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ALABAMA STATE-AGENT IMMUNITY & PRIVATE CONTRACTORS

*Jackson Britton**

INTRODUCTION

In his 1981 inaugural address, President Ronald Reagan established a theme that would dominate Americans' perception of government for decades to come: "[G]overnment is not the solution to our problem; government is the problem."¹ Since then, Congress and state legislatures have increasingly shifted traditional public functions to the private sector.² The practice is widespread, particularly at the state level, where "[o]ver the past two decades, the privatization of state enterprises has gone from novelty act to global orthodoxy. . . . The real question is how—not whether—to transfer state firms to private hands."³ State legislatures have privatized government functions in one of two ways: (1) by privatizing preexisting public entities, or (2) by contracting with private entities to perform traditional government services.⁴ Privatization is typically seen as a cost-saving device because it delivers government services while avoiding significant investments in personnel and resources, thereby limiting the growth of the administrative state.⁵

Privatization also impacts legal liabilities. Typically, when the government harms an individual, the individual cannot recover because the government is immune under some form of sovereign immunity.⁶ In contrast, when the government privatizes a public function and that private entity commits the same wrong, then the injured individual is typically able

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¹ President Ronald Reagan, First Inaugural Address (Jan. 20, 1981).

² Keon S. Chi, et al., *Privatization in State Government: Trends and Issues*, SPECTRUM: THE J. OF ST. GOV'T, FALL 2003, at 12, 20.

³ William Megginson, *Privatization*, 118 FOREIGN POL'Y 14 (2000).

⁴ Chi, *supra* note 2, at 20.

⁵ *Id.*

⁶ *Ex parte Cranman*, 792 So. 2d 392, 396-97 (Ala. 2000).

to recover against the private entity.⁷ Still, privatization may have no effect on liability. For example, a privatized state prison must afford inmates basic constitutional rights.⁸ On the other hand, privatization may decrease liability. For example, a public school is required to provide due process rights to a terminated teacher, whereas a private school is under no such obligation.⁹

The legal rules governing the liability of public, private, and hybrid entities are evolving just as rapidly as the administrative landscape. Private contractors and quasi-public bodies on both the state and federal level are increasingly raising sovereign immunity—or some form thereof—as a defense in suits that involve their provision of traditionally public services.¹⁰ These claims have also been met with increasing acceptance.¹¹ On two separate occasions in the 1990s, the United States Supreme Court denied private entities the ability to assert qualified immunity as a defense in § 1983 claims.¹² However, in subsequent cases, the Court has expressly cabined these holdings¹³ and held that private contractors are sometimes entitled to an immunity defense.¹⁴

Despite widespread privatization of government functions and the increasing national recognition of immunity defenses for private contractors, the trend has yet to grace the courthouses of Alabama. The following Discussion Section (II) proceeds by examining Alabama law that both

⁷ Sasha Volokh, *The Surprising Truth About Suing Private Persons*, WASH. POST (Feb. 19, 2014), <https://www.washingtonpost.com/volokh-conspiracy/wp/2014/02/19/the-surprising-truth-about-suing-private-persons>.

⁸ Alex Friedmann, *A Primer on Prisoners' Constitutional Rights*, PRISON LEGAL NEWS (Nov. 14, 2016), <https://www.prisonlegalnews.org/news/2016/nov/14/primer-prisoners/constitutional-rights>.

⁹ D. Parker Young & Donald D. Gehring, *Teacher Employment Rights and Due Process*, 54 EDUC. HORIZONS 52, 58 (1975).

¹⁰ Lauren Villa, *Public Service, Private Entity: Should the Nature of the Service or the Entity be Controlling in Issues of Sovereign Immunity?*, 78 ST. JOHN'S L. REV. 1257 (2004).

¹¹ *Id.*

¹² See *Wyatt v. Cole*, 504 U.S. 158, 168 (1992) (showing private individuals using state replevin law to compel local sheriff to seize property of business owner); see also *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (privately-employed state prison guards).

¹³ See *Filarsky v. Delia*, 566 U.S. 377, 392-93 (2012).

¹⁴ See *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016) (government contractor defense or derivative immunity); see also *Filarsky*, 566 U.S. at 394.

supports and limits the argument that a private contractor is entitled to state immunity. Part *a* notes potential constitutional limits that may arise. Part *b* discusses the availability of state sovereign immunity for private contractors. Part *c* turns to the potential availability of state-agent immunity for the individual employees of the private contractors and the unique problems that may arise when applied to private contractors. Ultimately, under the proper circumstances, a contracting entity and its employees may be entitled to both state sovereign immunity and state-agent immunity under Alabama law.

DISCUSSION

Generally, there are three sources of law that provide a private contractor with immunity: a constitution, a statute, or common law. While federal law may preempt state law, state law determines whether a defendant is immune from suit where the defendant is sued under state law.¹⁵ Moreover, the Alabama and federal immunity doctrines are much like “star-cross’d lovers”: they have the same result, but come from two completely different households.¹⁶

Under Alabama law, there are three types of established government-based immunities that correspond to the sources noted above.¹⁷ All three may serve as a basis for extending immunity to private entities that contract with the state of Alabama.¹⁸ First, the Alabama Constitution provides the basis for state sovereign immunity, which is available to the state, its departments, and agents in suits against the state.¹⁹ Precedent exists where

¹⁵ See, e.g., *Johnson v. Dunn*, 216 So. 3d 1217 (Ala. Civ. App. 2016) (declining to apply sovereign immunity and state-agent immunity to prison guards for prisoner’s federal § 1983 claim).

¹⁶ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act I, Prologue, I. 6; see also *Ex parte Cranman*, 792 So.2d 392, 398 (Ala. 2000), *abrogated in part by Parks v. City of Birmingham*, No. 2:13-cv-0894-SLB, 205 U.S. Dist. LEXIS 40168 (N.D. Ala. 2015) (explaining that federal immunity “is based upon the decisional law of the federal courts, uninfluenced by the presence of provisions comparable to §§ 13 and 14 of the Alabama Constitution of 1901.”).

¹⁷ See *Ex parte Cranman*, 792 So. 2d at 397; see also ALA. CODE §§ 6-5-344 (2019); 9-3-19 (2018); 6-5-332.2 (2018); 6-5-663 (2018); 6-5-340(b)(1) (2015); 6-5-336 (d) (2015).

¹⁸ *Ex parte Cranman*, 792 So. 2d at 397.

¹⁹ See *id.*

Alabama courts have found that private contractors were entitled to state sovereign immunity from suit.²⁰ However, most recently, the Supreme Court of Alabama has noted in dicta that private entities are not entitled to state immunity.²¹

Second, “[s]tate-agent immunity,” which also derives from the Alabama Constitution and is guided by common law, is available to individuals “sued for actions taken on behalf of the State.”²² Since the reset of state-agent immunity in *Cranman*, state courts have not directly addressed the issue of whether an individual private contractor is entitled to state-agent immunity. However, courts have impliedly acknowledged that nongovernmental employees are not entitled to state-agent immunity.²³

Third, the Alabama State Legislature may enact laws that provide immunity or effective immunity for certain entities or those entities providing certain functions.²⁴ The Legislature has used its power in two ways to establish statutory immunity. First, it has extended immunity to persons who otherwise would not be entitled to immunity.²⁵ These enactments are much like a band-aid: when a court finds that certain entities

²⁰ See discussion below regarding *Boaz Nursing Home, Inc. v. Recovery Inns of America, Inc.*, 289 Ala. 144 (1972); *Ex parte Bowden*, 574 So.2d 815 (Ala. 1991); *Alexsis, Inc. v. Terry*, 675 So.2d 1321 (Ala. Civ. App. 1996).

²¹ See *Health Care Auth. for Baptist Health v. Davis*, 158 So. 3d 397, n. 9 (Ala. 2013) (noting that “[i]t is unnecessary to cite authority for the proposition that a private entity does not possess State immunity.”).

²² *Cranman*, 792 So.2d at 397.

²³ See *Ex parte Greater Mobile-Washington Cty. Mental Health-Mental Retardation Bd., Inc.*, 940 So. 2d 990, 1006 (Ala. 2006) (concluding that “because the [defendant-employer] is not a State agency, it necessarily follows that [the defendant-employee] is not a candidate for state-agent immunity under *Ex parte Cranman*.”).

²⁴ See, e.g., ALA. CODE §§ 9-3-19 (2018) (providing civil immunity to persons donating fire control or fire rescue equipment); 6-5-332.2 (2018) (providing immunity for those assisting with the clean-up of an oil spill); 6-5-340(b)(1) (2018) (providing limited immunity for any government entity or independent contractor for actions involving Y2K). For statutory immunity of volunteers providing particular services, see ALA. CODE §§ 6-5-336(d) (2015) (good-faith immunity to a volunteer performing services for a government entity, hospital, nonprofit organization or nonprofit corporation); 6-5-344 (2019) (athletic supervisors); 6-5-663 (2018) (medical services).

²⁵ Alabama Jailer Liability Protection Act, Ala. Laws 2011-685 §§ 1-3 (2011); ALA. CODE §§ 14-6-1, 36-22-3 (2011).

are not entitled to sovereign or state-agent immunity, then the Legislature enacts laws that prescribe immunities to those entities.²⁶ The Legislature has also codified the case law establishing the test for state-agent immunity.²⁷ Accordingly, any claim of immunity must be based on and fit within the parameters of these three primary sources.²⁸

I. CONSTITUTIONAL LIMITS

Many believe that the greatest rivalry in all of college sports is the Iron Bowl.²⁹ They are not wrong. They may be surprised to learn, however, that the Alabama-Auburn rivalry is not necessarily the greatest rivalry in the state of Alabama. This title belongs to Article I, Sections 13 and 14 of the Alabama Constitution. The interplay between these two diametrically-opposed provisions forms the starting point for the argument that the immunity doctrine should recognize or extend to a particular entity.³⁰

Ex parte Cranman, the penultimate authority on Alabama's state-agent immunity doctrine, examined the interplay between the two competing provisions in the context of state-agent immunity.³¹ Article I, Section 14 of the Alabama Constitution states simply that "the State of Alabama shall never be made a defendant in any court of law or equity."³² This provision serves as a jurisdictional bar, preventing a state court from ever acquiring jurisdiction over a state-defendant.³³ Moreover, neither the Legislature nor

²⁶ See Alabama Jailer Liability Protection Act, Ala. Acts 2011-685 §§ 1-3 (2011); ALA. CODE §§ 14-6-1, 36-22-3 (2011); *Young v. Myhrer*, 243 F. Supp. 3d 1243, 1263 (N.D. Ala. 2017) (holding that county jailers are granted sovereign, not state-agent, immunity under the Alabama Jailers Act); *Ex parte Shelley*, 53 So. 3d 887 (Ala. 2009) (holding county jailers not immune under state sovereign immunity).

²⁷ ALA. CODE § 36-1-12.

²⁸ *Id.*

²⁹ See, e.g., Christopher Walsh, *Let's Just Call It What It Is: The Biggest Rivalry in College Football*, SPORTS ILLUSTRATED (Nov. 29, 2019), <https://www.si.com/college/alabama/bamacentral/alabama-at-auburn-iron-bowl-biggest-rivalry>.

³⁰ See generally ALA. CONST. art. 1, §§ 13, 14.

³¹ *Ex parte Cranman*, 792 So. 2d 392, 393-406 (Ala. 2000).

³² ALA. CONST. art. I, § 14.

³³ *Ex parte Davis*, 9 So. 3d 480 (Ala. 2008).

the courts have the authority “to waive the State’s immunity from suit,” because the State’s sovereign immunity is premised on the Alabama State Constitution.³⁴

However, the legislature and the courts are similarly without power to close the courthouse doors. Article I, Section 13 of the Alabama Constitution declares “[t]hat all courts shall be open; and that every person, for any injury done him . . . shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.”³⁵ In *J.B. McCrary Co. v. Phillips*, the Alabama Supreme Court found this provision limited the grant of immunity in Section 14.³⁶ There the legislature had statutorily authorized Jefferson County to construct a sewer system.³⁷ The county contracted the defendant to construct the system.³⁸ The defendant-contractor used explosives to excavate and, in doing so, the fragments and blasting material severely damaged the plaintiff’s house and property.³⁹ The defendant-contractor argued that the legislature granted the county sovereign immunity by the statute authorizing the construction of the sewer, and that the county’s contract with the defendant extended that immunity to the contractor.⁴⁰ The court rejected this argument holding that “the statute does not purport to extend such immunity; and . . . if it did, it would be in conflict with the thirteenth section of the Bill of Rights . . .”⁴¹ The court concluded that “[t]he immunity from suit extended by the Constitution to the state does not protect an agent who commits a trespass to the hurt of another.”⁴²

The *Cranman* court interpreted this holding to mean that Section 13 directly limits the extension of the State’s Constitutional immunity to its agents under the theory of state agent immunity.⁴³ However, the court did not view Section 13 as an absolute limit to the extension of immunity to state

³⁴ *Cranman*, 792 So. 2d at 399.

³⁵ ALA. CONST. art. I, § 14.

³⁶ *J.B. McCrary Co. v. Phillips*, 130 So. 805 (Ala. 1930).

³⁷ *Id.* at 806.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 806.

⁴¹ *Id.*

⁴² *J.B. McCrary Co.*, 130 So. 805, 906 (Ala. 1930).

⁴³ *Ex parte Cranman*, 792 So.2d at 400.

agents.⁴⁴ Instead, the court found it necessary to balance Section 13's open-door policy with the separation-of-powers principle embodied in Section 43.⁴⁵ The court interpreted this principle to mandate that the judiciary avoid interference with the co-equal branches but still act as a check upon the Legislature and the executive.⁴⁶ Accordingly, the court limited the state-agent immunity to specified instances.⁴⁷

Section 13 and *Phillips's* interpretation seemingly impose a direct limitation upon the extension of immunity to private contractors. But as the *Phillips* court notes, the county had no immunity to give to the defendant-contractor despite being the contractor's principal under agency law.⁴⁸ In addition, the court held that the defendant was strictly liable for trespass and acted wantonly to the extent that punitive damages were available.⁴⁹ These two points are key to a private contractor's argument. First, the court's holding that the county had no immunity to give effectively disposed of the case and made the court's discussion of Section 13's limit upon the extension of immunity to a private contractor merely dicta. Moreover, the finding that the defendant was strictly liable and acted wantonly likely placed the defendant within the "bad-faith" exceptions to immunity.⁵⁰ The holding in *McCrary*, therefore, is neither controlling nor persuasive because the denial was merely dicta and based on conduct that would not have entitled the defendant to any form of immunity.⁵¹ Accordingly, Section 13 should have

⁴⁴ *Id.* at 400-01.

⁴⁵ *Id.* at 401.

⁴⁶ *Id.*

⁴⁷ *Id.* at 405.

⁴⁸ *J.B. McCrary Co. v. Phillips*, 130 So. 805, 806 (1930).

⁴⁹ *Id.*

⁵⁰ *Id.* at 807 ("The immunity from suit extended by the Constitution to the state does not protect an agent who commits a trespass to the hurt of another.") (citing *Elmore v. Fields*, 153 Ala. 345, 350 (Ala. 1907)); cf. *Ex parte Cranman*, 792 So. 2d 392, 406 (Ala. 2000) ("[A] state agent shall not be immune from civil liability in his or her personal capacity... when the State agent acts willfully, maliciously, fraudulently, *in bad faith*, beyond his or her authority, or under a mistaken interpretation of law.") (emphasis added).

⁵¹ *J.B. McCrary Co.*, 130 So. at 806 ("This contention is without merit. In the first place, the statute does not purport to extend such immunity; and, in the second, if it did, it would be in conflict with the thirteenth section of the Bill of Rights...").

no more application to private contractors than it does to other agents of the state.

Since the court handed down the *McCrary* decision in 1930, Section 13 has not had a major impact on Alabama immunity law other than its theoretical impact acknowledged in *Cranman*. The Legislature has provided statutory immunity to non-government actors.⁵² Specifically, it has immunized private road builders.⁵³ In 2012, the state legislature enacted legislation that limited the duty and liability of private road-builders who contract with the state government.⁵⁴ A private contractor who contracts with the state to build a public roadway is justified in relying upon the specifications that are contained in the contract and is not liable to a third party unless the third party's injury was caused by: (1) the contractor's failure to follow the specified plans, thereby causing a dangerous condition; (2) the contractor complies with the contract but nonetheless creates a dangerous condition that a reasonably prudent contractor would have noticed; or (3) a latent defect that creates a dangerous condition and is the result of the work of the contractor.⁵⁵ While this section has yet to be interpreted by an Alabama appellate court, it would appear ripe for challenge under Section 13.⁵⁶ Accordingly, under the reasoning of *Cranman*, if the Legislature's extension of immunity to private contractors does not violate Section 13, then the court's extension of immunity, particularly state sovereign immunity, would not violate Section 13.

II. PRIVATE CONTRACTORS AS STATE AGENTS

Further evidence of Section 13 and *Phillips*'s lack of value is the fact that, since *Phillips* was decided, three cases have extended state sovereign

⁵² ALA. CODE § 36-5-701 (2019).

⁵³ *Id.* at § 36-1-12(d)(2) (1975).

⁵⁴ *Id.* at § 6-5-701.

⁵⁵ *Id.*

⁵⁶ *Hosea O. Weaver & Sons, Inc. v. Balch*, 142 So. 3d 479, 485 (Ala. 2013) (per curiam) (adopting the "accepted-work doctrine" to bar a suit against a road contractor where the work had been completed and the duty to maintain the road was solely within the jurisdiction of Alabama Department of Transportation); *id.* at 487-88 (Bryan, J. concurring) (noting that while the statute did not control the case because it was enacted during the pendency of appeal, it would control in future cases).

immunity to private contractors.⁵⁷ Section 14 applies to all suits brought directly or indirectly against the state.⁵⁸ Thus, state sovereign immunity extends to suits where the state is a nominal party as well as suits that are in effect against the state.⁵⁹

Generally, state courts have found that a suit against three types of entities are indirect actions against the state where the defendant is not a state employee or a state agency: (1) quasi-public corporations, (2) local government employees, and (3) private contractors.⁶⁰ Simply because a state entity is created by the legislature does not bring the quasi-public entity within the terms of section 14.⁶¹ For a quasi-public entity to be entitled to state sovereign immunity, it must be “an arm of the state” and not merely “a franchisee licensed for some beneficial purpose.”⁶² Whether a quasi-public entity is “an arm of the state” depends on “[1] the character of power delegated to the body, [2] the relation of the body to the state, and [3] the nature of the function performed by the body.”⁶³

While the extension of sovereign immunity to a quasi-public corporation is technically beyond the scope of this discussion, the extension of immunity to private contractors will have an impact upon these entities and their employees. For example, in *Ex parte Greater Mobile-Washington Cty.*, both the quasi-public entity and its employee were sued as defendants.⁶⁴

⁵⁷ *Boaz Nursing Home, Inc. v. Recovery Inns of Am., Inc.*, 266 So. 2d 588 (Ala. 1972); *Ex parte Bowden*, 574 So. 2d 815 (Ala. 1991); *Alexsis, Inc. v. Terry*, 675 So.2d 1321 (Ala. Civ. App. 1996).

⁵⁸ *Curry v. Woodstock Slag Corp.*, 6 So. 2d 479 (Ala. 1942); *Ex parte Ala. Dep’t of Transp.*, 764 So. 2d 1263 (Ala. 2000).

⁵⁹ *Curry*, 6 So. 2d at 479; *Ex parte Ala. Dep’t of Transp.*, 764 So. 2d at 1263.

⁶⁰ *Health Care Auth. for Baptist Health v. Davis*, 158 So.3d 397, 416 (Ala. 2013).

⁶¹ *Id.* at 403.

⁶² *Id.*

⁶³ *Id.* at 402-03 (emphasis omitted) (quoting *Armory Comm’n of Ala v. Staudt*, 388 So. 2d 991 (Ala. 1980)). If words have meaning, then this test, typically referred to as the three *Staudt* factors, would not apply to a private entity that was not previously a legislatively-created entity because this test is used to determine “whether an action against a body *created by legislative enactment* is an action against the State for purposes of the doctrine of State immunity . . .” *Id.* at 402 (emphasis added).

⁶⁴ *Ex parte Greater Mobile-Washington Cty. Mental Health-Mental Retardation Bd., Inc.*, 940 So. 2d 990 (Ala. 2006).

The court first held that the quasi-public entity was not a state agency under Section 14 for purposes of state sovereign immunity.⁶⁵ Then, without reasoning, the court held that “it necessarily follows that [the individual defendant], as its employee, is not a candidate for State-agent immunity under [*Cranman*].”⁶⁶ Recognizing private contractors as eligible for state sovereign immunity would not allow the quasi-public entity to argue that it is eligible for sovereign immunity under a private contractor theory because the quasi-public entity is legislatively-created whereas the private contractor is not.⁶⁷ However, depending on the test adopted, the employee could argue that even though they were directly employed by a legislatively-created quasi-public entity, they were acting in the role of a private contractor as an agent of the state of Alabama.⁶⁸ This would provide some protection for employees who would otherwise would not be indemnified by the state and potentially not indemnified by their quasi-public employer.

The Alabama Supreme Court has held that a private contractor is an “agent” of the state and entitled to state sovereign immunity on three occasions.⁶⁹ In analyzing when a private contractor is entitled to state sovereign immunity, the courts’ language has changed over time, but the substance has remained the same.⁷⁰ In each of the three cases below, the courts adopted a functional approach.⁷¹ In doing so, the courts determined that the private contractors were agents of the state because the agents were

⁶⁵ *Id.* at 1005-06.

⁶⁶ *Id.*

⁶⁷ *Id.* at 997 (As Rodgers noted, this Court articulated a three-factor test in *Armory Commission of Alabama v. Staudt*, 388 So. 2d 991 (Ala. 1980), for determining whether a legislatively created body is a State agency entitled to sovereign immunity.”).

⁶⁸ *See id.*

⁶⁹ *See* *Boaz Nursing Home, Inc. v. Recovery Inns of Am., Inc.*, 266 So. 2d 588 (Ala. 1972); *Ex parte Bowden*, 574 So. 2d 815 (Ala. 1991); *Alexsis, Inc. v. Terry*, 675 So. 2d 1321 (Ala. Civ. App. 1996).

⁷⁰ *See, e.g., Boaz Nursing Home*, 266 So. 2d 588; *Ex parte Bowden*, 574 So. 2d 815; *Alexsis*, 675 So. 2d 1321.

⁷¹ *See Boaz Nursing Home*, 266 So. 2d 588; *Ex parte Bowden*, 574 So. 2d 815; *Alexsis*, 675 So. 2d 1321.

performing a statutory duty that, if performed by the state agency, would entitle the agency to sovereign immunity.⁷²

First, in *Boaz Nursing Home*, the plaintiff brought a writ of garnishment against a private company that had contracted with the Alabama State Board of Health to be its fiscal agent in administering Medicaid claims.⁷³ As the fiscal agent, the private contractor would review the claims as they were submitted and then receive any approved funds to be dispersed.⁷⁴ The only funds held by the contractor at the time of the garnishment were the Medicaid funds provided by the Board.⁷⁵ Based on this finding, the court held that if the plaintiff were to succeed, this would directly affect both a property right and contract right of the State.⁷⁶ The court reasoned that the money held by the contractor was the property of the State and that the garnishment action would interfere with the State's contract to indemnify the contractor against loss.⁷⁷ The court concluded that these two consequences would directly affect the public treasury and interfere with the administration of the State's Medicaid program.⁷⁸

Second, in *Ex Parte Bowden*, the question was whether the administrator of the legislatively-created Alabama State Docks (ASD) workmen's compensation fund was entitled to sovereign immunity against a claim brought by an injured state docks employee.⁷⁹ The trial court found that ASD was entitled to sovereign immunity and that the privately-contracted administrator was an agent of the ASD.⁸⁰ The Court of Civil Appeals upheld the trial court.⁸¹ The Supreme Court quashed the writ of certiorari without opinion, allowing the appellate court's decision stand.⁸²

⁷² See, e.g., *Alexsis*, 675 So.2d 1321 (holding a private contractor is a state agent by nature of its contractual obligations to the State).

⁷³ 266 So. 2d at 589.

⁷⁴ *Id.* at 146.

⁷⁵ *Id.* at 147.

⁷⁶ *Id.* at 148.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Ex parte Bowden*, 574 So. 2d 815 (Ala. 1991).

⁸⁰ *Id.*

⁸¹ *Id.* at 816.

⁸² *Id.*

However, Justice Jones wrote a dissenting opinion addressing the lower court's opinion that a private contractor was entitled to sovereign immunity.⁸³ He stated, "there are cases in abundance sustaining the proposition that ASD and its agencies are immune from suit . . . however, this 'cloak' of immunity has not been extended to independent contractors doing work for the state."⁸⁴ Justice Jones made no mention of *Boaz*.

Third, in *Alexsis, Inc. v. Terry*, the Alabama Court of Civil Appeals held that the private contractor administering the Alabama Department of Transportation ("ALDOT") Employee Injury Program was an agent of the state and, as a result, was entitled to sovereign immunity.⁸⁵ Under the statute authorizing ALDOT to establish an employee self-insurance program, ALDOT had the option to either administer the program itself or contract the function out to a private entity.⁸⁶ ALDOT elected to hire the defendant, a private contractor, to administer the program.⁸⁷ The issue was whether the defendant could be considered an agent of the state for sovereign immunity purposes.⁸⁸ In answering the question, the court expressly adopted a functional approach and held that the contractor was an agent of ALDOT.⁸⁹ The dissent reiterated Justice Jones's views in *Bowden*⁹⁰ and argued that the private contractor was an independent contractor and as such cannot assert sovereign immunity.⁹¹ The majority refused to adopt the arbitrary, blanket rule that sovereign immunity does not extend to independent contractors. Instead, the court reasoned that, had ALDOT chosen to administer the program itself, it would have been entitled to state sovereign immunity.⁹² Nonetheless, ALDOT chose to contract with the defendant to administer the

⁸³ *Id.* at 816.

⁸⁴ *Id.* at 816 (J., Jones, concurring in part, dissenting in part) (citing *Evans v. Patterson*, 112 So.2d 194 (1959)).

⁸⁵ 675 So.2d 1321, 1323 (Ala. Civ. App. 1996).

⁸⁶ *Id.* at 1322.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1323.

⁹⁰ *Ex parte Bowden*, 574 So.2d, 815, 816 (Ala. 1991) (Jones, A., concurring in part and dissenting in part). Note that Justice Jones dissented in light of the majority of the Supreme Court quashing of the writ without opinion.

⁹¹ *Alexsis, Inc. v. Terry*, 675 So. 2d 1321, 1323 (Ala. Civ. App. 1996).

⁹² *Id.*

program and thus created an agency relationship.⁹³ Accordingly, the private contractor was entitled to sovereign immunity because it was performing a function typically performed by the state itself.⁹⁴

A question arises as to whether the courts' approaches in *Alexsis* and *Bowden* can be reconciled with the Supreme Court's analysis in *Boaz*. All three decisions reached the same result: the defendant-private contractor was an agent of the state and, as a result, was entitled to sovereign immunity.⁹⁵ On the other hand, neither the *Alexsis* court nor *Bowden* court referenced *Boaz*, much less mentioned *Boaz's* property or contract interference criteria.⁹⁶ While *Boaz* could be distinguished from *Alexsis* and *Bowden* on the ground that the action brought against the contractor in *Boaz* was a writ of garnishment, this fact seems immaterial to whether a private contractor is in fact an agent of the state.⁹⁷ Accordingly, an Alabama court would likely be able to choose between the two approaches in answering whether a private contractor is entitled to sovereign immunity where he is an agent of the state but the suit would not necessarily interfere with the state's property or contract interest.

While not directly controlling, subsequent case law that involves the question of whether municipal and county employees are agents of the state provides guidance for determining the correct approach for questions involving private contractors. Generally, the court has adopted two different approaches. First, in *Town of Loxley v. Coleman*, the court expressly followed the approach of *Alexsis* and *Bowden*.⁹⁸ In *Coleman*, the defendant was a municipal employee who was transporting a state prisoner when the prisoner fell out of the truck.⁹⁹ In response to the prisoner's state law negligence and wantonness claims, both the Town and the employee claimed

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See generally *Boaz Nursing Home, Inc. v. Recovery Inns of Am., Inc.*, 266 So. 2d 588 (Ala. 1972); *Ex parte Bowden*, 574 So. 2d 815; *Alexsis*, 675 So. 2d 1321.

⁹⁶ See generally *Ex parte Bowden*, 574 So. 2d 815; *Alexsis*, 675 So. 2d 1321.

⁹⁷ See generally *Boaz Nursing Home*, 266 So. 2d 588; *Ex parte Bowden*, 574 So. 2d 815; *Alexsis*, 675 So. 2d 1321.

⁹⁸ *Town of Loxley v. Coleman*, 720 So.2d 907, 908 (Ala. 1998).

⁹⁹ *Id.*

sovereign immunity.¹⁰⁰ The court held that both the Town and the employee were acting as agents of the state when the alleged injury occurred.¹⁰¹ Following *Alexsis*, the court reasoned that “[h]ad the Department of Corrections been transporting [the plaintiff], there would be no question that the doctrine of sovereign immunity would apply.”¹⁰² Accordingly, as an agent of the state, the municipal employee was entitled to state sovereign immunity and the lawsuit against her in her official capacity was dismissed.¹⁰³

In *Ex Parte Tuscaloosa County*, the defendant, a county license inspector, brought criminal charges against the plaintiff for not renewing his business license.¹⁰⁴ The plaintiff sued the defendant on various state law claims.¹⁰⁵ The court held that the defendant-county license inspector was “acting as an agent of the state for purposes of enforcing the state’s business-license laws.”¹⁰⁶ The court identified the *Loxley* approach, where the city and the employee were engaged in a function that the state corrections department would have otherwise had to perform, and the *Rutledge* approach,¹⁰⁷ where a county employee was acting as an agent of the state because the function was specified by statute and carried out in accordance with the procedures promulgated by the principal.¹⁰⁸ The court found that the license inspector’s duties and powers were specified by state law and, more specifically, the inspector was under a mandatory statutory duty to report the plaintiff.¹⁰⁹ Accordingly, a county and its employee act as agents of the state when state law places a mandatory duty to act on the county employee, and the employee so acts.¹¹⁰

Both cases present approaches under which a court could find a private contractor to be an agent of the state. These approaches are also

¹⁰⁰ *Id.*

¹⁰¹ *Id.* ar 909.

¹⁰² *Id.* at 908.

¹⁰³ *Id.* at 909.

¹⁰⁴ *Ex parte* Tuscaloosa County, 796 So. 2d 1100, 1103 (Ala. 2000).

¹⁰⁵ *Id.* at 1102.

¹⁰⁶ *Id.* at 1106.

¹⁰⁷ *Rutledge v. Baldwin Cty.* Comm’n, 495 So. 2d 49, 53 (Ala. 1986).

¹⁰⁸ *Id.*

¹⁰⁹ *Ex parte* Tuscaloosa County, 796 So. 2d at 1105.

¹¹⁰ *Id.* at 1106.

reconcilable. Similar to *Alexsis*, the municipal employee in *Loxley* was not under a statutory duty but was performing a state function that otherwise would have been performed by the state.¹¹¹ In *Rutledge* and *Ex Parte Tuscaloosa County*, state law mandated that the county employee perform a particular service for the state.¹¹² Accordingly, if a court finds a private contractor analogous to a local government employee, then a private contractor will be entitled to state sovereign immunity where she is performing a state function that is either mandated by state law or would otherwise be performed by a state employee.¹¹³

III. STATE AGENT IMMUNITY: LIKE “CRANMAN,” A SQUARE IN A ROUND HOLE

Other issues that may arise for a private contractor claiming immunity are: (1) the form of immunity that would apply and (2) to whom it would apply. If a private contractor is considered an agent of the state, then presumably the private contractor’s corporate form would be entitled to state sovereign immunity as was the case in the three private contractor cases referenced above. In this regard, ACME, LLC is treated no differently than ALDOT and both entities would be immune from suit. Where ACME, LLC and ALDOT differ, however, is that the law has traditionally treated a corporation as an individual person with all the rights and liabilities thereof.

A “backdoor” to the courthouse is unlocked through individual capacity suits against the employees and officers of the state agency.¹¹⁴ State sovereign immunity does not extend to suits where the agent is sued in her individual capacity; rather, the agent would be entitled to state-agent immunity.¹¹⁵ Thus, would the “person-hood” of a private contractor allow a plaintiff to sue the private contractor in “his/her/its” individual capacity? Presumably so. Under these circumstances, ACME, LLC and its employee

¹¹¹ *Coleman*, 720 So. 2d at 908.

¹¹² *Rutledge*, 495 So. 2d at 1103; *Tuscaloosa County*, 796 So. 2d at 1105.

¹¹³ See *Rutledge*, 495 So. 2d at 1103; *Tuscaloosa County*, 796 So. 2d at 1105.

¹¹⁴ *Coleman*, 720 So. 2d at 908-09.

¹¹⁵ *Id.* at 909.

would be immune from suit in their “official capacities,” but they would be subject to suit in their individual capacities.

In their individual capacities, they would likely be considered entitled to state-agent immunity.¹¹⁶ Moreover, because a private contractor’s corporate form can only act through its employees, the additional issue arises of how the corporate form would perform one of the specified determinative actions in *Cranman*. The logical answer is that if it acts through its agents then it is not performing a discretionary function as defined by *Cranman* and, therefore, is not eligible for state-agent immunity. However, if the issue is framed in this manner, then it would lead to the absurd conclusion that a corporation could never commit a tort. Accordingly, the liability or immunity of the private contractor’s corporate form would turn on the vicarious liability or “vicarious immunity” of the contractor’s employees.

CONCLUSION

The privatization of government functions is unlikely to stop in the near future. Private government contractors are equally as unlikely to stop claiming an entitlement to sovereign immunity while acting as the government’s agent. With the U.S. Supreme Court increasingly recognizing such immunity, a private government contractor is likely to raise the issue under Alabama immunity law.¹¹⁷ Under the right facts, this argument could be accepted. If the Alabama Supreme Court draws an arbitrary line in the sand and denies a private government contractor undoubtedly acting as a state agent the entitlement of state sovereign immunity, then it will be overturning prior precedent, violating the legislature’s statutory commands,¹¹⁸ and violating Section 14 of the Alabama Constitution by making the “State” a defendant in its own courts. If the court acknowledges that a private contractor is eligible for sovereign and state-agent immunity, then the court will face further issues such as how to determine when a

¹¹⁶ See discussion regarding quasi-public entities above; see also *Ex parte Greater Mobile-Washington Cty. Mental Health-Mental Retardation Bd., Inc.*, 940 So. 2d 990, 1006 (Ala. 2006).

¹¹⁷ Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 310-12 (2000).

¹¹⁸ In codifying *Cranman*, the Legislature largely used the language of the court and, therefore, “agents” of the state are statutorily immunized.

private contractor is acting as a state agent and how the corporate form of a private contractor impacts the state-agent analysis.

