

OPINION NO. 72-090

Syllabus:

A county board of mental retardation shares in the state's governmental immunity from suit and may not purchase liability insurance for board members, employees or volunteers, in the absence of specific statutory authorization.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: William J. Brown, Attorney General, October 6, 1972

I have before me your request for my opinion, which reads as follows:

"The Huron County Board of Mental Retardation operates with paid employees and volunteers who work with the mentally retarded.

"My questions are these:

"1. May group liability insurance be purchased from county funds to cover the Mental Retardation Board members, the employees, and the volunteers?

"2. May liability insurance be purchased to cover the Board of Mental Retardation members?

"3. Can the Board of Mental Retardation members be held liable for negligent acts of their employees or negligent acts of any volunteers who may help out in conducting school or activities of the Huron County Board of Mental Retardation?

"4. Could a volunteer, who is helping out with a project of the Huron County Board of Mental Retardation and receives an injury, sue the Board of Mental Retardation?"

Inquiries one and two can be dealt with simultaneously, as can three and four. I shall proceed to discuss questions three and four first.

Your third and fourth questions ask whether the county board of mental retardation can be held liable for either the negligent acts of their employees or volunteers, or for an injury incurred by a volunteer while helping with a board-approved project. The answer depends on whether the board is able to share in the state's governmental immunity from suit.

The Ohio Supreme Court in Krause v. State, 31 Ohio St. 2d 132 (1972), has recently upheld the doctrine of sovereign immunity. This decision was in accord with a consistent line of Ohio opinions pronouncing that doctrine. Wolf v. Ohio State University Hospital, 170 Ohio St. 49 (1959); State, ex rel. Williams v. Glander, 148 Ohio St. 188 (1947); Palumbo v. Industrial Commission of Ohio, 140 Ohio St. 54 (1944); Raudabaugh v. State, 96 Ohio St. 513 (1917). Paragraph one of the syllabus in Krause v. State, supra, reads as follows:

"The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly."

This immunity from suit which the state possesses extends to political subdivisions and administrative agencies as well. Wolf v. Ohio State University Hospital, supra.

Justice Matthias, in Schaffer v. Board of Trustees, 171 Ohio St. 228 (1960), answered a question very similar to the one you present. He articulated the question as "* * * whether a board of trustees of a veterans memorial appointed by county commissioners is liable in tort * * *." He pointed out that the traditional sovereign immunity is of constitutional dimension, protects the state, and extends to the county or one of its agencies. He said, at page 229:

"The board of commissioners of a county are not liable, in their quasi corporate capacity, either by statute or at common law, to an action for damages for injury resulting to a private party by their negligence in the discharge of their official functions."

At page 230:

"* * * municipal corporations proper

are called into existence, either at the direct solicitation or by the free consent of the people who compose them.

"Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

" * * * * * * * * * *"

At page 231:

"Thus, in the absence of statutory authorization therefor, a county or its agencies are immune from suit for negligence."

I had occasion to comment on a very similar situation in Opinion No. 72-007, Opinions of the Attorney General for 1972, wherein I held that a county children services board could not be liable for the negligence of volunteer drivers. I stated in that Opinion that:

" * * * The Guernsey County Children Services Board was established pursuant to a State statute, Section 5153.04, Revised Code, and it exists as an instrumentality of the State to perform a governmental function."

The above is equally applicable to the county board of mental retardation, which was established under Chapter 5126, Revised Code. It can hardly be doubted that the board is an instrumentality of the state performing a governmental function, and that it shares in the state's governmental immunity from suit.

Since the board of mental retardation is an instrumentality of the state, and since there exists no statutory authorization providing for suit against the board, I conclude that it cannot be held liable for either negligent acts of its employees or volunteers, or for an injury incurred by a volunteer while working on a board-approved project.

Your first two questions ask whether liability insurance may be purchased from county funds to cover the board members, the employees, and the volunteers. It is well settled in Ohio, with one exception, that the answer to questions one and two is no. Opinion No. 71-034, Opinions of the Attorney General for 1971; Opinion No. 71-028, Opinions of the Attorney General for 1971; Opinion No. 67-001, Opinions of the Attorney General for 1967; Opinion No. 3138, Opinions of the Attorney General for 1962; Opinion No. 2482, Opinions of the Attorney General for 1961; Opinion No. 1252, Opinions of the Attorney General for 1960.

In Opinion No. 72-007, supra, in dealing with the question of purchasing liability insurance to protect the county children services board, I stated that:

"As far as the Board itself is concerned

the answer must be that such insurance is unnecessary, and that public funds cannot, therefore, be expended for that purpose. As has just been seen, the Board has no liability, and it has been held repeatedly that public funds may not be expended for liability insurance when no such liability exists."

The issue is equally foreclosed against the board of mental retardation from expending public funds for liability insurance for employees and volunteers. My predecessor, in Opinion No. 67-001, supra, stated as follows:

"* * * For although the employee may be personally liable for his own negligence, the University and the Board of Trustees do not partake of this liability. Hence any subscription by the board of trustees for liability insurance to underwrite the private responsibility of individual employees, would constitute a diversion of public monies for private purposes. This expenditure would clearly come within the prohibition of Section 4, Article VIII, Constitution of Ohio, which specifically prohibits the diversion of public funds for private purposes."

There is, however, one exception previously alluded to, which would permit a board of county commissioners to expend public funds to purchase liability insurance for employees and volunteers while operating a motor vehicle. Sections 9.83 and 307.44, Revised Code; Opinion No. 72-007, supra. See also Opinion No. 72-078, Opinions of the Attorney General for 1972; Opinion No. 71-028, supra; and Opinion No. 67-007, Opinions of the Attorney General for 1967.

In specific answer to your questions it is my opinion, and you are so advised, that a county board of mental retardation shares in the state's governmental immunity from suit and may not purchase liability insurance for board members, employees or volunteers, in the absence of specific statutory authorization.