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GOVERNMENTAL IMMUNITY—TORT LIABILITY—COUNTY  
—INSURANCE OF COUNTY EMPLOYEES DOES NOT CONSTI-  
TUTE WAIVER—LIABILITY INSURANCE PURCHASED UN-  
DER §307.44, R.C. FOR COUNTY EMPLOYEES DOES NOT  
WAIVE GOVERNMENTAL IMMUNITY FROM TORT SUITS—  
GOVERNMENTAL IMMUNITY FROM TORT SUITS NOT  
WAIVED BY RESPONDEAT SUPERIOR—FACT THAT  
COUNTY NOT LIABLE FOR TORTS OF EMPLOYEES DOES  
NOT ABSOLVE INSURANCE COMPANY FROM LIABILITY  
UNDER POLICY ISSUED BY IT—§307.44, R.C.

## SYLLABUS:

1. The provisions of Section 307.44, Revised Code, permitting a board of county commissioners to purchase liability insurance to protect the officers and employees of the county, do not waive the county's governmental immunity from suit in tort.

2. Governmental immunity from tort liability cannot be defeated by the doctrine of respondeat superior.

3. Where under Section 307.44, Revised Code, a board of county commissioners insures the officers and employees of the county against liability for damages in the operation of county motor vehicles, the fact that the county is not liable for the negligence of its employees in the operation of county vehicles does not affect the liability of the insurance carrier under the insurance contract.

Columbus, Ohio, December 28, 1962

Hon. Earl W. Allison, Prosecuting Attorney  
Franklin County, Columbus, Ohio

Dear Sir:

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

"Section 307.44, Revised Code, reads 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. Whenever the board deems it necessary to procure such insurance, it shall adopt a resolution setting forth the necessity therefor, together with a statement of the estimated premium cost, and upon adoption of the resolution the board may purchase such insurance. The premium for such insurance or any other insurance covering county vehicular equipment may be paid out of the county road fund."

"Under the permissive language of the above quoted statute, the county commissioners of Franklin County have insured each county vehicle with an insurance policy in the minimum amount of \$10,000.00 and \$20,000.00.

"Recently an employee of the County Treasurer, while engaged in work on behalf of the county, was involved in an automobile collision which resulted in serious injuries to the driver of the other automobile.

"The insurance carrier, after investigation, has concluded that the accident was due to the negligence of the county employee

and is willing to pay the injured person \$10,000.00, said sum being the maximum due under the policy.

“The attorney for the injured person has offered to settle the case for \$20,000.00, claiming the county commissioners are also liable for the negligence of the county employee on the basis of the doctrine of respondeat superior.

“We have advised the county commissioners there is no statute imposing liability upon them for the negligence of its employees in the operation of county owned vehicles, but that each county employee is personally liable in damages for his own negligence. The insurance carrier now takes the position that if there is no liability against the county, there is likewise no liability against it on their policy.

“On the basis of the above facts, we respectfully request your opinion on the following questions:

“‘1. Since the county commissioners are not liable for the negligence of its employees in the operation of county owned vehicles, in the absence of a statute imposing such liability, does the permissive language contained in Section 305.44 of the Revised Code which authorizes the county to procure policies of insurance insuring its employees against liability now impose liability on the county negligence of its employees in operating county owned vehicles?

“‘2. Is there any legal means by which an injured party could hold the county liable for the negligence of its employees on the doctrine of respondeat superior?

“‘3. In the event the county is not liable for the negligence of its employees in the operation of county owned vehicles, would such non-liability also relieve the insurance carrier from liability under its policy?’”

I have had occasion to touch upon the point raised in your first question in Opinion No. 1252, Opinions of the Attorney General for 1960, page 241, wherein it is stated at page 245:

“\* \* \* \* \*

“As to Section 3375.401, Revised Code, which authorizes the purchase of certain insurance by public library boards, it is to be noted that said section does not authorize the purchase of such insurance to protect the board, but says:

‘Each board of library trustees appointed pursuant to sections 1713.28, 3375.06, 3375.10, 3375.12, 3375.15 and 3375.22 of the Revised Code may procure policies of insurance insuring officers and employees of the library 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 owned or operated by said library.'

"This section authorizes the insuring of officers and employees, and therefore cannot be interpreted as being an acknowledgment of liability as to the board.

\* \* \* \* \*

The syllabus of Opinion No. 1252, *supra*, reads as follows :

"The public library boards referred to in Section 3375.33, Revised Code, are not subject to liability for claims arising in tort and, therefore, have no authority to purchase liability insurance as to such claims."

It is of course apparent that the provision of and powers granted by Section 3375.401, Revised Code, quoted in Opinion No. 1252, *supra*, are nearly identical to those found in Section 307.44, Revised Code, which is quoted in your letter. Thus, it seems eminently clear that, as stated in Opinion No. 1252, *supra*, the authorization found in Section 305.44, *supra*, does not waive the governmental immunity from suit which is enjoyed by the various counties. Said statute permits the counties to purchase insurance for the protection of the officers and employees of the county. There is no mention made therein relating to the county itself and clearly none was intended.

With regard to your second question, attention is directed to the case of *Schaffer, v. Board of Trustees of the Franklin Veterans Memorial, et al.*, 171 Ohio St. 228, wherein the syllabus reads as follows :

"In the absence of statutory authorization therefore, a county or its agencies are immune from suit for negligence."

Since it is obvious that a county can only perform an act through its agents, it seems elementary that a county, once cloaked with governmental immunity, cannot be stripped thereof by reason of the doctrine of respondeat superior. The existence of liability on a county as a result of the latter, is the denial of all immunity granted by the former. I believe that no citation of authority is necessary to substantiate the statement that governmental immunity from tort liability cannot be defeated by the doctrine of respondeat superior.

A direct answer to your last question is precluded by the fact that your request does not set forth the provisions of the contract between the

board of county commissioners and the insurance company. You state that the board of county commissioners insured "each county vehicle," however Section 307.44, *supra*, provides for the insuring of the "officers and employees of the county" against liability. I thus can only assume that the contract insures the employees and officers of the county against liability when operating county vehicles.

If my assumption is correct, then the insurance carrier could not possibly be released from liability because of the fact that the county is not liable for the negligence of its employees, because the county would not be concerned in the contract. If the contract insures the employees against liability, then the company would appear to be liable for the amount covered in the event there is a finding against the employee for negligence.

In conclusion, therefore, it is my opinion and you are advised:

1. The provisions of Section 307.44, Revised Code, permitting a board of county commissioners to purchase liability insurance to protect the officers and employees of the county, do not waive the county's immunity from suit in tort.
2. Governmental immunity from tort liability cannot be defeated by the doctrine of respondeat superior.
3. Where under Section 307.44, Revised Code, a board of county commissioners insures the officers and employees of the county against liability for damages in the operation of county motor vehicles, the fact that the county is not liable for the negligence of its employees in the operation of county vehicles does not affect the liability of the insurance carrier under the insurance contract.

Respectfully,

MARK McELROY

Attorney General