

OPINION NO. 2001-037**Syllabus:**

R.C. 9.83 does not confer immunity from civil liability upon a parole officer who uses his own motor vehicle to transport a parolee for the Department of Rehabilitation and Correction. However, before a person may commence a civil action against a parole officer for an injury, death, or loss to person or property from the parole officer's use of his own motor vehicle to transport a parolee for the Department of Rehabilitation and Correction, a civil action must first be filed in the Court of Claims against the State of Ohio under R.C. 2743.16(B). In such an action, the State of Ohio may be subject to vicarious liability for the parole officer's acts while operating his own motor vehicle.

To: Reginald A. Wilkinson, Department of Rehabilitation and Correction, Columbus, Ohio

By: Betty D. Montgomery, Attorney General, August 27, 2001

You have requested an opinion concerning a state employee's immunity from civil liability when the employee is required to use his own motor vehicle to perform his official duties. Specifically, you ask:

1. If a parole officer is required to use his personal automobile to transport a parolee in the line of duty, and if the parole officer is involved in a motor vehicle accident during such use, is the parole officer subject to immunity from liability according to the terms and conditions of Section 9.83 of the Revised Code, notwithstanding the use of his personal automobile?
2. If the State of Ohio does not provide automobile insurance coverage for a state employee who uses his or her personal vehicle at the direction of the appointing authority, exposing the employee's personal policy of insurance as the primary insurance coverage in the event of an accident, does this practice deny the employee immunity as described in Section 9.83 of the Revised Code?

Resolution of your questions requires us to review initially the liability of a state officer or employee for the operation of a motor vehicle in the course of performing his duties. General provisions concerning civil immunity from liability conferred upon state officers and employees are set forth in R.C. 9.86. This statute provides, in pertinent part:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee

acted with malicious purpose, in bad faith, or in a wanton or reckless manner. (Emphasis added.)

R.C. 9.86 thus unequivocally provides that officers and employees of the state are granted immunity from civil actions for damage or injury caused in the performance of their duties, unless the actions were manifestly outside the scope of their employment or official responsibilities or were performed with malicious purpose, in bad faith, or in a wanton or reckless manner; exceptions exist for civil actions arising out of the operation of a motor vehicle and for civil actions in which the state is the plaintiff. 1993 Op. Att'y Gen. No. 93-080 at 2-403; 1993 Op. Att'y Gen. No. 93-036 at 2-186; see *Ratliff v. Indus. Comm'n*, 85 Ohio Misc. 2d 79, 80, 684 N.E.2d 388, 389 (Ct. Cl. 1997).

R.C. 9.86 further declares, however, that it does not "eliminate, limit, or reduce any immunity from civil liability that is conferred upon [a state] officer or employee by any other provision of the Revised Code or by case law." Accordingly, if any other provision of the Revised Code or case law confers immunity from liability upon a state officer or employee when he is operating a motor vehicle, R.C. 9.86 does not eradicate that immunity. We must, therefore, examine other provisions of state law in that regard, specifically R.C. 2743.16, which is part of the Court of Claims act.

R.C. 2743.16(B) provides that, when a claim arises from the operation of a motor vehicle by a state officer or employee while engaged in the course of his employment or official responsibilities for the State of Ohio, the claimant is required to pursue the State of Ohio as his exclusive remedy.¹ *Allen v. Dejacimo*, No. 51453, 1987 Ohio App. LEXIS 5528, at *2-3 (Cuyahoga County Jan. 15, 1987). R.C. 2743.16(B) further "precludes any action against the responsible state employee." *Id.* at *3. R.C. 2743.16(B) thus provides in pertinent part:

If a person suffers injury, death, or loss to person or property from the operation of an automobile, truck, motor vehicle with auxiliary equipment, self-propelling equipment or trailer, aircraft, or watercraft by an officer or employee of the state while engaged in the course of his employment or official responsibilities for the state, the person or the representative of that person or of the estate of that person shall attempt, prior to the commencement of an action based upon that injury, death, or loss, to have the claim based upon that injury, death, or loss compromised by the state or satisfied by the state's liability insurance.

¹Pursuant to R.C. 2743.02(A), the State of Ohio has waived its immunity from liability and consented to be sued and have its liability determined in the Court of Claims "in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in [R.C. Chapter 2743]." In Ohio, an employer is vicariously liable for the negligent acts of its employees committed while acting within the scope of their employment under the doctrine of *respondeat superior*. *Byrd v. Faber*, 57 Ohio St. 3d 56, 58, 565 N.E.2d 584, 587 (1991). Under this doctrine, an employer can be held liable for the negligent acts of an employee in causing injuries to third persons by the operation of the employee's own motor vehicle, provided the employee was acting within the scope of his employment. See, e.g., *Dayton Biscuit Co. v. Aerni*, 40 Ohio App. 49, 177 N.E. 775 (1931). See generally Christopher Vaeth, Annotation, *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R.5th 174 (1995).

.... Neither the person nor his or his estate's representative shall commence an action against the officer or employee to recover damages for the injury, death, or loss until after he commences the action in the court of claims against the state and the action in that court is terminated. If the court of claims determines that the state is not liable for the injury, death, or loss caused by the officer's or employee's operation of the automobile, truck, motor vehicle with auxiliary equipment, self-propelling equipment or trailer, aircraft, or watercraft, the person or his or his estate's representative is not prohibited by this division from commencing an action against the officer or employee to recover the claim or the unpaid amount of the claim based upon the injury, death, or loss.

Accordingly, if the Court of Claims determines that a state officer or employee was engaged in the course of his employment or official responsibilities for the State of Ohio while operating a motor vehicle, the State of Ohio may be subject to vicarious liability for the officer's or employee's acts while operating the motor vehicle. See R.C. 2743.16(B); *Conley v. Shearer*, 64 Ohio St. 3d 284, 287, 595 N.E.2d 862, 866 (1992); *Ratliff v. Indus. Comm'n*; *Allen v. Dejacimo*; see also R.C. 2743.02(A). However, if the Court of Claims determines that the State of Ohio is not liable for the injury, death, or loss caused by the officer's or employee's operation of a motor vehicle, a suit may be commenced directly against the officer or employee for his acts while operating the motor vehicle.² See R.C. 2743.16(B); *Conley v. Shearer*, 64 Ohio St. 3d at 287, 595 N.E.2d at 866; *Ratliff v. Indus. Comm'n*; *Allen v. Dejacimo*.

Let us now turn to your first question, which asks whether R.C. 9.83 confers immunity from civil liability upon a parole officer who uses his own motor vehicle to transport a parolee for the Department of Rehabilitation and Correction (Department). R.C. 9.83 authorizes the state to secure insurance or establish a self-insurance program to cover the potential liability of the state and its officers and employees for motor vehicle accidents, and reads, in part, as follows:

The state ... may procure a policy or policies of insurance insuring its officers and employees against liability for injury, death, or loss to person or property that arises out of the operation of an automobile ... by the officers or employees while engaged in the course of their employment or official responsibilities for the state.... The state is authorized to expend funds to pay judgments that are rendered in any court against its officers or employees

²Whether a state officer or employee who is operating his personal motor vehicle is engaged in the course of his employment or official responsibilities for the State of Ohio is a question of fact that must be addressed on a case-by-case basis. *Rogers v. Allis-Chalmers Mfg. Co.*, 153 Ohio St. 513, 526, 92 N.E.2d 677, 683-84 (1950); *Calhoun v. Middletown Coca-Cola Bottling Co.*, 43 Ohio App. 2d 10, 13, 332 N.E.2d 73, 76 (1974); see, e.g., *Ratliff v. Indus. Comm'n*, 85 Ohio Misc. 2d 79, 684 N.E.2d 388 (Ct. Cl. 1997). Factors that may be considered when answering this question include the purpose for which the motor vehicle was being used, any orders or instructions given to the state officer or employee, the nature of the state officer's or employee's duties, and the terms of compensation for use of a motor vehicle. Christopher Vaeth, Annotation, *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R.5th at 232-33 (setting forth an extensive list of factors that may be considered in determining whether an employee is acting within the scope of his employment at the time of a motor vehicle accident).

and that result from such operation, and *is authorized* to expend funds to compromise claims for liability against its officers or employees that result from such operation. (Emphasis added.)

The permissive language of R.C. 9.83 indicates that the state may, but is not required to, insure its officers and employees against liability and pay judgments and compromise claims for liability that result from a state officer's or employee's operation of a motor vehicle while engaged in the course of his employment or official responsibilities for the state. *See generally Dalton v. Ohio Bur. of Crim. Identification and Investigation*, 61 Ohio Misc. 2d 170, 176, 576 N.E.2d 828, 833 (Ct. Cl. 1988) ("use of the word 'may' in a statute means that the statute is permissive").

Pursuant to R.C. 9.821-.822, liability insurance that the state elects to procure to cover its officers and employees under R.C. 9.83 must be provided by the Department of Administrative Services (DAS) through the Office of Risk Management (ORM). *See* R.C. 9.83(D); R.C. 125.03; 2 Ohio Admin. Code 123:1-70-03. In accordance with R.C. 9.821-.822 and R.C. 9.83, ORM operates the state motor vehicle liability self-insurance program.³

The specifics of this program are set forth in DAS Directive 00-13 (eff. Dec. 27, 1999), which provides at 1 as follows:

In consideration of the premium payment, Administrative Services agrees to pay liability claims and judgments properly made and rendered against the state, state officers and state employees that result from the officer's or employee's operation of *any state-owned motor vehicle (automobiles, trucks and motor vehicles with auxiliary equipment)* providing the operation of the vehicle was in the course of state business, as verified by the appointing authority. (Emphasis added.)

In addition, DAS Directive 00-13, at 3 specifically provides that the state motor vehicle liability self-insurance program does not apply "[t]o any individual who is operating, using or responsible for his or her own personally owned, rented or leased vehicle." Thus, the state motor vehicle liability self-insurance program operated by ORM pursuant to R.C. 9.83 insures state officers and employees only against liability that results from the operation of state-owned motor vehicles.

In light of the foregoing, therefore, it is clear that R.C. 9.83 does not expressly or by necessary implication confer immunity from civil liability upon state officers and employees

³By the terms of R.C. 9.821, the Department of Administrative Services (DAS) through the Office of Risk Management (ORM) may "[p]rovide all insurance coverages for the state, including, but not limited to, automobile liability." R.C. 9.821(C)(1); *see* R.C. 9.822; R.C. 125.03; 2 Ohio Admin. Code 123:1-70-03. In addition, R.C. 9.83(D) provides that liability insurance for state officers and employees for motor vehicle accidents is to be procured by DAS as provided in R.C. 125.03. DAS thus is authorized to construe and administer R.C. 9.821 and R.C. 9.83 in any reasonable manner that is consistent with the provisions of those statutes. *See* R.C. 1.49(F); *Indus. Comm'n v. Brown*, 92 Ohio St. 309, 311, 110 N.E. 744, 745 (1915) ("[a]dministrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do"); *see also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (unless the language of a statute directly addresses the precise question at issue, the Court must defer to any reasonable agency construction of the statutory language), *reh'g denied*, 468 U.S. 1227 (1984).

operating motor vehicles while engaged in the course of their employment or official responsibilities for the state. See generally *Hollen v. Department of Mental Retardation and Developmental Disabilities*, No. 94API10-1539, 1995 Ohio App. LEXIS 2439, *11 (Franklin County June 15, 1995) (the last sentence of R.C. 9.83(A) "is not intended to shield state officers and employees from liability for their negligence"), *appeal disallowed*, 74 Ohio St. 3d 1458, 656 N.E.2d 952 (1995). Accordingly, R.C. 9.83 does not provide a parole officer with immunity from civil liability when the liability arises out of the officer's operation of his own motor vehicle to transport a parolee for the Department.

Your second question asks, if the State of Ohio does not provide automobile insurance coverage for a state employee who uses his or her personal vehicle at the direction of the appointing authority, the effect of which is to expose the employee's personal policy of insurance as the primary insurance coverage in the event of an accident, whether this practice denies the employee immunity as described in R.C. 9.83. Because R.C. 9.83 does not confer immunity upon a state officer or employee when he is operating his own motor vehicle, however, it is unnecessary for us to answer your second question.

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 9.83 does not confer immunity from civil liability upon a parole officer who uses his own motor vehicle to transport a parolee for the Department of Rehabilitation and Correction. However, before a person may commence a civil action against a parole officer for an injury, death, or loss to person or property from the parole officer's use of his own motor vehicle to transport a parolee for the Department of Rehabilitation and Correction, a civil action must first be filed in the Court of Claims against the State of Ohio under R.C. 2743.16(B). In such an action, the State of Ohio may be subject to vicarious liability for the parole officer's acts while operating his own motor vehicle.