CARLIE B. TERRY, JOHN THOMAS TERRY and ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiffs	)	AT LAW
	)	
Vs.	)	
CITY OF FOLEY, a Municipal Corporation,	)	
Defendant	)	CASE NO. 4269

SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS, that we the City of Foley, a municipal corporation, as principal, and Aetna Casualty and Surety Company, Hartford, Connecticut, a corporation, as surety, are held and firmly bound unto Carlie B. Terry, John Thomas Terry and Arlie Terry, a minor, by Carlie B. Terry, as next friend, their heirs, executors or administrators, in the sum of Ten Thousand Dollars ($10,000.00), for the payment of which we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 22nd day of October 1962.

The condition of the above obligation is such, that the above bounden City of Foley, a municipal corporation, has filed a Petition for a Writ of Certiorari with the Supreme Court of Alabama, to supersede and reverse a judgment recovered by the said Carlie B. Terry, John Thomas Terry and Arlie Terry, a minor, by Carlie B. Terry, as next friend, against the said City of Foley, a municipal corporation, on the 25th day of

September 1962, in the Circuit Court of Baldwin County, Alabama, in the above-styled cause, in the amount of Six Thousand Six Hundred Dollars ($6,600.00), payable at the rate of Twenty-Two Dollars ($22.00) per week for Three Hundred (300) weeks, besides costs,

Now, if the said the City of Foley, a municipal corporation, shall prosecute to effect said Petition for Writ of Certiorari and appeal, by Writ of Certiorari, in the Supreme Court of the State of Alabama, and shall pay and satisfy such judgment as the Supreme Court of Alabama shall render in the premises, then this obligation to be null and void, otherwise, to be and remain in full force and effect.

We hereby waive all rights to any claim of exemption as to personal property we now have or may hereafter have, under the Constitution and laws of the State of Alabama, and we hereby certify that we have property free from all encumbrance in the full amount of the above bond.

Witness our hands and seals this the 22nd day of October 1962.

CITY OF FOLEY, a municipal corporation,
As Principal

By Donald Hinie (SEAL)

As Its Attorney

AETNA CASUALTY AND SURETY COMPANY,
HARTFORD, CONNECTICUT, a corporation,
As Surety

By Henry S. Matter (SEAL)
As Its Attorney-In-Fact

This bond taken and approved this 22 day of October 1962.

Alice A. Duck
ALICE DUCK, CLERK, CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT
	)	OF BALDWIN COUNTY
Plaintiffs,	)	ALABAMA
	)	AT LAW
vs.	)	
CITY OF FOLEY, a municipal corporation,	)	
Defendant.	)	CASE NO. 4269

AMENDED ANSWER

Comes now the defendant in the above cause, and, leave of court having first been had and obtained, amends its answer heretofore filed by adding thereto the following separate and several pleas:

TWO-A

The material allegations of the complaint are untrue.

THREE-A

The defendant, City of Foley, is a municipal corporation located in Baldwin County, State of Alabama. The Code of Alabama, Title 37, Section 504, 1958 as revised, provides and did then provide as follows:

> "No recovery shall be had against any city or town, on a claim for personal injury received, unless a sworn statement be filed with the clerk, by the party injured, or his personal representative, in the case of his death, stating substantially the manner in which the injury was received, and the day and time, and the place where the accident occurred, and the damages claimed."

Defendant avers that the City of Foley, a municipal corporation, was a city or town within the meaning of the above quoted Section of the Alabama Code at the time of the matters complained of in the complaint and that no sworn statement

has been filed with the Clerk of said City of Foley, by the party injured, or his personal representative, as required by said Code Section, hence plaintiffs ought not recover.

FOUR-A

The defendant, City of Foley, is and was, at the time of the matters complained of, a municipal corporation organized under the laws of the State of Alabama, located in Baldwin County, State of Alabama. Code of Alabama, Title 37, Section 504, 1958 as revised, provides and did then provide as follows:

> "No recovery shall be had against any city or town, on a claim for personal injury received, unless a sworn statement be filed with the clerk, by the party injured, or his personal representative, in the case of his death, stating substantially the manner in which the injury was received, and the day and time, and the place where the accident occurred, and the damages claimed."

Code of Alabama, Title 37, Section 476, 1958 as revised, provides and did then provide as follows:

> "All claims against a municipality (except bonds and interest coupons and claims for damages) shall be presented to the clerk for payment within two years from the accrual of said claim, or shall be barred; claims for damages growing out of torts shall be presented within six months from the accrual thereof or shall be barred."

Defendant avers that no such sworn statement has been filed with the defendant ~~within the time provided by the last above code section,~~ and that no such claim has been presented to defendant or to the clerk of the defendant within the time provided by the last above quoted code section, hence plaintiffs ought not recover.

FIVE-A

At the time and place alleged in the complaint, to-wit, May 4, 1959, the decedent, Tom Terry, was an employee of the City of Foley, engaged in work on the swimming pool owned and operated by the said City of Foley. Said swimming pool was in the new Foley Park, also then operated by the defendant. The defendant City of Foley is and then was a municipal corporation organized and existing under the laws of the State of Alabama, located in the County of Baldwin, State of Alabama. The owning and operating of said swimming pool at said time was a governmental function of defendant. The accident and injury complained of occurred while said decedent was employed in furtherance of said governmental function of defendant. Hence, plaintiffs ought not recover.

SIX-A

Defendant is and was, at the time of the matters complained of in the complaint, a city, town or municipal corporation authorized and existing by virtue of the laws of the State of Alabama. Title 26, Section 263 of the 1940 Code of Alabama as last revised, which said section is herewith incorporated by reference and made a part hereof, provides and did provide that an entity such as the defendant might accept the provisions of the Workmen's Compensation Act of Alabama by filing an election with the Probate Judge of the appropriate County and by filing written notice with the Department of Industrial Relations of said State.

The only election or notice ever filed by defendant is as follows:

"To the Probate Judge, County of Baldwin, City of Foley: Notice is hereby given that we, Town of Foley, carrying on business of waterworks at (Street and Number) City of Foley, County of Baldwin, State of Alabama, hereby accept provisions of Part 2 of Senate Bill No. 53, Laws of 1919, State of Alabama, known as the Workmen's Compensation Act.

James T. Dumas
Acting Mayor "

At the time and place complained of, said Tom Terry was employed by defendant and was engaged in cleaning and disinfecting a swimming pool owned and operated by defendant and located in a public park operated by defendant. Said Tom Terry was not engaged or connected with the business of waterworks, as set forth in said notice. Hence, plaintiffs ought not recover.

~~It is denied that the defendant owed Workmen's Compensation benefits to the plaintiffs.~~

It is denied that the defendant had elected to accept the provisions of the Workmen's Compensation Act on, to-wit, May4, 1959, for employees of the City of Foley engaged in work in the new Foley Park, of the type of work being done by Tom Terry on, to-wit, May 4, 1959, such as work in cleaning and disinfecting the swimming pool located in said park.

It is admitted that the plaintiffs are the dependent surviving spouse and the dependent surviving children of Tom Terry, deceased.

All other allegations in the complaint as last amended, not herein referred to, are denied, as specifically as those separately set out and denied, and now having fully answered,

~~the defendant prays to be dismissed with its costs~~.

Paul W. Bryant

Howard P. Rieser

Attorneys for Defendant.

OF COUNSEL:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a Minor, by CARLIE B. TERRY, as Next Friend, COMPLAINANTS VS CITY OF FOLEY, A Municipal Corporation, DEFENDANT	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW, NO. 4269

DEMURRER

Come now the Plaintiffs in the above styled cause, and demur to the answer heretofore filed by the defendant, and assign therefor the following grounds of demurrer, which are set down and assigned to the answer severally and separately:

1. For that the pleadings in the case affirmatively show that Plaintiffs by filing this suit under oath have given sufficient notice in proper time so as to comply with Code of Alabama, Title 37, Sections 476 and 504, 1958 as revised.

2. For aught that appears, City of Foley, having elected to come under the Workmen's Compensation laws, was not pursing a governmental function such as will allow defendant to claim immunity from suit.

James A. Brice
Attorney for Plaintiffs

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 62-63

To the Clerk *of the* Circuit *Court of*

Baldwin *County—Greeting.*

Whereas, In a case now pending in our Supreme Court, by petition for Certiorari to the Circuit Court of Baldwin *County, in the cause of* Ex Parte, City of Foley, Alabama, a Municipal Corp. *Plaintiff*, *versus* Carlie B. Terry, Et Al, *Defendant*s, *the petitioner,* Ex Parte, City of Foley, Alabama, A Municipal Corporation, *has to the Supreme Court suggested, that a writ of Certiorari issue to the Clerk of the Circuit Court of said county commanding and requiring him to make and certify to this Court a true and correct copy of the record and proceedings in said Circuit Court in the cause of* Carlie B. Terry, Et Al *plaintiff*s, *versus* City of Foley, a Municipal Corp. *defendant*, *pending in said Court:*

IT IS FURTHER ORDERED by the Supreme Court of Alabama that the judgment of the Circuit Court *Court will be superseded upon Defendant entering into a Supersedeas Bond in the sum of* $10,000.00, *with good and sufficient surety or sureties, payable to the Plaintiff*s, *and conditioned to prosecute the appeal by certiorari to effect, or if* they *fail therein, to satisfy such judgment and costs as the Supreme Court may render in the premises; said bond to be approved by the Clerk of* Baldwin Circuit *Court of* Baldwin *County, Alabama.*

(Over)

You are therefore commanded to make diligent search of the records and proceedings in your office in the above cause, and certify, together with this Writ, a full and complete transcript of said above-named records and proceedings to our said Supreme Court, returnable to this Court within sixty (60) days from this date.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, at the Judicial Department Building, this the 22nd *day of* October, 19 62.

J. Render Thomas
Clerk of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

October Term, 19 62-63

1st *Div. No.* 109

Ex Parte: City of Foley
a Municipal Corporation
, Petitioner,

IN THE SUPREME COURT.
(In re

Carlie B. Terry, et al *Plaintiff,*

vs.

City of Foley *, Defendant,*

Baldwin Circuit *Court.)*

WRIT OF CERTIORARI

BROWN PRINTING CO., MONTGOMERY 1955

CARLIE B. TERRY, JOHN THOMAS TERRY and ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA
Plaintiff	)	AT LAW
Vs.	)	
CITY OF FOLEY, a Municipal Corporation,	)	
Defendant	)	CASE NO. 4269

SECURITY FOR COST OF APPEAL

WHEREAS, defendant the City of Foley, a municipal corporation, has filed a petition in the Supreme Court of Alabama for a writ of certiorari to supersede and reverse the judgment obtained by Carlie B. Terry, John Thomas Terry and Arlie Terry, a minor, by Carlie B. Terry, as next friend, against defendant City of Foley, a municipal corporation.

NOW, THEREFORE, We hereby acknowledge ourselves surety for all costs of the foregoing Petition for Writ of Certiorari and appeal from said judgment of the Circuit Court of Baldwin County, Alabama, entered on the 25th day of September 1962, and we hereby agree to pay all such costs. For the payment of this bond, we do hereby waive our rights of exemption to personal property under the Constitution and laws of the State of Alabama.

CITY OF FOLEY, a municipal corporation,
As Principal

By [signature] (SEAL)

As Its Attorney

AETNA CASUALTY AND SURETY COMPANY,
HARTFORD, CONNECTICUT, a corporation,
As Surety

By [signature] (SEAL)
As Its Attorney-In-Fact

Taken and approved on this 22 day of October 1962.

FILED
OCT 22 1962
ALICE L. DUCK, CLERK REGISTER

[signature]
ALICE DUCK, CLERK, CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

C E R T I F I C A T E

I hereby certify that I have mailed a true and correct copy of the foregoing Security for Cost to James Brice, Esq., attorney for the plaintiffs, by depositing a copy of the same in United States Mail, postage prepaid, to Mr. Brice at his said office in Foley, Alabama, on October 19, 1962

Donald J. Rivet

Attorney for Defendant
First National Bank Building
Mobile, Alabama

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

FILED
OCT 22 1962
ALICE J. BUCK, CLERK REGISTER

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiff	)	AT LAW
	)	CASE NO. 4269
Vs.	)	
CITY OF FOLEY, a Municipal Corporation,	)	
Defendant	)	

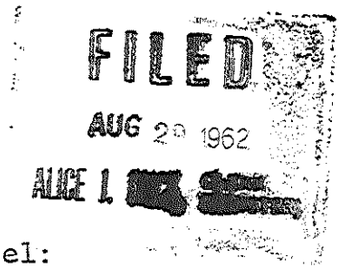
AMENDED ANSWER

Comes now the defendant in the above-styled cause, the City of Foley, a municipal corporation, and amends the answer it has heretofore filed to the complaint as last amended, and for further answer to the complaint as last amended, sets down and assigns, separately and severally, the following additional separate and several pleas:

EIGHT

At the time and place alleged in the complaint, to-wit, May 4, 1959, the decedent, Tom Terry, was an employee of the City of Foley, working in the new Foley Park, on the swimming pool, located in said park, which park and swimming pool were operated on, to-wit, May 4, 1959, for the benefit of the citizens and residents of the said City of Foley. The defendent, the City of Foley, is, and was, on, to-wit, May 4, 1959, a municipal corporation organized and existing under the laws of the State of Alabama, located in the County of Baldwin, State of Alabama. The operation of the swimming pool located in the new Foley Park on, to-wit, May 4, 1959, on which the said Tom Terry was working at the time he was allegedly injured,

and from which injury he allegedly died, is a governmental function of the said City of Foley, therefore, said City of Foley is immune from suit for any injury or death which might arise from the operation of said park and said swimming pool, including suit for the death of the said Tom Terry by his widow and children, or personal representative. The alleged injury received by Tom Terry on, to-wit, May 4, 1959, from which he allegedly died, was received while said Tom Terry was engaged in working on or around the said swimming pool, located in the new Foley Park, which swimming pool was operated by the said City of Foley for the benefit of the citizens and residents of Foley; hence, the defendant, City of Foley, is immune from suit for any alleged injury or death which arises from or out of the operation of said swimming pool or said park.



Paul W. Brock
Attorneys for Defendant

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiff	)	AT LAW
	)	CASE NO. 4269
Vs.	)	
CITY OF FOLEY, a Municipal corporation,	)	
Defendant	)	

A N S W E R

Comes now the defendant in the above styled cause, the City of Foley, a municipal corporation, and for answer to the complaint as last amended, heretofore filed, sets down and assigns, separately and severally, the following separate and several pleas:

ONE

Not guilty.

TWO

The allegations of the complaint are untrue.

THREE

The defendant, City of Foley, is a municipal corporation located in Baldwin County, State of Alabama. The Code of Alabama, Title 37, Section 504, 1958 as revised, provides as follows:

> "No recovery shall be had against any city or town, on a claim for personal injury received, unless a sworn statement be filed with the clerk, by the party injured, or his personal representative, in the case of his death, stating substantially the manner in which the injury was received, and the day and time, and the place where the accident occurred, and the damages claimed."

Defendant avers that the City of Foley, a municipal corporation, was a city or town within the meaning of the above quoted Section of the Alabama Code, and that no sworn statement has

been filed with the Clerk of said City of Foley, by the party injured, or his personal representative, as required by said Code Section.

FOUR

The defendant, City of Foley, is a municipal corporation organized under the laws of the State of Alabama, located in Baldwin County, State of Alabama. Code of Alabama, Title 37, Section 504, 1958 as revised, provides as follows:

> "No recovery shall be had against any city or town, on a claim for personal injury received, unless a sworn statement be filed with the clerk, by the party injured, or his personal representative, in the case of his death, stating substantially the manner in which the injury was received, and the day and time, and the place where the accident occurred, and the damages claimed."

Code of Alabama, Title 37, Section 476, 1958 as revised, provides as follows:

> "All claims against a municipality (except bonds and interest coupons and claims for damages) shall be presented to the clerk for payment within two years from the accrual of said claim, or shall be barred; claims for damages growing out of torts shall be presented within six months from the accrual thereof or shall be barred."

Defendant avers that no claim has been presented to the Clerk of the defendant municipality within the time provided by the above quoted Code Section for injuries, or, no claim has been presented to the Clerk for the defendant municipality for payment by the personal representative of the deceased Tom Terry.

FIVE

At the time and place alleged in the complaint, to-wit, May 4, 1959, the decedent, Tom Terry, was an employee of the City of Foley, engaged in work on the swimming pool owned and operated by the said City of Foley. The defendant City of Foley is a municipal corporation organized and existing under the laws of the State of Alabama, located in the County of Baldwin, State of Alabama, and was such on to-wit, May 4, 1959. The owning and operating of a swimming pool, such as the one located in the City of Foley, on which Tom Terry was working at the time he received his alleged injury, is a governmental function. Defendant City of Foley is a municipal corporation, as aforesaid, or a city or town within the contemplation of the purview of the laws of the State of Alabama. Any injury which Tom Terry received while engaged in work in, on or around the swimming pool, located in the new Foley Park, which swimming pool was owned and operated by the City of Foley, is a governmental function of the City of Foley, and the City of Foley is immune from suit for any injury or death caused by any person, including Tom Terry, or any other employee so engaged, hence, the plaintiffs, as representatives and beneficiaries of Tom Terry, deceased, under the provisions of the Workmen's Compensation Act of the State of Alabama, cannot recover in this action.

SIX

Defendant City of Foley, a municipal corporation, is a city, town, or municipal corporation, organized and existing by virtue of the laws of the State of Alabama, in the County of Baldwin, State of Alabama. Alabama Code, 1958 as revised, Title 26, Section 263, provides as follows:

> "Articles I and II of this chapter shall not be construed or held to apply to any common carrier during an interstate business while engaged in interstate commerce, or to domestic servants, farm laborers, or persons whose employment at the time of the injury is casual, and not in the usual course of the trade, business, profession or occupation of the employer, or to any employer, who regularly employs less than eight employees in any one business or to any county, city, town, village or school district. Any employer who regularly employs less than eight employees in any one business or any county, city, town, village or school district, may accept the provisions of Articles I and II of this chapter by filing written notice thereof with the Department of Industrial Relations and with the Probate Judge of each county in which said employer is located or does business, said notice to be recorded by the Judge of Probate for which he shall receive the usual fee for recording conveyances, and copies thereof to be posted at the places of business of said employers and provided further, that said employers who have so elected to accept the provisions of Articles I and II of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal. In no event nor under any circumstances shall Articles I and II of this chapter apply to farmers and their employees."

Defendant avers that at the time and place alleged in the complaint, on, to-wit, May 4, 1959, while Tom Terry was employed by the City of Foley in the new Foley Park in the cleaning and disinfecting of the swimming pool located in said park, that he was not covered by the Workmen's Compensation

Act of Alabama, that is, Articles I and II described in the Code Section set out above.

Defendant further avers that although it had accepted the Workmen's Compensation Act, as to some of its employees, it had never accepted the Workmen's Compensation Act of Alabama, that is, Articles I and II as mentioned in the Code Section set out above, for employees of the City of Foley engaged in working at the new Foley Park, on the swimming pool, as was Tom Terry on the date of his alleged injury; therefore, Tom Terry was not an employee of the City of Foley subject to the Workmen's Compensation Act of Alabama on, to-wit, May 4, 1959, in that the defendant City of Foley had never elected to be covered by Articles I and II of the Workmen's Compensation Act, as mentioned in the Code Section set out above, engaged in working on the new Foley Park and the swimming pool owned and operated by the City of Foley.

The defendant City of Foley and Tom Terry, on, to-wit, May 4, 1959, were not subject to the Workmen's Compensation Act of Alabama, Code of Alabama, 1958 as revised, Title 26, Section 253, etc.

SEVEN

It is admitted that Tom Terry was an employee of the City of Foley, working in the new Foley Park on the swimming pool located therein, on, to-wit, May 4, 1959. It is admitted that Tom Terry, while so employed in the new Foley Park, and working on the swimming pool, was engaged in the cleaning

and disinfecting of the swimming pool using a commercial product designed for cleaning and disinfecting swimming pools. It is admitted that the defendant City of Foley, is a municipal corporation, organized and existing under the laws of the State of Alabama, and located in the County of Baldwin, State of Alabama, and was such on, to-wit, May 4, 1959.

It is admitted that on, to-wit, May 4, 1959, Tom Terry was receiving a salary of Forty Dollars ($40.00) per week and his average wage was not less than Forty Dollars ($40.00) per week.

It is admitted that the defendant had notice of the fact that Tom Terry became ill on, to-wit, May 4, 1959, and claimed to have become ill as a result of working in the new Foley Park, in cleaning and disinfecting the swimming pool located in said park.

It is denied by the defendant that Tom Terry accidentally inhaled chlorine gas, which was a by-product of a cleaning solution he was preparing for the cleaning and disinfecting of the swimming pool located in said park, on, to-wit, May 4, 1959.

It is denied that Tom Terry received any injury while acting within the line and scope of his employment, on, to-wit, May 4, 1959, as an employee of the City of Foley, while working in the new Foley Park, in the process of cleaning and disinfecting the swimming pool located in said park.

It is denied that the defendant owes Workmen's Compensation benefits to the plaintiff.

It is denied that the defendant had elected to accept the provisions of the Workmen's Compensation Act on, to-wit, May 4, 1959, for employees of the City of Foley engaged in work in the new Foley Park, of the type of work being done by Tom Terry on, to-wit, May 4, 1959, such as work in cleaning and disinfecting the swimming pool located in said park.

It is admitted that the plaintiffs are the dependent surviving spouse and the dependent surviving children of Tom Terry, deceased.

All other allegations in the complaint as last amended, not herein referred to, are denied, as specifically as those separately set out and denied, and now having fully answered, the defendant prays to be dismissed with its costs.

Donald F. Pisco

Paul W. Brock

Attorneys for Defendant

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

4269

FILED

AUG 4 1982

ALICE J. DUCK, CLERK
REGISTER

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a Minor, by Carlie B. Terry, as Next Friend,	)	IN THE
Complainants,	)	CIRCUIT COURT OF BALDWIN COUNTY
VS.	)	ALABAMA. NO. 4269
CITY OF FOLEY, a Municipal Corporation,	)	At Law.
Defendant.	)	

This cause coming on to be heard is submitted upon the original bill of complaint and the demurrers and amended demurrers thereto;;and

It appearing to the Court that at the time of the injuries complained of the City of Foley, a Municipal Corporation, had elected to come within the provisions of the Workman's Compensation Laws of the State of Alabama; and

That the Decedent received injuries while in the repair work on the Municipal Pool in the Town of Foley, Baldwin County, Alabama, and

The Court is of the opinion tha t the City of Foley, having elected to come under the Workman's Compensation Laws, and the fact that the decedent was repairing the said pool, was a proprietary and not governmental function of the said Municipality; it is, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that the demurrers filed, and the amended demurrers filed, to the original bill of complaint be, and the same are hereby overruled. It is further

ORDERED that the Respondent be and it is hereby given 20 days in which to file additional pleadings.

This 27th day of April, 1962.

Hubert M. Stall

Judge, 28th Judicial Circuit of Alabama

CARLIE B. TERRY, JOHN THOMAS TERRY and ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiff	)	AT LAW
	)	CASE NO. 4269
Vs.	)	
CITY OF FOLEY, a Municipal corporation,	)	
Defendant	)	

This cause coming on to be heard is submitted upon the complaint as last amended, and the demurrers and amended demurrers which have been refiled thereto; and

It appearing to the Court that at the time of the injuries complained of the City of Foley, a Municipal Corporation, had elected to come within the provisions of the Workmen's Compensation Laws of the State of Alabama; and

That the Decedent received injuries while in the repair work on the Municipal Pool in the Town of Foley, Baldwin County, Alabama, and

The Court is of the opinion that the City of Foley, having elected to come under the Workmen's Compensation Laws, and the fact that the decedent was repairing the said pool, was a proprietary and not governmental function of the said Municipality; it is, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that the demurrers and the amended demurrers which have been refiled to the complaint as last amended be, and the same are hereby overruled. It is further

ORDERED that the Respondent be and it is hereby given 20 days in which to file additional pleadings.

This 22 day of June, 1962.

Hubert M. Hall

JUDGE, 28th Judicial Circuit of Alabama

CARLIE B. TERRY; JOHN THOMAS TERRY; AND ARLIE TERRY, a minor, by CARLIE B. TERRY as next friend, PLAINTIFFS, VS. CITY OF FOLEY, a municipal corporation, DEFENDANT	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW

AMENDED COMPLAINT

Comes now the Plaintiffs in the above styled cause and amend paragraph two of the bill of complaint heretofor filed so that same shall read as follows:

2. That on May 4, 1959, while working as an employee of the City of Foley in the new Foley Park, the said Tom Terry accidentally inhaled chlorine gas, which was a by-product of a cleaning solution he was preparing for the cleaning and disinfecting of the swimming pool located in said park, which accident seriously injured him and totally disabled him from the period beginning May 4, 1959 and ending September 7, 1959, and which accident caused his death on September 7, 1959.

James A. Brice
Attorney for Plaintiffs

I certify copy has been this date mailed to the attorneys of record for City of Foley

James A. Brice
3/21/61

FILED
MAR 22 1961
ALICE J. DUCK, CLERK REGISTER

CARLIE S. TERRY; JOHN THOMAS TERRY; AND ARLIE TERRY, a minor, by CARLIE S. TERRY as next friend, PLAINTIFFS, vs. CITY OF FOLEY, a municipal corporation,	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW
DEFENDANT	

AMENDED COMPLAINT

Comes now the Plaintiffs in the above styled cause and amend paragraph two of the bill of complaint heretofore filed that same shall read as follows:

2. That on May 4, 1959, while working as an employee of City of Foley in the new Foley Park, the said Tom Terry accidentally inhaled chlorine gas, which was a by-product of a cleaning solution he was preparing for the cleaning and disinfecting of the swimming pool located in said park, which accident seriously injured him and totally disabled him from the period beginning May 4, 1959 and ending September 7, 1959, and which accident caused his death on September 7, 1959.

James A. Brice
Attorney for Plaintiffs

FILED
MAR 22 1961
JUE L. DUCK, CLERK REGISTER

Filed this Mar 22 1961
as record in civil action
[illegible]
3/22/61

FILED
MAR 22 1961
JUE L. DUCK, CLERK REGISTER

CARLIE B. TERRY, JOHN THOMAS TERRY and ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiffs,	)	AT LAW
vs.	)	
	)	CASE NO. 4269
CITY OF FOLEY, a Municipal Corporation,	)	
Defendant.	)	

AMENDED DEMURRER

Comes now the defendant in the above styled cause and demurs to the complaint heretofore filed by refiling, separately and severally, all of the grounds of demurrer heretofore filed and further demurs to said complaint by adding the following separate and several grounds of demurrer, all of said grounds of demurrer assigned separately and severally:

1. For that it affirmatively appears from the allegations of plaintiff's complaint that at the time and place of the alleged injury said defendant was engaged in a governmental function in that said employee's alleged injury arose out of the operation and maintenance of a swimming pool owned and operated by the defendant, which operation and maintenance is a governmental function of the defendant municipal corporation.

2. For that it affirmatively appears from the allegations of plaintiff's complaint that the defendant was engaged in a governmental function at the time and place

of the alleged injury, therefore, is immune from suit for injury or death arising out of said municipal corporation's governmental function.

3. For that it affirmatively appears from the allegations of the plaintiff's complaint that said employee was employed in the operation and maintenance of a swimming pool located in the "new Foley park" which swimming pool and park is a governmental function of the defendant municipal corporation, and as such, any injury allegedly received because of the operation and maintenance of said swimming pool does not give rise to any action or cause of action to the injured party or his legal representative, as said defendant municipal corporation is immune from said suit because of the operation of said swimming pool and park is a governmental function.

Paul A. Brock

Donald A. Rieve

Attorneys for Defendant

OF COUNSEL:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

4269

RE FILED
MAY 30 1962
ALICE L. DUCK, CLERK & REGISTER

FILED
APR 13 1961
ALICE L. DUCK, CLERK & REGISTER

CARLIE B. TERRY, JOHN THOMAS TERRY and ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiffs	)	AT LAW
	)	NO. 4269
VS.	)	
CITY OF FOLEY, a Municipal Corporation,	)	
Defendant	)	

AMENDED DEMURRER

Comes now the defendant in the above styled cause and further demurs to the petition herein by amending its demurrer heretofore filed and by adding thereto, separately and severally, the following grounds of demurrer, which are set down and assigned to the petition, separately and severally:

1. No facts are alleged showing the accident and alleged subsequent injury arose out of the employment of said deceased employee, while said deceased employee was acting within the line and scope of his employment.

2. No facts are alleged showing that this defendant was given notice in proper form or that defendant had knowledge of any injury to said deceased employee as is required by law.

3. The respective residences of the plaintiffs are not alleged.

4. The plaintiffs fail to allege a description of the injury, its nature and extent, with sufficient certainty.

5. No facts are alleged showing that the defendant was given notice of said alleged accident as provided in Title 26, Section 304, Code of Alabama (1940), as amended.

6. No facts are alleged showing that this defendant had knowledge of any accident proximately resulting in injury to the deceased employee, while said deceased employee was acting within the line and scope of his employment.

7. For aught that appears, the Hartford Accident and Indemnity Company was not the workmen's compensation liability carrier of the defendant municipal corporation at the time said deceased employee allegedly was injured in an accident.

8. For aught that appears, the alleged injury was not proximately caused by an accident within the line and scope of said deceased employee's employment.

9. For that sufficient facts are not alleged by which the average earnings of said deceased employee can be determined.

10. For that it is not alleged what the average earnings of said deceased employee were at the time of the alleged accident and injury.

11. For that the average earnings of said deceased employee are alleged as a mere conclusion of the pleader.

12. For that the petition does not state facts sufficient to constitute a cause of action against this defendant.

13. For that no facts are alleged upon which the amount of compensation to which the plaintiffs are entitled, if any, can be calculated.

14. For that the allegations of the complaint are so vague, indefinite, and uncertain that it cannot be determined what workmen's compensation benefits plaintiffs claim.

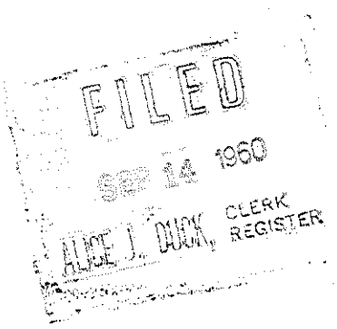
15. For that it is not averred that said deceased employee was injured as a proximate result of any accident within the line and scope of his employment.

16. No facts are alleged to show that said deceased employee died as a proximate result of any accident in which he was injured, while acting within the line and scope of his employment.

17. For that the allegations of the complaint are so vague, indefinite, and uncertain that the defendant cannot determine the type and nature of the claim against which it is called upon to defend.

18. For that the allegation "the City of Foley, which is a municipal corporation in Baldwin County, Alabama, defendant, which defendant has elected to accept the provisions of the Workmen's Compensation Act", is but a conclusion of the pleader.

19. No facts are alleged averring that defendant has elected to be covered by Articles 1 and 2 of the Workmen's Compensation Act, Title 26, Section 263, Alabama Code (1940), as amended.



J. Connor Owens Jr.
J. CONNOR OWENS, JR.

HAND, ARENDALL, BEDSOLE GREAVES & JOHNSTON

By: Donald F. Pierce
DONALD F. PIERCE

By: Paul W. Brock
PAUL W. BROCK
Attorneys for Defendant

****

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW NO. 4269

****

CARLIE B. TERRY ET AL,

Plaintiffs,

vs.

CITY OF FOLEY,

Defendant.

****

AMENDED DEMURRER

****

Refiled

FILED

SEP 14 1960

ALICE J. DICK, CLERK
REGISTER

J. CONNOR OWENS, JR.

ATTORNEY AT LAW

Dahlberg Building

BAY MINETTE, ALABAMA

CARLIE B. TERRY; JOHN THOMAS TERRY; and ARLIE TERRY, a minor, by CARLIE B. TERRY as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
PLAINTIFFS,	)	AT LAW.
VS.	)	
CITY OF FOLEY, a municipal corporation,	)	
DEFENDANT.	)	

TO THE HONORABLE H. M. HALL, JUDGE OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA:

C O M P L A I N T

Plaintiffs respectfully show unto your Honor as follows:

1. That they are the dependent surviving spouse and the dependent surviving children, respectively, of Tom Terry, deceased, who was on May 4, 1959, a citizen and resident of Foley, Baldwin County, Alabama, and a workman employed by the City of Foley which is a municipal corporation in Baldwin County, Alabama, defendant, which defendant has elected to accept the provisions of the Workmen's Compensation Act.

2. That on May 4, 1959, while working as a employee of the City of Foley in the new Foley Park, the said Tom Terry accidentally inhaled chlorine gas, which was a by-product of a cleaning solution he was preparing for the cleaning and disinfecting of the swimming pool located in said Park, which accident seriously injured him and totally disabled him from the period beginning May 4, 1959 and ending September 7, 1959, on which day he died.

3. Plaintiffs aver that the defendant had prompt and immediate notice of said accident and that the said defendant, or its insuror, The Hartford Accident and Indemnity Company, paid the medical expenses of the decedent incurred as a result of the accident, but paid no Workmen's Compensation benefits.

4. Plaintiffs allege that at the time of the accident, the decedent was receiving a salary of $40.00 per week, and that his average wages for a long period thereto was not less than $40.00 per week.

WHEREFORE, Plaintiffs claim of the defendant, City of Foley, such benefits as they are entitled to receive under the Workmen's Compensation Laws of Alabama. They pray that notice may be given the defendant and that hearing may be had, in accordance with the laws and rules of this Honorable Court.

Carlie B. Terry
CARLIE B. TERRY

+ witnessed by James A Brown Jr
JOHN THOMAS TERRY

Arlie Terry
ARLIE TERRY, a minor, by Carlie B. Terry as next Friend

STATE OF ALABAMA)

COUNTY OF BALDWIN)

Before me, the undersigned, a Notary Public in and for said State and County, personally appeared Carlie B. Terry, John Thomas Terry, and Carlie B. Terry as next friend of Arlie Terry, a minor, who are known to me, and who being first duly sworn, depose on oath and say: That they have read or had read to them the foregoing petition and the statements made therein are true and correct and that they know of their own knowledge that they are correct.

Carlie B. Terry
CARLIE B. TERRY

+ witnessed by James A Brown Jr
JOHN THOMAS TERRY

Carlie B. Terry
CARLIE B. TERRY, as next Friend of Arlie Terry, a minor

Sworn to and subscribed before me this

the 25 day of May, 1960.

James A Brown
NOTARY PUBLIC, BALDWIN COUNTY, ALABAMA

FILED
MAY 26 1960
ALICE J. DUCK, CLERK REGISTER

SUMMONS AND COMPLAINT

Moore Ptg. Co.

The State of Alabama,
Baldwin County.

Circuit Court, Baldwin County

No._____

_____TERM, 19____

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon CITY OF FOLEY, a municipal corporation,

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against CITY OF FOLEY, a municipal corporation, Defendant

by CARLIE B. TERRY; JOHN THOMAS TERRY; and ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend, Plaintiff

Witness my hand this 26 day of May 1960

Ent. 5-27-60

Alice J. Duck, Clerk

No. 4269 Page

The State of Alabama
Baldwin County

CIRCUIT COURT

CARLIE B. TERRY; JOHN THOMAS TERRY; and ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend

Plaintiffs

vs.

CITY OF FOLEY, a municipal corporation

Defendants

Summons and Complaint

Filed FILED 19

MAY 26 1960

Clerk

ALICE J. DUCK, CLERK REGISTER

To be served on Mayor Griffin

JAMES A. BRICE

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

Received In Office

May 26 19 60

, Sheriff

I have executed this summons

this May 27 1960

by leaving a copy with

City of Foley
by leaving
Mark Griffin, Mayor

Sheriff claims 22 miles at
Ten Cents per mile Total $ 2.20
TAYLOR WILKINS, Sheriff
BY
DEPUTY SHERIFF

J. Taylor Wilkins Sheriff

Deputy Sheriff

JAMES DONALD WOOD, COMPLAINANT	)	IN THE CIRCUIT COURT OF
VS.		BALDWIN COUNTY
ELLEN WOOD, alias ELLEN MALIN, RESPONDENT	)	IN EQUITY
	)	

TO THE HONORABLE JUDGES OF SAID COURT:

Now comes your petitioner, James Donald Wood, and respectfully makes known unto the Court the following facts:

1. That petitioner obtained a divorce from the respondent, which decree was dated August 31, 1964, and which divorce decree provided that complainant was to have permanent care, custody and control of the minor children, Connie Sue, now age 7 years, and Danny Ray, now 5 years of age, the children of the parties. The respondent has remarried and her name is Ellen Malin.

2. During the month of February, 1965, the respondent, Ellen Malin, abducted the said minor children from the home of complainant's sister at Hartselle, Alabama, and has hidden and still hides these children at her homeand at the homes of her relatives at Route 1, Eva, Alabama, such being in Morgan County, Alabama.

3. That the complainant hasmade numerous efforts to regain custody of the children but the children have been hidden by the respondent and the oldest child, being 7 years of age, has not even been attending school.

4. The respondent is still completely unfit to have the care, custody and control of said minor children and her present action is grossly contrary to the health and well being of the children as well as the flagrant violation of a prior decree of this Court.

THE PREMISES CONSIDERED, your petitioner prays that the said Ellen Wood, alias Ellen Malin, be required to appear before this Honorable Court at a time and place to be fixed by the Court, and show cause, if any she have, why she should not be punished for contempt of Court.

James Donald Wood

James Donald Wood

STATE OF ALABAMA

MORGAN COUNTY

Before me, a Notary Public, in and for said State and County, personally appeared James Donald Wood, who being known to me, and being by me first duly sworn, does depose and say that he has knowledge of the facts stated in the above petition and that said facts as therein stated are true and correct.

James Donald Wood

Affiant

Sworn to and subscribed before me this 22nd day of May, 1965.

Thomas A. Caddell

Notary Public

JAMES DONALD WOOD, COMPLAINANT	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA
VS.	)	IN EQUITY
ELLEN WOOD, ALIAS ELLEN MALIN, RESPONDENT	)	

RULE TO SHOW CAUSE

This day came James Donald Wood and filed herein his verified petition praying for an order upon Ellen Wood, alias Ellen Malin, to show cause why she should not be punished as for a contempt, a true and correct copy of said verified petition being hereto attached, and now upon consideration of the same, it is:

ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. That the said Ellen Wood, alias Ellen Malin, appear before the Court in her own proper person at 10:00 o'clock A M. on the 7th day of June, 1965, in the Courtroom of the Circuit Court of Baldwin County, Alabama, at Bay Minette, Alabama, then and there to show cause, if any she have, why she should not be punished as for a contempt of court for and on account of the matters and things set out in the verified petition of the said James Donald Wood.

2. That the Sheriff of Morgan County, Alabama, or any other lawful officer of the State of Alabama, do forthwith serve upon the said Ellen Wood, alias Ellen Malin, a copy of this order and attached petition, and make due return thereof.

Done this 24th day of May, 1965.

Lyman A. Woodall Sr.
Circuit Judge

JAMES DONALD WOOD, COMPLAINANT VS. ELLEN WOOD, ALIAS ELLEN MALIN, RESPONDENT	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN EQUITY

RULE TO SHOW CAUSE

This day came James Donald Wood and filed herein his verified petition praying for an order upon Ellen Wood, alias Ellen Malin, to show cause why she should not be punished as for a contempt, a true and correct copy of said verified petition being hereto attached, and now upon consideration of the same, it is:

ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. That the said Ellen Wood, alias Ellen Malin, appear before the Court in her own proper person at 10:00 o'clock A.M. on the 7th day of June, 1965, in the Courtroom of the Circuit Court of Baldwin County, Alabama, at Bay Minette, Alabama, then and there to show cause, if any she have, why she should not be punished as for a contempt of court for and on account of the matters and things set out in the verified petition of the said James Donald Wood.

2. That the Sheriff of Morgan County, Alabama, or any other lawful officer of the State of Alabama, do forthwith serve upon the said Ellen Wood, alias Ellen Malin, a copy of this order and attached petition, and make due return thereof.

Done this 21st day of May, 1965.

Inzer A. Marshburn
Circuit Judge

JAMES DONALD WOOD,) IN THE CIRCUIT COURT OF

COMPLAINANT

VS. BALDWIN COUNTY

ELLEN WOOD, alias ELLEN MALIN,) IN EQUITY

RESPONDENT)

TO THE HONORABLE JUDGES OF SAID COURT:

Now comes your petitioner, James Donald Wood, and respectfully makes known unto the Court the following facts:

1. That petitioner obtained a divorce from the respondent, which decree was dated August 31, 1964, and which divorce decree provided that complainant was to have permanent care, custody and control of the minor children, Connie Sue, now age 7 years, and Danny Ray, now 5 years of age, the children of the parties. The respondent has remarried and her name is Ellen Malin.

2. During the month of February, 1965, the respondent, Ellen Malin, abducted the said minor children from the home of complainant's sister at Hartselle, Alabama, and has hidden and still hides these children at her homeand at the homes of her relatives at Route 1, Eva, Alabama, such being in Morgan County, Alabama.

3. That the complainant hasmade numerous efforts to regain custody of the children but the children have been hidden by the respondent and the oldest child, being 7 years of age, has not even been attending school.

4. The respondent is still completely unfit to have the care, custody and control of said minor children and her present action is grossly contrary to the health and well being of the children as well as the flagrant violation of a prior decree of this Court.

THE PREMISES CONSIDERED, your petitioner prays that the said Ellen Wood, alias Ellen Malin, be required to appear before this Honorable Court at a time and place to be fixed by the Court, and show cause, if any she have, why she should not be punished for contempt of Court.

James Donald Wood

James Donald Wood

STATE OF ALABAMA

MORGAN COUNTY

Before me, a Notary Public, in and for said State and County, personally appeared James Donald Wood, who being known to me, and being by me first duly sworn, does depose and say that he has knowledge of the facts stated in the above petition and that said facts as therein stated are true and correct.

James Donald Wood
Affiant

Sworn to and subscribed before me this 22nd day of May, 1965.

Thomas A. Caddell
Notary Public

MAY 20 1965

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

SUPREME COURT OF ALABAMA

OCTOBER TERM 1964-65

1 Div. 109

City of Foley, Alabama,

v.

Carlie B. Terry, et al.

Appeal from Baldwin Circuit Court

LIVINGSTON, CHIEF JUSTICE.

This is an appeal from a judgment for the plaintiffs, the dependent surviving spouse and two dependent surviving children of Tom Terry, deceased, against the City of Foley, Alabama, a Municipal Corporation, under a complaint filed in a workmen's compensation case. Sections 253-313, Title 26, Code of Alabama 1940.

The trial court found the following facts:

"The defendant hired the decedent to work for it at a regular salary of $40.00 per week; that on May 4, 1959, the decedent was placed in the swimming pool to clean and disenfect the swimming pool and in so doing used a commercial compound containing chlorine gas; that the defendant was under the direct supervision and subject to the orders of Mr. Roberts, who was an agent of the defendant, acting within the line and scope of his employment; that said employment was also under the supervision of Mr. Roger Lee Kirkland, a member of the Town Council of the defendant; that the decedent worked all day on May 4, 1959, and at the end of the work day found that his breathing was affected; that he immediately called Doctor Julius Michaelson, complaining of his injuries; that the following morning he reported his condition to the said Mr. Roberts, who placed him in the hospital at Foley, Alabama, under the care of Doctor Julius Michaelson; that his condition continued and grew worse from time to time until September 7, 1959, when he died; that the defendant was in and out of the hospital during his lingering illness, and was in the hospital at the time of his death; that prior to May 4,

1959, the decedent was an athletic type, robust man, in apparent good health; that according to the testimony of Doctor Michaelson, decedent was affected in his breathing capacity, and that his condition was caused or aggravated by the inhalation of chlorine gas; that there were x-rays made; however, there is shown by the record quite a confusion as to an x-ray made in January of 1959, which has never been accounted for, nor established when it was taken and by whom; that the decedent died on September 7, 1959; that the decedent left surviving him his widow and two dependent children; that the decedent was a resident of Foley, Baldwin County, Alabama, at the time of his injury and also at the time of his death;

"That the defendant, at the time of the injury to the decedent, and at the time of his death, had Workman's Compensation insurance with the Hartford Accident & Indemnity Company; that it was generally considered by all that the work of the decedent came under the Workman's Compensation Laws, and that his rights were governed thereby; that the Workman's Compensation Insurance carrier paid a part of the doctor, medical and hospital expenses until the death of the decedent, after which it refused to make any payments; that the defendant had elected to come under the Workman's

Compensation Laws of the State of Alabama, and had secured insurance for its protection; that the decedent suffered personal injuries in the line and scope of his employment; that such personal injuries were caused by an accident;

"That the act which caused the personal injuries arose out of and in the course of the employment of the decedent, while acting in the line and scope of his employment;

"That the said accident was approximate contributing cause, acting upon the decedent to produce his disability and death;

"That the defendant had actual notice of the accident and injuries to the decedent;

"That the work in cleaning and disinfecting the swimming pool was a proprietary act on the part of the defendant and not a government function."

The complaint in this cause was filed in the Circuit Cout of Baldwin County, Alabama, on May 26, 1960. On March 22, 1961, the complaint was amended. Demurrers were filed to the original complaint and overruled. The demurrers were refiled, with amendments thereto, to the complaint as amended, and were also overruled. The defendant then interposed its answer admitting certain allegations of the amended complaint and denying others. The answer also raised legal questions which we will dispose of herein below. Suffice it to say, the evidence introduced in the court below is sufficient to sustain the

finding of facts made by the lower court, except as herein noted. The rule has long been settled that on certiorari to review judgments in compensation cases, this court does not look to the weight of the evidence as to facts found by the trier of facts, and will only determine if there is any evidence, or reasonable inference therefrom, to support the finding. Queen City Furniture Co. v. Hinds, 274 Ala. 584, 150 So. 2d 756.

There are numerous assignments of error but only those argued in brief will be treated in the opinion. Assignments not argued in brief are presumed waived. Rule 9, Revised Rules of the Supreme Court of Alabama.

We will now dispose of the legal questions presented by the record.

Subsection (d) of Section 262, Code of 1940 (1958 Recompiled Code of Alabama) provides as follows:

> "* * * (d) The term 'employer' as used herein shall mean every person not excluded by section 263 of this title who employs another to perform a service for hire and to whom the 'employer' directly pays wages, and shall include any person or corporation, co-partnership, or association, or group thereof, and shall if the employer is insured, include his insurer as far as applicable and shall not include one who regularly employs a number less than eight in any business."

Section 263 of Title 26, Code of 1940 (1958 Recompiled Code of Alabama), provides:

"Articles 1 and 2 of this chapter shall not be construed or held to apply to * * * any county, city, town, village or school district. Any employer * * * or any county, city, town, village or school district may accept the provisions of articles 1 and 2 of this chapter by filing written notice thereof * * * and provided further, that said employers who have so elected to accept the provisions of articles 1 and 2 of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal. * * *"

Admittedly, at all times pertinent to this review the City of Foley was operating under the Alabama Workmen's Compensation Act. However, the City claims that the Workmen's Compensation act did not cover the employees of the new Foley Park. But there is nothing in the record to support this contention. In other words, there is no evidence to indicate that the City of Foley made any attempt to classify its employees, admitting, for the sake of argument only, that it could do so. We do not think the legislature intended to limit the application of the Compensation Act to municipalities while engaged only in proprietary functions.

In 54 A.L.R. 788, Annotation "Municipal corporation as an employer within Workmen's Compensation Act," it is stated:

"The contention has been made where the statute expressly includes municipalities within its operation, that the act would have

no application when the services were performed in the exercise of a governmental function. However, the courts have very generally refused to uphold this contention where there was nothing in the act indicating any intention so to classify municipal employees. Atlanta v. Hatcher (1924) 31 Ga. App. 633, 121 S. E. 864; Hughes v. Buffalo (1924) 208 App. Div. 682, 203 N. Y. Supp. 391; ESQUE v. HUNTINGTON (reported herewith) ante, 785."

This Court is in agreement with the reasoning in the above-cited case of Hughes v. City of Buffalo, supra, which was a proceeding under the Workmen's Compensation Law, where the New York Supreme Court (Appellate Div.) said:

"* * * If the Legislature had intended to withhold liability from a municipality while in the performance of its governmental function as a state agency, such intent would have been indicated by phraseology very different from that actually employed. * * *"

Appellant cites many cases to the effect that municipalities are immune from suit by third parties for injuries or death caused by the negligence of municipal employees while said employees are acting in a governmental capacity. These authorities are inapt. This argument seems to be based on the theory that Section 14 of Article I of the Constitution of Alabama 1901 provides that the state can never be made a party-defendant in any court of law or equity, and that a municipality

is a mere agency of the state. The argument is fallacious. Our decisions are to the effect that municipalities are such agencies of the state as may be subject to suit. Such constitutional immunity was intended for the protection of "immediate and strict governmental agencies of the State, as its State Board of Administration, State Docks Commission, Alabama Polytechnic Institute, the University of Alabama, the State Insane Hospital, and other mere governmental agencies." See Ex parte Board of School Commissioners of Mobile County. Daves et al. v. Rain, 230 Ala. 304, 161 So. 108, and cases therein cited.

It is true that the operation of a swimming pool is generally considered under our cases as a governmental function. City of Decatur v. Parham, 268 Ala. 585, 109 So. 2d 692. Mathis v. City of Dothan, 266 Ala. 531, 97 So. 2d 908. See also "Municipal operation of bathing beach or swimming pool as a governmental or proprietary function, for purposes of tort liability" in 55 A.L.R. 2d 1434. It is also true that the trial court found that the operation of the swimming pool in question was a proprietary function. But whether or not the operation of the swimming pool was a governmental function or a proprietary function makes no difference, as we have demonstrated. The finding of the trial court of the fact that the operation of the swimming pool was a proprietary function was, at most, harmless error.

Appellant contends that no claim was presented to the City of Foley as provided by Sec. 476, Title 37, Code of 1940, and that no sworn statement was filed showing the day, time,

place and manner of injury, as well as the damages claimed, as required by Sec. 504, Title 37, Code of 1940. Obviously, the complaint, as amended, which was sworn to, did comply with Sec. 296 of Title 26, Code 1940, and, as a consequence, a holding by this Court that Tom Terry was covered by the Workmen's Compensation Act of Alabama renders Sections 476 and 504, supra, inapplicable. Moreover, we are clear to the conclusion that under the facts of this case notice of the accident was waived by the City of Foley's admission that Tom Terry's immediate supervisor took Terry to the hospital the day after he was injured, and the City, through its workmen's compensation insurance carrier, paid a part of his doctor, medical and hospital bills until Terry died. So, if Terry was covered by the Workmen's Compensation Act, the complaint and the amendment thereto were filed in time, Davis v. Standard Oil Co., 261 Ala. 410, 261 Ala. 410, 74 So. 2d 625, and it was not necessary to comply with either Sections 476 or 504, supra.

Appellant filed several special pleas. Appellees demurred to each plea but obtained no ruling thereon, and joined issue. Appellant contends that the pleas were proven, and, even if the pleas are found to be immaterial, judgment should have been entered for the appellant thereon. We see little merit in this argument. We adhere to the principle declared in Ex parte National Pipe & Foundry Co., 213 Ala. 605, 105 So. 693, that the compensation law should be liberally construed in furtherance of the humanitarian purposes leading to its enactment; and that pleading under the act was not intended to be cast in

the technical precision of the common law, or tested by the refined objections of hypercriticism. See also Ex parte Majestic Coal Co., 208 Ala. 86, 93 So. 728; Ex parte L & N. R. Co., 208 Ala. 216, 94 So. 289, and Ex parte Taylor, 104 So. 527; Ex parte Coleman, 211 Ala. 248, 100 So. 114.

We find no error in the record and the case is due to be, and is, affirmed.

AFFIRMED.

Lawson, Goodwyn and Coleman, JJ., concur.

STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 *Div., No.* 109

City of Foley, *Appellant*,

v.

Carlie B. Terry, et al., *Appellee*,

From Baldwin Circuit *Court.*

The State of Alabama.
City and County of Montgomery.

I, Richard W. Neal, Deputy ~~xxxxxxxxxxxx~~, *Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to* ..... *inclusive, contain a full, true, and correct copy of the* opinion of ..... *said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, Richard W. Neal, Deputy ~~xxxxxxxxxxxx~~, *Clerk of the Supreme Court of Alabama, this the* 20th *day of* May 19 65

Richard W. Neal

Deputy *Clerk of the Supreme Court of Alabama*

THE SUPREME COURT OF ALABAMA

1 *Div., No.* 109

City of Foley

Appellant,

v.

Carlie B. Terry, et al.

Appellee.

From Baldwin Circuit *Court.*

Certified Copy of

Opinion

BROWN PRINTING CO., MONTGOMERY

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 64-65

To the Clerk *of the* Circuit *Court,*

Baldwin *County—Greeting:*

Whereas, the Record and Proceedings of the Circuit *Court* _____ *of said county, in a certain cause lately pending in said Court between*

City of Foley, Alabama, a Municipal Corporation, *Appellant*,

and

Carlie B. Terry, et al., *Appellee*,

wherein by said Court it was considered adversely to said appellant, *were brought before our Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant*:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered, ordered, and adjudged by our Supreme Court, on the 20th *day of* May, *19* 65, *that said* judgment *of said* Circuit *Court be in all things affirmed, and that it was further considered, ordered, and adjudged that the appellant*, ~~xxx~~ City of Foley, Alabama, a Municipal Corporation, and Aetna Casualty and Surety Company, Hartford, Connecticut, a Corporation, surety on the supersedeas bond, pay such amount of the judgment of the Circuit Court as is presently due and ten per cent damages and interest thereon, and City of Foley, Alabama, a Municipal Corporation pay all further sums which shall become due and payable under the judgment of the Circuit Court this day affirmed and

the costs accruing on said appeal in this Court and in the Court below.

It is further certified that, it appearing that said parties have waived their rights of exemption under the laws of Alabama, it was ordered that execution issue accordingly.

Richard W. Neal, Deputy

Witness, ~~xxxxxxxxxxxx~~ *Clerk of the Supreme Court of Alabama, this the* 20th *day of* May, *19*65

Richard W. Neal

Deputy *Clerk of the Supreme Court of Alabama.*

THE SUPREME COURT OF ALABAMA

October Term, 19 64-65

1 *Div., No.* 109

City of Foley, Alabama, a Municipal Corporation

Appellant,

vs.

Carlie B. Terry, et al.

Appellee.

From Baldwin Circuit *Court*

CERTIFICATE OF AFFIRMANCE

The State of Alabama,
Baldwin *County.* } *Filed*

this 24 *day of* May *19* 65

Alice J. Wick

BROWN PRINTING CO., MONTGOMERY 1964

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432-5514
AREA CODE 205

June 3, 1965

Mrs. Alice J. Duck, Clerk
Circuit Court of Baldwin County, Alabama
Court House
Bay Minette, Alabama

Re: Carlie B. Terry, et al v. City of Foley, a Municipal Corporation, Case #4269

Dear Mrs. Duck:

This will acknowledge receipt of the costs bill which you prepared and forwarded in the above-referenced case some few days ago. Mr. James Brice, attorney for the plaintiff, and I have reviewed the Court's order of September 25, 1962, and the affirmance of the judgment by the Supreme Court of Alabama on May 20, 1965 and have attempted to compute the judgment, interest, penalty and other court costs, and we enclose herewith our client's draft in payment of same.

As I understand the costs bill, the total sheriff's fees involved are $21.40, the total clerk's fees are $54.75, the trial tax is $4.50, the court reporter's fee is $5.00, the witness fees-$5.10, and postage on the transcript-$2.04 for a total of $92.79.

In addition thereto, Mr. Brice and I agree that the judgment, interest and penalty should be in the total amount

of $8,061.24.

The total of the judgment, plus interest and costs, and the costs of the Circuit Court of Baldwin County, in the total amount of $92.79, should therefore be, if my addition is correct, $8,154.03. We enclose herewith our client's draft in the amount of $8,154.03 in full and final satisfaction of the judgment and costs.

Of course, the judgment should be satisfied of record before any funds are disbursed.

I understand that Mr. Brice, and perhaps Mrs. Terry, will likely talk with Judge Mashburn within the next few days. If for any reason this draft is not in full and final satisfaction of the judgment and all costs, I would appreciate your telephoning me collect, immediately, and letting me know what discrepancy exists.

We would like a Clerk's certificate to the effect that the judgment has been paid and all costs satisfied, when that has been accomplished. If there is any charge for that, I would appreciate your sending a note along of what that charge is, and I shall personally see to it that you are promptly paid. Many thanks for your continued good service.

With best personal regards.

Yours very truly,

Donald F. Pierce

For the Firm

DFP.mbd
cc: James A. Brice, Esq.

P.O. BOX [redacted] 768

246-3304
205-[redacted]

JAMES A. BRICE
LAWYER
[redacted], ALABAMA [redacted]
Jackson,

July 6, 1965

Mrs. Alice J. Duck
Circuit Clerk
Bay Minette, Alabama

Re: City of Foley
Vs: Carlie Terry, et als

Dear Mrs. Duck:

In order to facilitate payment in this cause, it is agreeable with me if you issue one check for $8061.24, the amount on hand, payable to Carlie Terry; Carlie Terry as guardian of John Terry N.C.M.; and Carlie Terry as guardian of Arlie Terry, a minor.

You can mail the check to her in care of Mr. Jim Stacey, Stacey Drugs, Foley, Alabama. If any question arises, you can call Jim. The judgment can then be marked satisfied.

Thank you.

Sincerely,

James A. Brice

JAB:pr

cc: Mr. Jim Stacey
Stacey Drugs
Foley, Alabama

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
LAWYERS
FIRST NATIONAL BANK BUILDING
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July 26, 1965

Mrs. Alice J. Duck, Clerk
Circuit Court of Baldwin County
Courthouse
Bay Minette, Alabama

Re: Tom Terry v. City of Foley
First Division, No. 109
Supreme Court of the State of Alabama

Dear Mrs. Duck:

Please send me a certificate to the effect that the judgment in the above-referenced case has been cancelled of record. If there is any charge kindly advise and I shall mail you a check.

With best personal regards, I am,

Yours very truly,

For the Firm

DFP.mbd

The Ætna Casualty and Surety Company

Hartford 15, Connecticut

Power of Attorney and Certificate of Authority of Attorney(s)-in-Fact

KNOW ALL MEN BY THESE PRESENTS, THAT *The Ætna Casualty and Surety Company*, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint Harry S. Mattei * *

of Mobile, Alabama, its true and lawful Attorney (s), with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or, if the following line be filled in, within the area there designated , the following instrument (s):

for The Ætna Casualty and Surety Company, as surety, by his sole signature and act any and all bonds, undertakings, and other writings obligatory in the nature of a bond, provided the amount of the bond shall not in any case exceed the sum of FIFTY THOUSAND ($50,000.00) DOLLARS * * ***

and to bind *The Ætna Casualty and Surety Company*, thereby as fully and to the same extent as if the same were signed by the duly authorized officers of *The Ætna Casualty and Surety Company*, and all the acts of said Attorney(s), pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following provisions of the By-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said By-laws.

ARTICLE IV—Section 7. The President, any Vice President, or any Secretary may from time to time appoint Resident Vice Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

ARTICLE IV—Section 9. Any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President or a Vice President or by a Resident Vice President, pursuant to the power prescribed in the certificate of authority of such Resident Vice President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

This Power of Attorney and Certificate of Authority is signed and sealed by facsimile under and by authority of the following resolution adopted by the Board of Directors of *The Ætna Casualty and Surety Company* at a meeting duly called and held on the 15th day of July, 1960.

RESOLVED: That the signature of Guy E. Mann, Senior Vice President, or of A. H. Anderson, Vice President, or of J. R. Julien, Secretary, or of D. N. Gage, Secretary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or undertaking to which it is attached.

IN WITNESS WHEREOF, *The Ætna Casualty and Surety Company* has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 28th day of June, A.D., 1962.

The Ætna Casualty and Surety Company,

THE ÆTNA CASUALTY AND SURETY COMPANY HARTFORD, CONN.

By D. N. Gage
Secretary

State of Connecticut, County of Hartford—ss:

On this 28th day of June, A.D., 1962, before me personally came D. N. GAGE, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of *The Ætna Casualty and Surety Company*, the corporation described in and which executed the above instrument, at its Home Office; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he executed the said instrument on behalf of the corporation by authority of his office under the By-laws thereof.

GEORGE A. PERRY JR. NOTARY PUBLIC HARTFORD, CONN.

George A. Perry, Jr.
Notary Public.

My Commission Expires Mar. 31, 19 66.

CERTIFICATE

I, the undersigned, Secretary of *The Ætna Casualty and Surety Company*, a stock corporation of the State of Connecticut, DO HEREBY CERTIFY that the foregoing and attached Power of Attorney and Certificate of Authority remains in full force and has not been revoked; and furthermore, that Article IV Sections 7 and 9, of the By-laws of the Company, and the Resolution of the Board of Directors, as set forth in the Certificate of Authority, are now in force.

Signed and Sealed at the Home Office of the Company, in the City of Hartford, State of Connecticut. Dated this day of A.D., 19 .

FILED OCT 23 1962 ALICE L. DUCK, CLERK REGISTER

THE ÆTNA CASUALTY AND SURETY COMPANY HARTFORD, CONN.

D. N. Gage
Secretary

(S-1853-C) (M)

HARRY MATTEI
Insurance
"SERVICE BEYOND THE CONTRACT"
1917 DUVAL STREET • POST OFFICE BOX 6146
MOBILE, ALABAMA

October 19, 1962

Mrs. Alice J. Duck, Clerk
Circuit Court of Baldwin County
Bay Minnette, Ala.

Re: Terry Vs. City of Foley
Case # 426

Dear Mrs. Duck:

Attached and enclosed is my Power of Attorney for the Aetna Casualty & Surety Co. of Hartford, Connecticut, surety on the Appeal Bond in the above case.

Mr. Donald F. Pierce, Attorney for the City of Foley asked that I send this to you.

We trust that you will find it in order.

Yours truly,

Harry Mattei

Harry Mattei, Agent

HM/rl
encl.

YOUR Independent Insurance AGENT
INSURED YOU FIRST

Telephone 479-6519

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
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MAILING ADDRESS:
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HEMLOCK 2-5514

May 10, 1961

Honorable Hubert M. Hall
Judge, Circuit Court
Baldwin County, Alabama
Bay Minette, Alabama

Re: Terry vs. City of Foley, a municipal corporation - Case No. 4269

Dear Judge Hall:

At the present time, Your Honor has under submission our demurrers to the amended complaint filed on behalf of the plaintiff Terry. While we naturally insist on all of the grounds of demurrer we have interposed to the complaint, primarily, because of the complicated nature of the issues involved, our letter is limited to advancing two main propositions. First of all, it is the contention of the defendant that this action is barred against the City of Foley because of the fact the alleged injury which the plaintiff received, was received by him while the City of Foley was engaged in a governmental function, hence the action is barred. The other contention advanced in this letter to Your Honor is that Title 37, Section 504 demands that before recovery can be had against a municipal corporation on a claim of personal injury, there must be a sworn

statement filed with the clerk of the municipal corporation by the injured party or his personal representative, which claim states in substance the manner in which the injury was received and the day, time and place where the accident resulting in injury occurred, along with the amount of damages claimed. Each of these contentions will be discussed and authorities in support of them noted in our letter.

It is a well recognized fact that a municipal corporation engaged in the operation of a park or a swimming pool, is immune from suit. On many occasions the Supreme Court of Alabama has had this particular matter before it and has on each occasion decided that to be the law. In the case of Mathis v. The City of Dothan, 266 Ala. 531, 97 So. 2d 908, it is reported where a father brought against the city an action for wrongful death of his minor child, who drowned in the city swimming pool. A judgment of nonsuit was entered in the trial court and the father appealed. The Supreme Court held that the operation of a recreational park, which embraced a swimming pool, was a governmental function of the city and that the father could not recover for death allegedly caused by the failure of the city to maintain the swimming pool in a safe condition. In the Mathis case, the appellant sought to rely upon the case of Brown v. The City of Fairhope, 265 Ala. 596, 93 So. 2d 419, which was a matter before Your Honor sometime ago. It was contended that that decision had changed the law with regard to the definition of an act which is a governmental function in nature and that a cause of action did exist against the City of Dothan. The Supreme Court refused the appellant's contention holding that:

> ". . . We think that the operation of a recreational park, which embraces a swimming pool and other recreational features, is performed for the common good of all and is not done for the special benefit or profit of the city."

The Supreme Court affirmed the nonsuit from the court below, continuing to hold as do the many decisions which it cites in its opinion that the operation of a recreational park and a swimming pool is a governmental function from which the municipal corporation may not suffer suit.

In 1959, the matter of governmental function was again before the Supreme Court in the case of City of Decatur v. Estelle Parham, 268 Ala. 585, 109 So. 2d 692. In this case an action was brought against the city to recover for personal injuries sustained when the plaintiff came in contact with electric current flowing from an electric hairdryer affixed to the wall in the dressing room of a bathhouse owned and operated by the city in connection with this operation of a swimming pool. The city appealed from an adverse judgment of the trial court. The Supreme Court of Alabama continued to apply the law as made in the earlier cases and held the city immune from suit although the particular circumstances of this case were such that the plaintiff had tried to circumvent that rule by alleging that the municipal corporation's agents had allowed electricity to continue to flow into this hairdryer, causing the plaintiff electrical shock, in that the continued existence of the hairdryer in its dangerous condition in the bathhouse was caused by the negligence of the city employees. There are many other issues which permiate the opinion of the Parham case, but it is equally clear upon a reading of the opinion that the court reaffirms the position it has taken with regard to immunity from suit in the areas of governmental function as it cites Mathis v. The City of Dothan on page 694 of its opinion, in 109 So. 2d in support of the governmental function rule which it reannounces in that part of its opinion.

Again in 1960 the Supreme Court of Alabama was presented the question of whether or not the operation of a park was a governmental function. In the case of Elsie Smith v. The City of Birmingham, 121 So. 2d 867, an action was brought against the city for injuries sustained by the plaintiff as a result of an attack upon her by a wild deer, which escaped while being delivered to a zoo operated in the city park by a private society under a contract with the city. Demurrer to the complaint was sustained in the trial court and the plaintiff appealed. The Supreme Court held that the operation and

maintenance of the city owned recreational park which included a zoo operated by a private association, was a governmental function and not merely corporate or ministerial, hence the city was not liable to the plaintiff for the injuries she allegedly received. The court said on page 869 of its opinion, as it appears in 121 So. 2d:

> "This court has often repeated the definitions and terms here involved. It is unnecessary to go further back than the case of McSheridan v. City of Talladega, 243 Ala. 162, 8 So. 2d 831, 833, in which it was said:
>
> > 'The underlying test is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity.
> >
> > That definition was approved recently in City of Bay Minette v. Quinley, Supra; in Parr v. City of Birmingham, 264 Ala. 224, 85 So. 2d 288; and in Mathis v. City of Dothan, 266 Ala. 531, 97 So. 2d 908.
> >
> > In the Parr case it was said that the operation of a municipal art museum was for the common good of all and hence the city was in the exercise of a governmental function.'"

Based upon the decisions of the Supreme Court of Alabama, it appears that it is clear that the operation of a park and a swimming pool by a municipal corporation is a governmental function, hence it is immune from suit from any injury arising out of the operation of said park or swimming pool.

It may well be suggested that if it is true that a city is immune from suit because of the operation of a park or swimming pool, then there is no room for operation of the Workmen's Compensation laws as far as municipal corporation employees are concerned. Clearly, this cannot be so because

Title 26, Section 263, Workmen's Compensation Act of Alabama, provides that a municipal corporation may elect to be covered by workmen's compensation by following the procedure set out in the Code. Hence, an apparent conflict between the Code and the cases would arise. However, a careful examination and study of the problem will demonstrate that there is a very definite area of operation for the workmen's compensation laws for municipal corporation employees. As is pointed out in one of the cases cited (City of Decatur v. Parham) on page 697 of 109 So. 2d, the Supreme Court of Alabama said as follows:

> "The rule is settled that when a municipality engages in the business of furnishing electricity, lights, water, etc. to the public, it is then not discharging or exercising governmental functions or powers, but is exercising proprietary or business powers and as to such business it is governed by the same rules of law which are applicable to ordinary business corporations and is therefore liable for the negligence of its servants, agents or employees while acting within the line and scope of their authority." (Citations omitted.)

An example of the applicability of workmen's compensation to city employees is found in the City of Athens v. Cook, 269 Ala. 364, 113 So. 2d 133, decided by the Supreme Court of Alabama in 1958. In that case an action was brought against the city for the wrongful death of one of its employees, the plaintiff receiving judgment below and appeal was taken to the Supreme Court of Alabama. The Supreme Court held that the city had elected the provisions of the Workmen's Compensation Act and that the rights of the plaintiff were governed by that act. This case is an example of the area of operation of the Workmen's Compensation Act with regard to municipal corporation employees. This is one of the instances when a municipal corporation is engaged in a "business" and its employees are likewise engaged in such business, distinguished from those

who are engaged in the performance of the governmental functions of municipal corporations.

The City of Athens in electing to come under workmen's compensation for those employees engaged in the rural lights department (page 369 of 269 Ala.), was electing one of its rights given by legislative enactment (Title 26, Section 263). As the Supreme Court of Alabama pointed out in the City of Decatur v. Parham case, on page 696 of 109 So. 2d, with regard to the fact that it would take legislative action to allow a suit to be brought against a municipal corporation for injuries arising out of a governmental function:

> "We have consistently adhered to the principle that legislative action is required to make a municipal corporation responsible for injuries or death caused by the negligence of its servants, agents or employees while engaged in governmental functions and we think it unsound to extend the nuisance exception to cover such injuries, thereby requiring the city to defend every personal injury negligence action and the law of nuisance would be further confused by attempt to force coverage of the individual case.
>
> Although, as we have observed, some courts engage in chipping away bit by bit at the doctrine of governmental immunity from one point of view or another where distinctions, defensible or indefensible, are seen, the general doctrine is so firmly imbedded in our jurisprudence that we entertain the view that correction, if needed, must come from the legislature. Only the legislature can provide the regulations and limitations necessary to protect the public interest and provide the physical basis for payment of such claims."

It is well recognized in our state that the State of Alabama cannot be made a party defendant in a legal action. Article 1, Section 14, Alabama Constitution of 1901. Title 37, Section 1, Alabama Code of 1958, as revised, provides for the establishment of municipal organizations, whether incorporated under the general law or by special act of the legislature. In the case of Ex Parte Row, 4 Ala. Appellate 254, 59 So. 69, 70, the court holds that:

> "Municipalities are but subordinate departments of a state government, and it is essential to their healthy growth, to their peace and well-being of their inhabitants that the state should delegate to them all police powers which are necessary to their orderly existence."

In the case of Ensley v. Simpson, 166 Ala. 366, 52 So. 61, 65, it is held:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."

It therefore logically follows that if the state cannot be made a party defendant by constitutional provision, then neither can a municipal corporation be made a party defendant to an action, when the municipal corporation is performing those duties which have been delegated to it by the state. Those duties are normally those which are classified with regard to the activities of municipal corporations as "governmental functions of municipal corporations."

It is therefore suggested, that the Workmen's Compensation Act has an area of operation, when a municipal corporation elects to be covered by its terms and provisions, for those functions of a municipal corporation which are proprietary or corporate in nature as distinguished from those functions

which are governmental in nature. It is submitted that there is a substantial question as to whether or not a municipal corporation, or the state, can waive its immunity to suit, should it attempt to do so by specific language and specific acts. See Curry v. Woodstock Slag Corporation, 6 So. 2d 749; Alabama Industrial School v. Edler, 144 Ala. 555, 42 So. 116; State Docks Commission v. Barnes, 225 Ala. 403, 143 So. 581.

It is submitted that the City of Foley is immune from suit in the instant case in that the city was engaged in a governmental function and it is out of that function which the injuries and claims of the plaintiff allegedly arise.

The plaintiff's action is barred in view of the fact he failed to file a claim with the City of Foley as prescribed by Title 37, Section 504, Code of Alabama, 1958, as revised. Title 37, Section 504 provides as follows:

> "No recovery shall be had against any city or town, on a claim for personal injury received, unless a sworn statement be filed with the clerk, by the party injured, or his personal representative, in case of his death, stating substantially the manner in which the injury was received, and the day and time and the place where the accident occurred, and the damages claimed."

No claim has ever been filed with the City of Foley as required by that section. In the case of Maddox v. City of Birmingham, 232 Ala. 383, 168 So. 424, an action was brought by Maddox against his employer, the City of Birmingham. The City of Birmingham has a non-claim statute similar to the one above quoted. The City of Birmingham's non-claim statute was at that time a local act reported on page 298, Section 12, General Acts of 1915. An action was filed by Maddox for damages for personal injuries against the City of Birmingham. An appeal followed from a judgment of nonsuit. To the action for personal injuries, demurrers were interposed to the complaint

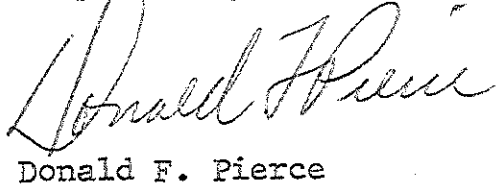
and the grounds that were assigned, other than those of governmental function and immunity from suit on that basis, were that the employee had failed to file a claim with the city as required by the city non-claim statute. The court held on page 384 of its opinion in 232 Ala.:

> "The trial court was supported by the foregoing authorities in sustaining the demurrer to the several counts of the complaint. The several counts were subject to the demurrer directed thereto for failure of the observance of the statute and failure to specifically indicate the place of the accident. (Citations omitted).
>
> It results from the foregoing that there was no error in sustaining the demurrer to the several counts of the complaint, and the judgment of the Circuit Court is affirmed."

In the Maddox case it affirmatively appears that an employee of the city is not excused from filing a claim with a municipal corporation, when he seeks to recover for personal injuries he has received, which injuries have arisen and are suffered by him in the line and course of his employment.

On behalf of the defendant, City of Foley, it is respectfully submitted that grounds of demurrer assigned are meritorious and that in accordance with the authorities cited should be sustained.

Respectfully submitted:



Donald F. Pierce

DFP.pcb

Of Counsel
HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

cc: James A. Brice, Esq.
Attorney at Law
Foley, Alabama

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
	)	AT LAW
Plaintiffs	)	CASE NO. 4269
	)	
	)	
CITY OF FOLEY, a Corporation,	)	
Defendant		

AMENDED ANSWER

The above-styled cause, the City of Foley, a municipal corporation, and amends the answer it has heretofore filed to the complaint as last amended, and for further answer to the complaint as last amended, sets down and assigns, separately and severally, the following additional separate and several pleas:

EIGHT

At the time and place alleged in the complaint, to-wit, May 4, 1959, the decedent, Tom Terry, was an employee of the City of Foley, working in the new Foley Park, on the swimming pool, located in said park, which park and swimming pool were operated on, to-wit, May 4, 1959, for the benefit of the citizens and residents of the said City of Foley. The defendent, the City of Foley, is, and was, on, to-wit, May 4, 1959, a municipal corporation organized and existing under the laws of the State of Alabama, located in the County of Baldwin, State of Alabama. The operation of the swimming pool located in the new Foley Park on, to-wit, May 4, 1959, on which the said Tom Terry was working at the time he was allegedly injured,

and from which injury he allegedly died, is a governmental function of the said City of Foley, therefore, said City of Foley is immune from suit for any injury or death which might arise from the operation of said park and said swimming pool, including suit for the death of the said Tom Terry by his widow and children, or personal representative. The alleged injury received by Tom Terry on, to-wit, May 4, 1959, from which he allegedly died, was received while said Tom Terry was engaged in working on or around the said swimming pool, located in the new Foley Park, which swimming pool was operated by the said City of Foley for the benefit of the citizens and residents of Foley; hence, the defendant, City of Foley, is immune from suit for any alleged injury or death which arises from or out of the operation of said swimming pool or said park.

Paul W. Bedsole

Howard Thrasher

Attorneys for Defendant

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
LAWYERS
SIXTH FLOOR FIRST NATIONAL BANK BUILDING
MOBILE, ALABAMA

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TELEPHONE:
HEMLOCK 2-5514

October 22, 1962

Miss Alice J. Duck
Clerk, Circuit Court of
Baldwin County, Alabama
Bay Minette, Alabama

Re: Terry vs. City of Foley

Dear Miss Duck:

Enclosed please find a Supersedeas Bond, the amount of which has been fixed by the Supreme Court of Alabama, which I request that you file in the above-referenced case. Also, I am enclosing a form of "Citation" to be issued to Jim Brice.

Judge J. Render Thomas, Clerk of the Supreme Court of Alabama, with whom I talked on Monday morning, October 22, advised that upon receipt of the Writ in your Court, you should proceed to prepare the record, etc., and treat the matter as a normal appeal. If you have any questions, please call me and I shall attempt to be of some assistance to you.

Thank you for your service.

Yours very truly,

Donald Pierce

For the Firm

DFP:msc

Encls.

cc: James A. Brice, Esq.
Attorney at Law
Foley, Alabama

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
LAWYERS
SIXTH FLOOR FIRST NATIONAL BANK BUILDING
MOBILE, ALABAMA

CHAS. C. HAND
C. B. ARENDALL, JR.
T. MASSEY BEDSOLE
THOMAS G. GREAVES, JR.
WM. BREVARD HAND
VIVIAN G. JOHNSTON, JR.
PAUL W. BROCK
ALEX F. LANKFORD, III
EDMUND R. CANNON, JR.
LYMAN F. HOLLAND, JR.
J. THOMAS HINES, JR.
W. C. BOONE, JR.
DONALD F. PIERCE

MAILING ADDRESS:
P. O. BOX 123
CABLE ADDRESS:
HAB
TELEPHONE:
HEMLOCK 2-5514

October 19, 1962

Miss Alice J. Duck
Clerk of the Circuit
Court of Baldwin County
Baldwin County, Alabama

Re: Carlie B. Terry, Et Al., Vs. City of Foley, Alabama
Circuit Court of Baldwin County, Case No. 4269

Dear Miss Duck:

Enclosed please find a cost bond to be filed in this case, after it has been approved by you. I have asked the agent, Mr. Mattee, to send you a copy of his power of attorney so that your files may be complete.

If you have any question concerning this matter, please be so kind to telephone me on Monday, October 22.

Yours very truly,

Donald F. Pierce

For the Firm

DFP:msc

Encl.

Phone on 10/22

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
LAWYERS
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MOBILE, ALABAMA

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HAB

TELEPHONE:
HEmlock 2-5514

August 28, 1962

Miss Alice J. Duff
Clerk of the Circuit
Court of Baldwin County
Bay Minette, Alabama

Re: Tom Terry vs. City of Foley

Dear Miss Duff:

Please file the enclosed Amended Answer in the Circuit Court of Baldwin County, Alabama, in the case of Terry vs. City of Foley, Case No. 4269.

We forwarded a copy of the amended answer today to James Brice, Esq., attorney for the plaintiff.

Yours very truly,

Donald F. Pierce

For the Firm

DFP:msc

Encl.

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
LAWYERS

CHAS. C. HAND
C. B. ARENDALL, JR.
T. MASSEY BEDSOLE
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SIXTH FLOOR FIRST NATIONAL BANK BUILDING
MOBILE, ALABAMA

MAILING ADDRESS:
P. O. BOX 123

CABLE ADDRESS:
H A B

TELEPHONE:
HEMLOCK 2-5514

May 29, 1962

Honorable Hubert M. Hall, Judge
Twenty-Eighth Judicial Circuit of Alabama
Bay Minette, Alabama

Re: Tom Terry vs. City of Foley, Case No. 4269
Circuit Court of Baldwin County, Alabama

Dear Judge Hall:

We are in receipt of the Court's order dated April 27, 1962, overruling the demurrers which we interposed to the complaint. The Court's order overrules the demurrers and the amended demurrers to the bill of complaint.

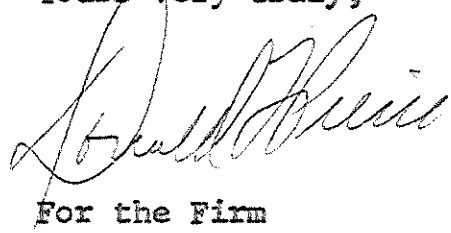
Plaintiff filed an amended bill of complaint in which he set out some additional facts. Because of the importance of the Court's ruling on this matter and so that there can be no possibility of a mistake resulting from the filing of the amended bill of complaint, we are asking the Court to please enter an additional order with the exact wording of the one of April 27, 1962, except that the judgment itself read that "the demurrers and amended demurrers filed to the amended complaint be, and the same hereby are, overruled."

It would appear that proper pleading would call for us to refile our demurrers and amended demurrers to the amended bill of complaint, which we are requesting the Clerk to do by copy of this letter, and then have the Court enter its order overruling our demurrers and amended demurrers to the amended bill of complaint.

If we may be of further service in assisting the Court in perfecting the record, kindly advise us.

With best personal regards,

Yours very truly,



DFP.pcb

For the Firm

cc: Mrs. Alice Duck, Clerk
Circuit Court of Baldwin County, Alabama

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a minor by CARLIE B. TERRY, as next friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiff	)	AT LAW
Vs.	)	CASE NO. 4269
CITY OF FOLEY, A Municipal Corporation,	)	
Defendant	)	

AMENDED ANSWER

Comes now the defendant in the above-styled cause, the City of Foley, a municipal corporation, and amends the answer it has heretofore filed to the complaint as last amended, and for further answer to the complaint as last amended, sets down and assigns, separately and severally, the following additional separate and several pleas:

TEN

The defendant, City of Foley, is a municipal corporation organized under the laws of the State of Alabama, located in Baldwin County, State of Alabama. Code of Alabama, Title 37, Section 504, 1958, as revised, provides as follows:

> "No recovery shall be had against any city or town, on a claim for personal injury received, unless a sworn statement be filed with the clerk, by the party injured, or his personal representative, in the case of his death, stating substantially the manner in which the injury was received, and the day and time, and the place where the accident occurred, and the damages claimed."

Code of Alabama, Title 37, Section 476, 1958 as revised, provides as follows:

"All claims against a municipality (except bonds and interest coupons and claims for damages) shall be presented to the clerk for payment within two years from the accrual of said claim, or shall be barred; claims for damages growing out of torts shall be presented within six months from the accrual thereof or shall be barred."

Defendant avers that no sworn statement setting forth substantially the manner in which the injury was received, and the day and time and place where the accident occurred has been filed for the personal injury or death of Tom Terry with the Clerk of the City of Foley within the time provided by the above-quoted Code Section, hence plaintiff cannot recover.

ELEVEN

Defendant City of Foley, a municipal corporation, is a city, town, or municipal corporation, organized and existing by virtue of the laws of the State of Alabama, in the County of Baldwin, State of Alabama. Alabama Code, 1958, as revised, Title 26, Section 263, provides as follows:

"Articles I and II of this chapter shall not be construed or held to apply to any common carrier during an interstate business while engaged in interstate commerce, or to domestic servants, farm laborers, or persons whose employment at the time of the injury is casual, and not in the usual course of the trade, business, profession or occupation of the employer, or to any employer, who regularly employs less than eight employees in any one business or to any county, city, town, village or school district. Any employer who regularly employs less than eight employees in any one business or any county, city, town, village or school district, may accept the provisions of Articles I and II of this chapter by filing written notice thereof with the Department of Industrial Relations and with the Probate Judge of each county in which said employer is located or does business,

> said notice to be recorded by the Judge of Probate for which he shall receive the usual fee for recording conveyances, and copies thereof to be posted at the places of business of said employers and provided further, that said employers who have so elected to accept the provisions of Articles I and II of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal. In no event nor under any circumstances shall Articles I and II of this chapter apply to farmers and their employees."

Defendant avers that at the time and place alleged in the complaint, on, to-wit, May 4, 1959, while Tom Terry was employed by the City of Foley in the new Foley Park in the cleaning and disinfecting of the swimming pool located in said park, that he was not covered by the Workmen's Compensation Act of Alabama, that is, Articles I and II described in the Code Section set out above.

Defendant further avers that it had elected to be covered by the Workmen's Compensation Act of Alabama for its employees engaged in its waterworks system only and that on, to-wit, May 4, 1959, Tom Terry was an employee of the recreation or park department of the City of Foley and not an employee of the waterworks department. Defendant avers that it had not elected to be covered by the Workmen's Compensation Act of Alabama for the employees of the recreation department or new Foley Park; that on, to-wit,

May 4, 1959, Tom Terry was an employee of said recreation department or of the Foley Park engaged in working on and around the swimming pool located in said park, hence Tom Terry and the defendant City of Foley were not subject to the Workmen's Compensation Act of Alabama, Title 26, Section 253, etc., Code of Alabama 1958, as revised.

Paul W. Brock

Donald Jones

Attorneys for Defendant

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

CARLIE B. TERRY: JOHN THOMAS TERRY: AND ARLIE TERRY, a minor, by CARLIE B. TERRY, as next friend,	()	IN THE CIRCUIT COURT OF
PLAINTIFFS	()	BALDWIN COUNTY, ALABAMA
vs.	()	
CITY OF FOLEY, a municipal corporation,	()	
DEFENDANT	()	AT LAW

DEMURRER

Now comes the defendant, by its attorneys, and demurs to the Bill of Complaint filed in this cause and to each and every paragraph contained therein, and as grounds therefore, assigns the following, separately and severally:

1. Said Bill of Complaint does not state a case of action.

2. Said Complaint does not allege that the parties plaintiff filed with the City of Foley a sworn statement notifying the said City of Foley of the time, place and manner of the injury complained of.

HAND, ARENDAHL, BEDSOLE & JOHNSON

J. CONNOR OWENS, JR.

J. Connor Owens, Jr.

Attorneys for Defendant

Filed
5-30-62

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN LAW

CARLIE B. TERRY, et al.
Plaintiffs

vs.

CITY OF FOLEY,
Defendant

DEMURRER

LAW OFFICES OF
J. CONNOR OWENS, JR.
101 COURTHOUSE SQUARE
BAY MINETTE, ALABAMA

_____Div. No._____ CERTIFICATE OF APPEAL. (Civil Cases.)

No. 4269

Baldwin County, Circuit Court.

Carlie B. Terry, et al
Plaintiff.
vs.

CITY OF FOLEY, a Municipal Corporation
Defendant.

I, Alice J. Duck Clerk of Circuit Court, of Baldwin County, Alabama, hereby certify that in the cause of Carlie B. Terry, et al plaintiff,
vs.
City of Foley, a Municipal Corporation defendant, which was tried and determined in this Court on the 25th day of September 19 62, in which there was a judgment for Six Thousand Six Hundred and no/100 - - Dollars, in favor of the plaintiff, (~~or judgment for the defendant,~~) the City of Foley, on the 22nd day of October 19 62, took an appeal to the Supreme Court of Alabama to be holden of and for said State.

I further certify that / City of Foley, a Municipal corp. filed security for cost of appeal, to the Supreme Court, on the 22 day of October 19 62, and that City of Foley, a municipal Corp., by Donald F. Pierce, as Its Attorney and Aetna Casualty and Surety Co., Hartford, Connecticut a Corporation, by Harry S. Mattem, as Its Attorney-In-Fact, are sureties on the appeal bond.

I further certify that notice of the said appeal was on the 24th day of October 19 62, served on James A. Brice, esq., as attorney of record for said appellee, and that the amount sued for was for Workmen's Compensation (~~Personal property~~) (~~or personal property~~.) x

Witness my hand and the seal of this Court, this the 2nd day of November 19 62.

Alice J. Duck
Clerk of the Circuit Court of
_____County, Alabama.

ROBERTS & SON, BIRMINGHAM

CARLIE B. TERRY, JOHN THOMAS TERRY AND ARLIE TERRY, a Minor, By CARLIE B. TERRY, as Next Friend,	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.
Plaintiffs,	)	
VS.	)	NO. 4269
CITY OF FOLEY, a Municipal Corporation,	)	
Defendant.	)	

STATEMENT OF THE CASE

The Plaintiffs, on May 25, 1960, filed a complaint in the Circuit Court of Baldwin County, Alabama, against the defendant, alleging that the Plaintiffs were the dependent surviving spouse and the dependent surviving children, respectively of Tom Terry, deceased; that the said decedent was, on May 4, 1959, a citizen and resident of Foley, Baldwin County, Alabama, and a workman, employed by the City of Foley, which is a municipal corporation in Baldwin County, Alabama, and that the defendant had elected to accept the provisions of the Workman's Compensation Act;

That on May 4, 1959, while working as an employee of the defendant in the Foley Park the said decedent accidentally inhaled chlorine gas, which was a by-product of a chemical cleaning solution he was preparing and using for the cleaning and disinfecting the swimming pool located in the Park at Foley, Alabama, which accident seriously injured him, and totally disabled him from work for a period beginning May 4, 1959, and ending September 7, 1959, which was the day he died;

Plaintiffs also allege that the defendant had prompt and immediate notice of the said accident, and that the said defendant, or its insurer, The Hartford Accident & Indemnity Company, paid a part of the medical and hospital expenses of the

decedent incurred as a result of of the accident, but paid no Workman's Compensation benefits;

That the decedent, at the time of his injury was receiving a salary of $40.00 per week, and that his average wages for a long period prior thereto was not less than $40.00 per week;

The Plaintiffs, on March 22, 1961, filed their amended complaint alleging that on May 4, 1959, while working as an employee of the City of Foley in the New Foley Park, the said decedent accidentally inhaled chlorine gas, which was a by-product of a cleaning solution he was preparing for the cleaning and disinfecting of the swimming pool located in said park, which accident seriously injured him and totally disabled him from the period beginning May 4, 1959, and ending September 7, 1959, and which accident caused his death on September 7, 1959;

The defendant filed several demurrers to the complaint and amended complaint, and upon being overruled, filed its answer on August 4, 1962;

The defendant, in addition to the general issue, pleaded that the defendant was not given notice as required by law, and that no claim was presented to the Clerk of the Defendant within the time as provided by law;

The defendant in its answer admitted that at the time and place alleged in the complaint, to-wit: May 4, 1959, the decedent was an employee of the City of Foley, engaged in working on the swimming pool owned and operated by the said defendant; that the defendant was a Municipal Corporation, organized and existing under the laws of Alabama, located in the County of Baldwin, State of Alabama; that the operation of said swimming

pool was a governmental function; that the said defendant was immune from suit for any injury or death caused by any person, including the decedent, or any other employee so engaged; that the decedent was not covered by the Workman's Compensation Act of Alabama; that although it had accepted the Workman's Compensation act as to cover its employees, it had never accepted the Workman's Compensation Act for the employees of the City of Foley engaged in working at the New City Park on the swimming pool as was the dece dent on the date of his alleged injury, and that said decedent was not an employee of the City of Foley, subject to Workman's Compensation Act, on May 4, 1959;

The defendant admitted that the decedent was an employee of the City of Foley, on May 4, 1959; that while so employed in the New Foley Park, working on the swimming pool, engaged in cleaning and disinfecting the swimming pool, using a commercial product designed for cleaning and disinfecting swimming pools;

The defendant admits that the defendant, City of Foley, was a municipal corporation, organized and existing under the laws of the State of Alabama, and located in the County of Baldwin, State of Alabama, on May 4, 1959;

That the defendant was re ceiving a salary of $40.00 per week and his average wage was not less than $40.00 per week;

The defendant admitted that it had notice of the fact that the decedent be came ill on May 4, 1959, and claimed to have become ill as a result of working in the New Foley Park, in cleaning and disinfecting the swimming pool located in said park;

The defendant denied that the decedent accidentally inhaled chlorine gas, which is a by-product of a cleaning

solution he was preparing for the cleaning and disinfecting of the swimming pool located in said Park, on May 4, 1959;

The defendant also denied that the decedent received any injuries while acting within the line and scope of his employment on May 4, 1959, as an employee of the defendant.

The defendant denied that it had elected to accept the provisions of the Workman's Compensation Act on May 4, 1959, for the employees of the City of Foley engaged in work in the New Foley Park of the type of work being done by the decedent on May 4, 1959;

The defendant admitted that the Plaintiffs are the dependent surviving spouse and the dependent surviving children of the decedent;

The defendant, on August 29, 1962, filed its amended answer alleging that at the time and place set out in the Complaint, to-wit: May 4, 1959, the decedent was an employee of the City of Foley, working in the New Foley Park, on the swimming pool located in said Park, which Park and Swimming Pool were operated on, to-wit: May 4, 1959, for the benefit of the citizens and residents of the City of Foley; that the defendant on said date was a Municipal Corporation, organized and existing under the laws of the State of Alabama, located in the County of Baldwin, State of Alabama; that the operation of the swimming pool located in the Park on, to-wit: May 4, 1959, on which the decedent was working at the time of the injury, and from which injuries it is alleged he died, was a governmental function of said City of Foley, was immune from suit for any injuries or death which might arise from the operation of said Park and said Swimming Pool.

FINDING OF FACTS:

The Defendant hired the decedent to work for it at a regular salary of $40.00 per week; that on May 4, 1959, the decedent was placed in the swimming pool to clean and disinfect the Swimming Pool and in so doing used a commercial compound containing chlorine gas; that the defendant was under the direct supervision and subject to the orders of a Mr. Roberts, who was an agent of the defendant, acting within the line and scope of his employment; that said employment was also under the supervision of Mr. Roger Lee Kirkland, a member of the Town Council of the defendant; that the decedent worked all day on May 4, 1959, and at the end of the work day found that his breating was affected; that he immediately called Doctor Julius Michaelson, complaining of his injuries; that the following morning he reported his condition to the said Mr. Roberts, who placed him in the hospital at Foley, Alabama, under the care of Doctor Julius Michaelson; that his condition continued and grew worse from time to time until September 7, 1959, when he died; that the defendant was in and out of the hospital during his lingering illness, and was in the hospital at the time of his death; that prior to May 4, 1959, the decedent was an athletic type, robust man, in apparent good health; that according to the testimony of Doctor Michaelson, decedent was affected in his breathing capacity, and that his condition was caused or aggrivated by the inhalation of chlorine gas; that there were x-rays made; however, there is shown by the record quite a confusion as to an x-ray made in January of 1959, which has never been accounted for, nor established when it was taken and by whom; that the decedent died on September 7, 1959; that the decedent left surviving him his widow and two dependent children; that the decedent was a resident of Foley, Baldwin County, Alabama, at the time of his

injury and also at the time of his death;

That the defendant, at the time of the injury to the decedent, and at the time of his death, had Workman's Compensation insurance with the Hartford Accident & Indemnity Company; that it was generally considered by all that the work of the decedent came under the Workman's Compensation Laws, and that his rights were governed thereby; that the Workman's Compensation Insurance carrier paid a part of the Doctor, medical and hospital expenses until the death of the decedent, after which it refused to make any payments; that the defendant had elected to come under the Workman's Compensation Laws of the State of Alabama, and had secured insurance for its protection; that the decedent suffered personal injuries in the line and scope of his employment;

That such personal injuries were caused by an accident;

That the act which caused the personal injuries arose out of and in the course of the employment of the decedent, while acting in the line and scope of his employment;

That the said accident was an approximate contributing cause, acting upon the decedent to produce his disability and death;

That the defendant had actual notice of the accident and injuries to the decedent;

That the work in cleaning and disinfecting the swimming pool was a proprietary act on the part of the defendant and not a governmental function.

D E C R E E:

It is, therefore

ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiffs have and recover of the defendants the sum of $22.00 per week, or 55 percent of the average weekly earnings of the decedent, for the full period of 300 weeks; it is further

ORDERED, ADJUDGED AND DECREED that the Attorney prosecuting the case, Hon. James A. Brice, have and recover of the defendant the sum of 15 percent of the weekly payments as herein ordered, payable along with and at the time of said payments. It is further

ORDERED, ADJUDGED AND DECREED that the costs of this proceeding be, and the same is hereby taxed against the defendant.

Dated at Bay Minette, Alabama, this the 25 day of September, 1962.

Hubert M Hare

Judge, 28th Judicial Circuit of Alabama.

FILED
SEP 25 1962
ALICE L. DIGGS, CLERK
REGISTER

APPLICATION OF CLAIMANTS TO EMPLOY ATTORNEY

State of Alabama)

County of Baldwin)

TO THE HONORABLE H. M. HALL, JUDGE OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA:

Now come Carlie B. Terry, John Thomas Terry, and Carlie B. Terry, as next Friend of Arlie Terry, a minor, and show unto your Honor that they are the dependent surviving spouse and the dependent surviving children of Tom Terry, deceased, an employee as defined by the Workmen's Compensation Laws of Alabama; that his employer was the City of Foley, a municipal corporation; that he suffered an injury while acting in the line and scope of his employment, and later died as a proximate result of said injury; that they, as beneficiaries, have been unable to reach settlement with the decedent's employer or insuror, Hartford Accident and Indemnity Company, and they pray for permission to secure the services of James A. Brice, Attorney, Foley, Alabama, to represent them in said matter.

Carlie B. Terry
CARLIE B. TERRY

+ witness to James A. Brice Jr
JOHN THOMAS TERRY

Carlie B. Terry
CARLIE B. TERRY, as Next Friend of Arlie Terry, a minor,

CARLIE B. TERRY; JOHN THOMAS TERRY; and ARLIE TERRY, a minor by CARLIE B. TERRY as Next Friend,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
	)	AT LAW.
PLAINTIFFS,	)	
	)	
VS.	)	
	)	
CITY OF FOLEY, a municipal corporation,	)	
DEFENDANT.	)	

O R D E R

The foregoing having been submitted and the Court being of the opinion that the permission should be granted, the said

Carlie B. Terry, John Thomas Terry, and Carlie B. Terry, as next friend of Arlie Terry, a minor, are hereby permitted and authorized to employ James A. Brice, an attorney at law, to represent them in a claim for compensation arising out of an accident sustained by their husband and father, Tom Terry, deceased, in the line and course of his employment while employed by the City of Foley.

Done this 26 day of May, 1960.

Hubert M. Hall

H. M. HALL, JUDGE OF THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

C I T A T I O N

STATE OF ALABAMA)
)
COUNTY OF BALDWIN)

CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

TO: Carlie B. Terry,
John Thomas Terry, and
Arlie Terry, a minor, by
Carlie B. Terry, as next friend,

Plaintiffs

or

James A. Brice, Esq.,
Attorney-of-Record for the
Plaintiff,

GREETINGS:

WHEREAS, the City of Foley, Alabama, a municipal corporation, has prayed for and obtained a Writ of Certiorari from the SUPREME COURT OF ALABAMA, demanding me, as Clerk of the Circuit Court of Baldwin County, Alabama, to certify on or by the 22 day of Oct, 1962, the first call of the First Division, a true and correct transcript of the record and proceedings had in said Circuit Court in the cause of Carlie B. Terry, John Thomas Terry, and Arlie Terry, a minor, by Carlie B. Terry, as next friend, Plaintiffs, vs. City of Foley, Alabama, a Municipal Corporation, Defendant,

Now, you are, therefore, cited to appear at the SUPREME COURT OF ALABAMA, at Montgomery, Alabama, to defend said Writ of Certiorari, if you shall think proper to do so.

Witness my hand this 23 day of October 1962.

Alice J. Duck
Clerk, Circuit Court, Baldwin County,
Alabama

SHERIFF'S RETURN

Executed this 24 day of Oct, 1962, by leaving a copy of the within with James A. Brice, Esq., Attorney-of-Record for Carlie B. Terry, et al., Plaintiff.

Taylor Wilkins
SHERIFF of Baldwin County, Alabama
By [illegible]

Sheriff claims 72 miles at
Ten Cents per mile Total $ 7.20
TAYLOR WILKINS, Sheriff
BY [illegible]
DEPUTY SHERIFF

No. 4269

Carlie B. Terry et al

vs.

City of Foley

Citation of appeal

To the Circuit Court
Foley, Ala