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ATTORNEY GENERAL OPINION NO. 85- 29

Honorable Bill Morris
State Senator, Twenty-Seventh District
Room 143-N, State Capitol
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--
Kansas Tort Claims Act--Indemnification of Employee
Acting Within Scope of Employment

State Departments; Public Officers, Employees--
Kansas Tort Claims Act--Inapplicable to Claims
Against Health Care Providers

Insurance--Health Care Provider Insurance--"Health
Care Provider" Defined

Synopsis: The Kansas Tort Claims Act is applicable to claims arising from the rendering of professional health care services by a school nurse or other school district employee while acting within the scope of his or her employment, so long as the nurse or other person is not a "health care provider" within the definition of that term prescribed in K.S.A. 1984 Supp. 40-3401(f). Only nurses who are certified as nurse anesthetists are included in that definition. Thus, claims arising against school nurses who are not certified nurse anesthetists are subject to the Kansas Tort Claims Act.

Additionally, in those instances where the tort claims act is applicable, the provisions of the act make it clear that an employee who properly acts within the scope of his or her employment and

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does not act with actual fraud or malice is not personally liable for damages caused by the employee's negligent act or omission. The damages will be paid by the governmental employer. Cited herein: K.S.A. 1984 Supp. 40-3401, K.S.A. 75-6105, 75-6109, 75-6115.

* * *

Dear Senator Morris:

You seek our opinion on the applicability of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., to health care services rendered by school nurses and other school district employees while acting within the scope of their employment by a school district. In addition, you inquire about the potential personal liability of such persons under the act.

Your inquiry arises under the provisions of K.S.A. 75-6115, which provides that claims arising from the rendering of professional services by certain persons are excluded from the act. The statute provides:

"The Kansas tort claims act shall not be applicable to claims arising from the rendering of or failure to render professional services by a health care provider. Claims for damages against a health care provider that is . . . an employee of a governmental entity, arising out of the rendering or failure to render professional services by such health care provider, may be recovered in the same manner as claims for damages against any other health care provider. As used in this section, 'health care provider' shall have the meaning provided by K.S.A. 40-3401 and amendments thereto." (Emphasis added.)

The provisions of the above-quoted statute are limited to those persons who are "health care providers" as defined in K.S.A. 40-3401, as amended. Subsection (f) of K.S.A. 1984 Supp. 40-3401 provides that the term "health care provider" shall include the following persons:

". . . a person licensed to practice any branch of the healing arts by the state board of healing arts, a person who holds

a temporary permit to practice any branch of the healing arts issued by the state board of healing arts, a person engaged in a postgraduate training program approved by the state board of healing arts . . . an optometrist licensed by the board of examiners in optometry, a podiatrist registered by the state board of healing arts, a pharmacist registered by the state board of pharmacy, a licensed professional nurse who is licensed by the board of nursing and certified as a nurse anesthetist by the American association of nurse anesthetists . . . a dentist certified by the state board of healing arts, to administer anesthetics . . . [and] a physical therapist registered by the state board of healing arts." (Emphasis added.)

Under the provisions of K.S.A. 75-6115, it is clear that the tort claims act does not apply to claims arising from the rendering of services by any of the health care providers described in K.S.A. 1984 Supp. 40-3401(f). However, as you indicate, the definition of "health care provider" prescribed in that law does not include all persons who render health care services. For example, that law does not include licensed practical nurses or registered professional nurses who are not certified nurse anesthetists. Thus, the tort claims act is applicable to such nurses, since they are not "health care providers" as defined in K.S.A. 1984 Supp. 40-3401(f). Consequently, it is our opinion that the Kansas Tort Claims Act is applicable to claims arising from the rendering of health care services by a school nurse or other school district employee while acting within the scope of his or her employment, so long as the nurse or other person is not a "health care provider" within the meaning of that term prescribed in K.S.A. 1984 Supp. 40-3401(f).

In those instances where the tort claims act is applicable, K.S.A. 75-6109 provides that the governmental employer shall indemnify its employee against damages for injuries caused by the employee while acting within the scope of his or her employment. However, the same statute provides that the governmental employer shall not be liable for any punitive or exemplary damages assessed against an employee, and that the employer shall have the right to recover any payments made by it on behalf of an employee if it is determined that the act or omission of the employee was due to actual fraud or malice. In this regard, K.S.A. 75-6105(c) also provides: "An employee acting within the scope of the employee's employment shall not be liable for punitive damages . . . except for any act or omission of an employee because of actual fraud or actual malice."

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These provisions, in our judgment, make it clear that an employee of the government who properly acts within the scope of his or her employment and who does not act with actual fraud or malice will not suffer personal financial loss for damages caused by the employee's negligent acts or omissions. Rather, the damages will be paid by the unit of government which is the employer.

In summary, we are of the opinion that the Kansas Tort Claims Act is applicable to claims arising from the rendering of professional health care services by a school nurse or other school district employee while acting within the scope of his or her employment, so long as the nurse or other person is not a "health care provider" within the definition of that term prescribed in K.S.A. 1984 Supp. 40-3401(f). Only nurses who are certified as nurse anesthetists are included in that definition. Thus, claims arising against school nurses who are not certified nurse anesthetists are subject to the Kansas Tort Claims Act.

Also, in those instances where the tort claims act is applicable, the provisions of the act make it clear that an employee who properly acts within the scope of his or her employment and who does not act with actual fraud or malice is not personally liable for damages caused by the employee's negligent act or omission. The damages will be paid by the governmental employer.

Very truly yours,

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RTS:JSS:RJB:jm