

2498

1. INSURANCE—LIABILITY—MAY BE PURCHASED BY TOWNSHIP TRUSTEES ONLY WHERE THERE IS A STATUTORY LIABILITY TO BE INSURED AGAINST.
2. SECTION 3298-17 G. C. REFERS EXCLUSIVELY TO ACT OF WHICH IT IS A PART.
3. STATUTORY LIABILITY OF TOWNSHIP TRUSTEES—CREATED BY SECTION 3298-17 G. C.— LIMITED TO ROADS, ROAD MACHINERY OR EQUIPMENT USED WITH RELATION TO ROADS.

SYLLABUS:

1. Liability insurance may be purchased by the township trustees only where there is a statutory liability to be insured against.
2. Section 3298-17, General Code, refers exclusively to the act of which it is a part.
3. The statutory liability of the township trustees created by Section 3298-17, General Code, is limited to roads, road machinery or equipment used with relation to roads.

Columbus, Ohio, November 13, 1950

Hon. Forrest E. Sidener, Jr., Prosecuting Attorney
Madison County, London, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Do Township Trustees have the power and authority to take out and pay for out of township funds liability insurance policies protecting them as a Board against civil liability arising out of the ownership by the Township of buildings and real estate and such activities as street cleaning, ownership, maintenance and use of teams and motor vehicles, street or road paving or resurfacing, hazards arising out of the use of streets and sidewalks, construction operations let to independent contractors and in general all such liability as may arise out of Section 3298-17 of the General Code of Ohio?

“Section 3298-17 of the Code provides as follows:

“Liability of Township Trustees for Damages. Each board of township trustees shall be liable, in its official capacity, for

damages received by any person, firm or corporation, by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties.'

"On February 25, 1931, Attorney General Bettman gave an opinion (Vol. 1, O. A. G. Opn. 1931, No. 2995), the syllabus of which reads as follows:

" 'By reason of the liability created by Section 3298-17, General Code, boards of township trustees may lawfully protect themselves against liability for damages by procuring liability or property damage insurance upon township owned motor vehicles and road building machinery while such vehicles and machinery are being operated in furtherance of the official duties of said trustee.'

"On June 25, 1937, you, as the Attorney General of Ohio, gave an opinion (Vol. II, O. A. G. Opn. 1937, No. 787) indicating that township trustees had authority to procure and pay for liability insurance on township motor vehicles, equipment and road machinery, the opinion holding (p. 1456) that such insurance, 'by virtue of the liability created by Section 3298-17, General Code, includes property damage and public liability insurance on township motor vehicles, equipment and road machinery, while such vehicles and machinery are being operated in furtherance of the official duties of the trustees of the township.'

"The policies as to which I am making inquiry would provide coverage on such property as the township offices, fire house, voting booths, cemeteries, street cleaning (including snow removal from the township street and highways), the ownership, maintenance and use of teams and motor vehicles, streets or road paving or resurfacing, hazards of township buildings, real estate, streets and sidewalks, and also construction operations which have been let to independent contractors by the board of trustees. It is assumed that all of these would present possible liability under G. C. 3298-17 quoted above."

Before proceeding with a discussion of the particular issue raised by your inquiry, it should no doubt be noted that in seeking to ascertain the liability of a township, whether in tort or contract, it must be remembered that townships are but political subdivisions of the state, organized as part of the machinery of the government for the performance of functions of a public nature, and that, as such, they partake of the state's immunity from liability. In other words, in the absence of statute, they are not liable for negligence in the performance of their public duties. See 39 Ohio Jur., 337.

With this in mind, your attention is redirected to Section 3298-17 of the General Code, the interpretation of which is the crux of your problem. Said section reads as follows :

“Each board of township trustees shall be liable, in its official capacity for damages received by any person, firm or corporation, by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties.”

A review of the legislative history of this section introduces doubt as to whether it is broad enough in its scope and intent to include any liability which might be incurred by the township trustees.

Section 3298-17, General Code, is a part of an act passed in 1915, 106 Ohio Laws, 574, 647: “to provide a system of highway laws for the State of Ohio” and appears therein under the subhead “Road construction and improvement by township trustees.” In commenting upon Section 3298-17, General Code, as it relates to the act of which it is a part, Judge Sherick has the following to say in the case of *Ray, Trustee, v. Board of Trustees of Trenton Township, Delaware County*, 49 O. App. 172, at page 174 :

“It was without doubt the legislative intent to make the board of trustees officially liable in damages for its negligence or carelessness in the discharge of its official duties prescribed in the act of which it is a part, but it can hardly be insisted that the legislative intent may be enlarged to cover duties not then in existence, and thereafter created, which in the main pertain to unrelated subjects. Statutes which grant the privilege of suing the state or its political subdivisions are in derogation of the common law and are therefore to be strictly construed, and are not to be enlarged unless that purpose and intent is plainly and unequivocally indicated by subsequent legislation.

“From the position of Section 3298-17, General Code, in the act (106 Ohio Laws, 647), it is evident that it has a companion section, that is Section 3298-16, General Code, with which it should and must be read for the purpose of appreciating the legislative intent. The related section provides that township trustees may bring and maintain all suits at law or equity involving injury to any road, ditch, drain or water course under their jurisdiction. It naturally followed that the legislature in the next section should repose certain responsibilities in township trustees. This it proceeded to do in accordance with its chosen system of highway laws. * * *”

The holding in this case unquestionably indicates that the liability created by Section 3298-17 was intended to be restricted to the act of which said section is a part.

Further support for this contention may be found in 39 Ohio Jur. 338, where it has been said, referring to Section 3298-17, General Code, that:

"By express statutory provision, boards of township trustees are liable, in their official capacity, for injuries resulting from their negligence or carelessness in the discharge of their official duties *with respect to the public roads under their jurisdiction and control.* * * *"
(Emphasis added.)

See also, Opinions of the Attorney General for 1949, at page 152, Opinion No. 412. However, also see Opinion No. 2397 of the Attorney General rendered on October 10, 1950.

I am not unaware of the opinions of the Attorney General mentioned in your letter, but it should be noted that said opinions refer to roads or equipment used with respect to roads.

With respect to the foregoing, I am accordingly of the opinion:

1. That liability insurance may be purchased by the township trustees only where there is a statutory liability to be insured against.
2. That Section 3298-17, General Code, refers exclusively to the act of which it is a part.
3. That the statutory liability of the township trustees created by Section 3298-17, General Code, is limited to roads, road machinery or equipment used with relation to roads.

Respectfully,

HERBERT S. DUFFY,
Attorney General.