

Opinion No. 62-42

March 13, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Boston E. Witt, First Assistant Attorney General

TO: Mr. Joseph L. Droege, Special Assistant, Attorney General Legal Section, State Highway Department, P. O. Box 1641, Santa Fe, New Mexico

QUESTION

QUESTIONS

Manufacturers and Wholesalers Indemnity Exchange has filed a lawsuit against the State Highway Commission and Daniel Valdez for damages arising out of an accident involving a semi-truck and a State Highway Department grader on U.S. 285 near Ojo Caliente. The suit was brought pursuant to Section 5-6-20, N.M.S.A., 1953 Compilation and a Motion to Dismiss was filed by the State Highway Commission which Motion came on to be heard by the District Court for the First Judicial District wherein the Court dismissed the action as against the State Highway Commission on the basis that the action was improperly brought under Section 5-6-20, supra, and should have been brought pursuant to Section 64-25-9, N.M.S.A., 1953 Compilation. In Connection with the above set of facts, you have posed four questions.

1. Since the District Court's ruling that the action was improperly brought under Section 5-6-20, supra, are the attorneys for the insurer authorized to appear on behalf of the Defendant, Daniel Valdez or is it the duty of the Attorney General?
2. If the action was brought under Section 64-25-9, supra, may the attorneys for the insurer assert a counter-claim on behalf of the insured or must the Attorney General file a separate action?
3. If the action is brought under Section 64-25-9, supra, and the Defendant, Valdez, has requested representation by the Attorney General under the provisions of Section 4-3-16, N.M.S.A., 1953 Compilation, may the Attorney General assert a counter-claim on his behalf?
4. In view of the holding of the district court that the action was improperly brought under Section 5-6-20, N.M.S.A., 1953 Compilation, would this also be true as regards the state employee, Valdez?

CONCLUSIONS

1. See analysis.

2. See analysis.

3. Yes.

4. Yes.

OPINION

ANALYSIS

Under question 1 you ask whether the attorneys for the insurance company are authorized to appear for the insured who in this instance is the defendant, Daniel Valdez, since Section 64-25-9, supra, specifically provides that any action filed under that section must be brought against the State employee involved at the time of the injury or damage and cannot under any circumstance be brought against the State. It would appear, therefore, that no action against the State can be filed pursuant to this section. On this basis, we conclude that the attorneys for the insurer are authorized to appear on behalf of the Defendant, Valdez, and defend him in all proceedings. At this stage, with the exception noted in question 3, the Attorney General has no interest in the cause as such since neither the State of New Mexico nor the State Highway Department is, in fact, a party to the lawsuit.

2. On the basis of our answer to your question 1, we conclude that it is the duty of the attorneys for the insurer to assert any counter-claim on behalf of the defendant, Valdez, and it is not the duty of the Attorney General to do so nor is it the duty of the Attorney General to file a separate action in that regard. With the exception noted in question 3, the Attorney General has no vital interest in the lawsuit at this point inasmuch as the State is not a party to the cause. It would be well to point out, however, that if the State feels or the State Highway Commission feels that it has a cause of action in and of itself against the plaintiff in the cause in question, he should file a separate action on behalf of the State against the plaintiffs in the above cause.

3. If the defendant, Valdez, has requested representation by the Attorney General under Section 4-3-16 and it is our information that he has, the Attorney General is under a duty to defend him and is at liberty to use all means available to him in that defense. This representation can be in addition to any representation by the attorneys for the insurance company. If the Attorney General represents the defendant, Valdez, upon request, it is our conclusion that he may assert a counterclaim on his behalf. This counterclaim as indicated above would be separate and distinct from any claim the State might have against the plaintiff in this cause. It is our judgment that the ends of justice certainly would not be met if the Attorney General in representing the defendant could not avail himself of all rules and privileges granted him by the court in the defense of Valdez.

4. It is our conclusion, based upon Judge Montoya's ruling, that Section 5-6-20 does not apply to the state employee, Valdez. As we understand Judge Montoya's ruling, Section

64-25-9 provides that the sole and exclusive means in which an allegedly injured plaintiff may sue for damages as a result of an injury allegedly caused by an employee of the State in connection with the operation of a state vehicle as defined in Section 64-25-8, N.M.S.A., 1953 Compilation. Therefore, it is our conclusion that any action brought against the defendant, Valdez, in which the plaintiff attempts to reach the insurance in force covering this occurrence which is maintained by the State must be brought pursuant to Section 64-25-9 rather than Section 5-6-20. This follows the rationale of the District Court's ruling on the State's Motion to Dismiss this cause.