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CORONER—ACTION BROUGHT AGAINST HIM FOR DAMAGES—ORDERED ALLEGED ILLEGAL AUTOPSY—DUTY OF PROSECUTING ATTORNEY TO EXAMINE FACTS AND CIRCUMSTANCES ON WHICH ACTION BASED—PERFORMANCE OF DUTIES—PROSECUTING ATTORNEY, FOLLOWING EVALUATION, AUTHORIZED TO DEFEND ACTION IF CORONER MADE WELL INTENTIONED ATTEMPT TO PERFORM OFFICIAL DUTY.

SYLLABUS:

In an action brought against a county coroner for damages for ordering an alleged illegal autopsy it is the duty of the prosecuting attorney to examine carefully all the facts and circumstances on which the action is based and to determine whether such facts and circumstances indicate a well intentioned attempt on the part of the defendant to perform duties attending his official position. If the prosecuting attorney, following such evaluation, concludes that there was such a well intentioned attempt to perform an official duty by the defendant he is then authorized to defend such action.

Columbus, Ohio, November 24, 1954

Hon. John D. Sears, Jr., Prosecuting Attorney
Crawford County, Bucyrus, Ohio

Dear Sir:

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

“When a civil action is brought by a widow against the county coroner for damages by reason of the coroner ordering an alleged illegal autopsy of her deceased husband, is it my duty as a county prosecutor of said county to represent the coroner in this law-suit?

“It is my feeling in this matter that since the coroner by Section 313.03 of the Revised Code is required to give bond signed by a bonding or surety company for the faithful performance of his duty of his office that it would be up to the bonding company to defend a lawsuit which alleges that the coroner performed an act outside of his authority.

“I realize that the county prosecutor is the legal representative of all the county offices but I didn't feel under these circum-

stances that the county prosecutor would be required to represent the coroner in this matter.”

Section 309.09, Revised Code, Section 2917, G. C. reads in material part as follows:

“The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, *and all other county officers* and boards * * * and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and *defend all suits and actions which any such officer or board directs* or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in Section 305.14 of the Revised Code. * * *” (Emphasis added.)

Without doubt a coroner is a “county officer.” Section 301.01, Revised Code, provides for the election of a coroner in each county. The coroner is required to take an oath and to give bond conditioned for the faithful performance of the duties of his office. Hence, the prosecuting attorney is the legal adviser of the county coroner. Your question concerns the duty, if any, of a county prosecutor to represent the county coroner in a civil action for damages brought against the coroner for ordering an alleged “illegal” autopsy of the plaintiff’s deceased husband.

Section 313.12, Revised Code, Section 2855-5, G. C. provides in substance that when a person dies as a result of criminal or other violent means, or by casualty, suicide, or in any suspicious or unusual manner, the physician called in attendance shall notify the office of the coroner of the known facts concerning the time, place, manner, and circumstances of such death.

Section 313.13, Revised Code, Section 2855 6, G. C. reads as follows:

“The coroner or deputy coroner may go to the dead body and take charge of it. *If, in the opinion of the coroner, or, in his absence, in the opinion of the deputy, an autopsy is necessary, such autopsy shall be performed* by the coroner, deputy coroner, or pathologists. A detailed description of the observations written during the progress of such autopsy, or as soon after such autopsy as reasonably possible, and the conclusions drawn therefrom shall be filed in the office of the coroner.” (Emphasis added.)

It is to be noted that the coroner has been given a rather broad discretion in the area of autopsies. The statute provides that if, in the coroner’s opinion an autopsy is necessary, the same shall be performed.

Whether or not an autopsy is illegally ordered by the coroner depends, of course, upon the circumstances surrounding the individual case. Where a coroner is confronted with a suit for damages arising out of an alleged illegal autopsy stemming from an order issued by him, almost assuredly his defense would revolve around a plea that he acted in good faith in his official capacity as coroner, and within the discretion lodged in him. The very issue to be decided is whether the coroner acted wholly outside of the scope of his authority, so that it could be said that he committed a purely personal tort.

While I realize that the coroner has been sued, or is about to be sued, as a *private individual* and in tort for damages, I do not consider that such a theory of the cause of action dictates an answer to your question to the effect that you therefore have *no* duty whatsoever to represent the coroner. Pursuant to Section 309.09, Revised Code, *supra*, a county prosecutor has the duty of defending all actions which a county officer directs, or to which the county officer is a party. In this connection I would call your attention to Opinion No. 1750, Opinions of the Attorney General for 1933, Vol. II, p. 1603, in which it was held that it is the duty of a prosecuting attorney to defend a county sheriff and deputy sheriff in actions brought against them for damages for false arrest if the facts and circumstances on which the actions are based show that the suits arise out of a well intended attempt on the part of such sheriff and deputy sheriff to perform duties attending their official positions.

The then attorney general relied in part upon the holding of a former attorney general, found in Annual Report of the Attorney General for 1912, Vol. II, page 1107, the syllabus of which reads:

“An assistant prosecutor employed by county commissioners to defend them in a suit against them for malicious prosecution, may be compensated from the county treasury if the suit arises out of a well intended attempt on the part of the commissioners to perform duties attending their official position.”

It would seem as though the conclusion reached in the opinions referred to, applies with equal force to the general situation you present. I would suppose that the coroner's defense to the suit will be that he acted in good faith and pursuant to the authority and discretion given him under the statutes.

If it reasonably appears to you, upon a preliminary examination into the facts and circumstances, that the coroner acted in good faith and out

of a well intended attempt to perform duties required of him by law, then and in that event, he is entitled to be represented by you.

In so advising you I do not intend to convey the impression that I consider it to be the duty of the prosecuting attorney to defend the county coroner in every suit brought against him. It is entirely possible, for example, that the circumstances might reveal that a coroner (or any other county officer, for that matter) committed a purely personal tort arising out of an act so totally unrelated to the officer's official duties that it could not reasonably be said to have been committed in the furtherance or performance of those official duties. Hence, were the coroner recklessly to drive his car into a person while on his way to the county morgue, it does not behoove you to feel compelled to defend him in a negligence suit arising therefrom. Public money is not to be expended for the purpose of compensating a prosecuting attorney for representing persons who happen to be public officers, in their individual and purely private actions.

It has been suggested that inasmuch as the coroner is bonded for the faithful discharge of his duties, it falls upon the *bonding company* to represent the coroner in a suit alleging the ordering of an illegal autopsy, and that therefore the prosecuting attorney is released from any duty he might otherwise be thought to have. I cannot accept this reasoning. The coroner is of course required by Section 313.03, Revised Code, to give a fidelity bond, the premium on which is paid from the county treasury. Yet the bonding company is not an insurer, for it merely assumes the liability of a surety who is *secondarily* liable upon an obligation. Thus, if the coroner himself cannot discharge the obligation, the surety becomes the party looked to for satisfaction. When the coroner is sued in tort, it does not necessarily follow that the surety will appear and defend him. It may be questioned further whether the benefit of the bond given to the county runs to an injured third party. However this may be, I am of the opinion that if the coroner is owed a defense by the prosecuting attorney, the prosecuting attorney should and must represent him, whether or not the bonding company has entered the litigation. It should also be borne in mind that county officers are forbidden by law from employing any other counsel at the expense of the county.

It will be noted that although the 1933 opinion, *supra*, refers to a "duty" to defend the officer there involved, such duty was conditioned upon an evaluation by the prosecuting attorney of the facts and circum-

stances on which the action was based and a conclusion that there was involved a well intended attempt to perform an official duty by the defendant. In other words, the "duty" exists only if the prosecuting attorney, following such evaluation, concludes that he has such a "duty."

It cannot be said, therefore, that there is ever found, in a case of this sort, a *duty* to defend as we normally understand that term. It would be more appropriate to say that the prosecuting attorney in such a case is under a duty to make a careful evaluation of such facts and circumstances and is then authorized to defend the officer concerned if such evaluation indicates that there is involved a well intentioned attempt to perform an official duty on the part of the defendant.

Accordingly, in specific answer to your inquiry it is my opinion that in an action brought against a county coroner for damages for ordering an alleged illegal autopsy it is the duty of the prosecuting attorney to examine carefully all the facts and circumstances on which the action is based and to determine whether such facts and circumstances indicate a well intentioned attempt on the part of the defendant to perform duties attending his official position. If the prosecuting attorney, following such evaluation, concludes that there was such a well intentioned attempt to perform an official duty by the defendant he is then authorized to defend such action.

Respectfully,
C. WILLIAM O'NEILL
Attorney General