

bonds issued under these proceedings constitute valid and legal obligations of said special school district.

In printing the bonds we suggest that the following paragraph be inserted immediately preceding the signature paragraph, viz: The said Rome Rural School District is sometimes referred to as Rome Rural Special School District.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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893.

TOWNSHIP TRUSTEES — HAVE CONTROL OF TOWNSHIP ROADS WITHIN TOWNSHIP—WITHIN SOUND DISCRETION TO KEEP ROADS IN REPAIR AND SAFE FOR TRAVEL—BOARD LIABLE FOR NEGLIGENCE IN FAILURE TO DISCHARGE DUTY IF ANY ONE DAMAGED — PROXIMATE CAUSE—SECTION 3298-17 G. C.

*SYLLABUS:*

1. *Township trustees have control of the township roads within their township.*
2. *In connection therewith, a board of township trustees may in the exercise of its sound discretion take whatever action it deems proper to keep such township roads in repair and safe for public travel.*
3. *If through negligence or carelessness a board of township trustees fails to discharge its duty to keep a township road in repair and safe for travel, under the provisions of section 3298-17, General Code, such board is liable in its official capacity to anyone proximately damaged thereby.*

COLUMBUS, OHIO, July 18, 1939.

HON. JOHN B. MEISTER, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion on the following:

“The Township Trustees of Franklin Township, Fulton County, Ohio, have charge of an improved road in a flooded district flooded by Bean Creek. The road was lowered by the county and township several years ago, and covered with concrete pavement so the flood waters would go over the top of the road.

The trustees would like your opinion as to what they ought to do when the water covers the road in order to avoid liability,

whether they are under a duty to shut off the road or to place lights there. A short time ago a party drove an automobile down this road and the water came up to the radiator, and he is claiming damage. About sixty rods of the road is thus covered with water.

The trustees also say that they have some other unimproved roads which are partly flooded, and they would like to know if they have authority to close them. The trustees will put up lights or gates if that is what they are supposed to do. I have been unable to find an answer to this question in our laws. The trustees also say that they do not want to set a precedent of paying damages in this particular case if they are not legally liable."

In order to afford a proper answer to your inquiry, it will be well at the outset to direct your attention to the following pertinent sections of the General Code of Ohio relative to township roads and the duties of township trustees with respect thereto.

The public highways of Ohio are classified and defined by section 7464, General Code, which provides as follows:

"The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include the roads and highways on the state highway system.

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under G. C. Sections 6965, 6966, 6967 and 6968, which shall be known as the county highway system, and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

Section 7567, General Code, provides:

"The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township

may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county or township or any two or more of them may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto."

Section 3370, General Code, reads in part as follows:

"The township trustees shall have control of the township roads of their township and shall keep the same in good repair. The township trustees may, with the approval of the county commissioners or state highway commissioner, as the case may be, maintain or repair a county road or inter-county highway or main market road within the limits of their township."

A cursory examination of the above quoted statutes readily reveals that the Legislature has given township trustees control of the township roads within their township and has charged them with the positive duty of maintaining, repairing and keeping same safe for public travel. It will be noted the statutes make no distinction between improved and unimproved roads, and it would therefore follow that the duties of the township trustees are the same as to each.

You state in your letter that, by reason of the sections above quoted, the trustees of Franklin Township have charge of a certain improved road and some unimproved roads which, at numerous times, are partly flooded by adjoining creeks. From your letter it appears that whenever the creeks in question overflow, the roads above referred to become impassable and unsafe for public travel. In view of these conditions, you seek my opinion concerning the duties of the township trustees in connection with those roads, specifically inquiring whether the trustees should close them to travel or merely erect lights to warn travelers of their dangerous condition. As stated above, the duty to keep open township roads rests with the township trustees, and I am of the view that under the circumstances of the instant case, the township trustees must take some action to clear the flooded roads and during such time must afford some type of warning to travelers of the impending danger. The proper course to pursue, however, depends upon the condition of each road and cannot, therefore, be answered categorically by me. Such course must be determined by the township trustees in the exercise of their sound discretion. However, I might add that, in my opinion, it is within the authority of the township trustees to close any township road whenever the impassable

condition of such road warrants such action as a proper means of protecting the traveling public.

Turning now to your question relative to the liability of the township trustees in connection with their control and management of township roads, I direct your attention to section 3298-17, General Code, which provides 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.”

Under the provisions of that section the township trustees are liable in their official capacity for damages resulting from their negligence or carelessness in the discharge of their official duties. As set forth above, the official duties of the board of township trustees include the control, maintenance and repair of township roads. In view of the above quoted section, it follows that such board would be liable for damages resulting from its negligence or its carelessness in the performance of such duties.

In the case of *Gause v. Pealer*, 41 O. App., 192, the Fifth District Court of Appeals, considered the question of the liability of township trustees for failure to perform their duty to keep township roads in repair. The syllabus in that case reads as follows:

“Township trustees, being charged with the duty of keeping township roads in repair, are liable in damages for failure to perform this duty.”

In the course of the opinion in that case, at page 195, Sherrick, P. J., made the following observations:

“Having seen that the trustees are charged with the duty of keeping the township roads in repair, it seems clear to us by the last-quoted section (3298-17) that it is provided that they shall be liable in damages for a failure to perform any such duty as is created and imposed by section 3370, G. C.

From these sections of the Code it appears to us that it was the intention of the Legislature of this state to provide a means whereby township roads might be repaired and maintained, and that the Legislature, to accomplish the contemplated end, imposed certain duties upon township trustees in reference thereto; and it was further provided that the traveling public had certain rights in the use of township roads, and that, in the event the trustees failed to perform the duties imposed upon them by statute, the trustees in their official capacity should be liable for

injuries sustained by the public in the use of these roads when the same are not kept in proper repair and safe for travel.” (Figures in parenthesis the writer’s.)

Thus in the case presented in your letter, if the driver of the automobile which was damaged on the flooded road can show that he was not negligent and, further, that such damage was caused by reason of the negligence or carelessness of the board of township trustees, in failing to take some action with respect to that road, then such board must answer to him in damages under the express provisions of section 3298-17, *supra*. However, it appears that the driver in question would encounter some difficulty when attempting to show a lack of negligence on his part, in view of section 12603, General Code, which provides in part that “no person shall drive any motor vehicle in and upon any public highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.” Whether or not said driver operated the automobile in a negligent manner or was guilty of contributory negligence is not a question of law; on the contrary it is one of fact which must be determined upon consideration of all circumstances surrounding the particular case.

In view of the foregoing, I am therefore of the opinion that :

1. Township trustees have control of the township roads within their township.
2. In connection therewith, a board of township trustees may in the exercise of its sound discretion take whatever action it deems proper to keep such township roads in repair and safe for public travel.
3. If through negligence or carelessness a board of township trustees fails to discharge its duty to keep a township road in repair and safe for travel, under the provisions of section 3298-17, *supra*, such board is liable in its official capacity to anyone proximately damaged thereby.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*