2406

1. INSURANCE, PUBLIC LIABILITY—COUNTY COMMISSIONERS—NOT AUTHORIZED TO PURCHASE IN ABSENCE OF STATUTE—TORT LIABILITY—COUNTY OR OFFICIALS.

2. COMMISSIONERS MAY LAWFULLY PAY PREMIUM ON POLICY OF PUBLIC LIABILITY INSURANCE—SECTION 2408 GC IMPOSES LIABILITY UPON COMMISSIONERS FOR DAMAGES, NEGLIGENCE, NOT KEEPING ROAD OR BRIDGE IN PROPER REPAIR.

3. COMMISSIONERS MAY NOT PAY PREMIUM ON POLICY OF PUBLIC LIABILITY INSURANCE COVERING COUNTY OWNED BUILDING—PARTLY OCCUPIED BY COUNTY AGRICULTURAL AGENT AND VARIOUS FEDERAL AND STATE AGENCIES—NO STATUTE TO IMPOSE TORT LIABILITY UPON COMMISSIONERS FOR NEGLIGENT MAINTENANCE, COUNTY BUILDINGS.

SYLLABUS:

1. County commissioners are not authorized to purchase public liability insurance in the absence of a statute imposing tort liability upon the county or its officials.

2. Inasmuch as Section 2408, General Code, imposes liability upon county commissioners for damages resulting from negligence in not keeping a road or bridge in proper repair, the commissioners may lawfully pay the premium on a policy of public liability insurance covering the same.

3. County commissioners may not pay the premium on a policy of public liability insurance covering a county-owned building occupied partly by a county agricultural agent and various federal and state agencies, since there is no statute imposing tort liability upon county commissioners for the negligent maintenance of county buildings.

Columbus, Ohio, March 24, 1953

Hon. Ray Bradford, Prosecuting Attorney
Clermont County, Batavia, Ohio

Dear Sir:

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

"Your opinion is respectfully requested on questions involving the liability of the counties of the State of Ohio, under Section 2408 of the Ohio General Code.

"1. Under Section 2408 of the General Code of Ohio, the county, in certain situations is liable for negligence in maintenance of roads and bridges.

"Question: Can the Board of County Commissioners contract for and cause to be paid the premium on a policy of insurance, issued by an insurance company, covering liability, under Section 2408, General Code of Ohio?

"2. Counties generally are not liable for negligence in maintenance of county public buildings, such as the court house and county homes. It is not clear from existing cases whether that liability exemption extends to other property owned by a county.

"Question: Can the Board of County Commissioners contract for and cause to be paid the premiums on a policy of insurance, issued by an insurance company, covering general public liability, on a building owned by the county, part of which is used for office space by the county agricultural agent, and the balance of which is leased or rented to various offices of State and Federal Government bureaus and agencies, the entire building being generally open to the public?

Section 2408, General Code, reads 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 treasury of the county, and the board shall take the treasurer's receipt therefor and file it with the county auditor."

Under this statute a recovery against the county commissioners in their official capacity is permitted if a plaintiff received an injury proximately resulting from carelessness or negligence in failing to keep a road or bridge in proper repair.

I direct your attention to the following language in Opinion No. 2995, Opinions of the Attorney General for 1931, page 303:

"It has been the consistent holding of this office that the premium on public liability insurance may lawfully be paid from

public funds if there is a real liability to be insured against, but if not, it is a sheer waste of public funds to pay such premiums and it is unlawful to expend those funds for the payment of premiums on insurance against a liability that does not in fact exist."

The opinion referred to held that 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 are being operated in furtherance of the official duties of said trustees.

This office has rendered a number of opinions over the past twenty-five years dealing with the problem of county, township and municipal officials purchasing public liability insurance. A brief review of these opinions would serve well to point up the law herein involved.

In Opinion No. 494, Opinions of the Attorney General for 1927, page 814, it was held that county commissioners were unauthorized to pay insurance premiums covering injury to persons caused by the negligent operation of county-owned motor vehicles. At page 817 of the opinions, reference was made to the fact that liability has been imposed upon county commissioners by Section 2408, General Code, for negligent upkeep of roads and bridges. After making this observation the then Attorney General states:

"I find no statute, however, which permits recovery of damages from a county for an injury to persons or property caused by the negligence of an agent or servant in the county in the operation of county owned motor vehicles."

In Opinion No. 5949, Opinions of the Attorney General for 1943, at page 182, I find the following language:

"As is suggested in the letter, *the real question for determination is whether the board of county commissioners would be liable for damages* and injuries sustained by persons attending the various events which are performed in the Memorial Building. This question, I believe must be answered in the negative." (Emphasis added.)

Opinion No. 480, Opinions of the Attorney General for 1945, page 607, was concerned with the question of whether township trustees had

legal authority to spend public funds in procuring insurance protecting the township from liability for damages by reason of the death of or injury to a fireman in the employ of such township. I direct your attention to the following language at page 611:

> "I think it proper to say that there appears to be no risk of liability falling upon the township trustees in the case you present, against which any insurance could lawfully be taken."

In Opinion No. 4122, Opinions of the Attorney General for 1948, page 563, it was held that the trustees of a municipal library have authority to procure liability insurance against possible liability created by Section 3714-1, General Code, for injury or loss to persons or property growing out of the operation of a bookmobile or other vehicle used on the public highways of the state. The statute referred to imposes liability upon the city for the negligence of its agents, except policemen and firemen in certain instances, in the operation of vehicles. The same opinion held that no liability attaches to boards of trustees of county, township, public school or county district libraries or to the political subdivisions which create and support them for damages to persons or property, growing out of the operation of bookmobiles, and accordingly, said boards of trustees are without authority to procure liability insurance.

The distinction made between the case of municipal library trustees and township library trustees was that in the case of the former, a statutory liability existed, and hence the Attorney General found authorization to protect against the liability by procuring liability insurance; but in the case of township library trustees there was no statutory liability, and hence by enjoying the common law tort immunity accorded public officers, no authorization was found to purchase liability insurance.

Opinion No. 412, Opinions of the Attorney General for 1949, page 152, held that township trustees have no authority to pay premiums on a liability insurance policy covering a town hall and surrounding property. The following statement appears on page 152:

> "The fundamental question becomes '*is there a liability or possibility of liability* attaching under the law to townships or township trustees in connection with the ownership of a town hall and surrounding property?' " (Emphasis added.)

The most recent opinion on the general subject is Opinion No. 803,

Opinions of the Attorney General for 1951, page 563, the third and fourth paragraphs of the syllabus reading as follows:

> "3. By virtue of Section 3714, General Code, a municipality may incur liability to one who suffers injury while using its parks or playgrounds, where such injury is caused by a nuisance created or permitted to exist by the municipality or its employees.
>
> "4. A municipality has authority to purchase insurance to protect itself against such liability, and may pay for the same out of public recreation funds."

It would appear, therefore, that the basic proposition is that where tort liability may be asserted against a county or township because of negligence, the county commissioners or the township trustees, as the case may be, may legally expend public funds for the payment of liability insurance premiums to an insurance company insuring the political unit against tort liability.

Inasmuch as the board of county commissioners are liable in their official capacity for the failure to keep roads and bridges established by the county in proper repair, I am compelled to advise that they may lawfully contract for and cause to be paid the premiums on policies of public liability insurance covering such roads and bridges.

Your second question concerns the contracting for public liability insurance on a county owned building, part of which serves as the office of the county agricultural agent, and the balance of which is leased to various state and federal government agencies.

The basic question involved in your request is whether tort liability may be asserted against a county because of negligence in the maintenance or operation of such a building.

At common law neither counties nor county commissioners are liable for negligence. It follows, therefore, that liability, if any, must be imposed by statute. 11 Ohio Jurisprudence, 536; Weiher v. Phillips, et al., 103 Ohio St., 249. I find no statute which would impose liability upon county commissioners for negligent maintenance or operation of a building housing offices such as you describe.

With the enactment of Section 9921-1a, General Code, in 1929, the legislature provided for the employment by trustees of Ohio State University of "county extension agents, including agricultural agents * * *

and such other employees as said trustees may deem necessary * * * and provide for the payment of their reasonable compensation and expenses incurred in the discharge of their duties, including the maintenance of proper offices and equipment and supplies therefor, from said agricultural extension fund." The duties of county extension agents, and hence of agricultural agents, etc., are to render educational service to the farmers concerning marketing, distribution and utilization of farm products. The agricultural extension fund is comprised of funds from federal, state and county treasuries. It would appear that a county extension agent or an agricultural agent is engaged in a governmental function of great public concern to the county and its inhabitants.

It is difficult to determine in what manner the county commissioners' common law exemption from tort liability is affected by the fact that federal and state bureaus and agencies rent a portion of the space in a county owned building. For injuries sustained by the public while upon leased premises, liability, if any, would rest upon the tenant. This general rule is laid down in the case of Burdick v. Cheadle, 26 Ohio St., 393.

In specific answer to your questions, it is my opinion that:

1. County commissioners are not authorized to purchase public liability insurance in the absence of a statute imposing tort liability upon the county or its officials.

2. Inasmuch as Section 2408, General Code, imposes liability upon county commissioners for damages resulting from negligence in not keeping a road or bridge in proper repair, the commissioners may lawfully pay the premium on a policy of public liability insurance covering the same.

3. County commissioners may not pay the premium on a policy of public liability insurance covering a county-owned building occupied partly by a county agricultural agent and various federal and state agencies, since there is no statute imposing tort liability upon county commissioners for the negligent maintenance of county buildings.

Respectfully,

C. William O'Neill
Attorney General