

Note from the Attorney General's Office:

1972 Op. Att'y Gen. No. 72-007 was questioned
by 1987 Op. Att'y Gen. No. 1987-082.

OPINION NO. 72-007

Syllabus:

1. Persons who volunteer to provide transportation in their own vehicles for children under the custody of a county children services board in making necessary trips to doctors, hospitals, and other activities in which the board is engaged in respect to such children, and who are to be paid on a mileage basis, are potentially liable both to the children whom they are transporting and to other persons in the event of injuries resulting from the negligence of such volunteer drivers.

2. Although the volunteer drivers are agents of the children services board, the board itself cannot be held liable for the negligence of said drivers.

3. A board of county commissioners may properly expend public monies to purchase liability insurance to protect the volunteer drivers; but it may not purchase liability insurance to cover the county children services board itself.

To: James R. Scott, Guernsey County Pros. Atty., Cambridge, Ohio
By: William J. Brown, Attorney General, January 27, 1972

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

"The Guernsey County Children Services Board is planning to use volunteer drivers to provide transportation in their own vehicles for children

under the custody of the Board in making necessary trips to doctors, hospitals, and other activities in which the Board is engaged in respect to such children. We would appreciate your opinion with regard to the following matters involved in this situation, to wit:

"1. Are the drivers of such vehicles (who are to be paid on a mileage basis) potentially liable to either the children whom they are transporting or to other persons in the event such volunteer drivers are negligent in the operation of their respective motor vehicles and injuries result from an accident?

"2. By reason of the apparent agency relationship between the Board and the volunteer drivers, can the Board be held liable for the negligence of said drivers in operating their motor vehicles for such purposes in transporting these children?

"3. Can the Board properly expend the public monies to purchase liability insurance to protect both the Board and the volunteer drivers against such potential liability, if any, resulting from the negligent operation of these vehicles by the volunteer drivers."

1. Although it is contemplated that the volunteers will use their own cars and do the driving themselves, other aspects of the plan make it quite clear that the drivers will be acting as agents of the Board. The children, whom they are to transport, will be assigned to them by the Board; their destination and the time to be spent in the trip will depend upon the Board; and the drivers are to be paid by the Board on a mileage basis. Whether they are agents of the Board or not, the drivers are liable for any negligence resulting in injuries, either to the children being transported or to other persons. In Richards v. Stratton, 112 Ohio St. 476, 480 (1925), the Supreme Court said:

"* * * An agent is bound in the performance of his duty to recognize and respect the rights and privileges of others, and failing to do so, either negligently or intentionally, thereby causing an injury to another, is liable to him for the damages sustained, and the fact that the injury occurred while in the performance of his agency would constitute no defense, although in some cases it may appear that the principal is liable also. * * *"

The Board's own governmental immunity from suit affords no protection to those who are its mere agents. Opinion No. 3789, Opinions of the Attorney General for 1941; 2 O. Jur. 2d, 210; 44 O. Jur. 2d, Public Officers, §§ 78, 81-82. Furthermore, the limitation of drivers' liability provided by the Ohio Guest Statute, Section 4515.02, Revised Code, would have no application to the children here since the drivers are to be paid on a mileage basis. Sprenger v. Braker, 71 Ohio App. 349 (1942).

2. Your second question asks whether, because of the relationship between the Board and the volunteer drivers, the Board may be held liable for the negligence of the drivers. The answer is that the Board shares in the State's own governmental immunity from suit.

In Opinion No. 3789, *supra*, my predecessor held that the Ohio State Archaeological and Historical Society, although acting as an agent of the State, was not entitled to governmental immunity from suit because it had been brought into existence by private incorporators and still had an existence separate and distinct from the State itself. But 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.

It has, of course, always been the rule in Ohio that the State cannot be sued without its consent. A recent contrary opinion by a court of appeals (*Krause v. State*, 28 Ohio App. 2d 1) is presently pending in the Supreme Court, but I am bound by that Court's consistent line of opinions upholding the rule. *Hack v. Salem*, 174 Ohio St. 383 (1963); *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*, 140 Ohio St. 54 (1944); *Raudabaugh v. State*, 96 Ohio St. 513 (1917). See also *Carolyn v. Youngstown State Univ.*, No. 70-609, Ohio Supreme Court, dismissed as improvidently granted, May 26, 1971, appeal dismissed by the United States Supreme Court, January 11, 1972. This immunity from suit extends to political subdivisions and administrative agencies of the State as well as to the State itself. *Wolfv. Ohio State University Hospital, supra* *Board of County Commissioners v. Gates*, 83 Ohio St. 19 (1910). And in *Schaffer v. Board of Trustees*, 171 Ohio St. 228 (1960), involving the board of trustees of a veterans memorial who had been appointed by the county commissioners, the Supreme Court said:

"In the absence of statutory authorization, therefor, a county or its agencies are immune from suit for negligence." (Emphasis added.)

Since there appears to be no such statutory authorization for suit against the Board, I conclude that it cannot be held liable for injuries caused by negligence of the volunteer drivers.

3. Your final question asks whether the Board may purchase liability insurance to protect both the Board and the volunteer drivers from any liability arising from injuries caused by negligence on the part of the drivers.

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. Opinion No. 71-034, Opinions of the Attorney General for 1971; Opinion No. 71-028, *ibid.*; Opinion No. 3138, Opinions of the Attorney General for 1962; Opinion No. 7245, Opinions of the Attorney General for 1956; Opinion No. 1214, Opinions of the Attorney General for 1952; Opinion No. 2498, Opinions of the Attorney General for 1950; Opinion No. 2128, Opinions of the Attorney General for 1947; and Opinion No. 5949, Opinions of the Attorney General for 1943.

The State and its political subdivisions may, however, under authority of legislation enacted in 1957, procure liability insur-

ance policies to protect individuals employed by them while operating motor vehicles. Section 9.93, Revised Code, reads as follows:

"The state and any political subdivision may procure a policy or policies of insurance insuring its officers and employees against liability on account of damage or injury to persons and property, including liability on, account of death or accident by wrongful act, occasioned by the operation of a motor vehicle, motor vehicles with auxiliary equipment, or all self-propelling equipment or trailers owned or operated by the state or a political subdivision, while said vehicle is being used or operated in the course of the business of the state or the political subdivision."

The board of county commissioners is also authorized to procure policies of insurance for motor vehicles owned or operated by the county. Section 307.44, Revised Code, states in part as follows:

"The board of county commissioners may procure policies of insurance insuring officers and employees of the county against liability on account of damage or injury to persons and property, including liability on account of death by wrongful act, occasioned by the operation of a motor vehicle, motor vehicles with auxiliary equipment, or all self-propelling equipment or trailers owned or operated by the county. * * *"

Under Section 9.83, *supra*, the motor vehicles spoken of are those "owned or operated" by the State or a subdivision. The General Assembly must be deemed to have chosen the words "or operated" instead of "and operated" in order to include employees who use personal automobiles in their work. In discussing a similar question, one of my predecessors said, in Opinion No. 67-007, Opinions of the Attorney General for 1967, as follows:

"Since your question pertains to the personal automobile of the volunteer fireman, and Section 9.83, *supra*, seems to restrict automobile liability insurance coverage to autos 'owned or operated by the state or political subdivision,' we must further consider Opinion No. 1535, Opinions of the Attorney General for 1960, page 481. Such opinion deals with the question of when motor vehicles are 'operated' by a public agency and holds that such public agency (specifically a public library) is the operator of an auto--although such auto is privately owned by an employee--whenever the auto is being driven 'in behalf of' the agency. See also Pappas v. Jeffery Manufacturing Co., 139 Ohio St. 637. The purchase of liability insurance is authorized in such a situation.

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* * * The language of Section 9.83, *supra*, does not permit insuring a fireman's return from a fire 'to wherever he might desire to go.' It expressly limits insurance coverage to the 'course

of the business' of the state or the political subdivision. * * *

See also Opinion No. 1535, Opinions of the Attorney General for 1960.

Since the board of county commissioners has specific authority to purchase insurance (Section 307.44, *supra*), and the Children Services Board does not (Section 5153.16, Revised Code), the policy should be purchased by the county commissioners. I conclude, therefore, that the board of county commissioners may purchase liability insurance to cover employees such as volunteer drivers in the operation of their personal automobiles, where such operation is in behalf of children who are under the jurisdiction of the Children Services Board, and where the drivers are paid on a mileage basis by the Board.

In specific answer to your questions it is, therefore, my opinion, and you are so advised, that:

1. Persons who volunteer to provide transportation in their own vehicles for children under the custody of a county children services board in making necessary trips to doctors, hospitals, and other activities in which the board is engaged in respect to such children, and who are to be paid on a mileage basis, are potentially liable both to the children whom they are transporting and to other persons in the event of injuries resulting from the negligence of such volunteer drivers.

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