MUNICIPAL LIABILITY – AN OVERVIEW

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I. INTRODUCTION

A lawsuit against a municipality will often have both federal and state causes of action, which have distinct elements and defenses.

A. Ohio Law

"Political subdivision" tort liability is codified in Ohio R.C. 2744.02, *et seq.* The statutes apply a three-tiered analysis to determine whether and to what extent an entity is entitled to immunity.

B. Federal Law

U.S.C. 1983 gives citizens the power to sue a person acting under color of state (or federal) law who has deprived the plaintiff of clearly defined rights secured by the laws of the United States.

II. OHIO POLITICAL SUBDIVISION IMMUNITY

A. Definition of a Political Subdivision

A 'political subdivision' is defined as any 'body corporate and politic' responsible for governmental activities in a geographic area smaller than the state. R.C. 2744.01(F). The Supreme Court of Ohio has defined 'body politic' as a "group or body of citizens organized for the purpose of exercising governmental functions." *Uricich v. Kolesar* (1936), 132 Ohio St. 115, 118.

R.C. 2344.01(F) then gives a non-exhaustive list of entities that are considered political subdivisions.

B. History

The Supreme Court of Ohio provides a detailed history of political subdivision immunity in *Butler v. Jordan*, 92 Ohio St.3d 354, 2001-Ohio-204:

"The history of the doctrine in this country is associated with the English common-law concept that the king can do no wrong….That concept evolved from the personal prerogatives of the King of England, who was considered the fount of justice and equity in the English common-law. In the English feudal system,

the lord of the manor was not subject to suit in his own courts….The king, as highest feudal lord, enjoyed this protection on the theory that no court was above him." *Id.* at 358.

American courts accepted the doctrine in the infancy of the republic. "However, courts and commentators have remained mystified *why* the doctrine was ever accepted" because this country chose to break away from England to avoid exactly this type of power. *Id.* at 360-61.

The Court then reviewed case law and found over time common law eroded immunity, and that "the common law of this country at the time the Ohio Constitution was adopted in 1851 actually recognized no impediments to recovery against a corporate political subdivision of the state…. Further, even if Ohio courts recognized immunity for corporate political subdivisions at the time of the adoption of the 1851 Ohio Constitution, such immunity apparently originated as an extension of the concept that 'the King can do no wrong.' However, as shown above, it appears that the historic justification for that English maxim never existed in this country. Therefore, it follows that ***the common law of this country should never have recognized such an impediment*** to an action against a political subdivision." *Id.* at 365 (emphasis added).

Indeed, in *Havelack v. Portage Homes, Inc.*, 2 Ohio St.3d 26 (1982), the Supreme Court abolished sovereign immunity for a political subdivision, finding that "*stare decisis* ("let the decision stand," i.e. precedent) alone is not a sufficient reason to retain the doctrine which serves no purpose and produces harsh results." *Id.* at 30.

That decision was rendered moot, though, by the Ohio General Assembly, which in 1985 enacted R.C. 2744, the Political Subdivision Tort Liability Act.

C. Analysis of Ohio Political Subdivision Immunity – Three Tiers

1. First Tier – The first tier provides a general grant of immunity because "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a ***governmental*** or ***proprietary*** function." R.C. 2744.02(A)(1) (emphasis added).

2. Second Tier – The second tier addresses exceptions to the general rule that political subdivisions are liable in tort. Five exceptions to immunity are found in R.C. 2744.02(B):

    a. Negligent operation of a motor vehicle within the scope of employment and authority. Defenses to this liability are as follows:

i. Member of ***police department*** operating motor vehicle while responding to an emergency call and the operation does not constitute willful or wanton misconduct.

ii. Member of ***fire department*** or fire agency operating motor vehicle while engaged in duty at a fire, proceeding towards a fire believed to be in progress, or answering emergency alarm and the operation does not constitute willful or wanton misconduct.

iii. Member of ***emergency medical service*** owned or operated by political subdivision operating motor vehicle responding to call for emergency care, with a valid commercial or driver's license, and the operation does not constitute willful or wanton misconduct[1].

b. Negligent performance of acts by their employees with respect to ***proprietary functions.***

c. Negligent failure to keep ***public roads in repair*** and negligent failure to remove obstructions from public roads (except with respect to bridges over which the subdivision is not responsible for maintenance and/or inspection).

d. Negligence of employees that occurs within and is due to ***physical defects within buildings*** used in connection with the performance of a governmental function, including office buildings and court houses, but not including jails or other detention facilities.

e. Liability ***expressly*** imposed by a section of the Revised Code, including sections 2743.02 and 5591.37

3. Third Tier – In the third tier of the analysis, immunity ***may be reinstated*** if a political subdivision can successfully assert one of the defenses to liability listed in R.C. 2744.03. The following defenses or immunities to establish non-liability with respect to governmental or proprietary functions:

[1] The operation must also comply with R.C. 4511.03. Note that other immunities are found elsewhere in the Ohio Revised Code. See, e.g., R.C. 4765.49(A) which provides that: "[a] first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services[.]" However, if "the services are administered in a manner that constitutes willful or wanton misconduct[,]" immunity will not apply.

a. Judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative functions.

b. Conduct was required by law or authorized by law, unless negligent, or was necessary or essential to the exercise of powers.

c. Conduct within discretion of the employee with respect to policy-making, planning, or enforcement powers of the employee's office or position.

d. Conduct caused injury or death to a person convicted of, or who pleaded guilty to, a criminal offense (or a child adjudged delinquent) while performing community service work.

e. Exercise of discretion in determining whether to acquire or use equipment, supplies, materials, personnel, facilities and other resources unless the discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

f. Employee is immune under all circumstances unless one of the following applies:[2]

   i. acts or omissions ***manifestly*** outside scope of employment or responsibilities;

   ii. acts or omissions were with ***malicious purpose, in bad faith, or in a wanton or reckless manner***;

   iii. liability expressly imposed by a section of the Revised Code.

g. The political subdivision, prosecutors, judges, city director of law, village solicitor, and chief legal officers entitled to any defense or immunity available at common law or under the Revised Code.[3]

[2] R.C. 2744.03(6) provides immunity to the employee of a political subdivision.

[3] The immunities and defenses available to employees under R.C. 2744.03(A)(6) and (7) have no effect upon a political subdivision's liability under R.C. 2744.02. Thus, the political subdivision may be liable for the acts and/or omissions of its employee even if the employee is not individually liable.

D. Governmental and Proprietary Functions

1. Governmental Functions

a. "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of R.C. 2744.01 or that satisfies any of the following:

i. A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

ii. A function that is for the common good of all citizens of the state;

iii. A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

b. A "governmental function" includes, but is not limited to, the following:

i. The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

ii. The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

iii. The provision of a system of public education;

iv. The provision of a free public library system;

v. The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

vi. Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

vii. The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

viii. The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility.

ix. A park, playground, or playfield;

x. An indoor recreational facility;

xi. A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility.

2. Proprietary Functions

a. "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of R.C. 2744.01 or that satisfies both the following:

i. The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

ii. The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

b. A "proprietary function" includes, but is not limited to, the following:

i. The operation of a hospital by one or more political subdivisions;

ii. The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

iii. The establishment, maintenance, and operation of a utility**,** including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

iv. The maintenance, destruction, operation, and upkeep of a sewer system.

E. Other Considerations

1. Denial of immunity is immediately appealable

   The Supreme Court of Ohio has held that "[w]hen a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at syllabus.

2. The statute of limitations for claims against a political subdivision is two years.

   R.C. 2744.04 states that that "An action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code."

3. R.C. 2744.05 – Limitations on Damages

   a. Punitive or exemplary damages "shall not" be awarded.

   b. There is no cap on compensatory damages under division (C)(1).

   c. However, damages that arise from the same cause of action or occurrence, except in wrongful death actions, that do not represent ***actual losses*** shall ***not exceed $ 250,000*** in favor of one person. *Id.*

   d. "Actual loss" includes wages, salaries, or future earnings; medical care and treatment; and future medical care.

   e. "Actual loss" does not include attorneys' fees, pain and suffering, loss of consortium, mental anguish, or any other intangible loss.

F. Additional Case Law

1. Supreme Court of Ohio

a. *Garrett v. Sandusky*, 68 Ohio St.3d 139, 140 (1994)

A nearly unanimous Supreme Court found that a wave pool is not a swimming pool, therefore the city was not entitled to immunity for the facility:

"In the present case, the Surf's Up Aquatic Center operated by the city was not merely a 'swimming pool.' The wave activation device at this facility materially transformed the pool from a placid body of water, commonly known as a swimming pool, to a potentially hazardous body of churning water. A wave pool is more akin to an amusement ride, which is not an immunized municipal function according to R.C. Chapter 2744."

b. *Hill v. City of Urbana*, 79 Ohio St.3d 130, 1997-Ohio-400.

Pursuant to R.C. 2744.02(B)(2), a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property caused by an act or omission of the political subdivision or any of its employees in connection with the performance of a proprietary function.

The "establishment, maintenance, and operation" of a municipal corporation water supply system encompasses, but is not limited to, the installing of water lines, equipment, and other materials which are a necessary part of the system and such activity is a proprietary function of a political subdivision. (R.C. 2744.01(G)(2)(c), construed and applied.)

c. *Greene County Agricultural Society v. Liming*, 89 Ohio St.3d 55, 2000-Ohio-486.

A county agricultural society is a political subdivision pursuant to R.C. 2744.01(F).

i. "Body politic" in *Black's Law Dictionary* is defined as "[a] group of people regarded in a political (rather than private) sense and organized under a single governmental authority.

ii. The Ohio Attorney General has opined that an agricultural society is a political subdivision.

The definitions of "governmental function" and "proprietary function" are mutually exclusive in R.C. 2744.01.

The conducting of a livestock competition at a county fair by a county agricultural society is a proprietary function pursuant to R.C. 2744.

i. Conducting a livestock competition only benefits some citizens of the state, not all citizens.

ii. Even though conducting a county fair may be an activity not customarily engaged in by non-governmental persons, conducting a livestock competition *is* an activity customarily engaged in by non-governmental persons.

d. *Ryll v. Columbus Fireworks Display Company, Inc.*, 95 Ohio St.3d 467, 2000-Ohio-2584.

Sponsoring a fireworks display is a proprietary function.

Inspection of the fireworks display, however, is a governmental function.

e. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2027.

R.C. 2744.03(A)(3) applies when an employee has the duty and responsibility for policy-making, planning or enforcement by virtue of office or position, and this immunity exists even if the discretionary actions were done recklessly or with bad faith or malice;

i. This subdivision applies to matters where there is an exercise of a high degree of official judgment or discretion;

ii. A baseball coach's decision regarding how to conduct batting practice does not involve "the exercise of a high degree of official judgment or discretion."

f. *Moore v. Lorain Metropolitan Housing Authority*, 121 Ohio St.3d 455, 2009-Ohio-1250.

The operation of a public housing authority is a governmental function under R.C. 2744.01(C)(2) for purposes of political subdivision immunity under R.C. 2744.

Governmental functions include the "repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function."

g. *Doe v. Marlington Local School District Board of Education*, 122 Ohio St.3d 12, 2009-Ohio-1360.

At issue was whether a school bus driver's supervision of the conduct of children passengers on a school bus amounts to operation of a motor vehicle within the statutory exception to political subdivision immunity under R.C. 2744.02(B)(1).

That exception does not apply to a claim for the negligent supervision of the conduct of the children on a school bus, therefore immunity applies.

h. *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483 .

When the allegations contained in a complaint are directed against *an office* of a political subdivision, the officeholder named as a defendant is sued in his or her *official capacity*, rather than in his or her individual or personal capacity.

The political-subdivision-immunity analysis set forth in R.C. 2774.02 applies to lawsuits in which the named defendant holds an elected office within a political subdivision and that officeholder is sued in his or her official capacity.

The three-tiered political-subdivision-immunity analysis set forth in R.C. 2744.02, and not the employee-immunity provision of R.C. 2744.03(A)(6), is to be applied in such a case.

2. Courts of Appeal

a. Sewer Systems

There are two different sections dealing with sewers, one of which is a proprietary function and the other a governmental function.

A political subdivision is not entitled to immunity for the "maintenance, destruction, operation and upkeep of a sewer system," which is a propriety function under R.C. 2744.01(G)(1)(d).

However, a municipality *is* immune from claims based on negligent planning or design of a system. R.C. 2744.01(C)(2).

What does this mean?

There is no immunity for the actual maintenance work of a sewer system once it has already been installed, but there is immunity for any decisions made regarding where to put it, how it should be designed, and even whether the city should service the system at all. *See Keytack v. City of Warren*, 11th Dist. No. 2005-T-0152, 2006-Ohio-5179, ¶22; *Shumaker v. Park Lane Manor of Akron, Inc.*, 9th Dist. No. 2512, 2011-Ohio-1052 (defendant entitled to immunity because the decision not to fix a water break reflects a positive exercise of judgment in light of the dangers presented); *Duvall v. City of Akron*, 9th Dist No. 15110, 1991 Ohio App. LEXIS 5381 (Nov. 6, 1991) ("Akron remains immune from liability when it exercise its judgment…in determining how to allocate its limited financial resources, with regard to updating the sewer system.").

b. "Operation" of a Bus

In *Groves v. Dayton Pub. Schools*, 132 Ohio App.3d 566 (1999), a disabled student sued a school district seeking damages for injuries she suffered as a result of a district bus driver's alleged negligence in failing to secure her in her wheelchair when helping her off the bus.

The statute being construed, R.C. 2744.02(B)(1), provided an exception to immunity where injuries were caused by the negligent operation on public roads of any motor vehicle by an employee of a political subdivision acting within the scope of his employment. The Second District Court of Appeals affirmed the trial court's denial of the political subdivision's motion to dismiss, holding that it could be inferred from the complaint that the driver's actions were part of his duties and that it could be found that the driver was "operating" the school bus at the time of the student's injury.

III. U.S.C. §1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

A. Introduction

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

What does this mean?

"The new federal claim created by §1983 differs in important ways from those preexisting torts. It is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort...But it is narrower in that it applies only to tortfeasors who act under color of state law." *Rehberg v. Paulk*, 566 U.S. ___ (2012).

B. Plaintiff's Burden in §1983 Actions

1. To prevail under a §1983 claim, a plaintiff must show that a person acting under color of state law deprived the plaintiff of "clearly defined" rights secured by the United States Constitution or laws of the United States. *Mills v. City of Barbourville*, 389 F.3d 568, 574 (6th Cir. 2004).

2. Against a State Official:

   a. The United States Supreme Court has established a two-tiered inquiry to determine whether a government official is entitled to qualified immunity under §1983. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).[4]

   b. Under the *Saucier* analysis, a federal court must determine whether, "[t]aken in the light most favorable to the party asserting the injury...the facts alleged show the…conduct ***violated a constitutional right***." *Id.*

   c. If a party's conduct did in fact violate a constitutional right, a federal court must determine "whether th[at] right was ***clearly established"*** at the time of the alleged violation. *Id.*

      To satisfy this second requirement, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The fundamental – and dispositive –

[4] The Supreme Court of the United States reconsidered the *Saucier* in *Pearson v. Callahan*, 555 U.S. 223 (2009). The *Pearson* Court reaffirmed the *Saucier* analysis, with some modification. Mainly, rather than requiring federal courts to initially consider the first prong of the analysis, a federal court is now free to consider the second step of the *Saucier* analysis first, foregoing the first step entirely. However, the substantive analysis remains unchanged.

question is "whether the defendants had fair warning that their actions were unconstitutional." *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005).

3. Against a Municipality:

In order to establish liability against a municipality, a plaintiff must prove that:

a. A Constitutional violation occurred, and

b. The City "is responsible for that violation." *Graham v. County of Washtenaw*, 358 F.3d 377, 382 (6th Cir. 2004).

In *Jackim v. Sam's East, Inc.*, 378 F.Appx. 556 (6th Cir. 2010), the court dismissed Sam's club because the plaintiff failed to establish that the defendant was a "state actor." While the actions of a private party *may* constitute state action under §1983, the actions must be fairly attributable to the state, such as in a conspiracy case.

It is long-settled that §1983 does not impose liability upon a municipality based on *respondeat superior* or vicarious liability theories. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

There are three bases upon which a municipality can be held liable pursuant to §1983:

a. When an express policy causes a Constitutional violation;

b. When a widespread practice or custom is so common that it has the effect of a written policy; or

c. When the Constitutional injury is caused by a person with final policymaking authority. *Gregory v. Shelby County*, 220 F.3d 433, 441-442 (6th Cir. 2000).

What does it mean to have a "widespread policy or custom"?

To establish municipal liability based on an unwritten practice or custom, the custom "must be so permanent and well settled as to constitute a custom or usage with the force of law." *Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658 (1978) at 691. Consequently, the Sixth Circuit (which includes Ohio) has held that such a policy or custom cannot be established based on a single incident of potential misconduct of a city employee. *See, e.g., Thomas v. City of Chattanooga*, 398 F.3d 426, 430-31 (6th Cir. 2005).

The established law in the Sixth Circuit is that §1983 municipal liability based upon an unwritten policy or custom "must be shown by a clear and persistent pattern." *Doe v. Claiborne County*, 103 F.3d 495, 507-08 (6th Cir. 1996).

Without evidence of *other similar instances*, a plaintiff cannot establish "a clear and persistent pattern" necessary to prove the existence of a municipal "custom" or "policy" to support a claim. *Id.*

C. Jurisdiction

Consider Removal of Suit – A case can be brought in either federal or state court, but generally it is a good idea to remove a case filed in state court to federal court:

1. Federal courts are more conversant with §1983.

2. Federal judges often are better equipped to deal with complicated legal issues which often arise.

3. The plaintiff must persuade all jurors to obtain a plaintiff's verdict (in state court only three-quarters, or six out of eight jurors are needed for a verdict).

4. Federal jury pool may be better.

D. Recent Supreme Court Decisions

1. *Rehberg v. Paulk*, 566 U.S. ___ (2012):

The Court resolved a long standing circuit conflict on the question whether witnesses who testify before a grand jury are entitled to absolute immunity from suit under §1983, or are instead entitled only to the lesser protections of qualified immunity.

Charles Rehberg sued James Paulk under §1983, alleging that Paulk, a law enforcement officer, had committed perjury at various grand jury proceedings which had led to Rehberg being indicted several times, only to have the criminal prosecutions subsequently dismissed. Paulk asserted that just as a witness at trial is entitled to absolute immunity, so too would he as a grand jury witness be shielded by absolute immunity.

A ***unanimous*** Court, in an opinion authored by Justice Alito, affirmed the Eleventh Circuit, holding that grand jury witnesses, like trial witnesses, are entitled to absolute immunity from any liability arising from their testimony

Justice Alito reasoned that absolute immunity for grand jury testimony is necessary in order to safeguard the vital function that grand juries play in modern criminal procedure, by assuring that witnesses may provide candid testimony without fear of a retaliatory suit, and guarding the sacrosanct secrecy of grand jury proceedings.

Moreover, the absolute immunity cannot be circumvented by simply claiming that a grand jury witness conspired to present false testimony or by using the testimony to support any other claim – any claim arising from testimony before a grand jury is shielded by absolute immunity. The fact that grand jury witnesses, like trial witnesses, may be subject to prosecution for perjury is a sufficient deterrent to knowingly providing false testimony.

Note: Plaintiff's frequently try to get around immunity by stating there was a conspiracy before the testimony, in the witness preparation. The Supreme Court held that to allow liability to be predicated on the alleged conspiracy "would be to permit through the back door what is prohibited through the front."

2. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. ___ (2012)

The Supreme Court ruled by a 5-to-4 vote that officials may strip-search people arrested for any offense, however minor, before admitting them to jails even if the officials have no reason to suspect the presence of contraband. The federal appeals courts had been split on the question, though most of them prohibited strip-searches unless they were based on a reasonable suspicion that contraband was present.

The case arose from the arrest of Florence in New Jersey in 2005. Mr. Florence was in the passenger seat of his BMW when a state trooper pulled his wife, April, over for speeding. A records search revealed an outstanding warrant for Mr. Florence's arrest based on an unpaid fine. Mr. Florence was held for a week in jails in Burlington and Essex Counties, and he was strip-searched in each. He was made to stand naked in front of a guard who required him to move intimate parts of his body. The guards did not touch him.

Justice Anthony M. Kennedy, joined by Alito, Roberts, Scalia, and Thomas, wrote that courts are in no position to second-guess the judgments of correctional officials who must consider not only the possibility of smuggled weapons and drugs, but also public health and information about gang affiliations: "Every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed," adding that about 13 million people are admitted each year to the nation's jails.

The "undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband." One person arrested for disorderly conduct in Washington State "managed to hide a lighter, tobacco, tattoo needles and other prohibited items in his rectal cavity." Officials in San Francisco, he added, "have discovered contraband hidden in body cavities of people arrested for trespassing, public nuisance and shoplifting."

Further, "people detained for minor offenses can turn out to be the most devious and dangerous criminals." Timothy McVeigh, later put to death for his role in the 1995 Oklahoma City bombing, was first arrested for driving without a license plate.

Justice Stephen G. Breyer, writing for the four dissenters, said the strip-searches the majority allowed were "a serious affront to human dignity and to individual privacy" and should be used only when there was good reason to do so. Justice Breyer said that the Fourth Amendment should be understood to bar strip-searches of people arrested for minor offenses not involving drugs or violence, unless officials had a reasonable suspicion that they were carrying contraband.

E. Common §1983 Actions

1. Failure to Provide Medical Care

   a. *Estelle v. Gamble*, 429 U.S. 97 (1976)

      i. Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment to the U.S. Constitution

      ii. An inadvertent failure to provide adequate medical care does not constitute an unnecessary and wanton infliction of pain

   b. *Farmer v. Brennan*, 511 U.S. 825 (1994)

      i. A prison official's deliberate indifference requires a showing that the official was subjectively aware of the risk

      ii. An Eighth Amendment violation occurs when two requirements are met

(a) The deprivation must objectively be sufficiently serious; the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm

(b) A prison official must have a sufficiently culpable state of mind, *i.e.*, be deliberately indifferent to the inmate's health or safety

iii. The official must know of and disregard an excessive risk to inmate health or safety

iv. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and the official also must draw the inference

c. *Horn v. Madison County Fiscal Court*, 22 F.3d 653 (6th Cir. 1994)

i. Proximate cause is an essential element of a 42 U.S.C. §1983 claim

ii. For liability to attach, the conduct must be more culpable than mere negligence; it must demonstrate deliberateness tantamount to intent to punish

iii. Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs is essential to a finding of deliberate indifference

d. *Miller v. Calhoun County*, 408 F.3d 803 (6th Cir. 2005)

i. Deliberate indifference is a stringent standard of fault requiring proof that a municipal actor disregarded known or obvious consequences of his or her action

ii. Municipal liability typically requires proof that the municipality was aware of prior unconstitutional actions by its employees and failed to take corrective measures

iii. Plaintiff must also prove that the municipal policies and practices directly caused the constitutional violation

iv. Physician's provision of grossly inadequate medical care to an involuntary detainee may amount to deliberate indifference if the care is so grossly incompetent,

inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness

2. Excessive Force

The Fourth Amendment to the U.S. Constitution guarantees citizens the right "to be secure in their persons" and protects against "unreasonable searches and seizures" of a person. U.S. Const., 4th Am.

a. *Graham v. Connor*, 490 U.S. 386, 397 (1989)

To determine whether a police officer's use of force in effecting an arrest is excessive, in violation of the Fourth Amendment, courts consider "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

b. *St. John v. Hickey*, 411 F.3d 762, 771 (6th Cir. 2005)

Federal courts must ultimately determine "whether the totality of the circumstances justifies a particular sort of seizure." (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

c. *Smith v. Freland*, 954 F.2d 343, 346 (6th Cir. 1992)

In considering whether a police officer acted reasonably, the Court must particularly "consider the difficulties of modern police work." This is because "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 346-47.

d. *Cummings v. City of Akron*, 418 F.3d 676 (6th Cir. 2005)

A defendant is not privileged to resist an arrest, even if unlawful. The United States Sixth Circuit Court of Appeals has recognized this rule:

> [I]n the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, *whether or not the arrest is illegal under the circumstances*. (Emphasis added).

e. *Steele v. City of Cleveland*, 375 F. Appx. 536 (6th Cir. 2010)

i. Plaintiff's decedent was driving a car with expired plates. He was playing loud music when six officers initiated a stop. He then started sliding his hand down to his right side and disobeyed repeated orders to keep his hands up. The officers also alleged he dove into the back of his car, grabbed a gun, and wrestled with an officer. He was shot sixteen times.

ii. The use of deadly force is reasonable where an officer has probable cause to believe that the suspect poses a threat of serious physical harm to another.

iii. The reasonableness of use of force must be viewed from the perspective of an officer at the scene, not with 20/20 hindsight.

iv. The plaintiff did not show a Constitutional violation, therefore the court did not consider the second prong of analysis, whether the right was clearly established.

3. Failure to Train – Failure to train claims are perhaps the most common claims against a municipality itself.

a. *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658 (1978)

i. A municipality cannot be held liable under 48 U.S.C. §1983 on a *respondeat superior* theory

ii. The plaintiff must identify a municipal policy or custom made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy

b. *Board of Comm'rs. of Bryan County v. Brown*, 520 U.S. 397 (1997)

i. The municipality must be the "moving force" behind the injury alleged; the plaintiff must demonstrate a direct causal link between the municipal action and the deprivation of federal rights

ii. Deliberate indifference is a stringent standard of fault requiring proof that a municipal actor disregarded known or obvious consequences of his or her action

iii. A plaintiff seeking to establish municipal liability based on the actions of an employee must demonstrate that the municipal action was taken with deliberate indifference as to its known or obvious consequences

c. *City of Canton v. Harris*, 489 U.S. 378 (1989)

i. Inadequacy of police training may serve as a basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact

ii. The focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform

iii. A municipality is only liable if the failure to train reflects deliberate indifference to the constitutional rights of its inhabitants

d. *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996)

i. The liability of supervisory personnel under §1983 must be based on more than the right to control employees

ii. There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it

iii. At a minimum a plaintiff must show that a supervisory official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending subordinate

iv. To state a municipal liability claim under an inaction theory, the plaintiff must establish:

(a) The existence of a clear and persistent pattern of unconstitutional conduct;

(b) Notice or constructive notice to the municipality;

(c) The municipality's tacit approval of the unconstitutional conduct such that its deliberate indifference in failing to act can be said to amount to an official policy of inaction; and

(d) The municipalities' custom was the "moving force" or a direct causal link in the Constitutional deprivation

e. *Napier v. Madison County*, 238 F.3d 739 (6th Cir. 2001)

i. To recover in a failure to train claim, a plaintiff must show that the plaintiff's civil rights were violated pursuant to and as a direct result of an official policy or custom

ii. The burden requires a showing that the unconstitutional policy or custom existed, that it was connected to the governmental entity, and that the policy or custom caused the Constitutional violation

f. *Miller v. Lindsay*, 408 F.3d 803 (6th Cir. 2005)

i. A municipal "custom" may be established by proof of the knowledge of policymaking officials and their acquiescence in established practice

ii. Only where a municipality's failure to train its employees evidences deliberate indifference can such a shortcoming be a city "policy or custom"

iii. A single act may establish municipal liability only where the actor is a municipal "policymaker"

IV. OTHER CONSIDERATIONS IN §1983 CASES

A. Punitive Damages

A municipality cannot be liable in punitive damages under federal law [*City of Newport v. Fact Concerts*, 453 U.S. 247 (1981)] or state law [*Rannells v. Cleveland*, 41 Ohio St.1 (1975)], but the individual defendants may be exposed.

B. Denial of Immunity is Generally Appealable

1. An interlocutory decision is appealable if it falls within "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). That "small class" of decisions is limited to orders granting or denying a claim that

"cannot be effectively vindicated after the trial has occurred." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

2. Further, to take advantage of the collateral order doctrine, a party pursuing an interlocutory appeal must demonstrate that the challenged order "'*imperil[s] a substantial public interest*.'" *Kelly v. Great Seneca Fin. Corp*., 447 F.3d 944, 948 (6th Cir. 2006) (emphasis added).

3. In *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009), the Sixth Circuit found that denial of absolute and qualified immunity for state police offers entitled the officers to immediate appeal from the denial of a dispositive motion based on absolute immunity because subjecting them to vexatious litigation imperils a substantial public interest.

C. Statute of Limitations

1. The statute of limitations period is ***two years*** from the date of accrual.

   Actions brought pursuant to §1983 incorporate the statute of limitations from a state's general personal injury statute. *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 855 (6th Cir. 2003). In Ohio, the applicable statute of limitations is set forth in R.C. 2305.10, which provides that a plaintiff must bring an action *within two years after the cause of action accrues*.[5] *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1998) (en banc). Case law is clear that R.C. 2305.10 applies to all §1983 actions.

2. Accrual is determined by federal law.

   While the applicable statute of limitations is dictated by state law, the question of *when* the statute begins to run is governed by federal law. *Fox v. DeSoto*, 489 F.3d 227, 233 (6th Cir. 2007). Under federal law, the statute begins to run when plaintiffs *knew or should have known* of the injury which forms the basis of their claims. *Id*. "In determining when the cause of action accrues in §1983 actions, [courts] have looked to what event should have alerted the typical lay persons to protect his or her rights." *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997).

[5] That statute provides that: "Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues." *Id.* at (A). Sections (C) and (E) govern product liability claims and childhood sexual abuse claims, respectively.