

1695

BOARD OF COUNTY COMMISSIONERS—LIABILITY FOR
DAMAGE TO CROPS—HIGHWAY MAINTENANCE—§§5579.04,
305.12 R.C.—NOT LIABLE FOR SUCH DAMAGE.

SYLLABUS:

A board of county commissioners is not liable for damage caused to growing crops in fields adjoining a county highway along which the board has caused brush, briars, weeds and thistles to be destroyed as provided in Section 5579.04, Revised Code; and, the expenditure of public funds to compensate for such loss is not authorized by law.

Columbus, Ohio, February 8, 1958

Hon. Sumner J. Walters, Prosecuting Attorney
Van Wert County, Van Wert, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“In discharging the duty to destroy brush briars, weeds and thistles along highways, which is required by Revised Code of Ohio, Section 5579.04, the Commissioners of Van Wert County, Ohio, elected to use a liquid spray designed to destroy brush and weeds. As a result, some of this spray drifted into an adjoining field and caused damage to growing crops. Would you please give us your Opinion as to whether or not Van Wert County may legally compensate the land owner for this damage which was suffered to his growing crop.”

Your question presents the issue of the tort liability of the Board of County Commissioners in their official capacity for the damage to growing crops resulting from a poisonous spray utilized in carrying out a statutory command with regard to the maintenance of the county highways of the state. In this regard I invite your attention initially to Section 305.12, Revised Code, reading as follows:

“The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain, and defend all suits in law or in equity, involving an injury to any public, state, or county road, bridge, ditch, drain, or watercourse established by such board in its county, and for the prevention of injury thereto. *The board shall be liable, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county, or any money or other property due the county.* The money so recovered shall be paid into the county treasury, and the board shall take the county treasurer’s receipt therefor and file it with the county auditor.” (Emphasis added.)

The statutory command for the destruction of brush, briars, weeds and thistles along county highways is set forth in Section 5579.04, Revised Code, reading as follows:

“*A board of county commissioners, board of township trustees, or street commissioners of a municipal corporation, having control of and being charged with the duty of repairing macadamized, graveled, or improved roads, and county engineers, township road superintendents, and the street commissioners of each municipal corporation, between the first and twentieth days of June, the first and twentieth days of August, and, if necessary, between the first and twentieth days of September of each year, shall destroy all brush, briars, burrs, vines, Russian, Canadian, or common thistles, or other noxious weeds, growing within the limits of a county or township road, or improved, graveled, or macad-*

amized road, street, or alley within their jurisdiction.” (Emphasis added)

Section 5579.04, *supra*, was the subject of an opinion of my predecessor, being Opinion No. 5839, Opinions of the Attorney General for 1955, p. 517, the syllabus of which reads as follows:

“1. *The destruction of weeds along a township highway is part of the maintenance of such highway enjoined by law upon the township trustees.*

“2. Where township trustees have caused weeds growing in a highway under their control to be treated with a poisonous chemical for the purpose of destroying them, and such sprayed weeds have been eaten by domestic animals grazing in an adjacent pasture, and such animals have thereby been killed, questions of mixed law and fact are presented as to the possible negligence of the trustees and the possible contributory negligence of the owner of such animals. Where such negligence is found, in the absence of any element of contributory negligence, such trustees would be liable in their official capacity for such damage as provided in Section 5571.10, Revised Code. The township trustees have authority to compromise or settle a claim for such damage.” (Emphasis added)

The holding in that opinion was based upon Section 5571.10, Revised Code, which imposed liability on each board of township trustees for damages incurred by any person by reason of negligence or carelessness of such board in the discharge of its official duties. With the exception of the language of Section 305.12, *supra*, I find no such comparable imposition of liability upon the boards of county commissioners. The creation of liability for negligent acts performed by governmental subdivisions must be distinctly set out in the statutes because of the inherent immunity from suit which a sovereign state enjoys. In Opinion No. 5839, *supra*, there is language which suggests that the use of poisons in destroying brush and noxious weeds along township highways might constitute negligence on behalf of such board. In regard to that language, I must point out the factual situation presented and the particular statutes there involved, for under Section 305.12, Revised Code, the board of county commissioners is liable for damages received by reason of its *negligence or carelessness in not keeping* any road or bridge under its care in proper repair. I consider it to be well settled that a definite distinction exists between *repair* and *maintenance*, especially with regard to public highways. It is doubtful whether weed destruction along a highway constitutes “repair”

of such highway. However, even assuming that it is included in this term it is to be noted that the statute bases liability on *failure* to repair rather than on negligence in the action of repair. Upon the basis of this distinction, I must conclude that no such liability exists on behalf of the county for the damage which you have discussed in your inquiry.

Since there is no legal liability for the acts complained of, I am impelled to conclude that the expenditure of public funds in such a situation would not be authorized by law, for unless there is liability, no expenditure of funds is authorized by statute. See Opinion No. 179, Opinions of the Attorney General for 1957, p. 41.

Therefore, it is my opinion and you are accordingly advised that a board of county commissioners is not liable for damage caused to growing crops in fields adjoining a county highway along which the board has caused brush, briars, weeds and thistles to be destroyed as provided in Section 5579.04, Revised Code; and, the expenditure of public funds to compensate for such loss is not authorized by law.

Respectfully,
WILLIAM SAXBE
Attorney General