

Opinion No. 38-2042

September 2, 1938

BY: FRANK H. PATTON, Attorney General

TO: Mr. G. F. Conroy State Highway Engineer Santa Fe, New Mexico. Attention: R. L. Ormsbee Chief Clerk

{*271} This will acknowledge receipt of your letter dated September 1 together with enclosures in re Jose Sena accident with SHD No. 486.

Your facts seem to be that an employee of the State Highway Department operating a highway department truck negligently collided with the automobile of a third party, damaging the same to the extent of \$ 381.35.

You inquire whether funds of the Highway Department may be used to pay repair expenses on the automobile so damaged through the negligence of such highway department employee.

I find no statute authorizing the State Highway Commission to expend funds for the purpose of paying off damages caused to third parties as a result of tortious acts of its employees. It has been established by our Courts that a suit against the State Highway Commission is in effect a suit against the State of New Mexico and cannot be maintained. Looney vs. Stryker, 31 N.M. 557; Dougherty vs. Vidal, 37 N.M. 256.

The rule is well established that a state is not liable for the torts of its officers, agents or employees in the discharge of their official duties unless the state has voluntarily assumed such liability and consented to be so liable. The only relief the aggrieved person has in such a case is an appeal to the Legislature, and in the absence of a statute so providing, a state cannot be forced to compensate a private individual for damages to property resulting from the tortious acts of any employee of the state. Resort must be had to the Legislature to make an appropriation for this purpose, or legislation must be enacted authorizing the State Highway Department to expend funds for such purposes. We are unable to find any such legislation in this state and in the absence thereof we must hold that the State Highway Commission has no authority {*272} to expend funds for the purpose outlined in your letter.

"A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, the only relief the aggrieved person has in such case being an appeal to the legislature; and, in the absence of a statute so providing, a state cannot be forced to compensate a private individual for damages to property from the construction or operation of public works, but the legislature may make an appropriation for this purpose." 59 C.J. 194, Sec. 337.

"The legislature may waive the state's exemption from liability for the torts of its officers and agents, and prescribe conditions of recovery. This right and power is very wide, and is not confined to principles defining liability in actions for tort between individuals. Where the state has thus voluntarily assumed liability, recovery may be had against it, and, where the state as a sovereign assumes liability for a tort, it must be held also to have waived its immunity from liability as an eleemosynary corporation. In order to hold the state liable for negligence, however, the intent of the legislature to make it liable must appear in clear and unambiguous language. The state, not being a municipal corporation, is unaffected by statutory provisions rendering such corporations liable, and a statute authorizing suits or claims against a state does not render the state liable in tort for the negligence or misconduct of officers or agents of the state unless the state has, by statute, expressly agreed to be liable on such claims. Where, however, the statutes, waiving immunity from suit expressly reserves to the state certain defenses, but does not reserve the defense of immunity from liability as a sovereign, it has been held that such liability is thereby assumed." 59 C. J. 195, Sec. 339.

See also *Dougherty vs. Vidal*, supra; *Looney vs. Stryker*, supra; *State ex rel. Casualty Company vs. State Highway Commission*, 38 N.M. 482; *Grant vs. Pooler*, 32 N.M. 460; *State ex rel. Evans vs. Field*, 27 N.M. 385.

Trusting the foregoing sufficiently answers your inquiry, I am,

By: FRED J. FEDERICI,

Asst. Atty. Gen.