

OPINION NO. 70-077

Syllabus:

County recorders and common pleas court clerks and their deputies are liable, both personally and on their bonds, to the persons who may have been injured through their negligent errors and omissions, including those arising from indexing and filing of papers within their respective offices. The principle of sovereign immunity does not apply to protect public officers and their deputies from personal liability in the performance of ministerial duties.

To: E. Raymond Morehart, Fairfield County Pros. Atty., Lancaster, Ohio
By: Paul W. Brown, Attorney General, July 3, 1970

I have your request for my opinion upon the liability of a county recorder and county clerk and their deputies for errors and omissions in indexing, recording and filing papers within the offices mentioned. The question arises in connection with authorization to county commissioners to procure insurance covering the county recorder and clerk of the common pleas court and their deputies for errors and omissions provided by recent legislation. Section 307.441, Revised Code, reads as follows:

"The board of county commissioners, of each county, may procure a policy or policies of insurance insuring the county recorder and the clerk of the court of common pleas and their deputies against liability on account of errors or omissions unknowingly made by them and for which they may be held liable.

"The policy or policies of insurance shall be in an amount of not less than fifty thousand dollars."

Your letter advises the belief of your county recorder that the sovereign immunity of the state and its subdivisions would protect these county officers from liability to lawsuit, citing Ohio Jurisprudence. It may well be that the principle of sovereign immunity would protect the county itself for failure of these officers to properly carry out the functions of their offices, but it does not serve to protect the officers themselves (or their bonds) from personal liability. Let me quote from this same chapter in 44 O. Jur. 2d, page 373, Public Officers, Section 81, as follows:

"It has been broadly stated that a public officer is liable to an individual injured for a violation or neglect of duty.

* * * Furthermore, it is, as a general rule, only against ministerial officers that an action will lie for neglect of official duty * * *."

It must be pointed out in this connection that the indexing and filing duties of the county recorder and clerk of the common pleas court are ministerial as distinguished from discretionary or quasi-judicial duties. 45 Am. Jur. 533, dealing with the subject of "Recording Officer," Section 180, reads as follows:

"Recorders are ministerial officers on the faithful performance of whose duties the validity of transfers of land especially depends, and they, and the sureties on their official bonds, are generally held to strict accountability for their acts and omissions in the performance of their official duties. They must respond in damages to any person who has been injured as the proximate result of their negligence in respect of records of title."

There is very little in the way of Ohio case law on this subject. The syllabus in the case of Green v. Garrington, 16 Ohio St. 549, (1866) reads as follows:

"An index to the record of a conveyance is not necessary to make the record effective as constructive notice to a subsequent purchaser; and where such purchaser has been misled, to his injury, by the neglect of the recorder to make such an index, his remedy is against the recorder." (Emphasis added.)

The liability of the county recorder on his bond is set forth in Section 317.33, Revised Code, as follows:

"If a county recorder refuses to receive a deed or other instrument of writing presented to him for record, the legal fee for recording it being paid or tendered; or refuses to give a receipt therefor, when required; or fails to number consecutively all deeds or other instruments of writing upon receipt thereof; or fails to index a deed or other instrument of writing, by the morning of the day next after it is filed for record; or neglects, without good excuse to record a deed or other instrument of writing within twenty days after it is received for record; or demands and receives a greater fee for his services than that allowed by law; or knowingly endorses on a deed or other instrument of writing a dif-

ferent date from that on which it was presented for record, or a different date from that on which it was recorded; or refuses to make out and certify a copy of any record in his office, when demanded, his legal fee therefor being paid or tendered; or purposely destroys, defaces, or injures any book, record, or seal belonging to his office, or any deed or other instrument of writing deposited therein for record, or negligently suffers it to be destroyed, defaced, or injured; or does or omits any other act contrary to sections 317.01 to 317.33, inclusive of the Revised Code he shall be liable to a suit on his bond, at the instance and for the use of the party injured by such improper conduct." (Emphasis added.)

Section 317.05, Revised Code, provides that the county recorder and his sureties are responsible for the neglect of duty or misconduct in office of deputy county recorders.

The general rule that public officers should be made to answer in damages to all persons who may have been injured through their negligence or misconduct had been applied to the clerk of the court of common pleas. 15 Am. Jur. 532, Clerks of Court, Section 27, reads as follows:

"The principle that a public officer should be held to a faithful performance of his official duties and made to answer in damages to all persons who may have been injured through his malfeasance, omission, or neglect applies to the negligence, carelessness, or misconduct of a clerk of court. As a public ministerial officer, the clerk is answerable for any act of negligence or misconduct in office resulting in injury to the complaining party."

In the case of State v. Metzger, 10 N.P. (N.S.) 97 (1910), the court says at page 106:

"While, as a judge, he may not be called upon civilly to answer for an erroneous performance of duty, yet in his function as clerk he may be sued and recovery had from him. Fairchild v. Keith, 29 Ohio St. 156."

The clerk of common pleas court is required by statute to give a bond conditioned upon the faithful performance of his duties. Section 2303.02, Revised Code.

While the county recorder and the clerk of the common pleas

court are both required to give bond, the bonds are in addition to their primary responsibility and are taken only as added security for such causes of action as may arise against them for failure to perform their official duties. The surety is required to pay only up to the amount of the bond. The county recorder or common pleas court clerk must pay all amounts exceeding the amount paid by the surety. In addition, the surety has the right of subrogation against the principal for the amount paid, 44 O. Jur. 2d, 612.

Although I do not find specific authority confirming that the same rules of liability apply to their deputies as apply to the county recorder and the common pleas court clerk, I am of the opinion that the same reasoning and rules do apply to such deputies.

I am of the opinion, therefore, and you are so advised that county recorders and common pleas court clerks and their deputies are liable, both personally and on their bonds, to the persons who may have been injured through their negligent errors and omissions, including those arising from the indexing and filing of papers within their respective offices. The principle of sovereign immunity does not apply to protect public officers and their deputies from personal liability in the performance of ministerial duties.