Opinion No. 66-63

May 16, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General George Richard Schmitt, Assistant Attorney General

TO: Edwin O. Wicks, M. D., P.H., Director, New Mexico Department of Public Health, Santa Fe, New Mexico

QUESTION

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May a civil action in damages be effectively maintained in the District Courts of this State against a state department or commission or its employees individually for the negligent (tortious) acts of the employees which occur in the performance of their official functions or duties?

CONCLUSION

No, unless the department has liability insurance in sufficient amount to cover the damages incurred, or unless the employee was individually negligent in the performance of a ministerial duty. In the latter instance only the employee can be held liable in damages.

OPINION

*{*77}* ANALYSIS

The answer to your question is based on the traditional doctrine of sovereign immunity which prevents the Federal Government and the states from being sued by private citizens unless the respective governments have consented thereto. "The origin of this idea seems to have been the common law notion that 'the king can do no wrong' but it was not until the sixteenth century that this was fully established as law, and then it was always coupled with the qualification that for every act of king some minister was always responsible. When the individual sovereign was replaced by the broader conception of the modern state, the idea was carried over that to allow a suit *{*78}* against a ruling government without its consent was inconsistent with the very idea of supreme executive power." Prosser, Law of Torts, 2nd Ed., pp. 770-771. This doctrine has also been extended to state officials and employees. "The complex process of legal administration requires that officers shall be charged with the duty of making decisions, either of law or of fact, and acting in accordance with their determinations. Public servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government, if the immunity to

private liability were not extended, in some reasonable degree, to those who act improperly, or exceed the authority given . . . ." Prosser, **Law of Torts,** 2nd Ed. P. 780.

The doctrine of sovereign immunity is firmly established in New Mexico except in areas of the law where the state has consented to be sued, such as actions based on written contracts. Section 22-23-1, N.M.S.A., 1953 Compilation, (P.S.) (Legislative consent in the area of negligence will be discussed later in this opinion). Otherwise the State cannot be sued unless the express consent of the legislature is obtained. **Maes v. Old Lincoln County Memorial Commission,** 64 N.M. 475, 330 P.2d 556 (1958). **Vigil v. Penitentiary of New Mexico,** 52 N.M. 224, 195 P.2d 104 (1948) (Tort Action); **Lucero v. N.M. State Highway Department,** 55 N.M. 157, 228 P.2d 945 (1951) (Personal Injury Action by employee); **Parr v. N.M. State Highway Department,** 54 N.M. 126, 215 P.2d 602 (1950) (Workmen's Compensation action by employee); **State v. Town of Grants,** 69 N.M. 145, 364 P.2d 853 (1951) (Counterclaim by the Town of Grants for damages to sewer lines filed against the State Highway Commission); **City of Albuquerque v. Campbell,** 68 N.M. 75 358 P.2d 698 (1960) (Tort Action based on negligence of city employee while driving an automobile); **Elliott v. Lea County,** 58 N.M. 147, 267 P.2d 131 (1954) (Tort action for injuries sustained when stepping into an open, unguarded and unlighted ramp while leaving the county hospital); **Murray v. Board of Commissioners of Grant County,** 28 N.M. 309, 210 Pac. 1067 (1922) (Tort Action for injuries sustained when driving a car over a washed out bridge).

A general consent indicated by statute to sue the state is not sufficient. For instance, a statute which establishes a state institution as a corporation with the right to sue and be sued does not authorize a tort action against such institution. Legislative consent in this area has always been very strictly construed by our Supreme Court and the express consent to the tort action by the legislature must be obtained before it can be maintained against the state. **Vigil v. Penitentiary of New Mexico,** supra, **Maes v. Old Lincoln County Memorial Commission,** supra, and **City of Albuquerque v. Campbell,** supra.

The argument that the doctrine of immunity does not apply when the sovereign is acting in a proprietary capacity does not apply to actions against the state. This doctrine is confined to municipalities as indicated by the New Mexico cases, particularly **Livingston v. Regents of New Mexico Col. of A. & M. A.,** 64 N.M. 306, 328 P.2d 78 (1958). The Court in the above styled cause made no attempt to distinguish between proprietary and governmental activities and held the college to be immune to an action in damages for injuries sustained by a student in the college cafeteria due to the alleged negligence of a college employee. See also Prosser, **Law of Torts,** 2nd Ed. P. 772, where he cites cases applying the immunity doctrine to state prisons, hospitals, educational institutions and state fairs.

An action against a state officer or employee is an action against the state and such officer or employee, therefore, is also afforded the protection of the doctrine of sovereign immunity. **Vigil v. Penitentiary of New Mexico,** supra; **Livingston v. Regents of N.M. Col. of A.M.A.,** supra; **Zamora v. Regents of the University of N.M.,**

60 N.M. 41, 287 P.2d 237 (1955) (Workmen's Compensation action by employee); **N.M. State Highway Department vs. Bible,** 38 N.M. 372, 375, 34 P.2d 295 (1934) (Workmen's Compensation Action by employee against the Commission); **Eyring v. Board of Regents of N.M. Normal University,** 59 N.M. 3, 9, 277 P.2d 550 (1954) (Tort Action -- malicious *{*79}* breach of contract by school president); **Swayze v. Bartlett,** 58 N.M. 504, 273 P.2d 367 (1954) (Suit against Comm'r of Public Lands on land claims); **McWhorter v. Board of Education,** 63 N.M. 421, 320 P.2d 1025 (1958) (Workmen's Compensation Action); **Evans v. Field,** 27 N.M. 384, 201 Pac. 1059 (1921) (Mandamus Action against Commissioner of Public Lands); **Otto v. Field,** 31 N.M. 120, 241 Pac. 1027 (1925) (Mandamus against the Comm'r of Public Lands); **State ex rel., Del Curto v. District Court of Fourth Judicial District,** 51 N.M. 297, 183 P.2d 607, (1947) (Prohibition Action against Comm'r of Public Lands). And a recent pronouncement of this doctrine by the New Mexico Supreme Court is to be found in **Clark v. Ruidoso-Hondo Valley Hospital,** 72 N.M. 9, 380 P.2d 168 (1963), where a negligence action brought against the county hospital and the administrator thereof was dismissed.

Your attention is also invited to a most recent decision, **Nolasco v. Melendez,** No. 5807, Civil, in the United States District Court for the District of New Mexico, decided November 4, 1964. In this case a negligence action was brought against the New Mexico State Fair and its manager, individually. The Federal District Court in Albuquerque dismissed the suit holding that the doctrine of sovereign immunity applied to the fair and its manager when engaged in the performance of his discretionary duties and obligations.

As is readily observed from the cases cited above, the doctrine of sovereign immunity has been extended to various kinds of negligent acts as well as other actions of the state, its officials and employees. To be distinguished, of course, are the personal torts of the state officials and employees. Examples of this are observed in the actions for damages arising out of assault and battery by state police officers and sheriffs. **Alaniz v. Funk,** 69 N.M. 164, 364 P.2d 1033 (1961); **Mead v. O'Connor,** 66 N.M. 170, 344 P.2d 478 (1959); **Padilla v. Chavez,** 62 N.M. 170; 306 P.2d 1094 (1957).

However, even in these cases, the doctrine of sovereign immunity might have been held to be applicable if the state had been joined as a party defendant in the action or if the defense of sovereign immunity had been raised by the defendants in view of the following cases. Our Supreme Court in the **McWhorter v. Education** case, supra, held that school districts were immune from suit under the Workmen's Compensation Act. The Defendant argued the court was inconsistent because in a previous case it had awarded compensation to an injured school employee. In response to the contentions, our Supreme Court answered that the question of immunity was not raised in the previous case and therefore not treated by the court. And that silence on the question not raised in that case was of no aid to the defendant in his argument. Thus in view of this holding in the McWhorter case, there is at least a strong implication that if the defendant state law enforcement officers in the cases cited above had seen fit to expressly raise the doctrine of sovereign immunity the court might have applied it and held them immune from suit.

It should also be noted that courts, in many instances, have extended sovereign immunity to public officers and employees for deliberate and intentional acts or torts, (which might be classified as personal torts) when arising in the area of malicious prosecution and defamation. See **Phelps v. Dawson,** 97 F.2d 339 (1938) 116 A.L.R. 1343; **White v. Towers,** 37 Cal. 2d 727, 235 P.2d 209; **Denman v. White,** 316 F.2d 524, (1963) and **Matson v. Marigotti,** 371 Pa. 188, 88 Atl. 2d 829.

The recognized exception to this sovereign immunity doctrine occurs when the state employee or officer complained of is individually negligent in the performance of a ministerial duty as was noted in the **Clark** case, supra. A ministerial duty has been expressly defined by our New Mexico Supreme Court in **Kiddy v. Board of County Commissioners of Eddy County,** 57 N.M. 145, 149, 255 P.2d 678 (1953) and exists:

"When the person or the board is entrusted with the performance of an absolute and imperative duty, the discharge of which requires *{*80}* neither the exercise of official discretion nor judgment."

To be ministerial the duty must not require discretion. Prosser, **Law of Torts,** 2d Ed. p. 281. It appears it might have to be a clear duty imposed upon the official or employee by statute. Finally, before the action can be maintained against the official or employee, it must, in some instances at least, be shown that the law which imposes the duty was created for the benefit of the plaintiff. **Gamble v. Velarde,** 36 N.M. 262, 269, 13 P.2d 559 (1932); **Leger v. Kelly,** 142 Conn. 585, 116 Atl. 2d 429, 431. Examples of a ministerial duty are to be found in the Kelly and Gamble cases cited above. Both of these cases were successful mandamus actions. In the former, the county commission was required to perform its ministerial duty of calling an election imposed by statute. In the latter, the plaintiff was successful in requiring the State Auditor to refund excise taxes to him which had been collected upon sales of gasoline used otherwise than in motor vehicles. The refund was expressly authorized by statute, was created for the benefit of the plaintiff, and was automatic upon the filing of a claim therefor.

Thus, it appears conclusive that all employees of a particular department, insofar as their negligent actions are concerned, are protected by the doctrine of sovereign immunity in the performance of their discretionary public duties. However, the doctrine **only applies** in instances where the State or its various subdivisions do not have sufficient liability insurance to cover any judgment in damages rendered against them. This expression of legislative consent to negligence actions was enacted in 1959 and is to be found in Sections 5-6-19 through 5-6-22, N.M.S.A., 1953 Compilation (P.S.). It is expressly conditioned on the amount of liability insurance carried by the state or the particular state agency or institution involved. The plaintiff in any such action must, upon demand by the defendant waive the amount of any judgment recovered against the state which is not covered by liability insurance, Section 5-6-21, supra. Further this insurance is optional and the procurement of any amount thereof is within the discretion of the various state agencies and departments. Attorney General's Opinion 64-70. The state has also waived the protection of the doctrine of sovereign immunity for injuries or damages caused to any person by the operation of state vehicles. Section 64-25-9,

N.M.S.A., 1953 Compilation. However, in this instance public liability and property damage insurance is mandatory, Section 54-25-8, N.M.S.A., 1953 Compilation. The injured party in the event suit is instituted against the operator of the vehicle must agree to release in writing any amount of his claim in excess of the limit stated in the policy, Section 64-25-9, supra.

Thus under the statutes, principles and authorities set forth above it can be reasonably concluded that the state, its officers and employees are immune from suit arising out of the performance of their discretionary duties in their employment unless they are insured for the amount of any judgment that may be rendered against them.

We repeat there is no obligation for a department to obtain the insurance coverage provided under the statutes cited above. However out of fairness to the citizenry of the state, as well as for the further and complete protection of the state officers and employees, this office has always recommended the purchase of liability insurance covering all necessary employees and officials whenever practicable. Attorney General's Opinion No. 64-70.