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ATTORNEY GENERAL OPINION NO. 81-193

Mr. Phillip M. Fromme
Coffey County Attorney
County Courthouse
Burlington, Kansas 66839

Re: Militia, Defense and Public Safety -- Emergency
Preparedness for Disasters -- Forced Evacuations

State Departments; Public Officers, Employees --
Kansas Tort Claims Act -- Immunities for Disaster
Emergency Activities

Synopsis: K.S.A. 48-904 et seq., authorizes forced evacua-
tions and administrators of schools hospitals and
nursing homes are entitled to the immunities pro-
vided in the Emergency Preparedness for Disasters
Act when authorized to assist such evacuation.
The governor's authority to compel evacuations and
ingress and egress to dangerous locations may pre-
vent any person including students and patients
from acting contrary to evacuation orders issued
in a state of declared disaster emergency. In the
event of a declared disaster emergency, orders of
the governor govern over otherwise lawful rules
and regulations. Volunteer firemen may not be com-
pelled to respond to accidents not involving fire.
Cited herein: K.S.A. 48-904, 48-915, 48-924,
48-925, 48-934, K.S.A. 1980 Supp. 75-6101, 75-6103.

* * *

Dear Mr. Fromme:

You have requested our opinion concerning numerous aspects
of the Kansas Emergency Preparedness for Disasters Act, K.S.A.
48-904 et seq. We endeavor to respond to each inquiry indi-
vidually. First, you ask:

"What is the liability of workers involved in helping to evacuate people during a declared disaster?"

Kansas tort law affecting the liability of governmental entities including the State of Kansas and its municipalities is governed by the terms of K.S.A. 1980 Supp. 75-6101-75-6115, known as the Kansas Tort Claims Act. Generally, the Act permits liability and waives governmental immunity for negligent acts or omissions of public employees in situations where a private person would be liable under Kansas law. See K.S.A. 1980 Supp. 75-6103. However, in certain situations the state or municipality and its employees are not liable for negligent acts or omissions. With regard to the emergency preparedness situations the Act states in pertinent part:

"A governmental entity or an employee acting within the scope of his or her employment shall not be liable for damages resulting from:

. . . .

"(i) any claim based upon emergency preparedness activities, except that governmental entities shall be liable for claims to the extent provided in Article 9 of Chapter 48 of the Kansas Statutes Annotated." K.S.A. 1980 Supp. 75-6104.

There are other listed exceptions which might be pertinent in a given fact situation, and the list of exceptions should not be viewed as exclusive. However, absent a particular set of facts we can not speculate on the application of any of the other exceptions. Indeed, any discussion of tort liability should be prefaced on the understanding that the facts of each case will be determinative of the application of the law, and general statements regarding tort law are to be taken in this context.

As referenced by the Kansas Tort Claims Act, Chapter 48, Article 9 of the Kansas Statutes Annotated specifies immunity from liability for negligent acts or omissions in disaster emergency situations. K.S.A. 48-915(b) provides:

"Whenever a proclamation is issued declaring a state of disaster emergency pursuant to K.S.A. 48-924, neither the state nor any political subdivision of the state nor, except in cases of willful misconduct, gross negligence or bad faith, the employees, agents, or representatives of the state or any political

subdivision thereof, nor any volunteer worker, or member of any agency, engaged in any emergency preparedness activities, complying with or reasonably attempting to comply with this act, or any proclamation, order, rule or regulation promulgated pursuant to the provisions of this act, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity performed during the existence of such state of disaster emergency or other such state of emergency."

Thus, employees, agents, representatives, volunteer workers or other members of any agency involved in emergency preparedness activities are not liable so long as the following conditions exist: 1) A proclamation declaring a state of disaster emergency has been proclaimed pursuant to K.S.A. 48-924; 2) the negligent conduct in question is not the result of willful misconduct, gross negligence or bad faith (note: The State of Kansas and Kansas municipalities are not liable in cases of actual fraud or actual malice by their employees, K.S.A. 1980 Supp. 75-6109); and 3) the worker is complying with, or reasonably attempting to comply with, the emergency preparedness law, any proclamation, order, rule or regulation adopted under the law or any ordinance relating to blackout or other precautionary measures enacted by a political subdivision of the state.

Likewise, the state and its political subdivisions are also immune from tort liability in the above circumstances and are immune even without a proclamation when engaged in emergency preparedness activities. K.S.A. 48-915(a).

The power to order evacuations is given to the Governor pursuant to K.S.A. 48-925(c)(5) and may be exercised during a declared emergency. In addition, a local disaster emergency plan which contains evacuation authority and procedures may be invoked by the chairman of the county commission or the chief executive officer of a city having such plan.

Finally, where the "worker" is a law enforcement officer, military personnel or person authorized to assist such persons, the provisions of K.S.A. 48-934 are invoked. That section provides:

"Law enforcement officers, military personnel, or other persons authorized to assist them, while engaged in maintaining or restoring the public peace or safety or in the protection of life or property during a state of disaster emergency proclaimed under K.S.A. 48-924, shall have all powers, duties and immunities of peace officers of the state of Kansas in addition to all powers, duties and immunities now otherwise provided by law and shall be immune from civil and criminal liability for acts reasonably done by them in the performance of their duties so long as they act without malice and without the use of excessive or unreasonable force. All such personnel shall have the authority to enforce any and all ordinances of any municipality within an area affected by disaster as indicated in the proclamation of a state disaster emergency under K.S.A. 48-924, and for such purpose, all such personnel shall be considered to be authorized officers of said municipality."

See also, K.S.A. 1980 Supp. 75-6104(m).

Thus, the relationship of the individual worker to the disaster emergency activities and the reasonableness of his or her actions will be determinative of the liability exposure. Needless to say, there are hundreds of hypothetical circumstances under which a worker might be immune and an equivalent number where liability might be found. Generally, however, the above statutes create immunity for disaster emergency workers whether they are volunteers or paid professionals.

You next inquire:

"If hospital administrators or nursing home administrators are ordered by the sheriff to evacuate their patients, what is their liability?"

Assuming that the sheriff's "order" to evacuate is based on an order of the governor pursuant to K.S.A. 48-925(c)(5), hospital and nursing home administrators probably would be considered agents or at least volunteer workers pursuant to K.S.A. 48-915(b) and entitled to immunities contained therein.

Next, you ask: "If people refuse to evacuate, does anyone have the authority to use force to evacuate them? If so, who has that authority?" In Kansas Attorney General Opinion No. 81-130, this office responded to a very similar question.

The synopsis of that opinion, which is appended hereto for your convenience, states:

"The governor's power to act under a declaration of disaster emergency pursuant to K.S.A. 48-925 includes forced evacuation, but the authority so granted to the governor does not extend to the chairman of a board of county commissioners, the board of county commissioners, or mayor of a city. However, the powers authorized by K.S.A. 48-925 may be exercised by the governor only upon the declaration of a disaster emergency, as specified in the Emergency Preparedness for Disasters Act, and the powers granted local officials in local disaster emergencies may be exercised only after formal declaration of such disaster emergency, as provided in K.S.A. 48-932."

We would only add to this that local governmental entities may have powers of forced evacuation, if, and only if, such is authorized by the local or interjurisdictional disaster emergency plan. See Attorney General Opinion No. 81-130 at 3.

Questions number 4 and 5 also concern forced evacuations and generally you inquire about the authority of school officials to force pupils to move to safe locations when parents, relatives or baby sitters seek to transport the school children to an unsafe place. In question number 5 you ask about authority to move nursing home or hospital patients when such patients refuse.

As previously noted in Attorney General Opinion No. 81-130, forced evacuation is permissible only upon the declaration of a disaster emergency as provided for in the Emergency Preparedness for Disasters Act, discussed above. In our opinion, government employees, agents and citizen volunteers attempting to assist in the evacuation of a school, hospital or nursing home upon order of the governor or appropriate local official are acting within the law. It is to be remembered the "compelling" of an evacuation comes, not from the administrators of such institutions, but rather, from the order of duly authorized government officials.

In regard to school children, we are unsure how a parent could take a child into a dangerous area as described above. K.S.A. 48-925(c)(7) provides the governor with the authority to "control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises

therein." Therefore, if an area were so dangerous as to pose a threat to life or limb, no one would be allowed to return. The particular act of a parent taking a child into such an area would be proscribed. However, other reasons may exist for refusing to release a child to his or her parent. There is no express statutory authority for a superintendent to deny a parent custody of his or her child. However, such authority might be implied from the statute.

Undoubtedly, there are instances when "the natural rights of a parent to the custody and control of his child are subordinate to the police power of the state" State v. Garber, 197 Kan. 567 (1966). Although there have been no cases in Kansas in which the court has stated that during a declared emergency a parent's right is subordinate to that of the state, during a declared emergency anyone who violates a provision of the act or a rule or regulation promulgated under the act is guilty of a class A misdemeanor. There is no reason to differentiate between children and adults with respect to their obligations under the Act. Therefore, in our opinion, the state in a proper exercise of its jurisdiction could retain custody of a child as against a parent during a declared emergency.

With regard to whether administrators of these institutions may assist in the forced evacuation and ignore objections of parents or patients, we must repeat that the authority to force evacuation comes from the governor pursuant to statute. The Emergency Preparedness for Disasters Act authorizes the governor to "require and direct cooperation and assistance of state and local government officials." K.S.A. 48-925(c)(10). In addition, the Act contemplates that disaster relief will require assistance from agents and volunteer workers in addition to public officials. (See discussion regarding question number 1.) Hence, an order of the Governor, issued pursuant to K.S.A. 48-925(b) which has "the force and effect of law," may authorize such administrators, as agents or volunteers, to assist in the forced evacuation.

Your next inquiry is: Would orders from the sheriff override any regulations under which hospitals and nursing homes operate? As discussed previously, the sheriff is not expressly authorized to issue orders under the Act. However,

"[d]uring a state of disaster emergency declared under K.S.A. 48-924, . . . the governor may: (1) Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders or rules or regulations of any state agency which implements such statute, if strict compliance

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with the provisions of such statute, order or rule or regulation would prevent, hinder or delay in any way necessary action in coping with the disaster;" K.S.A. 48-925(c)(1).

Hence, orders of the governor override regulations. Likewise, we believe orders of the sheriff or other official complying with the gubernatorial directive or authority granted thereunder would govern over said regulations.

Finally, you ask, "by what authority can volunteer firemen be ordered to respond to accidents not involving fire, such as monitoring or decontamination?" K.S.A. 48-923(c) states that the Act shall not be construed to affect the jurisdiction or responsibilities of the firefighting forces, except during a declared state of disaster emergency. It further provides that state, local, and interjurisdictional plans "shall place reliance on such forces which are available for performance of functions related to a declared state of disaster emergency." K.S.A. 48-923(c).

K.S.A. 48-925(c)(10) permits the governor to require and direct assistance from local government agencies and officials. However, volunteer firemen are not public "officials" and in our opinion may not be ordered to respond to accidents not involving fire. See Kansas Attorney General Opinion No. 81-74. We hasten to call your attention to the language of K.S.A. 48-933(a) providing, in relevant part:

"Each person within this state shall conduct himself or herself . . . in ways that will reasonably assist . . . and . . . meet disasters. This obligation includes appropriate personal service . . . during a declared state of local disaster emergency under K.S.A. 48-924 or a declared state or local disaster emergency under K.S.A. 48-932. This act neither increases nor decreases these obligations, but recognizes their existence under the constitution and statutes and the common law of this state."

As noted, failure to follow a lawful order or proclamation, rule or regulation is governed by K.S.A. 48-939 which states:

"The knowing and willful violation of any provision of this act or any rule and regulation adopted by the adjutant general under this act or any lawful order or proclamation issued under authority of this act whether pursuant to a proclamation declaring a state of disaster emergency under K.S.A. 48-924 or a declaration

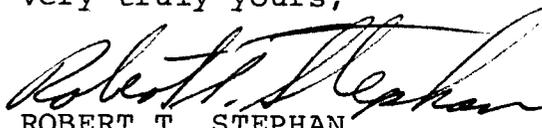
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of a state of local disaster emergency under K.S.A. 48-932, shall constitute a class A misdemeanor and any person convicted of such violation shall be punished as provided by law therefor."

Hence, "appropriate personal service" may be required of local volunteer fire fighters just as it may be required of any citizen. Yet such volunteers may not be ordered to respond as public officers under K.S.A. 48-925(c)(10).

Thus, it is our opinion that K.S.A. 48-904 et seq. authorizes forced evacuations, and administrators of schools hospitals and nursing homes are entitled to the immunities provided in the Emergency Preparedness for Disasters Act when authorized to assist such evacuation. The governor's authority to compel evacuations and control ingress and egress to and from dangerous locations may prevent any person, including students and patients, from acting contrary to evacuation orders issued in a state of declared disaster emergency. In the event of a declared disaster emergency, orders of the governor prevail over otherwise lawful rules and regulations. Volunteer firemen may not be compelled to respond to accidents not involving fire.

Very truly yours,



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Enc.