A Roadmap: Defeating Immunity in Suits Against Law Enforcement in Alabama Courts

Last July, the Alabama Supreme Court decided *Hollis v. City of Brighton*[1] and tinkered with the qualified immunity provided to law enforcement officers in civil suits under Alabama law. The opinion sought to reconcile Ala. Code § 6-5-338(a), establishing the statutory immunity afforded to peace officers, with the general state agent immunity standard set forth in *Ex parte Cranman*.[2]

Ultimately, the case combined the immunity provided in *Cranman* to law enforcement officers enforcing the criminal laws with the immunity provided by 6-5-338(a) for peace officers generally. But the case did not change the other elements of *Cranman* that can defeat an immunity claim by an officer who would otherwise be afforded protection.

Hollis involved a December 1999 house fire in Brighton, Ala. The officer, Derwin Davis, while on patrol around 2 a.m. saw flames coming from the Hollis residence. He entered the home; found Benjamin Hollis, his wife and two sons still asleep; woke them up and got them out of the house.

At this point, the primary dispute arose. Initially, the fire was isolated to the curtains in the master bedroom. Mr. Hollis later testified that the fire "could easily have been extinguished…." Despite pleading by Mr. Hollis, Officer Davis would not allow him back into his home to extinguish the fire and insisted that they wait on the fire department. The fire department did not arrive until 45 minutes later, at which point the Hollis's home had been completely destroyed.

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[1] 2006 Ala. LEXIS 180 (Ala. 2006) ("Hollis II").

[2] 792 So. 2d 392 (Ala. 2000). The immunity standard described in *Cranman* appeared in a plurality opinion, but has since been unequivocally adopted by the Alabama Supreme Court. Ex parte Butts, 775 So. 2d 173 (Ala. 2000). *See also, e.g., Hollis,* 2006 Ala. LEXIS 180; Byrd v. Lamar, 846 So. 2d 334 (Ala. 2002).

The Hollises filed suit against the city, alleging that the negligence of the fire department, combined with the negligence of Officer Davis in preventing them from putting out the fire, caused the destruction of their home. The trial court granted summary judgment to the city based on the immunity afforded its agents, and the Supreme Court affirmed in part; but the court also reversed in part, noting the discrepancy between *Cranman* and 6-5-338(a), and allowing the claims to proceed insofar as they were based on the actions of Officer Davis.[3]

On remand, the trial court ruled that Officer Davis, and the city by extension, were provided immunity under the law enforcement prong (prong 4) of the *Cranman* standard. The Supreme Court affirmed but also took the opportunity to resolve the potential conflict between *Cranman* prong 4 and 6-5-338(a).

It was important for the court to undertake this exercise because it had, since *Cranman*, sometimes weighed law enforcement officer immunity under 6-5-338(a)[4] and other times under the new *Cranman* restatement.[5] It was not until the first Hollis decision, in 2004, that the court noted the discrepancy. Writing a special concurrence, Justice Lyons predicted that the court would be forced to amend *Cranman* to account for the requirements of 6-5-338(a).

The court's amendment seems very simple; they merely added into *Cranman* prong 4 a reference to 6-5-338(a):

> Because the peace officers' immunity statute does not limit the availability of immunity to 'enforcement of the criminal laws,' we today modify category (4) of *Cranman* to read as follows:
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> 'A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
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> '...

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[3] Hollis v. City of Brighton, 885 So. 2d 135 (Ala. 2004) ("Hollis I").

[4] *See, e.g.,* Norris v. City of Montgomery, 821 So. 2d 149 (Ala. 2001).

[5] *See, e.g.,* Blackwood v. City of Hanceville, 936 So. 2d 495 (Ala. 2006); Howard v. City of Atmore, 887 So. 2d 201 (Ala. 2003).

> '(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons, or serving as peace officers under circumstances entitling such officers to immunity pursuant to § 6-5-338(a), Ala. Code 1975.'"[6]

But because the court did not actually incorporate the language of 6-5-338(a) into its law enforcement restatement of immunity, a bit of further analysis is necessary. Before any analysis of the new standard, it is important to note the significance of the fact that the court's amendment was isolated to prong 4 of *Cranman*. This means that the rest of *Cranman* continues to apply to any analysis of immunity involving law enforcement officers.

Under a strict *Cranman* analysis before prong 4 was amended, law enforcement officers were provided immunity only if a court could determine that the officer, in taking the actions complained of, was "exercising judgment in the *enforcement of the criminal laws* of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons;…"[7] This language highlights the problem the officer in *Hollis* was facing. At first glance, it seems logical that Officer Davis would be afforded immunity. He was doing what any officer would have a duty to do under such circumstances—try and save a family from a burning house. Perhaps he did so negligently—by refusing reentry to Mr. Hollis—but he was nevertheless engaged in an activity within the traditional mission of law enforcement officers.

But look at the language of the original prong 4. Officer Davis was not enforcing criminal laws. He was certainly not trying to arrest anyone. So should he be entitled to immunity? While there might be a strong policy argument that he should be, the legal language of the original prong 4 would not seem to afford him that protection.

But now take a look at the language of 6-5-338(a). It provides that "every peace officer…shall have immunity from tort liability arising out of his or her conduct in *performance*

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[6] *Hollis II*, 2006 Ala. LEXIS 180, *22.

[7] *Cranman*, 792 So. 2d at 405 (emphasis added).

of any discretionary function within the line and scope of his or her law enforcement duties.'"[8] This seems a great deal more protective of peace officers than the original prong 4. It would be hard to argue that Officer Davis would not be afforded immunity under this standard.

What about an officer directing traffic who causes an accident? Immunity seems clear under the language of 6-5-338(a), but certainly questionable under the original prong 4. An officer negligently administering CPR? A dare officer who fails to report certain confidences to parents of a child who later overdoses? An officer on patrol who has an accident?[9]

Each officer under the hypotheticals above would have a better chance of winning summary judgment on immunity under the revamped *Cranman* than under the original prong 4. The court acted to ensure that officers are provided immunity both 1) in the enforcement of criminal laws *and* 2) when performing other duties as peace officers that involve a discretionary function. But again, this decision does not upset the other parts of *Cranman* that can be used to defeat immunity. And in practice, it is these other parts of *Cranman* that will be most helpful to lawyers attempting to defeat immunity. Courts tend to find that most of the actions taken by law enforcement either involve enforcement of the criminal laws or the performance of a discretionary act; therefore, a plaintiff must usually prove that the actions willful or malicious or that they violated a rule or law of some kind.

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After the decision in *Hollis*, when assessing civil damages claims against a law enforcement officer to be filed in Alabama state courts, a lawyer should follow the roadmap below (or the included graphic) to assess the immunity issue:

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[8] Ala. Code § 6-5-338(a) (emphasis added).

[9] *See* Ala. Code § 32-5A-7 and *Blackwood*, 936 So. 2d 495, for a discussion for information on how to handle a case where an officer on patrol and exceeding the speed limit causes an accident.

(1) Was the officer acting as a peace officer or in some other capacity?

a. If acting in an administrative or other capacity, analyze outside of prong 4.

b. If acting as a peace officer, analyze under prong 4; proceed to #2.

Not all suits against law enforcement officers should be analyzed under prong 4 of *Cranman.*[10] Some law enforcement officers may not be acting as peace officers at all. For example, a police chief would be protected for decisions about whom to hire and how to train his officers by prong 2 of *Cranman*, rather than under prong 4.[11] Jailers and dispatchers are generally considered to be peace officers.[12]

(2) Was the officer making an arrest or otherwise enforcing a criminal law?

a. If yes, there is immunity; proceed to #4.

b. If no, there might not be immunity; proceed to #3.

Even since *Hollis* was decided, the Supreme Court has already shown a willingness to find that a particular officer's activity does not fall within the original *Cranman* prong 4. In *Blackwood v. City of Hanceville*,[13] an officer responding to the scene of an accident lost control of his vehicle, crossed a median and collided head on with an oncoming vehicle, causing severe injuries to the driver. The Alabama Supreme Court, with little discussion, ruled that his actions could not be protected under the original prong 4 because he was not enforcing the criminal laws.[14] The Supreme Court made clear before

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[10] For a case in which the court analyzes the actions of law enforcement differently for the very similar acts of court clerks, *see* Ex parte City of Tuskegee, 932 So. 2d 895 (Ala. 2005).

[11] Howard v. City of Atmore, 887 So. 2d 201, 209-10 (Ala. 2003).

[12] *Id*; Swan v. City of Hueytown, 920 So. 2d 1075 (Ala. 2005).

[13] 936 So. 2d 495 (Ala. 2006).

[14] But they did not look for immunity under 6-5-338(a), instead relying on Ala. Code § 32-5A-7, which allows drivers of emergency vehicles to exceed the speed limit in certain situations.

Hollis that the "peace officer" issue, question #1 above, and the *Cranman* prong 4 analysis here, are two distinct, separate questions.[15]

(3) Was the officer performing a discretionary function?

a. If yes, there is immunity; proceed to #4.

b. If no, there is no immunity.

There is a good bit of case law discussing what actions of law enforcement qualify as discretionary functions. Generally, most of them do. The best place to start is the cases listed in the annotated code, especially the "Discretionary acts" section. The Court has generally defined "[d]iscretionary acts…as those acts as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances."[16]

(4) Did the officer violate a departmental rule, a state statute, or the state Constitution?

a. If yes, there is no immunity.

b. If no, there is immunity; proceed to #5.

This is perhaps the most effective way to defeat immunity against a law enforcement officer.[17] Cities, counties and the state will often conduct their own internal investigation whenever there is an incident that might lead to a lawsuit. If they have found themselves that the officer broke a departmental rule, then not only can the plaintiff defeat a defense motion for summary judgment, but he can potentially win his own motion by showing

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[15] *Swan*, 920 So. 2d at 1079-80 (analyzing the immunity of a dispatcher under 6-5-338(a) and separately under *Cranman* prong 4).

[16] Wright v. Wynn, 682 So. 2d 1, 2 (Ala. 1996).

[17] For a fairly detailed analysis of whether a defendant has breached a local, departmental rule, *see* Howard v. City of Atmore, 887 So. 2d 201, 206-10 (Ala. 2003).

the court that the rule was broken. The Court has recently touched on what kind of rules, state and local, can be considered in this kind of analysis within the context of a suit against law enforcement.[18]

(5) Did the officer act willfully or maliciously or in bad faith?

a. If yes, there is no immunity.

b. If no, there is immunity; proceed to #6.

This is obviously a very fact-intensive question, and if there is sufficient cause to believe that an officer may have exhibited such conduct, the complaint should always allege that he did so. The courts have shown a willingness to acknowledge the fact-intensive nature of proving or disproving such allegations;[19] therefore, an allegation of willful or bad faith conduct can help a plaintiff survive an early motion for summary judgment based on the need for discovery to proceed to a point that the record can either prove or disprove the claims.

(6) Did the officer act beyond his authority?

a. If yes, there is no immunity.

b. If no, there is immunity; proceed to #7.

There is little case law addressing this question, although the Court has indicated that it might prefer to collapse this question with question with question #4 above. In *Giambrone v. Douglas*,[20] in a discussion about the burden shifting created by an immunity analysis, the Court stated that a "State agent acts beyond authority and is

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[18] Blackwood v. City of Hanceville, 936 So. 2d 495 (Ala. 2006). For a more extensive discussion, outside the law enforcement context, of which rules are sufficient to be used in this analysis, *see* Giambrone v. Douglas, 874 So. 2d 1046 (Ala. 2003); Ex parte Spivey, 846 So. 2d 322wwwwww (Ala. 2002).

[19] *See* Ex parte City of Tuskegee, 932 So. 2d 895 (Ala. 2005); Ex parte Butts, 775 So. 2d 173 (Ala. 2000).

[20] 874 So. 2d 1046 (Ala. 2003).

therefore not immune when he or she 'fails to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist.'[21] Earlier this year, the Court cited that construction approvingly in *Ex parte Trottman*,[22] a case in which they again blurred the distinction (if any) between a violation of rules and an act beyond authority. On the other hand, the Court earlier indicated in a 2005 footnote that these are separate questions.[23]

(7) Did the officer act under a mistaken interpretation of the law?

a. If yes, there is no immunity.

b. If no, there is immunity.

There does not seem to be any helpful law in Alabama that clarifies or explains what is meant by this language. Perhaps it is included merely to prevent a state agent who has acted beyond his authority and/or broken a rule or law from regaining his immunity by claiming he did not understand or know about the law.

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[21] *Id.* at 1052. *See also* Walton v. Montgomery County Bd. of Educ., 371 F. Supp. 2d 1318, 325 (M.D. Ala. 2005).

[22] 2007 Ala. LEXIS 51, *7 (Ala. 2007). *See also* Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006); *Howard*, 887 So. 2d at 208.

[23] *City of Tuskegee*, 932 So. 2d at 906 n.6 ("[W]e note that an officer is not entitled to absolute immunity when he or she is engaged in an 'arrest or an attempted arrest.' For example, if an officer is engaged in an arrest but he or she 'fails to discharge [the arrest] pursuant to detailed rules or regulations, such as those stated on a checklist,' then the officer is not entitled to immunity….Secondly, an officer will not be entitled to immunity under § 6-5-338(a) and the standard set out in Cranman if he or she carries out an arrest or attempted arrest that is "beyond his [or her] authority.'").