COUNTIES:

COUNTY COURTS:

There is no reason nor authority for the county court to take out liability insurance on the employees of the county who work on the public roads of the county.

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83

Honorable J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date in which you request an opinion of this department as to whether or not the county court of Webster County can purchase liability insurance covering injury or death to employees working on the public roads of the county. We are of the opinion that your letter raises two questions:

(1) Is the county authorized to purchase such liability insurance?

(2) Is there any need for the county to purchase said insurance?

Under date of May 9, 1939, this department issued an opinion to Honorable John W. Mitchell, Assistant Prosecuting Attorney of Buchanan County, Missouri, in which the questions presented by your letter were ruled upon. We are of the opinion that this 1939 opinion correctly states the law and we are in accord with the conclusion of that opinion. We enclose a copy of said opinion for your examination.

A diligent search of the Missouri statutes, as they appear at the present date, reveals no authority by which the county court of a county may undertake to purchase liability insurance other than Section 3713 of the Missouri Workmen's Compensation Act (said Act is discussed later in this opinion).

Furthermore, in a search for law relative to question one as set out above in this opinion, we find the case of Hartford Accident Indemnity v. Wainscott (1933) 19 Pac. (2d) 328. This case dealt with the question of whether or not a county could purchase liability insurance to protect it against claims for injury to persons or property attributable to the negligence of the county or its agents. In that case the insurance contract protected the county against liability for property damages or personal injury to its employees

or others occasioned by the operation of a fleet of motor vehicles owned by the county. The contract also provided that, where the automobile was used for "'pleasure and business' or 'commercial' purposes", the policy should be extended to cover as additional assured, "any person or persons while riding in or legally operating any such automobile and any person, firm or corporation legally responsible for the operation thereof (excepting always, a public garage, automobile repair shop and/or sales agency and/or service station, and the proprietors, agents, or employees thereof), provided such use or operation is with the permission of the named assured or, if the named assured is an individual, with the permission of an adult member of the assured's household, other than a chauffeur or domestic servant" (l. c. 329).

The court said: (l. c. 330)

> "(2) The second and, indeed, the vital question in the case is whether or not there was any authority of law whatever for the payment of money out of the treasury of Maricopa county for public liability or property damage insurance as defined in the policy on motor vehicles owned by the county. It is contended by plaintiff, and, indeed, admitted by defendant, that neither the state nor any political subdivision thereof, which last term obviously includes counties, is liable for the negligence of its agents when such agents are engaged in a governmental function. * * * *"

In answering its own question the court stated that a county is the local subdivision of a State or territory, possessing only such powers as the state gives it, and that it can incur no liabilities except in pursuance of law (l. c. 330). The court further held that the use of the trucks by the County of Maricopa was for a governmental purpose and not a private purpose, and, therefore, the facts in that case would not bring the case within the exception to the general rule that counties are not liable for negligence of its agents, the exception being that they may be liable where they are engaged in a non-governmental function.

The court said: (l. c. 331)

> "(10) But, say defendants, even though the county would under no circumstances be liable itself for the use of the motor vehicles in question, and therefore not authorized to

> purchase insurance which protected only it against a liability which did not exist, the provisions of the policies in question also protect its employees against liability for torts committed by them while using county property. So far as actual injury to the employees of the county themselves is concerned, they are protected fully by the Workmen's Compensation Law (Rev. Code 1928, Sec. 1391 et seq.). We think it is going too far to say that the county is authorized to insure any of its employees against liability to others for their own wrongful conduct."

The court thus held that the county was not authorized to purchase insurance which protected it only against a liability that did not exist. It will be noted that that part of the above quotation which deals with injuries to employees of the county refers to the contention of the defendant that the insurance contract provided that the employees themselves were to be additional assured. This situation is, of course, different from that which we are discussing in this opinion for the reason that we are here dealing only with the question of the protection of the county itself. Therefore, the injection of this matter into the opinion of the Arizona court does not change the holding of the court with regard to the question presented by your letter, i.e., that a county is not authorized to purchase insurance protecting it only against a non-existent liability.

We are, therefore, of the opinion that the first question must be answered in the negative.

An additional aspect of this entire question of the purchase of liability insurance by the county is that of whether there is any need for such insurance. We refer you to our 1939 opinion in this regard. That opinion cites cases showing that a county is a territorial subdivision of the state and that its powers, duties and functions are derived from the state. Further cases in this regard are McClellan v. City of St. Louis (1943) 170 S. W. (2d) 131, and Zoll v. St. Louis County (1938) 124 S. W. (2d) 1168, 343 Mo. 1031. The 1939 opinion also cites cases showing that the county is not liable in tort for the negligence of its agents or officers. The case of Cassidy v. City of St. Joseph, 247 Mo. 197, was a case in which the plaintiff was suing for damages for the death of her husband, an employee of the city. The Supreme Court of Missouri reversed an order of the Circuit Court granting a new trial after a verdict for the defendant city. The decision was based on the non-liability of the city in tort and the court, in discussing the rule, mentioned counties and other political subdivisions, as well as cities, as being

included within it. This case shows the rule is just as applicable where the injury or death of an employee is involved as where the injury or death is to one not employed by the political subdivision. Recent cases have reiterated the proposition regarding the liability of counties in tort.

In Zoll v. St. Louis County, supra, the court said: (l.c. 1040)

> "The courts of this State have consistently held that, absent consent of the State, its agencies cannot be sued in damages from whatever source caused, except when acting in a private or proprietary capacity as was the case in Hannon v. St. Louis County, supra."

In Todd v. Curators of Mo. University (1940) 147 S. W. (2d) 1063, 347 Mo. 460, the court said: (l.c. 464)

> "(2) In the absence of express statutory provision, a public corporation or quasi corporation, performing governmental functions, is not liable in a suit for negligence. (Cohran v. Wilson 287 Mo. 210, 229 S. W. 1050; Dick v. Board of Education (Mo.), 238 S. W. 1073; Krueger v. Board of Education, 310 Mo. 239, 274 S. W. 811, 40 A. L. R. 1086; Robinson v. Washtenaw, Circuit Judge, 228 Mich. 225, 199 N. W. 618; Reardon v. St. Louis County, 36 Mo. 555; Clark v. Adair County, 79 Mo. 536; Moxley v. Pike County, 276 Mo. 449, 208 S.W. 246; Lamar v. Bolivar Special Road District (Mo.), 201 S. W. 890; State ex rel. v. Allen, 298 Mo. 448, 250 S. W. 905; Zoll v. St. Louis County, 343 Mo. 1031, 124 S. W. (2d) 1168; Bush v. State Highway Commission, 329 Mo. 843, 46 S. W. (2d) 854; Broyles v. State Highway Commission (Mo. App.), 48 S. W. (2d) 78; Arnold v. Worth County Drainage District, 209 Mo. App. 220, 234 S. W. 349; D'Arcourt v. Little River Drainage Dist. 212 Mo. App. 610, 245 S. W. 394.)"

In White v. Jones (1944) 177 S. W. (2d) 603, 352 Mo. 354, the court, on motion for rehearing, said: (l.c. 361).

> "* * * *Reliance is placed on Zoll v. St. Louis County, 343 Mo. 1031, 124 S. W. (2d) 1168, 1173, where the court said: 'The

> courts of this state have consistently held that, absent consent of the state, its agencies cannot be used in damages from whatever source caused, except when acting in a private or proprietary capacity as was the case in Hannon v. St. Louis County, supra . . . . . It is the prerogative of the state to determine when suit may be maintained against it or its agencies and when not.' ****"

In Hannon v. St. Louis County (1876) 62 Mo. 313, referred to in White v. Jones, supra, the court held that a county was liable in damages for injuries when it was in the position of a landlord and owed a duty to persons who came on its property. That case, therefore, is not contrary authority on the proposition regarding tort liability as stated in the other cases. The Hannon case is not pertinent to the instant situation.

We think the authorities just cited, together with those in the opinion of May 9, 1939, show conclusively that a county is not liable in tort for the negligence of its agents or officers where the injury occurring arises during the exercising, by a county, of governmental functions. We are of the opinion that the hiring of employees to work on the roads of the county is unquestionably in the exercise of a governmental function and would, therefore, fall within the rule laid down by the authorities.

As an additional reason sustaining our position that there is no need for the county to purchase liability insurance, we refer you to Section 3693, R. S. Mo., 1939, Mo.R.S.A. Section 3693. Said section provides that the provisions of the Chapter on Workmen's Compensation shall not apply to county employments, but in the fifth part of that section, it is further provided that any employer exempted in Section 3693, may bring himself within the provisions of the chapter by filing with the Commission a notice of his election to accept the same. The county, therefore, may elect to come under the provisions of the Missouri Workmen's Compensation law. Such an election would effectively provide for compensation to employees of the county in case of their injury or death, subject, of course, to the limitations found in Chapter 29, of the Revised Statutes of Missouri, 1939.

We call your attention to the fact that we have, in this opinion, distinguished between the carrying of insurance under the provisions of the Workmen's Compensation Act (Sec. 3713, R. S. Mo. 1939, Mo. R.S.A. Sec. 3713) and the purchasing of insurance without an election to come under the provisions of the Workmen's Compensation Act. Section 3713, supra, compels

the employer to carry insurance covering all liability, unless the employer is able to carry said liability without coverage. Therefore, if the county elected to come under the provisions of the Workmen's Compensation Act, the county, of course, could purchase liability insurance.

We are, therefore, of the opinion that the second question must also be answered in the negative.

## CONCLUSION

It is, therefore, the opinion of this department that (1) the County Court of Webster County is unauthorized to purchase liability insurance to protect the county against liability in case of injury or death to employees of the county who are working on the public roads of the county for the reason that (a) there is no express authority therefor and, (b) the liability is non-existent; (2) there is no need to purchase such insurance because (a) the county would not be liable in a tort action for injury or death to said employees and, (b) the county may provide compensation to its employees by electing to come under the provisions of the Missouri Workmen's Compensation Act.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

Encl.