefore, the intent of this research was to further the understanding of the concept of sovereign immunity in similar cases involving educators or school districts, as applied by state and/or federal courts in the state of Georgia.

Additional articles involving the subject of sovereign immunity and its subsequent development in the state of Georgia were accessed via searches done on LEXIS/NEXIS©, the database used to conduct legal research online. The LEXIS/NEXIS© database is available to all University of North Texas students via the University of North Texas Library homepage. Research information and law review articles involving the subject of governmental immunity in the state of Georgia revealed limited numbers of articles covering said topic.

In order to answer the two research questions posed in this dissertation, proper identification and understanding of published articles involving court cases filed and settled in the state of Georgia, in addition to cases settled in higher courts, were analyzed for the sole purpose of interpreting how the Georgia Tort Claims Act of 1992

had been applied in litigation involving Georgia educators and school districts. Georgia statutes were also obtained through LEXIS/NEXIS© as well as case law databases in order to find cases involving claims of wrongdoing by Georgia school personnel or districts. Once all cases and subsequent published Georgia court decisions involving the Georgia Governmental Tort Claims Act of 1992 were identified, each case was deemed relevant, or not, in terms of whether or not they were applicable to the questions identified in this research. Once the relevance of each applicable court decision had been made, a case by case analysis of the application of the Georgia Governmental Tort Claims Act was performed and applied to the research questions identified in this dissertation. Analyses of the Georgia cases relevant to this study and post passage of the 1992 Georgia Tort Claims Act are set forth in Chapter 4. The legal research process described above is exhaustive and comprehensive, and to my full confidence, has served as effective in answering the research questions of this study.

## CHAPTER 4

### FINDINGS AND IMPLICATIONS

Chapter 4, by design, is written in an effort to discuss and fully analyze cases involving tort liability in Georgia after the passage of the 1992 Georgia Tort Claims Act. Case summaries and discussion points are included to provide a clear understanding of how this statute has been applied in recent cases involving tort liability. Additionally, the implications of the Georgia Tort Claims Act were analyzed at the conclusion of the cases presented. The list of cases were applicable in this study due to the fact that each of them address the primary litmus test used to determine the degree of liability that a government shall be held responsible for tortuous action. This test involves the application and understanding of ministerial actions versus discretionary actions. As the cases are described, this central theme is prevalent in most, if not all, of the cases reviewed. The following cases involving tort liability occurred after the passage of the 1992 Georgia Tort Claims Act.

#### Georgia Cases Involving Tort Liability Since the Passage of the 1992 Georgia Tort Claims Act

Few cases in recent years have set in motion the degree of litigation that the *McDowell v. Smith* (2009) case did. In this particular case, Antuan Smith filed a complaint alleging, among other things, that school receptionist Stacey McDowell is liable for negligently releasing Ms. Smith's first-grade daughter to the girl's noncustodial father. The trial court granted Ms. McDowell's motion for summary judgment, finding that her discretionary actions in releasing the child to the father are protected by official



immunity. The Court of Appeals reversed the grant of summary judgment, finding that Ms. McDowell's acts were ministerial, and thus not within the scope of official immunity *Smith v. McDowell*, (2008). This case is significant, especially in terms of applicability to school policies and procedures, mainly because it sets in motion a precedent for several cases to come, many of which will ultimately be decided based upon this understanding and interpretation of ministerial versus discretionary acts of school employees.

On appeal from the grant of summary judgment, the court resolved to conduct a review of the evidence, and view the undisputed facts in the light most favorable to the nonmoving party (*Merlino v. City of Atlanta*, 2008). The appellate court ruled in favor of Ms. Smith due to the fact that the record shows that as the receptionist at Cook County Primary School, Ms. McDowell's duties included checking students out of school early. This is significant because it reflects this responsibility as an "official duty." School policy required that before releasing a student, she was required to check the student's information card to verify that the person picking up the child was actually authorized to do so. If the person was not listed on the card, the child could not be released, and an administrator had to be consulted. School policy further required her to consult with an administrator about any facsimile request for an early release.

One afternoon, Ms. McDowell received a telephone call and a facsimile note from a woman claiming to be Ms. Smith. The woman requested that Sidney Ledgester, the biological father of K. L., be allowed to pick the child up from school that day. Ms. McDowell looked for, but did not find, K. L.'s information card. She also checked K. L.'s file on the school computer, which contained no information about Ledgester. When Ledgester arrived at the school, Ms. McDowell checked his driver's license to confirm

his identity. She then called K. L.'s teacher, who sent the child to the office. K. L. recognized her father and appeared happy to see him.

Without consulting an administrator, Ms. McDowell released K. L. to Ledgester. K. L.'s grandmother later called to ask why the child was not on the school bus, and Ms. McDowell then realized that the earlier telephone call and facsimile note had not actually come from Ms. Smith. Ms. McDowell later found the student information card, which did not list Ledgester as a person to whom the child could be released. As is quite evident in this case, it is important to know and understand the complete doctrine of official immunity, as it applies to school employees.

The doctrine of official immunity, also known as qualified immunity, protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice, or corruption. Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or intent to injure. The rationale for this immunity is to preserve the public employee's independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight (*Cameron v. Lang*, 2001).

In this case, there is no evidence that Ms. McDowell acted with malice or intent to injure and as a result, the determination of whether she is entitled to official immunity is dependent on the issue of whether her actions were discretionary or ministerial. A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and

judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed (*Murphy v. Bajjani*, 2007).

In this set of circumstances, Ms. McDowell was not called on to exercise personal judgment, examine facts, reach reasoned conclusions or act in a way not specifically directed. On the contrary, she was merely required to execute specific duties as dictated by the school checkout policies. As the Court of Appeals found, these were hard and fast policies with no exceptions, policies which explicitly allowed for no discretion. Ms. McDowell repeatedly and positively testified that she had no discretion. Of course, this is an important element of this case due to the fact that if her actions had been discretionary, then she most likely would have been immune in terms of liability.

The child was not to be released without consulting the card and Ms. McDowell released the child without consulting the card. If the parent sent a fax request for release, Ms. McDowell was instructed to consult an administrator. In this incidence, she did not contact an administrator, which was a clear violation of check out policy. This is important because Ms. McDowell's mandated actions were simple, absolute and definite, and required the execution of specific tasks without any exercise of discretion. This is the primary reason that all but one of the Georgia Supreme Court Justices concluded that her actions were ministerial functions. Ms. McDowell contended that this case was controlled by early court cases in Georgia which provide proper precedent in that the duty to supervise, control, and monitor students is a discretionary function (*Reece v. Turner*, 2007; *Harper v. Patterson*, 2004; *Payne v. Twiggs County School District*, 1998).

Ms. McDowell further claimed that the Court of Appeals erred in failing to follow precedent and instead relied on case law from other jurisdictions. However, according to *Balmer v. Elan Corp.* (2003), the Court of Appeals, while not bound by the decisions of other states, certainly was at liberty to consider foreign authority. Additionally, the Court of Appeals conducted a thorough review of recent Georgia decisions and found that “a de facto absolute immunity for school employees had been developed gradually across the last decade. Not one recent case existed in which the Georgia courts have found a ministerial duty on the part of a school employee” (*Smith v. McDowell*, 2008, p. 92).

The Court of Appeals then properly determined that the instant case is factually distinguishable from those prior cases involving the discretionary function of supervising students (*Smith v. McDowell*, 2008). As a result of the Court of Appeals determination of relevance of prior cases, Ms. McDowell contended that her case is similar to *Perkins v. Morgan County School District*, (1996), which held that a secretary's early release of students pursuant to procedures set forth in a school handbook was a discretionary task.

However, once the Appellate Court analyzed this case, it became quite apparent that the Perkins case is materially different from this case because in the Perkins case the rules in the handbook required the secretary to exercise “discretion” as to the manner in which students were to be dismissed early from school. Conversely, as discussed above, the early release policies in this case did not allow for any exercise of discretion by Ms. McDowell, and instead required her merely to execute specific tasks. The determination of whether an action is discretionary or ministerial depends on the

character of the specific actions complained of, not the general nature of the job, and is to be made on a case-by-case basis (*Reece v. Turner*, 2007). In this case, since the specific actions mandated by school policy are ministerial, the Court of Appeals correctly concluded that they are not within the scope of official immunity. The final judgment in this case was affirmed by all but one of the Georgia Supreme Court Justices.

The following dissent from Justice Benham *Leake v. Murphy* (2005) describes his opinion in full and relies heavily on the premise of governmental sovereign immunity laws and prior cases in Georgia. His dissent from the majority's opinion was based upon his belief that Ms. McDowell was entitled to official immunity. Justice Benham further explained his dissent by pointing out that the majority opinion dismissed longstanding precedent that monitoring, supervising, and controlling the activities of students is a discretionary action protected by the doctrine of official immunity. *Leake* is directly applicable to this case. After an incident where a random man entered the school, the school adopted a policy whereby a person was required to stand in the lobby and make sure visitors entering the school signed in at the administration office which was adjacent to the lobby. In addition, the policy required the principal and her two staffers to monitor persons in the lobby by watching the lobby area from the glassed-in administrative office. The policy was in place for a year before the incident giving rise to the suit occurred. On the day of the incident leading to the suit, a mentally-ill man entered the school and severely injured a child. In contravention of the policy, there was no one stationed in the lobby to monitor visitors and the principal and her two staffers also failed to monitor the area from their office. The Court of Appeals held that the

principal and her two staffers had official immunity because, although there was a stated policy in place, they could not be held liable for the complete failure to perform a discretionary act (*Reece v. Turner*, 2007). This case solidified that opinion that decisions concerning the supervision of students and school personnel are considered discretionary, even where specific school policies designed to help control and monitor students have been violated (*Perkins v. Morgan County School Dist.*, 1996). *Chamlee v. Henry County Bd. of Ed.* (1999) explains this further by stating a discretionary duty is not transformed into a ministerial duty simply because a rule or policy has been promulgated concerning the discretionary activity. In other words, the supervision of students is considered to be discretionary even where specific school policies designed to help control and monitor students have been violated.

Monitoring and supervising students includes checking them in and out of school. According to two specific cases, *Perkins v. Morgan County School District* (1996) and *Wright v. Ash* (1996), the enforcement of policies regarding students leaving campus is discretionary. As such, Ms. McDowell's failure to adhere to the check-out policy was a failure to perform a discretionary act for which she could not be held liable. Any other ruling would have the effect deterring nonsupervisory employees from working in schools, and other state government positions, for fear of being sued for missteps in following policies designed to perform discretionary acts.

Here, Ms. McDowell attempted to adhere to what she believed was the proper policy and procedure, but was hindered by a series of routine omissions. She could not find a warning about releasing the child to the father because another coworker had not entered the warning into the computer; she could not locate the child's information card

because she had not been made aware of a new filing system; and she could not locate an administrator for consultation. Furthermore, Ms. McDowell was also the victim of a fraud. Additionally, due to the fact that the day-to-day vagaries of running an office are enormously stressful, an obvious breakdown of policy occurred. As a result, Ms. McDowell stood to take the brunt of liability for this unfortunate incident. This result is in contravention of the official immunity doctrine that all state agents, no matter their status, are immune from liability for discretionary acts performed in the scope of their authority. Such was the case in *Chamlee v. Henry County Bd. of Ed.* (1999), in which an automotive shop instructor supervising students fixing cars had official immunity although policy was not followed. This dissent was significant in that he clearly articulated other cases of precedent, most of which are analyzed further in this dissertation. Justice Benhams' sole dissenting vote allowed the research in this dissertation to proceed, as it presented several cases involving potential litigation against school districts and/or school personnel.

Another Georgia Supreme Court case, *Murphy v. Bajjani* (2007), involved a situation in which a student, Timothy Bajjani, was assaulted by a fellow student while both were attending North Gwinnett High School and suffered severe injuries as a result. As a result of this assault, Timothy's parents filed a lawsuit against the Gwinnett County School District, and all members of the Gwinnett County Board of Education, the superintendent of the Gwinnett County school system, and the principal, assistant principal, and clinic nurse of North Gwinnett High School.

Later, the Bajjani family dismissed their claims against the school district, the board of education, and the board members and employees in their official capacities,

leaving as defendants the principal, the assistant principal, and the clinic nurse in their individual capacities. The defendant in this case obviously felt that they were entitled to official immunity and as a result they filed a motion for summary judgment with the trial court. The summary judgment was awarded, as they had hoped, based upon the immunity afforded to them, acting in their respective capacities as an employee of a state entity.

However, this case was far from over. On appeal, the Court of Appeals reversed the judgment after making three determinations with regard to the allegations of negligent performance of the statutory duty to create a school safety plan that addressed security issues (OCGA § 20-2-1185(a), (c)). The court ruled that the absence of a school safety plan precluded the grant of judgment on the pleadings *Leake v. Murphy*, (2005). A claim of negligence for failing to report immediately to the district attorney and the police the name of the student believed to have committed an aggravated battery on school property was viable because Timothy was a member of the class the statute was intended to protect. And the harm he suffered, the aggravation of his injuries resulting from the delay in medical care the recipients of the report would have summoned, was the harm the statute was intended to guard against. Also, the claim that school personnel failed to obtain immediate medical care for Timothy was viable because school personnel had a ministerial duty to provide the student with adequate medical attention. Even if the duty were discretionary rather than ministerial, the allegations of willfulness, corruption, and malice were circumstances which could abrogate immunity defenses (*Bajjani v. Gwinnett County School District*, 2006). In the Court of Appeals, the Justices granted the defendants' petition for a writ of



certiorari to the Court of Appeals to review whether that court correctly determined the defendants were not entitled to judgment on the pleadings.

The Court of Appeals rejected the assertion by the defendant school superintendent and board of education members that official or qualified immunity protected them from the personal liability the plaintiffs sought to impose upon them with regard to the creation of a school safety plan pursuant to OCGA § 20-2-1185.<sup>1</sup> The Georgia Constitution provides:

Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. (1983 Ga. Const., Art. I, Sec. II, Par. IX (d))

Under this constitutional provision, qualified immunity protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done with willfulness, malice, or corruption. Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or intent to injure. The rationale for this immunity is to preserve the public employee's ability to act independently without fear of lawsuits and to prevent a review of his or her judgment in hindsight (*Cameron v. Lang*, 2001). This case is important in that it established a threshold in determining whether the Court of Appeals correctly determined that the defendant's actions were ministerial or discretionary.

In determining proper ruling the Appellate Court relied on its decision in *Leake v. Murphy*, (2005) ("Leake 1") in which the Court of Appeals determined that the

preparation of a school safety plan was a ministerial duty and that the legislature had conferred upon the county school board and the county school superintendent by enacting OCGA § 20-2-59. Consequently, it was the finding of the Appellate court that the absence of the plan from the appellate record precluded the grant of judgment on the pleadings. As a result the justices concluded that the holding in Division 1 of Leake 1 was incorrect and that it should overrule the portion of Leake 1 in which the court had previously relied.

A 2008 Georgia Court of Appeals case, *Reece v. Turner* (2007), involved a motion for summary judgment that was denied by the State Court of Cobb County on damages claims brought against them in their individual capacities by Mary Turner. The issue on appeal is whether appellants, as employees of the Cobb County public school system, were entitled to official immunity. In denying summary judgment to appellants, the trial court determined that, as a matter of law, appellants were not entitled to official immunity on the damages claims.

This case is interesting in that it is the only one in this study that disallowed individuals a motion for summary judgment based upon that fact that they were supposedly not entitled. Facts of the case are as follows; Mary Turner was a student at Pebblebrook High School in Cobb County. Earl Reece was the director of the performing arts department at Pebblebrook High School and Susan Goldsmith was principal of Pebblebrook from 1986 to 1992, and later Susan Gunderman assumed that role from 1995 to 1999.

This appeal arises out of efforts by Turner to hold appellants responsible for her sexual molestation by nonparty Virgil Spaur, who served as the technical director of the

performing arts department at Pebblebrook. Beginning in the 1996 academic year, Spaur initiated a pattern of inappropriate sexual conduct toward Turner, a 14-year-old freshman at Pebblebrook. The conduct, which occurred on and off school premises, lasted approximately nine months and included conversations of a personal nature, inappropriate touching, and having sexual intercourse with Turner, causing Turner to suffer severe emotional distress.

Spaur previously had sexually molested a minor female student at Pebblebrook in February 1992. Following an internal investigation, Reece and Goldsmith did not report the incident to the relevant child welfare agency, as required under OCGA § 19-7-5. However, Reece and Goldsmith did deliver a memorandum to Spaur that governed the future conditions for his employment in the performing arts department (The 1992 Memorandum). The 1992 Memorandum was signed by Spaur and stated that his employment would continue on a probationary basis.

The 1992 Memorandum listed certain “requirements and restrictions” placed upon Spaur. One requirement mandated that an instructor must be supervising any activity where students are present. In turn, Spaur was to never be alone with a student and the presence of an instructor was required. Additionally Paragraph 5 of this memo stated: “Any student who is assigned to work in the technical control booth must be approved by Mr. Reece. If students are assigned to the booth, at least two students must be present.” The 1992 Memorandum stated that “any infraction” of these paragraphs “would result in the immediate termination of Spaur's employment with Pebblebrook High School.”

Four years later in 1996, Spaur repeatedly spent unsupervised time alone with

Turner on school grounds, including in the technical control booth, resulting in their ongoing improper sexual relationship. Turner subsequently brought the instant suit against appellants in their individual capacities, alleging that they were liable for Spaur's misconduct. Turner contended that the 1992 Memorandum placed ministerial duties upon all of the school individuals involved requiring them to supervise Spaur and ensure that an instructor was always present whenever students were with him and requiring Reece to approve all students who worked in the technical control booth with Spaur. Turner further pointed out that school personnel had a ministerial duty under OCGA §19-7-5 and school administrative regulations to report the 1992 incident to the relevant child welfare agency, which they had not done. According to Turner, all school personnel failed to carry out these ministerial duties, which allowed Spaur to have unimpeded contact with Turner during the 1996 academic year.

As a result, school officials soon filed a motion for summary judgment contending that Turner's damages claims brought against them in their individual capacities were barred by the doctrine of official immunity and the affirmative defense of assumption of the risk. The trial court denied the motion, but only addressed the official immunity argument. The trial court reasoned that based on the 1992 Memorandum, appellants' duties were ministerial in nature, which deprived them of official immunity. The trial court further determined that there was a genuine issue of material fact over whether appellants had negligently breached the duties imposed upon them by the 1992 Memorandum, rendering the grant of summary judgment to appellants inappropriate. The trial court's refusal to grant summary judgment to school personnel was based on the contention that the trial court erred in concluding that the 1992 Memorandum

imposed ministerial rather than discretionary duties upon them, which in turn deprived them of official immunity. The appellate court agreed due to the fact that the law specifically states that a suit against a public officer acting in his or her official capacity will be barred by official immunity unless the public officer (1) negligently performed a ministerial duty, or (2) acted with actual malice or an actual intent to cause injury while performing a discretionary duty. (See Ga. Const. of 1983, Art. I, Sec. II, Par. IX (d) (as amended 1991)). In other words, public officials are immune from damages that result from their performance of discretionary functions, unless those functions were undertaken with malice or intent to cause injury (*Harper v. Patterson*, 2004). As was evidenced in this case, the request for summary judgment was denied since the actions of school officials were deemed ministerial. Obviously, the school officials in this case failed to follow the very plan they had put in place to protect the student. Therefore, the motion to grant summary judgment was denied by the trial court.

In the case of *Harper v. Patterson*, (2004), Jaime Harper and other students also named as plaintiffs, were enrolled in a special education class taught by Jeffrey Stephen Patterson that was supervised by Phyllis Sparks Ramsey (both defendants). In this case, the plaintiffs are mentally handicapped and also suffer from a number of physical, mental and emotional disabilities. The plaintiffs alleged that while enrolled in a special education program they were subjected to repeated sexual abuse, exploitation, and harassment by Patterson, a paraprofessional employed to assist them, and that Ramsey, their special education teacher, allowed Patterson to molest them and take pornographic pictures of them while participating with him in some of these activities.

The plaintiffs appealed the trial court's grant of summary judgment to defendants

Ben Arp and Danette Ozment, two school officials, based on the statute of limitation, and the Gilmer County School District based on sovereign immunity. They further appealed the grant of summary judgment, on the pleadings to Ramsey, based on the defense of official immunity. The plaintiff felt as if Ramsey had been negligent in performing the duties of his job, which would have superseded the ability to be granted summary judgment based upon immunity. This appeal was denied and the trial courts decisions were confirmed unanimously by the Appellate Judge Barnes. The relevant issue in this case centers around the fact that although the employee's acts were considered acts of malice, and they were ultimately held responsible for their actions, the district was not found to be at fault, due to sovereign immunity. This can be attributed to the fact that under Art. I, Sec. II, Par. IX of the Georgia Constitution of 1983, the defense of sovereign immunity extends to a county-wide school district (*Coffee County School District v. Snipes*, 1995). The justices also pointed out that the plaintiff's arguments that sovereign immunity did not apply because the actions taken involved malice, were ministerial, or violated the public duty doctrine, misrepresented the constitutional provision of sovereign immunity.

In the Georgia Supreme Court case of *Payne v. Twiggs County School District* (1998), a question was certified by the United States Court of Appeals for the Eleventh Circuit regarding the interpretation of OCGA § 20-2-1090, which required school boards to insure students against injuries sustained in school bus accidents. In answering the certified question, one must interpret the language used both in the statute and in the insurance contract according to its plain and ordinary meaning. According to statute section 20-2-1090, direct action against a school bus insurer to recover damages for

injuries sustained solely due to one student physically attacking another student while on a school bus is not allowable. At issue in this case was the defense of the Twiggs County School District, the school assistant principal, Basley, and Bowden, the bus driver at the time of the incident. On May 5, 1993, while riding a school bus home from school in Twiggs County, Payne was attacked with a knife by Smith, a fellow student, and badly cut on the face. Payne brought an action in the United States District Court for the Middle District of Georgia against the Twiggs County School District. Assistant principal of the school, and the driver of the bus at the time of the incident.

The complaint asserted a cause of action under 42 U.S.C. § 1983 and Georgia principles of negligence liability. Payne later amended her claim to include Selective Insurance Company, the Twiggs County School District's insurer. The school district, assistant principal, and the bus driver all filed summary judgment motions, which were granted by the district court. The insurance carrier, Selective, filed a separate motion to dismiss Payne's action, which was denied by the district court. The court investigated whether the statute allowed a direct action against a school bus insurer in a case where one student sustains an injury resulting from an attack by another student on the school bus. The insurance policy in question provided coverage that would pay all sums an insured person legally must pay as damages because of bodily injury or property damage to which the insurance applied as long as it was caused in an accident resulting from the ownership, maintenance, or use of a covered auto. This answer to the question presented was important because it clearly delineated the difference in when insurance claims should be awarded. None of them included assault from one of the bus riders. According to OCGA § 20-2-1090, the various school boards of the counties,

cities, and independent school systems employing school buses were authorized and required to carry policies to insure the school children riding to and from school against bodily injury or death at any time resulting from an accident or collision in which such buses are involved. In plain terms, statute OCGA § 20-2-1090 required school boards to purchase insurance in the event of an accident resulting from a collision in which the bus is involved. When a student riding on a school bus suffers an injury that is not proximately caused by an accident or collision in which the bus is involved, such as when the student is injured due to an attack made by a fellow student, OCGA § 20-2-1090 is not applicable. Accordingly, the school board was not required by the statute to insure against the type of injuries Payne sustained due to Smith's attack.

Consistent with the requirements of Code section 20-2-1090, the Selective policy procured by the Twiggs County School Board insured against bodily injury caused by an accident and resulting from the ownership, maintenance, or use of a covered auto such as a school bus, and required Selective to pay all sums its insured must pay due to such bodily injury. As explained above, the facts alleged by Payne do not show a causal connection between her injuries and the use of a Twiggs County school bus, nor do her allegations show that her injuries were sustained as the result of an accident involving a school bus. Rather, she alleges that her injuries were the direct result of an attack inflicted by a fellow student. The school bus is only connected to Payne's injuries to the extent that it was the site of the attack. What is evident here is that the Court of Appeals has concluded that the injury bears no apparent relationship to the operation of the vehicle or to how it was being used. Instead, on this occasion, injuries were the result of a deliberate assault which took place in the vehicle simply because that is where the



victim happened to be when the assailant came for him. Under these circumstances, Justices found no causal connection or relationship between the use of the vehicle and the injury, and as a result concluded that the injury was not covered under Policy 5. The court then concluded that the terms of the selective policy did not insure against the harm suffered when Smith attacked Payne.

This case is extremely important to the interpretation of liability when a school motor vehicle is concerned. Of particular interest is the fact that according to court interpretation of statutes, a school district's coverage by insurance does not provide automatic coverage in an event such as this. A student attacking another most definitely is not covered by the school's insurance. Since the insurance did not cover the assault, the school district was not held liable for any damages in this case.

Another Georgia Appellate case, *Welborn v. DeKalb School District* (1997) involves Melia Wellborn's appeal of an earlier trial court dismissal of her complaint against Bruce Finkbone, the DeKalb County School District and unidentified Defendants X, Y, and Z. She contended that the court erred by dismissing her individual claims and by dismissing the DeKalb County School District as a party defendant. The facts of the case are as follows: This suit was brought by Wellborn, individually, and as next friend of her hearing-impaired son who, while a minor, allegedly was drawn into a sexual relationship with his sign language interpreter, Finkbone. Wellborn alleges that Finkbone began the relationship with her son in 1992 when the boy was 14 years old and that the school district and its employees knew or should have known that Finkbone engaged in homosexual acts with students.

Wellborn's first complaint alleged various state and federal causes of action

against Finkbone, the DeKalb County School Board, and the unidentified defendants. Later, Wellborn filed an amended and recast complaint that dropped the school board as a defendant but added the DeKalb County School District to the other defendants. Then, because Jason Wellborn reached the age of majority during the pendency of this action, the school district moved to dismiss the case because of the failure to join the real party in interest (OCGA § 9-11-17(a)) and also moved to dismiss Wellborn's complaint because she failed to seek the trial court's permission before adding the school district as a party (OCGA § 9-11-21), because the school board is not an entity subject to suit, and because there had been no waiver of sovereign immunity.

Subsequently, the trial court found that Jason was the real party in interest and thus was indispensable to the action. Therefore, the trial court ordered Wellborn to join or substitute Jason as a plaintiff or face dismissal. The trial court also found that the school board was not a party capable of being sued (*Cook v. Colquitt County Bd. of Ed, 1992*), and that the school district had never been properly served with process. As a result of these findings, the complaint was dismissed against the school board and the school district.

The *Cook v. Colquitt County Board of Education* (1992) case was significant in that it clearly articulated the fact that school boards cannot be sued. This Georgia Supreme Court case ruling affirmed the lower courts understanding of the fact that school districts cannot be sued and the following commentary by Georgia Supreme Court Justice Hunt described the rationale behind the decision. Justice Hunt explained that in a long line of cases the Court of Appeals has always held to the fact that a county board of education, unlike the school district it manages, is not considered to be

a body corporate. If that were the case then the entity would have the ability to be sued. However, by definition, the fact that the county board of education is not considered to be a corporate body means that it does not have the ability to be sued. What is interesting is the fact that the plaintiffs contended that the aforementioned rule did not apply due to the changes provided by the adoption of the Constitution of Georgia, 1983, Art.1, Sec. II, Par. IX. The change referred to by the plaintiff involves the recovery of damages for any claim against the state or any of its departments and agencies for which liability insurance has been provided, but only to the extent of what is covered by the policy. This change was not applicable in this case due to the fact that the event was not due to the actions of the school district or its employee.

Four of the seven Georgia Supreme Court Justices concurred as well, based upon the fact that school boards are not legal entities unless so authorized by legislative act. The plaintiff's in this case argued that according to prior ruling in *Thigpen v. McDuffie County Bd. of Ed.* (1985) and its understanding of this constitutional amendment, a school board is now a legal entity with the capacity to sue and be sued. Dissenting Justices wholeheartedly disagreed with this interpretation and as a result stayed with their initial ruling.

Another case involving a situation in which notice of claim and strict adherence to the rules that regulate the ability to file suit according to the Georgia Tort Claim Act is the case of *Driscoll et al. v. Board of Regents of the University System of Georgia* (2014). In this particular case, claims were filed on behalf of the deceased wife involved in an automobile accident when the tire of a Georgia State University owned van came off, jumping the median and striking her car, killing her. Almost a year after the accident,

counsel for the decedent's estate sent an "ante litem notice" to the Risk Management Division of the Georgia Department of Administrative Services also known as the D.O.A.S. Even though the notice included important items such as the date of the incident, location, injury and entities involved, as well as a brief description of the accident, the notice still failed to meet the proper requirements to make a claim due to since it failed to provide the amount of loss claimed. As a result of this case, it became evident that in order for a plaintiff to avoid the State's defense of immunity, proper understanding of procedures involving notice of claim are of paramount importance. As a result of the plaintiff's failure to state any amount of loss whatsoever, the trial court granted the defendants motion to dismiss. The court, in its ruling, pointed out that it is not at liberty to ignore an element that is plainly listed in the statute. This trial court decision was eventually appealed to the Georgia Court of Appeals and even they acknowledged the harsh nature of the result in this case, but, like the trial court, found that the Georgia Tort Claims Act mandated the result. Consequently, the Appellate Court upheld the decision to dismiss originally designated by the Trial Court.

In the case of *Larkins v. County School District* (2008) once again the issue of whether or not actions taken by a school employee were ministerial or discretionary came into question. Cheryl Larkins, a parent volunteer at Baker Elementary School, was injured when she tripped and fell over an electrical receptacle in the cafeteria, while working at the school carnival. Ms. Larkin filed suit for damages against Linda Gruehn, the principal of Baker Elementary, as well as the superintendent of Cobb County School system.

Ms. Larkin claimed that she was injured as a result of the negligence of school

employees that were charged with the tasks of setting up for the carnival, and that since these employees were employees of the district, the district was responsible as well as the elementary principal. Ms. Larkins reported that the electrical receptacle that she tripped over was normally covered by a refrigerated case, but the case had been moved for the carnival, thereby exposing the receptacle. Of particular interest in this case is that no evidence was ever produced to prove who actually moved the case.

This case was an appeals case in which the trial court originally granted the defendant's motion for summary judgment. As a result, the superintendent of the Cobb County school system, Grace Calhoun, as well as the principal of Baker Elementary school, Linda Gruehn were both protected from liability. This is interesting due to the fact that the case occurred after the 1992 Georgia Tort Claims Act, which allowed for individuals to bring suit against government officials. At the heart of the ruling was the fact that the appellate court found the action of removing the refrigeration case, in order to make room for the carnival, to be an act of discretion, thereby protecting the school system and its employees from liability. According to a prior case, *Guthrie v. Irons* (1993), school employees are entitled to official immunity from their actions if those actions are within the scope of their employment, discretionary in nature, and without willfulness, malice, or corruption.

Ms. Larkin further alleged that the defendants were negligent in failing to take necessary measures to correct a dangerous condition. Her assertion was denied based on a Georgia Supreme Court decision in *Hennessy v. Webb*, (1980), in which it was determined by the court that actions such as moving the placement of a rug and mat in a school doorway were allegations regarding the exercise of discretion by those in

charge. Therefore, since actions such as the one that occurred in *Hennessey v. Webb* constituted acts of discretion, the defendants in the Larkin case were likewise protected under the guise that the removal of the refrigerator by the school employee was an act of discretion, thereby protecting them from damages.

#### Liability Issues Involving Non-renewal or Termination of Employees

School officials are, at times, subject to suits involving the non-renewal or termination of employees. A recent appellate case in Georgia, *Liberty County School District v. Halliburton* (2014), involves the non-renewal of an employee who, in turn, filed suit against the district in which she was employed, as well as the members of the school board and the superintendent. Lavern Halliburton, a school principal in the Liberty County School District was non-renewed at the end of the 2010-2011 school year as a result of poor performance. Of particular interest is the fact that the defendants moved to dismiss at the trial court level, claiming that they were entitled to qualified immunity. The trial court denied their motion to dismiss and the trial eventually made it to the Court of Appeals of Georgia.

At the appellate court level, Ms. Halliburton claimed that she had been racially discriminated against, in that other white employees were treated differently by Superintendent Dr. Judy Burton Scherer. Burton claimed that the non-renewal was based upon race and not performance. The defendants were granted summary judgment, in part, based upon the fact that the school board, as an entity is exempt from suit based upon qualified immunity. However, the appellate court only granted summary judgment for the school board. Specifically, the Georgia Tort Claims Act provides for a

limited waiver of the state's sovereign immunity for the torts of its officers and employees, but it expressly excludes school districts from the waiver (*Coffee County School Dist. v. Snipes*, 1995). While the school board was exempt based upon this premise, the individual defendants were subject to liability based upon Halliburton's claim that their actions were based upon racial discrimination and malice. The defendants claimed that their recommendation to the school board to not renew Halliburton was an act of discretion and therefore they should be granted official immunity.

The appellate court affirmed the trial court's denial of the motion to dismiss as to Scherer and the school board members in their individual capacities. This case ultimately was remanded for further proceedings. Once again, the central point of this case involved whether or not the acts of the individuals involved acts of malice, which, in turn, would waive their right to qualified immunity and subject them to liability. Individual defendants maintained that all actions were performed in good faith in the performance of their official duties, and as a result, should be considered discretionary in nature, thereby protecting them under sovereign immunity. The appellate court agreed with the fact that the non-renewal was an act of discretion and thereby provided them with immunity. However, the issue of discriminatory acts of malice, claimed by Halliburton, could not be dismissed and were ultimately remanded to the Georgia Supreme Court. Results from this Georgia Supreme Court case are not currently available. However, precedent does suggest that if the plaintiff can prove acts of discrimination were, indeed, acts of malice caused by prejudice, then in all likelihood, the employees may eventually be held liable to some degree and forced to pay some

type of reparation.

Another Georgia case involving qualified immunity occurred in 1998 and involved the sudden collapse, and death of Jessica Pheil, a student in the Crisp County School District, one week after she fell on a staircase at Crisp County High School (*Crisp County School District et al. v. Pheil et al.*, 1998). Jessica Pheil died from a pulmonary embolism and her parents filed suit against the district, the school board, and four individuals who had served as either superintendents or principals of the school. The claims were based upon negligence, alleging that the defendants had removed a handrail from the staircase, failed to allow students sufficient time to change classes, and violated the Rehabilitation Act by failing to accommodate for Jessica Pheil's disability, which included allergies and migraine headaches.

The defendants moved for summary judgment based upon the grounds of sovereign immunity and the fact that all parties involved were acting in their official capacities. In response to the defendant's motion for summary judgment, the Pheils did not respond to directly to the defendant defense of sovereign immunity, but instead relied entirely on the Federal Rehabilitation Act of 1973, 29 USC § 794, claiming that state immunity did not apply in such claims. The trial court denied summary judgment as a result of finding genuine issues of fact as to whether Jessica's alleged disability contributed to her death and whether the defendants failed to comply with the Rehabilitation Act. The trial court also found that OCGA § 51-1-20 did not provide sovereign immunity for claims under the Act. This would be of extreme relevance had the Pheils been able to make the case that the defendants did not comply with the Rehabilitation Act. However, the appellate court determined the claims were not



applicable due to the fact that their claim that their daughter's fall was based upon the removal of the handrail, which could not be confirmed as the causal reason for the fall. Furthermore, eye witnesses testified that she was walking without any assistance down the middle of the staircase. The Pheils contention that their daughter's fall was a result of not having enough time between classes was not considered applicable to this case by the appellate court due to the simple reasoning that the parents had not filed any formal complaint with the principal or any other school official in regards to the time between classes being too short, thereby eliminating any chance for the school to make adjustments for her. As a result of these findings, coupled with the fact that the Pheils failed to establish the necessary elements of a claim under the Rehabilitation Act, the court reversed the trial court and provided summary judgment that all school parties were declared not liable for the unfortunate death of the student.

In the case of *Hackett v. Fulton County School District* (2002), the issue of a school employee being responsible for actions taken against a person came into question when defendant, William Kreil, a science teacher at Westlake High School in Fulton County, Georgia was charged with three separate criminal charges, including sexual assault against a person. Kreil was ultimately convicted and is serving his sentence at Arrendale State Prison in Alto, Georgia. The facts of this case involved the plaintiff, Melvin Hackett, a 1999 graduate of Westlake High School. Hackett is a former student of William Kriel and while in 11<sup>th</sup> grade he was the victim of a scheme in which Kriel offered the promise of a potential scholarship should Hackett qualify through work done on an independent project. Kriel then lured Hackett to his home and while there sexually assaulted him. Hackett did not report this assault to anyone, including his

parents. However, in January of 2001, Hackett came forth and filed a complaint asserting claims under Title IX of the Education Amendment of 1972, claiming negligent hiring, retention, and supervision, assault and battery, intentional infliction of emotional distress, and false imprisonment against Fulton County School District, Westlake High School principal Marquis Jones, and William Kreil teacher at Westlake High School.

The plaintiff asserted that the principal, Marquis Jones, acted with deliberate indifference when he did not investigate prior complaints of inappropriate sexual comments by William Kreil to other employees. Furthermore, the plaintiff contended that although the school district's background check did not reveal any previous charges or allegations against Kreil for misconduct involving students, there was no dispute that defendant Kreil failed to provide a complete and accurate picture of his employment history on his employment application with FCSD, and that he failed to disclose that he had been asked to resign from teaching positions at several schools in both Louisiana and Georgia because of allegations of improper conduct with minor students. The plaintiff also accused the school district of failing to take appropriate action to protect the student in accordance with the guiding principles of Title IX, which states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (20 U.S.C. § 1681). The plaintiff brought his claim against the school district solely due to the fact that they receive federal funds. The plaintiff also claimed he was subjected to discrimination and harassment because of his sex by defendant Kreil and Fulton County School District was liable under Title IX for failing to prevent such harassment.

However, as this case progressed the plaintiff failed to assert to what degree he was emotionally distressed or that he had been discriminated against based upon his sex. Therefore, his claims against the principal and the school district were denied and motion for summary judgment was granted in their behalf. However, his claims against the teacher were indeed sufficient for this case to go to trial at a time and date to be determined within 60 days of the official order of the court. Of particular note in this case is the fact that suit was brought against the school district and the principal under the guise of Title IX, thereby rendering governmental sovereign immunity as useless in the defense of both the principal and the school district.

It is clear that the majority of law suits filed in the state of Georgia after the passage of the 1992 Georgia Tort Claims Act have been decided based upon whether or not the actions of the respective defendants fall in the area of discretionary acts or ministerial acts. In order to apply such findings to the original questions proposed at the beginning of this work, case results are presented in Table 1. This table clarifies which level of the Georgia State Justice System heard the case and whether or not the case was upheld when and if appealed to the Georgia Supreme Court. Only cases decided after the 1992 Georgia Tort Claims Act involving either ministerial or discretionary acts are listed below. This list is not an exhaustive list of cases that have occurred since 1992. It is, however, a sample representing findings from cases involving decisions based upon both ministerial and discretionary acts of state employees or districts.

Table 1

*Georgia Tort Claims Case Analyses*

Case	Lower Court Ruling Affirmed by Georgia Court of Appeals	Appellate Court Ruling Affirmed by Georgia Supreme Court	Affirmed or not by United States Supreme Court (If Applicable)	Type of Action Challenged (Ministerial or Discretionary)
<i>Cook v. Colquitt County</i> 1992	Upheld Trial Court Decision	Upheld Appellate Court Decision	N/A	N/A This decision was based upon school board immunity from suits
<i>Welborn v. DeKalb County School District</i> (1997)	Dismissed based upon school board immunity from suits	N/A	N/A	N/A
<i>Harper v. Patterson</i> (2004)	Trial court decisions confirmed. Appeal to Ga. Supreme court denied based upon statute of limitations	N/A	N/A	N/A
<i>Murphy v. Bajjani</i> (2007)	Reversed Summary Judgment of Trial Court	Upheld Appellate Court Decision	N/A	Ministerial
<i>Reece v. Turner</i> (2008)	Denied Defendants Motion for Summary Judgment	N/A	N/A	Ministerial
<i>Smith v. McDowell</i> (2008)	Reversed Summary Judgment of Trial Court	Upheld Appellate Court Decision reversing Judgment of Trial Court	N/A	Ministerial

Note: N/A refers to the fact that the case was settled at a lower court and not heard by the court designated with N/A.

Aside from the fact that all of the referenced cases can primarily be categorized into either ministerial or discretionary acts by the defendants, it is also important to note that another factor has to do with whether or not there was actual malice or attempt to injure on the part of defendant. No cases asserted liability due to actual malice or attempt to injure. School districts may be more likely to settle these issues. In these instances, there is not a court record to confirm these complaints.

### Conclusion

Chapter 4 has presented two distinct categories of cases during this analysis: cases involving liability of school personnel or school districts in which tortuous actions were deemed discretionary and cases in which actions were deemed to be ministerial. In cases involving discretionary acts, it is clear that the courts have applied precedent in every case reviewed and subsequently allowed for defendants to be granted immunity for their actions as long as the acts occurred within the scope of their jobs and did not include acts of malice. However, it is quite clear that acts deemed ministerial in nature are cause for liability when actions are not procedurally followed.

In the cases reviewed after the passage of the 1992 Georgia Tort Claims Act involving the issue of negligence, it is clearly established that the only remedy for plaintiffs, when public schools and/or its employees are allegedly involved in some type of tort, is to file suit under this Act.

## CHAPTER 5

### CONCLUSIONS

Prior to 1992, the state of Georgia enjoyed sovereign immunity for all of its governmental units. The concept of sovereign immunity, a product of English Common Law, was brought to the United States, where states such as Georgia adopted the premise. However, in 1983, Georgia passed a new constitution and questions arose in regard to the need for individuals from the state of Georgia to be able to bring suit against governmental entities. Since the concept of immunity had always been the generally accepted rule, the state had not formally adopted an avenue for bringing suit against governmental units until the passage of the 1992 Georgia Tort Claims Act.

The Georgia Tort Claims Act was enacted in order that individuals might bring suit against government entities such as school districts or their respective employees for negligent acts, or torts, against said individuals. Cases involving tort claims against governmental units are carefully analyzed in this chapter in order that the two driving questions of this research may be answered. In order to complete this analysis of tort law cases, research questions initially posed in Chapter 1 of this dissertation shall be revisited and are as follows:

1. How have Georgia courts interpreted the Georgia Tort Claims Act in litigation against school personnel and school districts?
2. How do tort liability rulings, involving school personnel or districts, in other states of the United States compare with similar cases filed in Georgia since 1992?

The state of Georgia and the adoption of the Georgia Tort Claims Act was the

central focus of this analysis. In response to the question 1 of this study, it is important to first establish the types of negligent acts that might bring about a suit under the Georgia Tort Claims Act. Research suggests, in Georgia, governmental units of the state are subject to suit in cases of malice with intent to injure. Cases reviewed in this study provide several examples in which liability for an occurrence involving injury was clearly placed upon the individual working for the state. That said, the majority of cases reviewed in Georgia were settled based upon one of two characteristics.

Cases involving acts of discretion, in which an individual acted within the scope of their employment and made a decision based upon their own judgment, were often dismissed at the trial court level. Several examples of these types of cases are reviewed and analyzed in Chapter 4. However, in some cases, the actions of state employees involved acts considered to be ministerial. Ministerial acts are those acts that require set expectations, bound by rules or clearly defined procedures, in which an individual does not use discretion. According to the Georgia cases reviewed after the passage of the 1992 Georgia Tort Claims Act, findings from this case study revealed the fact that the primary commonality shared in all the cases reviewed centers around the very issue of discretionary versus ministerial acts, in regards to liability of governmental entities.

Another area evidenced in the review of cases involves limit of claims. Individuals awarded damages are limited in the amount that can be received due to negligent actions of governmental entities. This statute limits claims against the state to a specific dollar amount and is designed to protect the governmental purse. Consequently, even when an individual claim against the state is honored, there are

limits to the monetary damages awarded.

A couple of decades ago it was next to impossible to successfully sue a state government entity in Georgia. Even today suing a government entity can be complicated. In the final analysis of the Georgia Tort Claims Act, comparisons and contrasts with other State Tort Claims Acts were performed. Evidence from cases involving tort claims from other states revealed that each of the states have provisions that differ in regards to what type of acts may allow for a waiver of governmental immunity.

Once again, it is important to note that prior to the Georgia Tort Claims Act, the state of Georgia had enjoyed sovereign immunity against tortuous lawsuits, just as the other states in this study had, and as a result citizens were not allowed to sue state agencies or their employees in civil court. In terms of the characteristics shared with other State Tort Claims Acts, the most obvious has to do with the specific procedure and guidelines for private citizens or companies bringing suit against state agencies and entities. For the sake of this research, each of the respective Tort Claims Acts of Texas, Oklahoma, and Mississippi are described in full, in order that contrasts can be evidenced.

Texas Tort Claims Act, Oklahoma Tort Claims Act and the Mississippi Tort Claims Act;

#### Contrasts and Comparisons

The Texas Tort Claims Act is a set of statutes that determine when a Governmental entity may be liable for tortuous conduct under state law. Prior to the adoption of the Act by the Texas Legislature in 1969, individuals could not recover



damages from state or local governmental units for injuries resulting from the actions of a government employee or officer in the performance of a governmental function. However, with the passage of the Texas Tort Claims Act, Texas public school employees enjoy a high degree of protection from liability arising from their performance as professional employees. In fact, Texas educators are not held personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment involving the exercise of judgment or discretion, except in circumstances in which a professional employee uses excessive use of force in carrying out corporal punishment. Secondly, school employees can be sued as a result of injuries arising from a motor vehicle accident. (Texas Education Code, 22.0511(b), 2009).

The passage of the Act waved sovereign immunity for governmental entities engaged in governmental functions and set in motion a string of similar legislative responses from surrounding states such as Oklahoma, Mississippi, and eventually Georgia. With the exception of Texas, in each of these states, a governmental unit is liable for property damage, personal injury, and death caused by the wrongful act or omission or the negligence of an employee acting within their scope of employment if the damage, injury or death arises. Under the Texas, Oklahoma, Mississippi and Georgia Tort Claims Acts, liability limits have been established to protect state treasuries. For example, in Texas, liability is limited to money damages in the maximum amount of \$250,000 for each person and \$500,000 total, per occurrence, in which bodily injury or death occurred. \$100,000 per occurrence is the limit for injury or destruction to property. While limits on claims are fluid depending on the most recent revisions made by respective legislative units, of most importance is the simple fact that each of the

states has, at a minimum, established some type of limit in terms of the amount of monetary damages awarded.

Another question that continually arises in terms of the respective Tort Claims Acts has to do with whether or not public officials are provided immunity based on these Acts? The answer to this question centers on the commonality that all share in regards to official immunity. These State Tort Claims Acts only address immunity for the government entity itself and do not provide immunity for public officials. However, in certain cases public officers or employees may be absolved from personal liability for acts within the scope of their respective governmental authority. For example, in Texas case law, either absolute immunity or qualified immunity to a public servant is dependent on the type of authority retained by that individual. For example, judges are generally entitled to the defense of absolute or complete immunity in the exercise of judicial functions (*Turner v. Pruitt*, Tex. 1961).

The majority of public servants, in each of the states analyzed however, may only assert a defense of qualified immunity from liability. Qualified immunity provides protection from liability for discretionary actions taken in good faith within the scope of the officer's or employee's authority. Determination of whether an action was taken in good faith is a fact issue and a discretionary action involves the exercise of discretion or judgment. Coincidentally, and of great interest, is the fact that all of the Tort Claims Acts reviewed share this central commonality in terms of the degree of liability as a result of actions deemed discretionary and those considered ministerial.

In response to Research Question 2, it is important to analyze the findings of cases reviewed involving tort claims against government entities of other states in the

United States. This research found several unique qualities of each of the respective Tort Claims Acts reviewed. For instance, in Texas, suits against the state can only occur in cases of motor vehicle accidents involving school personnel or in cases of excessive force when applying discipline. Mississippi, like Georgia, provides the opportunity to bring suit against the state in instances in which death or injury occurs as a direct result of negligent acts. Like Georgia, the Mississippi cases were often decided through a determination of whether or not the tortuous acts were deemed ministerial or discretionary. Just as is the case in Georgia, discretionary acts of a state employee, performed within the scope of their duties, are covered by governmental immunity. However, when ministerial acts are not followed, governmental immunity is waived, allowing for suit to be brought against the state entity or employees.

The research in this dissertation has been part of a larger body of work tracing back to Carman's (2009) dissertation, which analyzed tort law as it applies to Texas educators and respective Texas school districts. Lacefield's (2010) work, along with the work of Kriesel-Hall, (2013), both of whom followed Carman's work with work of their own in Oklahoma and Mississippi respectively, helped to provide a blueprint for the research in this dissertation. Therefore, an important aspect of the findings involved the inclusion of a comparison/contrast of the Tort Claims Acts of each of the respective states, Texas, Oklahoma, Mississippi, and for the purposes of this research Georgia. The Texas Tort Claims Act is a set of statutes that determine when a governmental entity may be liable for tortuous conduct under state law. Prior to the adoption of the Act by the Texas Legislature in 1969, individuals could not recover damages from state or local governmental units for injuries resulting from the actions of a government

employee or officer in the performance of a governmental function. The passage of the Act waved sovereign immunity for educational entities in Texas when excessive force in administering corporal punishment was used and when motor vehicle negligence resulted in injury or death to students.

The Oklahoma Tort Claims Act was enacted in 1978. In the four states studied in this research, each of the state legislatures adopted tort claims acts at the urging of higher level courts and an obvious need to allow the public some type of ability to file suits against government entities for tortuous actions. These states were most likely responding to the adoption of the Federal Tort Claims Act of 1946, as many of their statutes are similar to the ones enacted at the federal level of government. The Oklahoma Tort Claims Act was enacted in 1978 and specified the immunity of state employees and political subdivisions acting within the scope of their employment. Like the Texas Tort Claims Act, the degree of liability, if property damage or personal injury occurs, is limited by the act in order to protect the state treasury. For example, Oklahoma cases in which the government or its employees have been found liable are limited as to the amount they can reward. Liability for property damage is limited to \$25,000 and \$125,000 for personal injuries for smaller cities under 300,000. The State and larger cities, i.e., Oklahoma City and Tulsa are liable up to \$175,000 and \$200,000 on medical negligence claims. There is also a million dollar limit on all claims arising out of one accident.

It is important to note that just like the Texas Tort Claims Act, the Mississippi Tort Claims Act details a number of functions or activities where the State's immunity from liability has not been waived, such as legislative functions and judicial functions.

Another important characteristic shared by all of the Tort Claims Acts has to do with the fact that each of them has a limit to the number of days a notice of claim must be filed in order for the case to be considered.

The Mississippi Tort Claims Act is the most recent of the Acts to be adopted. The legislature of Mississippi enacted the Mississippi Tort Claims Act in 1993. The state of Mississippi, like Texas, Oklahoma, and Georgia waived the government's immunity except in cases of tort liability originating from certain actions. Once again, the major point of emphasis here in comparing the Mississippi Tort Claims Act with those of the other southern states seems to hinge on the description of discretionary acts versus ministerial. Like the other states, Mississippi waives its sovereign immunity for money damages up to a specified amount unless the governmental entity's action falls under one of the exemptions provided in the Tort Claims Act. Again, just as is the case with Texas, Oklahoma, and Georgia, the Mississippi Tort Claims Act provides explicit and absolute immunity for governmental entity actions that fall under specified exemptions, including the exemption for discretionary actions.

As a result of the research performed involving the Tort Claims Acts of Texas, Oklahoma, Mississippi, and Georgia, it is obvious that each of the acts has accomplished what they were designed to accomplish. The public does indeed have a need to be able to file suit against the government in cases of tortuous acts. Each of these respective Tort Claims Acts, although adopted at different times, achieves their designed mission by making it possible for citizens injured by city and state employees to be fully or partially indemnified for the losses that they have suffered as a result of the negligent acts, errors and/or omissions of governmental employees.

One very important fact that each of the respective State Tort Claims Acts shares is that each of the Acts contains clauses that can cause claimants to have their right to recover damages limited or in some cases lost altogether. The most common one has to do with the time frame individuals have in which to file suit. Another clause has to do with the plaintiff's misunderstanding or interpretation as to what tortuous acts are considered to be discretionary acts and which are deemed ministerial. Of all the cases studied, not one of the cases analyzed involved acts of malice or intent to harm. Those are the very types of acts that would allow for damages to be rewarded under all of the respective State Tort Claims Acts.

Consequently, after much analysis of the respective cases analyzed in this research, with the exception of Texas, the one central application of the respective state's Tort Claim Acts consistent throughout each of the trial court cases, appellate cases, and even the state Supreme Court cases, was the application of statutes in regard to discretionary versus ministerial duties. This application of statutes, characteristic of each of the respective states in this analysis, was consistent as cases, involving the actions of school employees and or their respective districts, were ultimately decided based upon the type of negligent act performed. The discretionary versus ministerial argument and the application of law resulting from Tort Claims Acts is not the only commonality when looking at the respective states studied. Another primary commonality discovered is the fact that even though each of the states studied has opened the door for individuals to bring suit against government entities found liable in tort cases, the states have all limited the amount of damages they are willing to pay from their respective state treasuries. This fact protects not only the states and their

respective treasuries; it also limits unreasonable claims from being awarded to individuals that have somehow managed to win a case against a governmental entity.

One of the final commonalities shared by each of the respective Tort Claims Acts addresses the issue of whether or not a school that possesses liability insurance is subject to waiving their rights of immunity. The distinct answer in each of the state's studies is that possession of insurance does allow claims to be made in cases of personal injury, but only to the degree and amount that the insurance policy provides. Based upon the cases presented and analyzed, it is apparent that the appellate courts have interpreted state's Education Codes in ways that have favored public school employees and have limited the employees' exposure to civil liability. The key to most educators staying out of court hinges on their respective understanding of the law and education code.

All research supports one simple fact, that all levels of education from the classroom teacher to the superintendent are legally protected from frivolous lawsuits at a much greater scope than the average person understands, especially in cases in which school employees exercise discretion as opposed to acting within the scope of ministerial duties. Educational leaders are protected to higher degree than most are even aware. The most successful leaders in the field of education are those who fully understand the extent to which they either are or are not protected under the governmental sovereign immunity statutes in their respective state. This rationale, more than any other, fully supports the notion that continued and further understanding of governmental immunity laws in the United States must be analyzed. Sufficient change in the educational system can occur when an individual or group of individuals is

provided the support and power to initiate change. If knowledge truly is power, there can be no greater reason for continued research into the issue of tort liability and subsequent laws designed to protect individuals acting within the scope of their respective jobs. Removing the fear of claims and unjustified law suits serves today's educator more than ever. However, much work in the field remains as individual states address this issue through an assortment of statutes still to be developed, especially in other geographical areas of the United States.



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