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BOARD OF TOWNSHIP TRUSTEES OR BOARD OF TOWNSHIP MEMORIAL TRUSTEES *NOT* LIABLE FOR NEGLIGENCE IN OPERATION/MAINTENANCE OF MEMORIAL BUILDING; NO AUTHORITY TO INSURE AGAINST SUCH LIABILITY—511.15, .16 RC.

SYLLABUS:

A board of township trustees or a board of township memorial trustees is not liable for negligence in the operation and maintenance of a township memorial building and has no authority to insure against such liability.

Columbus, Ohio, March 5, 1957

Hon. John H. Barber, Prosecuting Attorney
Fulton County, Wauseon, Ohio

Dear Sir:

I am in receipt of your request for my opinion, which reads as follows:

> "The Clinton township trustees have title to, control and manage a Memorial Auditorium which is rented to various organizations as a meeting place for community, civic and patriotic purposes. In the past the board of trustees has maintained liability insurance on this building and are now confronted with a finding from the Bureau of Inspection and Supervision of Public Offices to the effect that the expenditure for liability insurance on this building is unauthorized on the basis that no liability accrues to the trustees in the operation of this building.
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> "I find no section of the code covering this point. I have further referred to a 1949 O.A.G. 412 rendered by your predecessor which is relied upon by the examiner. I do not feel that the foregoing opinion exactly covers the situation before us since the operation of auditorium would appear to be a proprietary function rather than governmental."

As you are undoubtedly aware, Sections 511.15 and 511.16, Revised Code, provide that title to a township memorial building shall be transferred upon its completion to a board of memorial trustees who maintain

it thereafter. I assume that your township memorial building is being managed by such a board of memorial trustees and not by the board of township trustees itself, and that your question relates to the authority of the board of township trustees to place in that portion of the township budget allocated to the maintenance of the memorial building, as provided in Section 511.16, Revised Code, an amount of money for the purpose of purchasing liability insurance.

In Dunn v. Agricultural Society, 46 Ohio St., 93, the Supreme Court of Ohio expressed itself definitively as to the liability of townships in negligence cases. It said:

> "There is a class of public corporations, sometimes called civil corporations, and sometimes quasi corporations, that, by the well settled and generally accepted adjudications of the courts, are not liable to a private action in damages, for negligence in the performance of their public duties, except when made so by legislative enactment.
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> "Of this class, are counties, townships, school districts and the like. The reason for such exemption from liability, is that organizations of the kind referred to, are mere territorial and political divisions of the state, established exclusively for public purposes, connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation, or even consent, of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are no less than public agencies of the state, invested by it, of its own sovereign will, with their particular powers, to assist in the conduct of local administration, and execute its general policy, with no power to decline the functions devolved upon them, or withhold the performance of them in the mode prescribed, and hence, are clothed with the same immunity from liability as the state itself."

The doctrine of governmental and proprietary functions referred to in your request has application only to municipal corporations and not to townships.

The Supreme Court has always clearly distinguished townships from municipal corporations for purposes of determining tort liability. I call your attention to State, *ex rel.* Attorney General v. City of Cincinnati, 20 Ohio State, 18, in which the Court said at page 37:

> "And here I might properly stop; yet, for the purpose of excluding a possible conclusion, I will, on my own individual

responsibility, say one word more. It may be asked, Do we intend to include township and county organizations in the category with municipal and other corporations proper? The question is not involved in the present case, and so is not properly before us; but if it were, I apprehend the answer to it would readily be found in the case of the Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109, where it is held that a county is not properly a corporation, but that "it is at most but a local organization, which, for purposes of civil administration, is invested with a few functions characteristic of a corporate existence."

In the case cited, Board of Commissioners of Hamilton County v. Mighels, 7 Ohio State, 110, the court dealt at length with the distinction between a municipal corporation and a county, but it will be observed that its reasoning applies just as cogently to a township. It said, at page 118:

"For the purpose of maintaining this action, an effort has been made in argument to assimilate counties to natural persons and municipal and other corporations proper. Now it is conceded, that if the negligence, and consequent injury to the plaintiff below, had been the act of a natural person in the construction of a private building, to which the plaintiff below had been invited, the party guilty of the negligence would properly be liable in damages. So also, it now seems to be well settled, that had the defendants below been the agents of a municipal or other corporation proper, and had the plaintiff below been injured through like negligence and under like circumstances, the corporation might be held to answer for the injury. And why? Because where there is a wrong there ought to be a remedy; persons, whether natural or artificial, are bound so to use their own property and conduct their own affairs as not to injure others; and where an act is done to the injury of another by a natural person in the pursuit of his own interests, or, through its agents, by an artificial person, a corporation proper, which is called into existence, either at the direct solicitation or by the free consent of the persons composing it, for the promotion of their own local and private advantage and convenience, and which can work only through agents, such natural or artificial person is, on every principle of justice and enlightened reason, bound to rectify the consequences of his own misfeasance. And it is freely admitted that if counties are in all material respects like municipal corporations proper, and may be fairly classed with them, then this action ought to be maintained. But how is the fact? This question is vital, and on its solution the case must depend.

"As before remarked, 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.

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy."

And at pages 119-120:

"But, it is said, the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the agents of the county, for whose torts in the performance of official duties the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasances in office of the sheriff, or for the official defalcations of the county treasurer? This will not be pretended. And yet, if this case is to rest on the principles governing the relation of principal and agent, wherein is the distinction between the case at bar and the case supposed? We confess our inability to discover any such distinction. In the case of municipal corporations proper, the electors are, mediately or immediately, invested with very ample control over their agents, not only as to what shall be done, but how it shall be done, and by whom it shall be done; they may exact such guarantees as they deem proper for their own indemnity, and may prescribe by-laws for their government. As between the commissioner and the electors of a county all this is wanting. All his powers and duties are prescribed by the supreme Legislature; and the electors can exercise no control over him whatsoever, except such as springs from the bare fact of election; and to this extent they can control a sheriff or treasurer as well as a commissioner."

In State v. Powers, 38 Ohio State, 54, the court said at page 62:

"On the other hand, school districts are constituted so as to partake rather of the character of counties and townships, which

> are provided for in the 10th article of the constitution, not as corporations, but as mere subdivisions of the state for political purposes, as mere agencies of the state in the administration of public laws."

This case was later overruled, but on other principles of law enunciated therein. I am of the opinion that the amendments to Article X, Ohio Constitution, since the decision in State v. Powers, *supra,* are not such as to alter the proposition.

Again, in Hunter v. Commissioners of Mercer County, 10 Ohio State, 516, the Court said at page 520:

> "The county is not a corporation, but a mere political organization of certain of the territory within the state, particularly defined by geographical limits, for the more convenient administration of the laws and police power of the state, and for the convenience of the inhabitants. Such organization is invested with certain powers delegated to it by the state for the purposes of civil administration; and for the same purpose it is clothed with many characteristics of a body corporate. A county may not improperly be called a quasi corporation, for it is in many respects like a corporation. But a county can neither sue nor be sued, except by express power conferred by statute, and in the manner so expressed. Nor can any of the officers of a county, by virtue of such office, sue or be sued, except as provided by statute."

By these cases and others I think it is well settled that counties and townships are not corporations but act only as agents of the state; and the doctrine of proprietary and governmental functions applies only to corporations. The principal case on the doctrine is Wooster v. Arbenz, 116 Ohio State, 281. A reading of that case will show that the terms "Corporation" and "Municipal corporation" are repeatedly used. The first case applying the doctrine in Ohio is Western College v. City of Cleveland, 12 Ohio State, 375, and at page 377, the doctrine is definitely stated:

> "It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state—discharging duties incumbent on the state; as to the second, the municipal

> corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

That a corporation might be liable for torts at all was first enunciated for this state in Goodloe v. City of Cincinnati, 4 Ohio Reports, 500. The ruling was simply that corporations are so liable, not distinguishing municipal from private corporations. See also Rhodes v. City of Cleveland, 10 Ohio Reports, 160, in which it was said, reading the syllabus:

> "Corporations are liable like individuals for injuries done, although the act was not beyond their lawful powers."

The decision in Rhodes v. City of Cleveland, *supra,* was approved and followed in a number of cases, including City of Mansfield v. Balliett, 65 Ohio St., 451.

In sum, municipal and private corporations were at a very early time held not liable for any of their acts done within their corporate powers. Then, beginning with the Goodloe case they were held liable for all their torts. The doctrine of governmental and proprietary functions recognized that with regard to some functions municipal corporations act as agents of the sovereign state, and when they do they partake of sovereignty and sovereign immunity. The purpose of the doctrine is to distinguish those functions where the municipal corporation does partake of sovereignty from those where it does not. But counties and townships have never been regarded otherwise than as agents of the state. There has never been any confusion between their governmental and corporate functions, for they are not corporations and are regarded as having governmental functions only. Therefore the doctrine of governmental and proprietary functions does not apply to them.

It follows, then, that if a township is under any liability for negligence that liability must be statutory in origin. Section 5571.10, Revised Code, reads:

> "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 such board in the discharge of its official duties."

In Opinion No. 2498, Opinions of the Attorney General for 1950, page 730, the Attorney General said of the then Section 3298-17, General Code, that the liability it creates extends only to the subject matter of the act of which it was a part. The act in question deals only with the improvement of township roads. See 106 Ohio Laws, 574, 647. See also Ray v. Board of Trustees of Trenton Township, 49 Ohio App., 172, at page 174, and 39 Ohio Jurisprudence, 338.

As to a board of township memorial trustees there might, at first impression, seem to be some reason to apply the doctrine of governmental and proprietary functions to them. They, like municipal corporations, are created by the voters of a locality acting under permissive legislation, and the purpose of their functions would appear to be the benefits of the locality and not of the state as a whole. Nevertheless such boards are not corporations, their powers are very strictly limited and they do not in many important respects possess the attributes of corporations. The sovereign state has adopted the policy of permitting the erection of veterans' memorials, to be constructed at public expense, and the construction of such memorials appears to be a public policy of the state. The fact that such construction is permissive rather than mandatory does not render the boards created to hold and maintain such memorials any less the agents of the state.

In Opinion No. 2498, *supra,* it was said, reading the first paragraph of the syllabus:

> "Liability insurance may be purchased by the township trustees only where there is a statutory liability to be insured against."

Since I am of the opinion that neither the board of township trustees nor the board of township memorial trustees is liable for negligence, it follows that no liability insurance may be purchased.

I think it appropriate to add here, however, that the statute imposes certain limitations on the uses to which buildings of the sort here involved may be put. In Section 511.16, Revised Code, it is provided in pertinent part:

> " * * * The board of permanent memorial trustees may permit the occupancy and use of the memorial building or any part thereof, upon such terms as it deems proper."

Section 511.17, Revised Code, reads:

> "Under such reasonable rules and regulations as the board of permanent memorial trustees prescribes, the memorial building

constructed under section 511.08 of the Revised Code shall be open and free for use as a meeting place by all organizations and allied organizations of present and former soldiers, sailors, and marines."

Section 511.17 limits the discretion granted in the quoted portion of Section 511.16. The board may not permit the use or occupancy of the memorial building in such a way as to interfere with the use of the building as a meeting place for the organizations mentioned. In your letter of request you state that the hall is being used by community, civic, and patriotic groups. I think that such use is clearly consistent with the authorized purposes of the building as set forth in the quoted statutory provisions and that the board of memorial trustees in renting the building for such use acts within its delegated power and as an agent of the state.

If, however, the building were used in whole or in part by a private business for profit a different question would arise. The law of such a case is not settled, but I call your attention to the case of Dean v. Trustees, 65 Ohio App., 362, which suggests that liability might attach. Since your building apparently is not being used for private profit-making purposes of the sort or to the extent involved in the Dean case it is not necessary here to consider that aspect of the question.

Therefore, I am of the opinion, and you are advised, that a board of township trustees or a board of township memorial trustees is not liable for negligence in the operation and maintenance of a township memorial building and has no authority to insure against such liability.

Respectfully,
WILLIAM SAXBE
Attorney General