

Special Contribution

Appellate Conflicts in Local Government Law: The Disagreements of a Decade

by R. Perry Sentell, Jr.*

I. INTRODUCTION

In awesome solemnity, Chief Justice John Marshall thundered in 1803, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹ Marshall’s historic declaration has borne both lavish praise and unstinting criticism,² and it serves as the

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. Commonly cited sources are William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 30; ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Gilbert A. Harrison ed., 1962). *See also Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105-1573 (2003).

commonly understood sentiment underlying the legal order of our country. At both federal and state levels, the “judicial department” rules our daily lives by virtue of saying “what the law is.”

At the state level, constitutions and statutes typically establish a judicial branch of government and populate that branch with all manner of courts—local, trial, and appellate. Those courts apply and interpret statutory strictures and common law principles, ultimately resolving the rights and obligations of both government and individual.

The Georgia Constitution fashions a bi-level appellate system, composed of an intermediate appellate court, the Georgia Court of Appeals,³ and at the apex, the Georgia Supreme Court.⁴ Each court is styled “a court of review,”⁵ each possesses a described jurisdiction,⁶ and via various procedures, the supreme court reviews at least some of the court of appeals decisions.⁷ Additionally, “[t]he decisions of the [Georgia] Supreme Court bind all other courts as precedents.”⁸ Because they are final, the supreme court’s dispositions provide the (legally) “correct” solutions to the issues litigated.

Inevitably, the supreme court occasionally encounters a decision by the court of appeals with which it differs. In that event the supreme court must “correct” the perceived “error,” thereby reversing the court of appeals resolution of the case. These reversals occur across the illimitable substantive spectrum of Georgia law, extending randomly throughout the pages of the *Georgia Reports*. An effort merely to designate and catalogue their total instances would summon a persistence of herculean proportions.

Perhaps, however, a severely restricted focus upon a single subject area, extending over a relatively brief period, would serve a useful purpose. Such an exercise might yield results of general interest on the

3. See GA. CONST. art. VI, § 5, para. 1 (1983): “The Court of Appeals shall consist of not less than nine Judges who shall elect from among themselves a Chief Judge.”

4. See GA. CONST. art. VI, § 6, para. 1 (1983): “The Supreme Court shall consist of not more than nine Justices who shall elect from among themselves a Chief Justice”

5. See GA. CONST. art. VI, § 5, para. 1: “The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law” GA. CONST. art. VI, § 6, para. 2: “The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases”

6. *Id.*

7. See, e.g., GA. CONST. art. VI, § 6, para. 5: “The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance.” For treatment of the supreme court’s practices in exercising its certiorari jurisdiction, see R. Perry Sentell, Jr., *Lightening the Load: In the Georgia Supreme Court*, 37 GA. L. REV. 697 (2003).

8. GA. CONST. art. VI, § 6, para. 6.

phenomena of appellate reversals and more explicit edification on the selected subject.

On the subject of local government law, articles annually surveying the field will provide a perspective for ponder and a means of measurement.⁹ A canvas of the last ten survey articles will identify the cases in which the supreme court reversed the court of appeals, as well as the specific legal issues drawing the appellate conflicts.¹⁰ The effort will reflect, for the law of local government, the appellate disagreements of a decade.

II. A DECADE OF REVERSALS: NUMERICAL FACETS

Attention initially devolves to facets amenable to absolute numerical calculation. Pivotal, of course, are the total instances of reversals and the years in which they occurred. Those revelations operate to unfold an entire decade of local government law's appellate divisiveness. Additionally, an identification of the subject cases themselves will disclose whether the supreme court was unanimous in its decision of reversal and whether its action ultimately favored the local government. Finally, some focus on "causation" might prove insightful, i.e., whether the court of appeals original decision reversed or affirmed the trial court in the case, and consequently, the eventual impact upon the trial's result occasioned by the supreme court's subsequent reversal. These numerical facets can be elaborated in a fairly brief order.

A. Total Reversals

The following table chronicles the total occasions upon which the Georgia Supreme Court reversed (over the past ten survey years)

9. These articles appear annually in each fall issue of the *Mercer Law Review*. Although they are simply "survey" efforts, designed primarily to keep the practitioner current on local government legal developments, the articles are fairly complete in coverage, and in identifying the cases in which the supreme court is reviewing decisions by the court of appeals. Although possibly lacking in total accuracy, they come close.

10. The canvassed articles are: R. Perry Sentell, Jr., *Local Government Law*, 55 *MERCER L. REV.* 353-96 (2003); 54 *MERCER L. REV.* 417-60 (2002); 53 *MERCER L. REV.* 389-440 (2001); 52 *MERCER L. REV.* 341-81 (2000); 51 *MERCER L. REV.* 397-439 (1999); 50 *MERCER L. REV.* 263-305 (1998); 49 *MERCER L. REV.* 215-55 (1997); 48 *MERCER L. REV.* 421-54 (1996); 47 *MERCER L. REV.* 225-68 (1995); 46 *MERCER L. REV.* 363-99 (1994). This effort thus derives from discussions consuming a total of 423 pages.

decisions by the Georgia Court of Appeals dealing with issues of local government law.¹¹

TABLE I

Number of Cases in Which Supreme Court
Reversed Court of Appeals 1994-2003

<i>Survey Year</i>	<i>Cases</i>	<i>Survey Year</i>	<i>Cases</i>
1994	1	1999	2
1995	3	2000	4
1996	1	2001	2
1997	3	2002	0
1998	0	2003	2
		Total	18 Cases

Whatever notoriety reversals may attract within the local government bar, their occurrence in the recent past has proceeded at a relatively steady judicial pace. As Table I reveals, the Georgia Supreme Court reversed the Georgia Court of Appeals in a total of eighteen local government cases during the last ten survey years. That combination of time and total yields a decade reversal average of 1.8 cases per decisional year. As further reflected, the total reversals ranged from a high of four cases in the survey year 2000 to a low of no cases in survey years 1998 and 2002. As they are distributed over the ten-survey-year period, the reversals reflect no particularly significant trend in frequency of occurrence, and only a slight increase over the course of the decade. (The first five years of the surveyed period produced a total of eight reversals as compared with ten disagreements during the final five years.) Finally, as with many statistical findings, evaluation is controlled by perspective. On one hand, given local government law's pervasive reach, a reversal rate averaging less than two cases per year might be viewed as fairly minimal appellate correctional scrutiny. Contrarily, in such a unique practice, an average reversal rate of almost two cases per decisional year might be considered fairly substantial appellate oversight.

11. Because the annual survey period for the articles runs from June through May, it overlaps the calendar years in which the cases were actually decided. Beyond taking note of that fact, however, the discussion here is based on the decade of survey period cases.

For the sake of completeness, Table II transfers the ten *survey* years into the eleven *calendar* years in which the cases were actually decided.

Table II

Calendar Years in Which Supreme Court
Reversed Court of Appeals 1993-2003

<i>Calendar Year</i>	<i>Cases</i>	<i>Calendar Year</i>	<i>Cases</i>
1993	1	1998	1
1994	2	1999	5
1995	2	2000	1
1996	2	2001	1
1997	1	2002	0
		2003	2
		Total	18 Cases

The effect of this translation of survey years into calendar years is to add an additional year (1993) to the total, and with one exception, to spread the cases more evenly throughout the period. The year containing the largest number of reversals moves from 2000 back to 1999. With number and time of reversals tabulated, a focus upon the individual cases of appellate disagreement appears appropriate at this juncture.

B. The Cases and the Nature of the Reversals

The following table reflects the style of each of the eighteen cases reversed and the calendar year of each decision.¹² Additionally, the

12. The cases and their references are as follows: *City of Winder v. McDougald*, 276 Ga. 866, 583 S.E.2d 879 (2003); *City of Decatur v. DeKalb County*, 277 Ga. 292, 589 S.E.2d 561 (2003); *Dudley v. State*, 273 Ga. 466, 542 S.E.2d 99 (2001); *Jackson v. Shadix*, 272 Ga. 631, 533 S.E.2d 706 (2000); *City of Tybee Island v. Godinho*, 270 Ga. 567, 511 S.E.2d 517 (1999), *overruled on other grounds by Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne*, 278 Ga. 116, 118, 598 S.E.2d 471, 474 (2004); *City of Marietta v. Edwards*, 271 Ga. 349, 519 S.E.2d 217 (1999); *City of Douglasville v. Queen*, 270 Ga. 770, 514 S.E.2d 195 (1999); *Rowe v. Coffey*, 270 Ga. 715, 515 S.E.2d 375 (1999); *Adams v. Hazelwood*, 271 Ga. 414, 520 S.E.2d 896 (1999); *Seay v. Cleveland*, 270 Ga. 64, 508 S.E.2d 159 (1998); *Roberts v. Burke County Sch. Dist.*, 267 Ga. 665, 482 S.E.2d 283 (1997); *Hibbs v. City of Riverdale*, 267 Ga. 337, 478 S.E.2d 121 (1996); *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896 (1996); *Athens-Clarke County v. Walton Elec. Membership Corp.*, 265 Ga. 229, 454 S.E.2d 510 (1995); *City of Winder v. Girone*, 265 Ga. 723, 462 S.E.2d 704 (1995); *Mixon v. City of Warner Robins*, 264 Ga. 385, 444 S.E.2d 761 (1994), *superseded by statute*, as stated in *City*

table indicates whether the supreme court's decision of reversal was unanimous¹³ and whether the reversal ultimately favored the local government.¹⁴

Table III

Cases & The Nature of The Reversals

<i>Case</i>	<i>Unanimous Court</i>	<i>For Local Government</i>
DeKalb County v. J&A Pipeline Co. (1993)	Yes	Yes
Mixon v. City of Warner Robbins (1994)	Yes	No
Gilbert v. Richardson (1994)	Yes	No
Athens-Clarke County v. Walton Elec. Corp. (1995)	Yes	Yes
City of Winder v. Girone (1995)	Yes	Yes
Hibbs v. City of Riverdale (1996)	Yes	No
City of Atlanta v. Watson (1996)	Yes	Yes
Roberts v. Burke County School Dist. (1997)	No	Yes
Seay v. Cleveland (1998)	Yes	Yes
City of Tybee Island v. Godinho (1999)	Yes	Yes
City of Marietta v. Edwards (1999)	Yes	Yes
City of Douglasville v. Queen (1999)	No	Yes
Rowe v. Coffey (1999)	No	Yes
Adams v. Hazelwood (1999)	Yes	Yes
Jackson v. Shadix (2000)	No	Yes
Dudley v. State (2001)	Yes	Yes
City of Winder v. McDougald (2003)	No	Yes
City of Decatur v. DeKalb County (2003)	Yes	Yes
Totals	Yes 13 (72%)	Yes 15 (83%)
18 Cases	No 5 (28%)	No 3 (17%)

of Winder v. McDougald, 276 Ga. 866, 867, 583 S.E.2d 879, 880 (2003); Gilbert v. Richardson, 264 Ga. 744, 452 S.E.2d 476 (1994); DeKalb County v. J & A Pipeline Co., 263 Ga. 645, 437 S.E.2d 327 (1993).

13. All decisions in which there were no dissents are treated as "unanimous." There were several cases in which various justices concurred (either in "judgment only" without opinion, or "specially" with an opinion).

14. Some of the cases were actually brought against a local government officer or employee, but on this table are treated as cases against the local government. The decisions shown as favoring the local government include decisions for local government officers or employees.

As styled, the chronologically arranged cases in Table III indicate the local government (including the local government officer or employee) involved in the litigation and the opposing party.¹⁵ Dated to survey period, only two years (1998 and 2002) contained no reversals; when translated into calendar period, that number decreases to only one year (2002). As for the “nature” of the supreme court’s reversing decisions, the table focuses upon two primary factors: court composition and ultimate prevailing party.

Table III reflects that when the supreme court reverses a local government decision by the court of appeals, the justices are usually united in that determination. Thus, in almost three-quarters of the reversals (72%), the justices decided in unanimity. That finding, in turn, elicits two further impressions. First, when the court of appeals is reversed, its position is one typically deemed erroneous by the entire membership of the supreme court. Perhaps it is that overwhelming concurrence among themselves that convinces the justices to take the drastic step of reversal. Alternatively, the point may at least support a rationalization for taking the step. Second, the fact of unanimity also serves to expose an abiding analytical enigma: How can precisely the same legal issues so clearly resolvable in one fashion by the court of appeals propel every justice on the supreme court to the opposite solution? The perpetual presence of this enigma in judicial law making does not diminish its discordant perplexity.

Table III also reveals an intriguing aspect concerning the minority of reversals (28%) in which the justices were not unanimous in their decision. In not a single one of those instances did the majority of the justices decide against the local government. Thus, in every case in which one (or more) of the justices dissented, the supreme court reached a conclusion favoring the local government. What might logically be deduced from this facet is problematic, but it is clear at a minimum that the dissenters did not dissent to prevent the opposing party from prevailing.

Aside from the supreme court’s composition on the occasions of its reversing decisions, Table III also discloses the paucity of reversals not resulting in a local government victory. In but three of the total eighteen reversals, only 17% of the decisions, did the ultimate resolution favor the opposing party in the case. Whether that disclosure suggests a lower court’s adverseness to the local government is not clear.¹⁶ One

15. In the final case charted, *City of Decatur*, 277 Ga. at 292, 589 S.E.2d at 561, the opposing party is, of course, another local government.

16. This point will receive additional discussion in treating the information derived from Table IV, *infra*.

point, however, does seem apparent: When it reverses the court of appeals, the supreme court is typically not acting out of a concern over the opposing party's litigational plight. Accordingly, in the event a supreme court reversal is forthcoming in the case, the local government can more confidently anticipate a favorable result than can the opposing party. In the overarching practice of local government law, the opposing party's attorney is left to ponder that probability in determining whether to seek the supreme court's review of the case.

C. The Court of Appeals Original Decisions

With the cases identified and the nature of the supreme court's reversals examined, attention finally reverts to the decisions reversed. Only by focusing upon the court of appeals original dispositions of the cases can the impact of the supreme court's subsequent reversals be adequately appraised. In attempting such an appraisal, moreover, it is informative to look as well to the cases as they emerged from the trial process. The trial court's actions, the court of appeals dispositions, and the supreme court's reversals all converge to explicate the appellate review phenomena. They also assist in assessing that phenomena's importance to a decade of local government legal development.

Table IV

Court of Appeals Original Decisions
Subsequently Reversed by Supreme Court

<i>Case</i>	<i>Ct. of Apps. Rev'd Trial Court</i>	<i>Ct. of Apps. Aff'd Trial Court</i>	<i>Local Government Ultimately Won</i>
J&A Pipeline Co.	Yes		Yes
Mixon		Yes	No
Gilbert		Yes	No
Athens-Clarke County		Yes	Yes
Girone	Yes		Yes
Hibbs		Yes	No
Watson	Yes		Yes
Roberts	Yes		Yes
Seay		Yes	Yes
Godinho	Yes		Yes
Edwards	Yes		Yes
Queen	Yes		Yes
Rowe	Yes		Yes
Adams	Yes		Yes

Jackson	Yes		Yes
Dudley		Yes	Yes
McDougald		Yes	Yes
City of Decatur		Yes	Yes
Total	10 (56%)	8 (44%)	

Table IV's revelations contribute additional intrigue to the exercise. Thus, in 56% of the local government cases in which the supreme court reversed the court of appeals, the court of appeals had originally reversed the trial court. Obviously, in the remaining 44% of the supreme court's reversals, the court of appeals had originally affirmed the trial court's dispositions of the cases. Those conclusions are of considerable import in reviewing Georgia local government law's developments over the past decade. They evidence that in a solid majority of the supreme court's reversals, the trial court had yielded the "right" result in the litigation's first instance.¹⁷ Most of the time, therefore, nothing was accomplished for either party by the expensive and time consuming (hence, "inefficient") process of appeal and appellate review. That was not true, of course, in the minority of reversals in which both the trial court and the court of appeals had been "wrong."

Table IV also radiates another striking finding. In every instance in which the supreme court reversed the court of appeals reversal of the trial court, the end result yielded a victory for the local government. Thus, in 56% of the cases evoking disagreement between the appellate courts, the court of appeals decided against, and the supreme court for, the local government. Additionally, the table reveals, in three of the cases featuring the supreme court's reversal of the court of appeals affirmation of the trial court, the end result yielded a victory for the local government. Accordingly, a resounding 72% of the total reversals operated to "correct" the court of appeals decisions against the local government. To characterize the implied proclivities as merely "appellate tendencies" would constitute a significant understatement.

III. A DECADE OF REVERSALS: SUBSTANTIVE FACETS

Numerical elaboration in place, local government's appellate conflicts require as well a scrutiny of substance. The issues drawing the appellate courts' disagreements over the past decade are instructive in

17. Once again, it is important to note that the term "right" is not employed here as a manifestation of judgment: the supreme court's decision is treated as "right" not in the sense that it is necessarily the sounder answer, but rather that it is the final one.

several respects. They represent local government law's most confounding problems of the era, problems requiring disposition by Georgia's highest judicial tribunals. The opposing solutions proffered by those tribunals reflect not only the difficulty of the questions presented, they also unfold the common law tradition. When the supreme court reverses the court of appeals resolution, the case law process brings its best to bear in resolving litigational conflicts. That the process itself is conflicted in doing so only heightens the occasion's analytical intrigue.

Table V

Issues Presented by the Cases Reversed

<i>General Issue</i>	<i>No. of Cases Presenting the Issue</i>	<i>% of Total Cases</i>
County Finance	3	17%
County Liability	5	28%
Municipal Liability	7	39%
Condemnation	1	5%
Official Entitlements	1	5%
Governmental Innovations	1	5%
Total	18	99%

Table V seeks to identify the substantive issues featured in the cases attracting the supreme court's reversals. Grouping those issues into six general categories, the table reflects the broadly ranging subject matter polarizing the appellate process over the past decade. Impressively, the disagreements in twelve of the eighteen cases (67%) touched upon facets of local government "liability." For both municipalities and counties, responsibility for injury allegedly inflicted upon others persisted as the point most frequently sundering the appellate courts. Some 17% of the reversals turned on matters of county finance, and each of the three remaining cases (a collective 15%) featured yet another disputed issue. This substantive spectrum of disagreements thus illustrates the phenomena of appellate reversals and its impact upon a decade of local government litigation. Perhaps the briefest description of the cases themselves will helpfully conclude the exercise.¹⁸

18. The decisions reviewed, going back over a decade, depended, of course, upon the controlling statutes and cases then in effect. Obviously, the discussion here is not intended to indicate that the results of the cases reviewed are necessarily the present rule. The

A. County Finance

County financial issues occupied a continuing presence in the cross-hairs of appellate disagreement. Indeed, the decade opened and closed with reversals of significant monetary impact upon county governments throughout the state. A chronological canvas will highlight those economic controversies once and presently resistant to judicial consensus.

In the 1993 case of *DeKalb County v. J & A Pipeline Co.*,¹⁹ a subcontractor sought county liability for labor and materials supplied on a county public works project when the surety on the general contractor's payment bond proved insolvent.²⁰ The trial court dismissed plaintiff's action, the court of appeals reversed,²¹ and the supreme court granted certiorari.²² The court's unanimous opinion initially sketched two relevant statutory duties: first, the general contractor's duty to supply the county with a payment bond of "good and sufficient surety,"²³ second, the county's duty to take the bond in the required "manner and form."²⁴ The latter duty, the court held, did not require the county to look beyond a duly submitted bond and surety affidavit and further investigate the surety.²⁵ Analogizing to lien-law requirements in the private sphere,²⁶ the court concluded the county was free from liability

emphasis rather is on the disagreements between the two appellate courts and the issues of local government law that have prompted those disagreements over the past decade.

19. 263 Ga. 645, 437 S.E.2d 327 (1993).

20. *Id.* at 646, 437 S.E.2d at 329. Plaintiff first failed to recover for its labor and materials from the general contractor and, when unsuccessful, then sought recovery directly against the county. See *J & A Pipeline Co. v. DeKalb County*, 208 Ga. App. 123, 124, 430 S.E.2d 13, 15, *rev'd*, 263 Ga. 645, 437 S.E.2d 327 (1993).

21. *J & A Pipeline Co.*, 208 Ga. App. at 123, 430 S.E.2d at 13.

22. *J & A Pipeline Co.*, 263 Ga. at 645, 437 S.E.2d at 327.

23. *Id.* at 647, 437 S.E.2d at 330 (citing O.C.G.A. § 13-10-1 (repealed 2001)).

24. *Id.* (citing O.C.G.A. § 36-82-102 (repealed 2000)). The statute provides that if the bond and affidavit are not taken in the required manner and form, "the [county] for which work is done under the contract shall be liable to all subcontractors and to all persons furnishing labor, skill, tools, machinery, or materials to the contractor or subcontractor thereunder for any loss resulting to them from such failure." O.C.G.A. § 36-82-102 (repealed 2000).

25. *J & A Pipeline Co.*, 263 Ga. at 649, 437 S.E.2d at 331. "[T]here is no express requirement that a county, presented with the general contractor's payment bond or the surety's affidavit which, on its face, comports with the statutory requirements . . . make any further inquiry or investigation so as to defeat the subcontractors' or materialmen's direct action remedy." *Id.*

26. *Id.* "It follows that the county has no greater duty to subcontractors and materialmen under [O.C.G.A. section] 36-82-102 than a private owner of improved property has to subcontractors and materialmen under the lien laws." *Id.*, 437 S.E.2d at 332.

to subcontractors if it took bonds and necessary affidavits appearing valid upon their face.²⁷ The court thus rejected the court of appeals position that, in order to defeat direct claims by sub-contractors and materialmen, the county must inquire into the surety's "solvency and sufficiency."²⁸

Seven years later, the county prevailed on another prominent financial front in *Jackson v. Shadix*.²⁹ There, county voters approved a referendum proposing that a special purpose local option sales tax be imposed for raising "not more than \$34,000,000 . . . and for a period of time not to exceed five (5) years."³⁰ When the tax yielded the stated amount of money in a period of less than five years,³¹ taxpayers contended that the levy automatically terminated.³² Although the trial court rejected plaintiffs' contentions, the court of appeals viewed the authorizing statute as ambiguous and construed it against the county.³³ A narrowly divided supreme court granted certiorari and reversed.³⁴ The court focused upon a statutory provision of termination "[o]n the final day of the maximum period of time specified for the imposition of the tax."³⁵

27. *Id.* at 649-50, 437 S.E.2d at 332.

If . . . the county takes a payment bond from the general contractor or an affidavit from the surety which does, on its face, comport with the statutory requirements, the subcontractors' and materialmen's direct action remedy will be defeated notwithstanding the subsequent inefficacy of the bond or the subsequent discovery of the falsity of the affidavit.

Id.

28. The court emphasized that a later statute, not applicable in this case, does provide that "[a]ny payment bond required by this Code section shall be approved as to form and as to the solvency of the surety by the officer of the . . . county . . . who negotiates the contract." *Id.* at 650, 437 S.E.2d at 332 (citing O.C.G.A. § 13-10-1(f) (repealed 2001)). Whether that statute might authorize a direct action against the county in these circumstances "must await the case wherein that issue is properly presented and raised." *Id.* at 651, 437 S.E.2d at 332.

29. 272 Ga. 631, 533 S.E.2d 706 (2000).

30. *Id.* at 632, 533 S.E.2d at 707. The tax imposed was a "mixed purpose" tax; i.e., a tax for street, road, and bridge purposes, and for funding specified capital improvements.

31. *Id.* Collection of the tax began in 1994 and more than \$34,000,000 had been collected by 1998. *Id.*

32. *Id.*

33. *Shadix v. Carroll County*, 239 Ga. App. 191, 521 S.E.2d 99 (1999), *rev'd*, *Jackson v. Shadix*, 272 Ga. 631, 533 S.E.2d 706 (2000). For the statute empowering counties to levy special purpose sales taxes, see O.C.G.A. § 48-8-110 to -122 (2002 & Supp. 2004).

34. *Jackson*, 272 Ga. at 634, 533 S.E.2d at 708. "An analysis of the statute and the referendum persuades us that the trial court was correct in holding that the [tax] was to terminate after five years, not after collection of the amount mentioned in the referendum. Thus, the Court of Appeals erred in reversing the judgment of the superior court . . ." *Id.*

35. *Id.* at 633, 533 S.E.2d at 707. This provision was found in the controlling 1987 version of the statute, O.C.G.A. section 48-8-112 (Supp. 1994).

The “unmistakable and unambiguous meaning” of that provision, the court asserted, was measurement “by the period of time specified in the resolution.”³⁶ Moreover, a later amendment to the statute, not applicable to this case, specified that such taxes would terminate “when the amount provided for has been collected.”³⁷ That change, the court insisted, confirmed the general assembly’s belief that the earlier statute had employed a “time-based termination.”³⁸

The local option sales tax was continuing to shed issues of divisiveness at the conclusion of the surveyed decade. The parties in *City of Decatur v. DeKalb County*³⁹ litigated the validity of an intergovernmental contract under which the county agreed to disburse annually to municipalities a portion of the proceeds collected under the Homestead Option Sales and Use Tax Act.⁴⁰ Although the statute required the expenditure of not more than 20% of tax receipts for capital outlay projects,⁴¹ a purpose the agreement was intended to facilitate, both the trial court and the court of appeals rendered decisions of invalidity.⁴² The problem emerged from the perceived contrast between contract and statute. The former conferred tax expenditure power upon the cities; the latter confined tax expenditures to the county.⁴³ “[T]he Intergovernmental Agreement,” the court of appeals asserted, “seeks to shift that responsibility to the municipalities.”⁴⁴ As authority for its perspicuity, the court quoted the supreme court’s famous admonition in *City of Augusta v. Mangelly*: “[I]t can never be a valid county purpose to provide [its tax] revenue to a municipality.”⁴⁵

36. *Jackson*, 272 Ga. at 633, 533 S.E.2d at 707.

37. *Id.* at 634, 533 S.E.2d at 708. The later 1997 provision appeared in O.C.G.A. section 48-8-112(b)(3). *Id.*

38. *Id.* A dissenting opinion for three justices maintained that the referendum was confusing, that the voters could not know when the tax terminated, and that the provision must be construed most strongly in favor of the taxpayers. *Id.* at 636-37, 533 S.E.2d at 709-10 (Sears, J., dissenting).

39. 277 Ga. 292, 589 S.E.2d 561 (2003).

40. See O.C.G.A. § 48-8-100 to -109 (2002). “HOST allows for a special sales tax to be levied in a special tax district if the voters of that district so approve.” *City of Decatur*, 277 Ga. at 293, 589 S.E.2d at 562.

41. *City of Decatur*, 277 Ga. at 293, 589 S.E.2d at 562; O.C.G.A. § 48-8-104(c)(2)(A) (2002).

42. *City of Decatur v. DeKalb County*, 255 Ga. App. 868, 871, 567 S.E.2d 332, 334 (2002), *rev’d*, 277 Ga. 292, 589 S.E.2d 561 (2003).

43. *Id.* at 870, 567 S.E.2d at 334. “Contrary to the structure set forth in the statute, the county has little power under the agreement to control what is done with the tax proceeds once they are given to the municipalities.” *Id.*

44. *Id.*

45. *Id.* (quoting *City of Augusta v. Mangelly*, 243 Ga. 358, 362, 254 S.E.2d 315, 319 (1979), *superseded by statute*, as stated in *Nielubowicz v. Chatham County*, 252 Ga. 330,

Granting certiorari, the supreme court unanimously charged the court of appeals with a “misplaced reliance” upon *Mangelly*.⁴⁶ Immediately following that decision, the court explained, the legislature enacted a newer version of the Local Option Sales Tax Act.⁴⁷ This later statute rested upon the constitution’s grant of a “special district” tax power,⁴⁸ and authorizes “district taxes” which are immune to *Mangelly*’s “county tax” prohibition.⁴⁹ The disbursement of district taxes via an intergovernmental contract, an arrangement likewise enjoying express constitutional authorization,⁵⁰ encounters none of *Mangelly*’s restrictive proscriptions. The court accordingly reversed the court of appeals condemnation of the county-city disbursement agreement.⁵¹

B. County Liability

The moving target of local government liability consumes an inordinate share of the Georgia judiciary’s time and efforts. It can come as little surprise, therefore, that the subject also claims a considerable legacy of appellate conflict. A healthy leaven of that conflict focuses upon the liability of counties and their officers.⁵²

The famous constitutional amendment of 1991 sought to bring some stability to the issue by declaring sovereign immunity for the state and “all of its departments and agencies,” an immunity that may be

312 S.E.2d 102 (1984)).

46. *City of Decatur*, 277 Ga. at 293, 589 S.E.2d at 562. Two justices having been disqualified, the court included two replacement judges. *Id.* at 294, 589 S.E.2d at 563.

47. *Id.* at 293, 589 S.E.2d at 562; O.C.G.A. § 48-8-80 (2002).

48. *City of Decatur*, 277 Ga. at 293, 589 S.E.2d at 562 (citing GA. CONST. art. IX, § 2, para. 6).

49. *Id.* at 293-94, 589 S.E.2d at 562. The court relied upon its prior decision in *Board of Commissioners of Taylor County v. Cooper*, 245 Ga. 251, 264 S.E.2d 193 (1980), to hold “that a district tax created under that constitutional provision is not a ‘county tax’ within the meaning of *Mangelly*, and that distribution of the proceeds from such a district tax to municipalities does not violate the principles of *Mangelly*.” *Id.*

50. See GA. CONST. art. IX, § 3, para. 1.

51. *City of Decatur*, 277 Ga. at 294, 589 S.E.2d at 562. “It does not violate *Mangelly*’s proscription on county taxes, and the Court of Appeals erred in so holding.” *Id.* For a more thorough treatment of the peculiarities of the Georgia county’s taxing power, see R. Perry Sentell, Jr., *Local Government Litigation: Some Pivotal Principles*, 55 MERCER L. REV. 1 (2003); R. PERRY SENTELL, JR., ADDITIONAL STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 565-606 (1983); R. Perry Sentell, Jr., *The County Spending Power: An Abbreviated Audit of the Account*, 16 GA. L. REV. 599 (1982).

52. For a more thorough treatment of county liability, see R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of ‘92*, 9 GA. ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The “Crisis” Conundrum*, 2 GA. ST. U. L. REV. 19 (1985).

explicitly waived by the general assembly.⁵³ As for governmental officers and employees, the amendment “provides no immunity for ministerial acts negligently performed or for ministerial or discretionary acts performed with malice or an intent to injure.”⁵⁴ In the 1994 case of *Gilbert v. Richardson*,⁵⁵ the appellate courts diverged on an implication of immunity waiver.⁵⁶ The case featured an action against a county sheriff and deputy for injuries plaintiff suffered in a collision with the deputy.⁵⁷ Both courts concluded that the county might waive its sovereign immunity to the extent of any insurance purchased under express authority of the motor vehicle insurance statute.⁵⁸ However, the supreme court rejected the court of appeals position that county participation in a group insurance program did not constitute the purchase of liability insurance.⁵⁹ Rather, the court held this waiver of county immunity operated to also waive the sheriff’s sovereign immunity for the negligence of his deputy.⁶⁰ Consequently, the court reversed the court of appeals grant of summary judgment for the sheriff.⁶¹

Insurance, albeit a “comprehensive liability policy,”⁶² likewise attracted appellate dissension in the later case of *Roberts v. Burke County School District*.⁶³ There, plaintiffs sued for the death of their five-year-old child who was struck by a car some four-tenths of a mile

53. See GA. CONST. art. I, § 2, para. 9.

54. *Gilbert v. Richardson*, 264 Ga. 744, 753, 452 S.E.2d 476, 483 (1994).

55. 264 Ga. 744, 452 S.E.2d 476 (1994).

56. *Id.* at 744, 452 S.E.2d at 476.

57. *Id.* at 745, 452 S.E.2d at 478. At the time of the collision, the deputy was responding to an emergency call. *Id.*

58. *Id.*; O.C.G.A. § 33-24-51 (1996). For treatment, see R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973).

59. *Gilbert*, 264 Ga. at 751, 452 S.E.2d at 482. The court rejected the argument contra as providing “no basis for a finding that [the] County’s participation in GIRMA is not a waiver of sovereign immunity.” *Id.*

60. *Id.* at 754, 452 S.E.2d at 484.

[T]he official immunity of a public employee does not protect a governmental entity from liability under the doctrine of respondeat superior Since deputy sheriffs are employed by the sheriff rather than the county, sheriffs may be liable in their official capacity for a deputy’s negligence in performing an official function Since, however, the county has waived sovereign immunity to the extent of its liability insurance coverage, [the sheriff’s] sovereign immunity defense is likewise waived to that extent.

Id.

61. *Id.*

62. *Roberts v. Burke County Sch. Dist.*, 267 Ga. 665, 666, 482 S.E.2d 283, 284 (1997).

63. 267 Ga. 665, 482 S.E.2d 283 (1997).

from the place of his discharge by the school bus.⁶⁴ Reversing the trial court's conclusion of immunity waiver,⁶⁵ the court of appeals employed the insurance policy's coverage exclusion for injury arising from the "use" of a vehicle.⁶⁶ Discharging the child at an unauthorized location and requiring him to walk home, the court reasoned, were necessarily concomitant to the "use" of the bus.⁶⁷ The supreme court granted certiorari and criticized the court of appeals fixation on the place where the boy was killed.⁶⁸ Contrarily, the court delineated, the trial judge found the school district's negligence to consist of its "selection and implementation of the unsafe route."⁶⁹ That conduct, the supreme court asserted, "is removed from the actual operation of the school bus"⁷⁰ and fell outside the policy exclusion.⁷¹

Aside from immunity, a local government may seek protection from negligence liability by denying the existence of a "duty" owing to the plaintiff in the circumstances.⁷² The Georgia Supreme Court adopted the "public duty doctrine" in its 1993 decision in *City of Rome v. Jordan*,⁷³ formulating the following precept: "[W]here failure to provide police protection is alleged, there can be no liability based on a [local

64. "There was evidence that by the time of the fatal injury, the boy had walked about four-tenths of a mile in the direction of his home and the school bus had traveled approximately two miles away from the site where the child had been discharged." *Id.*

65. *Burke County Sch. Dist. v. Roberts*, 220 Ga. App. 510, 513, 469 S.E.2d 529, 532 (1996), *rev'd*, 267 Ga. 665, 482 S.E.2d 283 (1997).

66. *Roberts*, 267 Ga. at 666, 482 S.E.2d at 284. The material policy "contained an exclusion of coverage for injury or damages arising from the ownership, maintenance, operation, use, or loading or unloading of a vehicle." *Id.*

67. "The Court of Appeals reversed the judgment of the trial court and remanded the case with direction that the trial court enter an involuntary dismissal." *Id.*

68. *Id.* at 668, 482 S.E.2d at 286.

The illogic of such an approach is stark in a case such as this which involves a young child, for it can well be argued that with a child of tender years there would not be a point of safety, following discharge from a school bus, until the child was inside his home and in the presence of a caregiver.

Id.

69. *Id.*, 482 S.E.2d at 285.

70. *Id.*

71. *Id.*, 482 S.E.2d at 286. "[T]he trial court correctly concluded that the boy's injury and death could not be said to have arisen from the 'use' of the school bus within the contemplation of the . . . insurance policy. Therefore, the Court of Appeals determination to the contrary does not stand." *Id.* One justice dissented, arguing that "[b]ecause the death arose out of the use of the bus, the injury is excluded from coverage under the . . . policy." *Id.* at 669, 482 S.E.2d at 286 (Fletcher, J., dissenting).

72. *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861 (1993).

73. 263 Ga. 26, 426 S.E.2d 861 (1993).

government's] duty to protect the general public."⁷⁴ Over the next several years, both appellate courts experienced conceptual difficulties in applying the "doctrine," difficulties culminating in *Coffey v. Brooks County*.⁷⁵ The case featured an action by motorists, who wrecked their vehicles on a county road washed out by an unusually heavy rainstorm. Plaintiffs alleged county negligence in failing to properly inspect and barricade the road.⁷⁶ The court of appeals, although viewing plaintiffs' charges as "based on [defendant's] omissions, rather than any affirmative act of negligence,"⁷⁷ concluded as follows: "[W]e are compelled not to extend the public duty doctrine to . . . law enforcement officers engaged in the *protection* of the public at large from hazardous conditions caused by the weather rather than by a third party."⁷⁸ Accordingly, plaintiffs successfully hurdled the barrier of "public duty."⁷⁹

Taking the case on certiorari—under the style of *Rowe v. Coffey*—⁸⁰ the supreme court, via a combination of two two-justice opinions, reversed.⁸¹ The court's conclusion,⁸² emerging from a veritable blizzard of proffered views,⁸³ rejected the court of appeals exclusion of weather conditions from the reach of the public duty doctrine. Rather, the doctrine applied to county officers failing to remedy the road conditions,⁸⁴ those officers violated no duty to the motorists and thus escaped negligence liability.⁸⁵

As noted, the 1991 constitutional amendment confers "official immunity" upon local government officers, sued in their individual

74. *Id.* at 28, 426 S.E.2d at 861. For a thorough treatment of Georgia's "public duty doctrine," see R. Perry Sentell, Jr., *Georgia's Public Duty Doctrine: The Supreme Court Held Hostage*, 51 MERCER L. REV. 73 (1999).

75. 231 Ga. App. 886, 500 S.E.2d 341 (1998), *rev'd*, *Rowe v. Coffey*, 270 Ga. 715, 515 S.E.2d 375 (1999).

76. *Id.* at 886, 500 S.E.2d at 344. Plaintiffs sued the county, its officers, and its employees. *Id.*

77. *Id.*

78. *Id.* at 888, 500 S.E.2d at 345 (emphasis in original).

79. *Id.* at 893, 500 S.E.2d at 349.

80. 270 Ga. 715, 515 S.E.2d 375 (1999).

81. *Id.* at 715, 515 S.E.2d at 375.

82. *Id.* The first opinion in the case, referred to as the "majority," reflected the views of but two justices. It joined with another two-justice opinion, referred to as "specially concurring," to constitute the supreme court's controlling position. *Id.*

83. *Id.* There were four different opinions in the case. *Id.*

84. *See id.* at 716, 500 S.E.2d at 377. Although the doctrine covered only protective police services, those services included police protection in general. *Id.*

85. *Id.* For analysis of both the public duty doctrine and the supreme court's treatment of *Rowe v. Coffey*, see R. Perry Sentell, Jr., *Georgia's Public Duty Doctrine: The Supreme Court Held Hostage*, 51 MERCER L. REV. 73 (1999).

capacity, for “discretionary” functions performed negligently but without malice or intent to injure.⁸⁶ The amendment exposes the officers’ “ministerial” functions to negligence liability.⁸⁷ For officers sued in their official capacity, however, the local government’s sovereign immunity affords complete protection. These delineations, as well, fall subject to appellate disagreements.⁸⁸

One such conflict arose in *Seay v. Cleveland*,⁸⁹ an action against a county sheriff for alleged negligence in conducting sheriff’s sales.⁹⁰ The court of appeals treated the sheriff’s sale duties as amounting to “ministerial” functions, thereby “forfeit[ing] the protections of sovereign immunity.”⁹¹ Taking the case on certiorari, a unanimous supreme court emphasized that plaintiff had sued the sheriff in his “official capacity.”⁹² In that context the court explained, “[s]overeign immunity applies equally to ministerial and discretionary acts.”⁹³ Accordingly, plaintiff’s claims “against [the sheriff] in his official capacity are precluded under the doctrine of sovereign immunity,” and both lower courts had erred.⁹⁴

When the employee is sued in his individual capacity for injury resulting from a discretionary function, there is then the need to define the “actual malice” sufficient to overcome his official immunity for negligence.⁹⁵ The appellate courts have found themselves in sharp conflict over the proper definition. The dispute erupted in *Adams v. Hazelwood*,⁹⁶ a student’s action against a high school coach for injury allegedly suffered in performing a work detail assignment.⁹⁷ Although

86. GA. CONST. art. I, § 2, para. 9.

87. *Id.*

88. For discussion of the liability of local government officials, see R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979).

89. 270 Ga. 64, 508 S.E.2d 159 (1998).

90. *Id.* at 64, 508 S.E.2d at 160. Purchasers at a sheriff’s sale complained of the sheriff’s failure to use sale proceeds to satisfy superior liens on the property purchased. *Id.*

91. *Seay v. Cleveland*, 228 Ga. App. 836, 839, 493 S.E.2d 30, 32 (1997), *rev’d*, 270 Ga. 64, 508 S.E.2d 159 (1998).

92. *Seay*, 270 Ga. at 65, 508 S.E.2d at 161. The sheriff would have been liable for negligently performing a ministerial function, the court noted, “had he been sued in his personal capacity.” *Id.*

93. *Id.*, 508 S.E.2d at 160.

94. *Id.*

95. See *Adams v. Hazelwood*, 271 Ga. 414, 520 S.E.2d 896 (1999).

96. 271 Ga. 414, 520 S.E.2d 896 (1999).

97. *Id.* at 414, 520 S.E.2d at 897. The coach had assigned the student to the work detail of cutting weeds with a pair of scissors for the student’s admitted destruction of

the trial court dismissed the suit, the court of appeals concluded there was evidence of the coach's "ill will" in devising a demeaning assignment.⁹⁸ The supreme court then granted certiorari to determine "whether the Court of Appeals properly equated ill will with actual malice in the context of official immunity."⁹⁹ Answering in the negative, the court denigrated the equation as an "absurdity" and "contrary to well-established rules."¹⁰⁰ In the context of "official immunity," the court reasoned "actual malice means a deliberate intention to do a wrongful act."¹⁰¹ A wrongful act "may be accomplished with or without ill will and whether or not injury was intended."¹⁰² There simply was no evidence, the court concluded, that the coach "acted with a deliberate intent to commit a wrongful act or with a deliberate intent to harm."¹⁰³ Accordingly, the trial judge had correctly cloaked the coach's actions with official immunity.¹⁰⁴

C. *Municipal Liability*

Municipal liability, the decade's most prolific source of appellate disagreement, encompasses a host of confounding issues. Although the municipality enjoys a degree of sovereign immunity, it may also escape tort responsibility on other grounds both statutory and common law. Contrarily, liability may be imposed under theories not sounding in tort. All these facets placed the court of appeals in line for supreme court reversals.¹⁰⁵

Ironically, one traditional statutory exception to municipal immunity, street and sidewalk defects, suffered a later statutory modification from

school property. The student sued alleging injury to his wrist. *Id.*

98. *Hazelwood v. Adams*, 235 Ga. App. 607, 610, 510 S.E.2d 147, 151 (1998), *rev'd*, 271 Ga. 414, 520 S.E.2d 896 (1999).

99. *Adams*, 271 Ga. at 414, 520 S.E.2d at 897.

100. *Id.* at 415, 520 S.E.2d at 898. This standard would permit the employee's official immunity to be pierced "solely on the basis of the defendant's rancorous personal feelings toward the plaintiff, even though the defendant's actions in regard to the disliked plaintiff may have been completely lawful and legally justified." *Id.*

101. *Id.* (citing *Merrow v. Hawkins*, 266 Ga. 390, 391, 467 S.E.2d 336, 337 (1996)).

102. *Id.*

103. *Id.* at 416, 520 S.E.2d at 899.

104. *Id.* The court thus reversed the court of appeals denial of summary judgment for defendant. *Id.*

105. For a more thorough treatment of municipal liability, see R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993); R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* (1988); R. Perry Sentell, Jr., *Georgia Local Government Liability: The "Crisis" Conundrum*, 2 GA. ST. U. L. REV. 19 (1985).

another direction.¹⁰⁶ Illustratively, *City of Tybee Island v. Godinho*¹⁰⁷ featured an action for injuries sustained on a defective city sidewalk adjacent to a public beach. Plaintiff relied upon the historic statute imposing municipal liability for negligently maintained streets and sidewalks,¹⁰⁸ and the city countered with the more modern statute conferring immunity upon owners who permit use of their property for “recreational purposes.”¹⁰⁹ In the court of appeals,¹¹⁰ plaintiff carried the day, on grounds that the state-owned beach, not the city sidewalk, constituted the recreational property.¹¹¹ On certiorari the supreme court read the “plain language” of the Recreational Property Act to extend immunity to owners providing access to recreational property.¹¹² Holding the city sidewalk to qualify for “recreational” tort immunity, the court reversed the court of appeals.¹¹³

Entirely aside from governmental immunity, basic elements of tort law often arise to control municipal liability litigation. One such element, plaintiff’s contributory negligence, surfaced as the pivotal point in *City of Winder v. Girone*.¹¹⁴ There, plaintiff fell while directing cleanup operations necessitated by raw sewage spills onto her property.¹¹⁵ The trial court granted summary judgment to the city, only to be reversed by the court of appeals.¹¹⁶ That court discounted the significance of plaintiff’s conduct in the case, emphasizing the city’s trespass, which

106. See *City of Tybee Island v. Godinho*, 270 Ga. 567, 511 S.E.2d 517 (1999), *overruled on other grounds by* Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 118, 598 S.E.2d 471, 474 (2004).

107. 270 Ga. 567, 511 S.E.2d 517 (1999).

108. *Id.* at 569, 511 S.E.2d at 519; see O.C.G.A. § 32-4-93 (2001).

109. *Godinho*, 270 Ga. at 567, 511 S.E.2d at 518; see O.C.G.A. § 51-3-20 to -26 (2000).

110. *Godinho v. City of Tybee Island*, 231 Ga. App. 377, 499 S.E.2d 389 (1998), *rev’d*, 270 Ga. 567, 511 S.E.2d 517 (1999).

111. *Id.* at 378, 499 S.E.2d at 391. The court of appeals thus reversed the trial court in granting the city’s motion for summary judgment. *Id.* at 380, 499 S.E.2d at 392.

112. *Godinho*, 270 Ga. at 568, 511 S.E.2d at 518. “Moreover, to exclude coverage in these circumstances might encourage people not to provide access to their property for the purpose of permitting people to enjoy property owned by others, and thus would defeat the very purpose of the [Recreational Property Act].” *Id.*, 511 S.E.2d at 518-19. Regarding the traditional statute imposing sidewalk liability on municipalities, “the RPA will control when the sidewalk is used for a ‘recreational purpose’ and the other requirements of the RPA are satisfied, and § 32-4-93 will apply in other cases.” *Id.* at 569, 511 S.E.2d at 519.

113. *Id.* at 569, 511 S.E.2d at 519. The court thus upheld the trial court’s summary judgment for the municipality. *Id.*

114. 265 Ga. 723, 462 S.E.2d 704 (1995).

115. *Id.* at 723, 462 S.E.2d at 704-05. Plaintiff alleged municipal negligence in failing to maintain the offending sewer line. *Id.*, 462 S.E.2d at 705.

116. *Girone v. City of Winder*, 215 Ga. App. 822, 825, 452 S.E.2d 794, 797 (1994), *rev’d*, 265 Ga. 723, 462 S.E.2d 704 (1995).

resulted in the dangerous condition.¹¹⁷ Rejecting that position,¹¹⁸ the supreme court reasoned that under “traditional negligence principles,”¹¹⁹ there was undisputed evidence that plaintiff “attempted to cross the sewage-covered patio with knowledge of [its] slippery nature.”¹²⁰ Accordingly, “she is therefore barred from recovery by reason of her failure to exercise ordinary care for her own safety.”¹²¹

Another essential element of negligence, “proximate cause,” has dominated the instances of plaintiffs injured as a result of high-speed police chases.¹²² In this context as well, the supreme court has crafted “law” via the process of reversals. A pivotal 1994 controversy, *Mixon v. City of Warner Robins*,¹²³ presented an action against the municipality for the death of a motorist struck by a suspect fleeing from a police officer.¹²⁴ Rejecting the claim, the court of appeals designated the suspect’s conduct to be the sole “proximate cause” of the collision.¹²⁵ In its reversing opinion, the supreme court acknowledged the “policy” nature of the requisite solution¹²⁶ and focused upon a statute requiring the pursuing officer “to drive with due regard for the safety of all persons.”¹²⁷ The court then translated that mandate into the standard that the officer “balance the risk to the public with [his] duty to enforce the law.”¹²⁸ Given the circumstances,¹²⁹ a jury could find

117. *Girone*, 215 Ga. App. at 824, 452 S.E.2d at 796. “The Court of Appeals . . . [made] a distinction between dangerous conditions created by means of a trespass upon the property of the person subsequently injured, and dangerous conditions created on the property of the defendant that result in injury to a person who comes upon defendant’s property.” *Girone*, 265 Ga. at 723, 462 S.E.2d at 705.

118. *Girone*, 265 Ga. at 723, 462 S.E.2d at 705. “That distinction is without precedent . . .” *Id.*

119. *Id.*

120. *Id.* at 724, 462 S.E.2d at 706.

121. *Id.* at 725, 462 S.E.2d at 706 (quoting *Soto v. Roswell Townhomes*, 183 Ga. App. 286, 288, 358 S.E.2d 670, 672 (1987)). The court thus reversed the court of appeals. *Id.*

122. See *Mixon v. City of Warner Robins*, 264 Ga. 385, 444 S.E.2d 761 (1994), superseded by statute, as stated in *City of Winder v. McDougald*, 276 Ga. 866, 867, 583 S.E.2d 879, 880 (2003).

123. 264 Ga. 385, 444 S.E.2d 761 (1994).

124. *Id.* at 385, 444 S.E.2d at 762-63. Plaintiff sued for the death of his wife killed at an intersection in a residential area when struck by a driver being pursued by a police officer for running a stop sign. *Id.*

125. *Mixon v. City of Warner Robins*, 209 Ga. App. 414, 434 S.E.2d 71 (1993), *rev’d*, 264 Ga. 385, 444 S.E.2d 761 (1994).

126. *Mixon*, 264 Ga. at 386, 444 S.E.2d at 763.

127. *Id.* at 388, 444 S.E.2d at 764 (quoting then O.C.G.A. § 40-6-6 (1994)).

128. *Id.* at 389, 444 S.E.2d at 765. The court extracted this standard from *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

the officer's failure to act "with due regard" for the safety of other drivers;¹³⁰ thus, the court could not declare the absence of "proximate cause."¹³¹

Immediately following the supreme court's decision in *Mixon*, the legislature amended the governing statute to provide that the officer's pursuit "shall not be the proximate cause or a contributing proximate cause of the damage, injury or death caused by the fleeing suspect unless the . . . officer acted with reckless disregard for proper law enforcement procedures."¹³² This statute then figured prominently in the 2003 controversy, *City of Winder v. McDougald*,¹³³ an action not on behalf of a third party, but for the death of the fleeing suspect himself.¹³⁴ The court of appeals denied the city's motion for summary judgment,¹³⁵ and a closely divided supreme court reversed.¹³⁶ By "imposing a reckless disregard standard in place of the negligence standard,"¹³⁷ the supreme court reasoned the legislature narrowed recovery for innocent persons.¹³⁸ It would be "absurd," the court asserted, to find that it "simultaneously [expanded] liability to cover injuries to the fleeing suspect."¹³⁹ The statute, therefore, "does not govern the claim of the fleeing suspect."¹⁴⁰

129. *Mixon*, 264 Ga. at 391, 444 S.E.2d at 766, i.e., the minor nature of the traffic offense, the fact that the violator was not speeding until the officer began pursuit, and the residential area. *Id.*

130. *Id.*

131. *Id.* "It follows that the lack of 'proximate cause' in the instant case is not 'plain and undisputed' and that the Court of Appeals erred in affirming the grant of summary judgment in favor of [the officer] and the City on that basis." *Id.*

132. O.C.G.A. § 40-6-6(d)(2) (2004).

133. 276 Ga. 866, 583 S.E.2d 879 (2003).

134. *Id.* at 866, 583 S.E.2d at 880. Plaintiffs' fourteen-year-old daughter was driving her father's car without permission at 4:40 a.m. without lights when the police officer attempted to stop her. With the police officer following her, the daughter lost control of the car and crashed into a utility pole. *Id.*

135. *City of Winder v. McDougald*, 254 Ga. App. 537, 544, 562 S.E.2d 826, 831 (2002), *rev'd*, 276 Ga. 866, 583 S.E.2d 879 (2003).

136. *McDougald*, 276 Ga. at 868, 583 S.E.2d at 881.

137. *Id.* at 867, 583 S.E.2d at 880.

138. *Id.* Accordingly, "[t]he fleeing suspect may be able to recover for her own injuries if an officer acts with an actual intent to cause injury." *Id.* at 868, 583 S.E.2d at 881.

139. *Id.* at 867, 583 S.E.2d at 880.

140. *Id.* at 868, 583 S.E.2d at 881. A dissenting opinion for three justices emphasized another provision of the statute requiring emergency vehicle drivers to drive with due regard for the safety of all persons. (O.C.G.A. § 40-6-6(d)(1) (2004)). "The majority opinion's distinction between innocent third parties and fleeing suspects in the coverage of [O.C.G.A. section] 40-6-6(d) is based on an unstated and judicially-created public policy that fleeing suspects are not entitled to any protection from police misconduct short of actual malice." *Id.* at 870, 583 S.E.2d at 882 (Benham, J., dissenting).

The supreme court's reversal in *Mixon* augured against the municipality,¹⁴¹ while *McDougald's* reversal operated in the municipality's favor.¹⁴² Both decisions rested upon legislation purporting to evolve tort law's "proximate cause" impact upon emergency vehicle chases.¹⁴³ Appellate divisiveness in this specific context appropriately reflects the amorphous heritage of the concept in the common law.

One traditional effort at evading the bar of municipal tort immunity assumes the configuration of an action in nuisance.¹⁴⁴ In *Hibbs v. City of Riverdale*,¹⁴⁵ for example, plaintiffs employed the tactic to complain of flooding conditions resulting from the city's approval of a defective drainage system.¹⁴⁶ There, the supreme court reversed the court of appeals¹⁴⁷ position that a claim founded in negligence could not support an action for nuisance.¹⁴⁸ Rather, the supreme court delineated, the crucial distinction turned on whether the municipal conduct "was a single isolated act of negligence."¹⁴⁹ When municipal negligence "causes the repeated flooding of property, a continuing, abatable nuisance is established, for which the municipality is liable."¹⁵⁰ The supreme court concluded the court of appeals had erred in failing to determine the nature of the city's conduct.¹⁵¹

Nuisance again polarized the courts in *City of Douglasville v. Queen*,¹⁵² an action for the deaths of two small girls struck by a train

141. *Mixon*, 264 Ga. at 385, 444 S.E.2d at 761.

142. *McDougald*, 276 Ga. at 866, 583 S.E.2d at 880.

143. *See id.*; *Mixon*, 264 Ga. at 385, 444 S.E.2d at 761.

144. For a more thorough treatment of nuisance liability in Georgia local government law, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 117-34 (1988); R. Perry Sentell, Jr., *Georgia County Liability: Nuisance or Not?*, 43 MERCER L. REV. 1 (1991); R. Perry Sentell, Jr., *Municipal Liability in Georgia: The "Nuisance" Nuisance*, 12 GA. ST. B.J. 11 (1975).

145. 267 Ga. 337, 478 S.E.2d 121 (1996).

146. *Id.* at 337, 478 S.E.2d at 121-22. Plaintiffs charged the municipality with negligently approving the developer's plans and construction of the subdivision's inadequate storm drainage system, resulting in the maintenance of a nuisance. *Id.*

147. *Hibbs v. City of Riverdale*, 219 Ga. App. 457, 465 S.E.2d 486 (1995), *rev'd*, 267 Ga. 337, 478 S.E.2d 121 (1996).

148. *Hibbs*, 267 Ga. at 337, 478 S.E.2d at 122.

149. *Id.* at 338, 478 S.E.2d at 122. "While a municipality enjoys sovereign immunity from liability for negligent acts done in the exercise of a governmental function, it may be liable for damages it caused to a third party from the creation or maintenance of a nuisance." *Id.* at 337, 478 S.E.2d at 122.

150. *Id.* at 338, 478 S.E.2d at 122.

151. *Id.* at 339, 478 S.E.2d at 122-23.

152. 270 Ga. 770, 514 S.E.2d 195 (1999).

while attending the city's Fourth-of-July parade.¹⁵³ The court of appeals reversed the trial court's grant of summary judgment for the city,¹⁵⁴ only to itself suffer reversal by the supreme court.¹⁵⁵ Probing for the "unlawfulness" necessary for nuisance,¹⁵⁶ the supreme court noted none: "[I]t was not unlawful for the City to route the parade . . . onto [city] streets that passed next to railroad property."¹⁵⁷ Likewise as to the requisite damage to persons within the sphere of operation: "[D]uring the 30 or more years prior to the injuries incurred by [decedents], no other parade spectator had ever been injured by a train on the railroad tracks."¹⁵⁸

Finally, claimants may press municipal liability on constitutional grounds not sounding in tort. That effort sundered the appellate courts in *City of Atlanta v. Watson*,¹⁵⁹ a claim that, in administering its noise abatement program, the municipality discriminated against owners of multi-family residences near the city airport.¹⁶⁰ The city's purchase of only single-family residences in the noise-affected area, plaintiffs charged, worked an illegitimate and arbitrary distinction denying their rights to equal protection.¹⁶¹ Reversing the court of appeals,¹⁶² the

153. *Id.* at 770, 514 S.E.2d at 197. The girls were walking on the railroad track from their family's car to their parents who were positioned on railroad property adjacent to the public highway in the downtown area awaiting the city's annual Fourth-of-July parade. *Id.*

154. *Queen v. City of Douglasville*, 232 Ga. App. 68, 72, 500 S.E.2d 918, 922 (1998), *rev'd*, 270 Ga. 770, 514 S.E.2d 195 (1999).

155. *Queen*, 270 Ga. at 774, 514 S.E.2d at 199.

156. *Id.* at 773, 514 S.E.2d at 199. "That which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance . . . Thus, where the act is lawful in itself, it becomes a nuisance only when conducted in an illegal manner to the hurt, inconvenience or damage of another." *Id.* (quoting *Mayor & Council of Savannah v. Palmerio*, 242 Ga. 419, 425, 249 S.E.2d 224, 229 (1978)).

157. *Id.* "Accordingly, we reject as a matter of law the position that the City's holding of its parade in the vicinity of railroad property which contained no danger created or maintained by the City constituted a nuisance." *Id.*

158. *Id.* at 774, 514 S.E.2d at 199. One justice dissented urging that the nuisance issue should go to a jury. *Id.* at 776, 514 S.E.2d at 200 (Hines, J., dissenting).

159. 267 Ga. 185, 475 S.E.2d 896 (1996).

160. *Id.* at 185, 475 S.E.2d at 898. The city's contested efforts proceeded under a federal program for airports receiving federal funding, seeking to reduce existing land uses incompatible with airport noise. *Id.* at 186, 475 S.E.2d at 898.

161. *See* GA. CONST. art. I, § 1, para. 2. "The Georgia equal protection clause . . . requires that the State treat similarly situated individuals in a similar manner." 267 Ga. at 187, 475 S.E.2d at 899.

162. *Watson v. City of Atlanta*, 219 Ga. App. 704, 466 S.E.2d 229 (1995), *rev'd*, 267 Ga. 185, 475 S.E.2d 896 (1996). The court of appeals reversed the trial court's grant of summary judgment to the municipality. *Id.* at 705, 466 S.E.2d at 231.

supreme court applied a “rational basis” test¹⁶³ in determining that the city’s classifications of property owners bore “a rational relationship to the legitimate governmental purpose of reducing land use incompatible with airport noise in a sound and responsible fiscal manner, while simultaneously avoiding the virtual elimination of [a neighboring municipality’s] residential basis and the resulting negative impact on its business community and infrastructure.”¹⁶⁴ Equal protection, the court concluded, afforded plaintiffs no grounds for municipal liability.¹⁶⁵

D. Condemnation

*City of Marietta v. Edwards*¹⁶⁶ presented a charge of bad faith in the municipality’s condemnation of property, property it had sold to complainants only three months earlier.¹⁶⁷ Alleging that the city misled them during the sale and that they subsequently expended substantial sums on property improvements, complainants prevailed over summary judgment in the court of appeals.¹⁶⁸ On certiorari the supreme court viewed the evidence somewhat differently and reversed.¹⁶⁹ First, the court characterized a statement by the city sales facilitator to complainants as falling far short of a “guarantee” that the city “would not exercise its legal right of condemnation.”¹⁷⁰ It “does not show bad faith in the subsequent condemnation.”¹⁷¹ Second, the fact of the improvements to the property meant only that “the City will have to pay just and adequate compensation . . . valued as part of the

163. *Watson*, 267 Ga. at 187, 475 S.E.2d at 899. The court reasoned that there was neither a suspect class nor a fundamental right in the case which would demand a higher standard of judicial scrutiny. *Id.*

164. *Id.* at 190, 475 S.E.2d at 901. Evidence revealed that the city’s purchase funds had been limited and that multi-family residences could better withstand exclusion from the program without “suffering a corresponding loss of tenant occupancy.” *Id.* at 189, 475 S.E.2d at 900.

165. *Id.* at 190, 475 S.E.2d at 901. “[T]he classification drawn by the City between the two types of residences does not violate the constitutional guarantee of equal protection, and we reverse the contrary ruling by the Court of Appeals.” *Id.*

166. 271 Ga. 349, 519 S.E.2d 217 (1999). For perspective on condemnation, see R. Perry Sentell, Jr., *Condemning Local Government Condemnation*, 39 MERCER L. REV. 11 (1987).

167. *Edwards*, 271 Ga. at 349, 519 S.E.2d at 217. Plaintiffs closed the purchase in November and the municipality voted to condemn the property in February. *Id.*

168. *Fowler v. City of Marietta*, 233 Ga. App. 622, 504 S.E.2d 726 (1998), *rev’d in part*, 271 Ga. 349, 519 S.E.2d 217 (1999).

169. *Edwards*, 271 Ga. at 351-52, 519 S.E.2d at 219.

170. *Id.* at 350, 519 S.E.2d at 218. “Appellees have proved, at most, that the City’s condemnation plans were uncertain, changing, and inaccurately communicated during the course of an entirely separate and distinct sales transaction.” *Id.*

171. *Id.* at 351, 519 S.E.2d at 218.

newly-renovated property on the date of taking.”¹⁷² Again, those renovations in no way increased the evidence of municipal bad faith.¹⁷³ Accordingly, the supreme court determined “no genuine issue of material fact” over whether, subsequent to the complainants’ purchase, the city “lost the constitutional right to condemn the property.”¹⁷⁴

E. Official Entitlements

Georgia statutory law affords peace officers a number of rights, including the right to be prosecuted only upon indictment by grand jury.¹⁷⁵ The point at which the officer possesses or loses that right reared its countenance as yet another issue of appellate divisiveness. The question arose in *Dudley v. State*,¹⁷⁶ a prosecution by accusation of a former municipal police chief for an alleged crime committed during his tenure of office.¹⁷⁷ Because he was no longer a peace officer at the time of the prosecution’s commencement, the court of appeals denied the chief’s entitlement to grand jury indictment.¹⁷⁸ Unanimously reversing that decision, the supreme court deemed the controlling statutes “plain and unequivocal” in affording peace officers “enhanced protections,” including officials “no longer in office by the time of prosecution.”¹⁷⁹ This meaning was congruent with the legislative purpose of protecting officers “against possible frivolous indictments” for acts performed while

172. *Id.*

173. *Id.* “The fact that Appellees made renovations to the property does not affect either the City’s right to condemn the right-of-way or its obligation to pay just and adequate compensation.” *Id.*

174. *Id.*, 519 S.E.2d at 219. “Here, Appellees seek to estop the City from the exercise of its right of eminent domain by asserting [the agent’s] unauthorized statements as evidence of the City’s bad faith. This is precisely what [O.C.G.A. section] 45-6-5 prohibits.” *Id.* at 350, 519 S.E.2d at 218. For treatment of estoppel, see R. PERRY SENTELL, JR., *THE DOCTRINE OF ESTOPPEL IN GEORGIA LOCAL GOVERNMENT LAW* (1995).

175. O.C.G.A. § 17-7-52 (2004); O.C.G.A. § 45-11-4 (2002). For a more thorough treatment of the subject, see R. Perry Sentell, Jr., *Georgia Local Government Officials and the Grand Jury*, 26 GA. ST. B.J. 50 (1989).

176. 273 Ga. 466, 542 S.E.2d 99 (2001).

177. *Id.* at 466, 542 S.E.2d at 101. While police chief, defendant, had an altercation with a member of the city council and, after leaving office, was charged by accusation (and later convicted) with simple battery. Defendant challenged the conviction on grounds that he was not charged by grand jury indictment. *Id.*

178. *Dudley v. State*, 242 Ga. App. 53, 56, 527 S.E.2d 912, 915 (2000), *rev’d*, 273 Ga. 466, 542 S.E.2d 99 (2001).

179. *Dudley*, 273 Ga. at 467, 542 S.E.2d at 101. “O.C.G.A. § 17-5-52(a) states that ‘peace officers shall be afforded the rights provided in Code Section 45-11-4, . . . [a]nd such protections extend by express statement . . . to public officials accused of misdeeds in office ‘presently or formerly holding such office.’” *Id.*

in office.¹⁸⁰ Finally, the court concluded, this determination “comports with the general precept of criminal jurisprudence that the provisions of the law existing at the time of commission of a crime control.”¹⁸¹

F. Governmental Innovations

The ancient historical foundations of governmental entities yield only grudgingly to modern innovations. In a few Georgia localities, traditional political structures have experienced consolidating or unifying efforts that, in turn, give birth to unprecedented forms of government. Because Georgia law in the main makes no express provision for them, these “modern” local governments must undergo a period of adaptation. The process necessarily takes place in the context of litigation, individual instances in which courts determine the new entity’s “place” in the scheme of previously existing “law.” Often, the answer proves illusive; it may provoke appellate disparity.

In *Athens-Clarke County v. Walton Electric Membership Corp.*,¹⁸² the parties litigated the authority of a municipal-county “unified government” to impose a street franchise fee upon an electrical utility in the formerly unincorporated area of the county.¹⁸³ The unified government possessed that power only if it constituted a “municipality,” described by the utility fee statute as “[a]ny geographically defined political subdivision of this state, other than a county”¹⁸⁴ In its consideration of the issue, the court of appeals focused upon the unified government’s charter declaration that the entity “shall be deemed to be both a municipal corporation and a county throughout the total territory of said government.”¹⁸⁵ Under that stricture the court denied the unified government the status of “municipality” and held it devoid of statutory power to impose the contested franchise fee.¹⁸⁶

180. *Id.* at 468, 542 S.E.2d at 102. “Thus, a peace officer should not lose such protections for the officer’s actions in the performance of duty merely because the officer is no longer employed as such at the time of prosecution.” *Id.*

181. *Id.* “Accordingly, the judgement of the Court of Appeals is reversed” *Id.* at 469, 542 S.E.2d at 102.

182. 265 Ga. 229, 454 S.E.2d 510 (1995).

183. *Id.* at 229, 454 S.E.2d at 511. Prior to unification, the municipality could not impose fees in the county’s unincorporated areas. *Id.*

184. *Id.* at 230, 454 S.E.2d at 512 (quoting O.C.G.A. § 46-3-3(5)(A) (2004)).

185. *Athens-Clarke County v. Walton Elec. Membership Corp.*, 211 Ga. App. 232, 439 S.E.2d 504 (1993), *rev’d*, 265 Ga. 229, 454 S.E.2d 510 (1995) (quoting Athens-Clarke County Charter). The unification was sanctioned by GA. CONST. art. IX, § 3, para. 2(a), and the unified government’s charter was granted in 1990 Ga. Laws 3560.

186. *Walton Elec. Membership Corp.*, 211 Ga. App. at 235, 439 S.E.2d at 507. The court concluded that the unified government was not a “municipality” under the Georgia Electric Service Territorial Act, O.C.G.A. § 46-3-1 to -55 (2004).

Reversing that decision, a unanimous supreme court emphasized the unified government's charter authorizations "to perform multiple and substantial municipal functions."¹⁸⁷ Accordingly, the newly-created entity existed as a municipal-county "hybrid," "something other than a county," and well within the empowering statute's grant "to assess franchise fees against the EMC."¹⁸⁸ Moreover, the court concluded the government's adoption of a reasonable fee ordinance, followed by the utility's continued use of the streets, obligated payment of the fee despite the absence of a formal "agreement."¹⁸⁹

IV. CONCLUSION

In performing its Marshallian "duty" of saying "what the law is," Georgia's "judicial department" functions at both trial and appellate plateaus. The appellate system, moreover, operates through two constitutionally designated "courts of review." Generally (at least for present purposes), the Georgia Court of Appeals reviews the trial courts, and the Georgia Supreme Court reviews the court of appeals. Because the supreme court's decisions bind "all other courts," they necessarily provide "correct" (final) disposition of the issues presented. When the supreme court reverses the court of appeals, therefore, it "corrects" the "errors" committed by the latter court in reviewing the trial process. The full extent of this "correcting" phenomena holds profound significance for an appraisal of our bi-level appellate system. An encompassing study of all facets of all appellate reversals—frequency of occurrence, subjects impacted, consistency of results, causal consequences—would add immeasurably to our jurisprudential understanding. Such a study would also require incalculable amounts of time, patience, and perseverance.

This brief effort tenders a minuscule alternative. Isolating the subject of local government law and confining the period of scrutiny to the last decisional decade, the account reveals at least some information about appellate reversals. The small study proceeds along two revealing lines of analysis: the numerical and the substantive. Numerically, it is revealed that the Georgia Supreme Court acts neither frequently nor occasionally in reversing the court of appeals. Rather, the correction process maintains a relatively steady judicial pace, with reversals

187. *Walton Elec. Membership Corp.*, 265 Ga. at 230, 454 S.E.2d at 512. Therefore, so long as it is "other than a county," it is a "municipality" under the Act. *Id.*

188. *Id.* at 230-31, 454 S.E.2d at 512. "[T]he county's continued existence does not mean that the new hybrid form of government is a county." *Id.* at 230, 454 S.E.2d at 512.

189. *Id.* at 231-32, 454 S.E.2d at 513. "That being so, the holding of the Court of Appeals that an agreement would be necessary is incorrect." *Id.* at 232, 454 S.E.2d at 513.

assuming a fairly even distributional pattern throughout the scrutinized decade. Additionally, the reviewed experience portrays a supreme court that is generally unanimous in its decision to reverse. Moreover, in a solid majority of the instances, the court's reversal operated to restore the result originally reached by the trial court. In every one of those instances, in turn, (i.e., cases in which the supreme court reversed the court of appeals reversal of the trial court), the outcome favored the local government. Finally, a resounding 72% of the supreme court's total reversals operated to "correct" a court of appeals decision against the local government.

Substantively, the study roughly groups into six classifications the issues drawing the appellate courts' disagreements over the past decade. Apparently, those issues project local government law's most confounding problems of the era. Although it is no surprise to find local government "liability-immunity" leading the list, the extent of the lead is impressive. Undoubtedly, it results not only from the complexity of the subject matter, but also from the inordinate machinations effected by both legislative and judicial attention to the subject. They show no signs of abating. Issues of county finance likewise attained a prolific status on the supreme court's reversal agenda, with litigation over special option local sales taxes assuming an anticipated predominance. Those instances confirm both the taxpayer animosity to taxation in general, as well as the continuing sales tax confrontation between municipalities and counties.

Specifics aside, the study strives to impress with two overall reflections: the potential of appellate reversal in the law-making context and its special bearing on local government law.