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December 17, 1986

ATTORNEY GENERAL OPINION NO. 86- 173

Constance M. Achterberg
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118 South Seventh Street
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Re: Agriculture -- Weeds -- Noxious Weeds; Control and
Eradication; Duty of Counties to Provide or Sell
Chemicals; Liability for Damages

Procedure, Civil -- Actions Relating to Commercial
Activity; Kansas Product Liability Act -- Liability
of Counties for Providing or Selling Certain
Chemicals

State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Liability of Counties for
Providing or Selling Certain Chemicals

Synopsis: There is no exception under the Kansas Tort Claims
Act which would exempt a county from liability for
claims arising from the sale of chemicals as
required by the noxious weeds laws. Cited herein:
K.S.A. 2-1314; 2-1322; 2-1323; 60-3301; 60-3302;
60-3305; 60-3306; 75-6101; 75-6103; 75-6104;
75-6105.

* * *

Dear Ms. Achterberg:

As county counselor for Saline County, you ask our opinion
concerning the liability of counties for damages arising from
the sale of certain chemicals as required by the noxious weeds

laws, K.S.A. 2-1314 et seq. K.S.A. 2-1322 provides as follows:

"The board of county commissioners, or the governing body of incorporated cities, cooperating with the secretary of the state board of agriculture, shall purchase or provide for needed and necessary equipment and necessary chemical material for the control and eradication of noxious weeds. The board of county commissioners of any county or the governing body of any city may use any equipment or materials purchased as provided for in this section, upon the highway, streets and alleys, for the treatment and eradication of weeds which have not been declared noxious by legislative action. The board of county commissioners shall sell chemical material to the landowners in their jurisdiction at a price fixed by the board of county commissioners which shall be in an amount equal to not less than fifty percent (50%) nor more than seventy-five percent (75%) of the total cost incurred by the county in purchasing, storing and handling such chemical materials, and may make such charge for the use of machines or other equipment and operators as may be deemed by them sufficient to cover the actual cost of operation." (Emphasis added.)

Any county official who fails to comply with this law is guilty of a misdemeanor punishable upon conviction by a fine of not less than fifty dollars (\$50) nor more than five hundred dollars (\$500). K.S.A. 2-1323.

The Kansas Product Liability Act, K.S.A. 60-3301 et seq., imposes on sellers the duty "to warn or protect against a danger or hazard which could . . . arise in the use or misuse" of the chemicals it sells. K.S.A. 60-3305. A product seller is also liable under the act for defective products if the manufacturer of the defective product is no longer in existence or a judgment against the manufacturer could not be satisfied. K.S.A. 60-3306. A "product seller" is defined as follows:

"'Product seller' means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product." K.S.A. 60-3302(a). (Emphasis added.)

The Restatement (Second) of Torts §402A (1965) imposes strict liability in certain instances on sellers "engaged in the business of selling." This phrase is explained in comment f:

"The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, It is not necessary that the seller be engaged solely in the business of selling such products.

. . . .

"The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods."

It appears that a county in this instance meets the definition of "product seller" even though the sale of chemicals is certainly not a primary function of a county.

Under the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., a governmental entity is liable "for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable" K.S.A. 75-6103(a). See Fudge v. City of Kansas City, 239 Kan. 369, 371 (1986). By statute, a \$500,000 limit on damages is placed on all claims against a governmental entity. K.S.A. 75-6105(a). In certain

instances listed in the act, a governmental entity is exempt from liability. K.S.A. 75-6104. However, for "[n]egligent or tortious conduct, liability is the rule, immunity the exception," and "a strict or narrow interpretation must be applied to statutory exceptions." Jackson v. City of Kansas City, 235 Kan. 278, Syl ¶¶ 2, 3 (1984).

The question submitted to us is whether any exception provided in the Kansas Tort Claims Act exempts a county from liability arising under the Products Liability Act for damages resulting from chemicals sold pursuant to the noxious weeds laws. Our discussion will focus on two exceptions to governmental tort liability listed in the act:

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

. . . .

"(c) enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution;

"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused" K.S.A. 75-6104.

The Kansas Supreme Court examined K.S.A. 75-6104(c) in Cansler v. State, 234 Kan. 554 (1984). In that case the plaintiff brought suit against the State of Kansas for failure to warn local law enforcement that convicts had escaped from the Kansas State Penitentiary. The State claimed it was exempt from liability by virtue of the "enforcement or nonenforcement of a law" exception. The Court ruled:

"The enforcement of a law exception to the Kansas Tort Claims Act, K.S.A. 1981 Supp. 75-6104(c), provides an exception from liability only where claimant's sole asserted claim of causal negligence is the public entity's enforcement or failure to

enforce a law. That section does not provide an exemption where the agency, in enforcing or failing to enforce a law, commits some additional tortious act or omission which would be negligence at common law, and which act or omission causes damage." 234 Kan. at 554, Syl. ¶ 5.

"Here, the claim is not based upon the State's simple acts of retaining or failing to retain custody of the inmates; the claim is based upon the State's failing in its common law duty to retain custody of known dangerous persons, in giving them access to highpowered firearms, in permitting them to escape confinement while well armed, and in failing to warn the public and nearby on-duty law enforcement personnel, including the plaintiff, of the escape." 234 Kan. at 569.

Thus, the Court held that K.S.A. 75-6104(c) did not exempt the State from liability as the claim was not based solely on the State's enforcement or nonenforcement of a law.

The situation presented for our opinion is similar to the above case. An action brought against the county under the products liability act for the chemicals it sold would not be based on the county's enforcement of the noxious weeds laws. Such an action would most likely be based on defective product or the county's failure to warn. Therefore, K.S.A. 75-6104(c) does not provide an exemption to liability in this instance.

A governmental entity is exempted from liability if the actions which gave rise to the claim were discretionary in nature. K.S.A. 75-6104(d). The Kansas Supreme Court in Hopkins v. State, 237 Kan. 601, 610 (1985) discussed the meaning of the term "discretionary function:"

"'Discretion' has been defined as the power and the privilege to act unhampered by legal rule

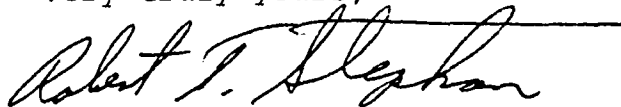
"Discretion implies the exercise of discriminating judgment within the bounds of reason It involves the choice of exercising of the will, of

determination made between competing and sometimes conflicting considerations. Discretion imparts that a choice of action is determined, and that action should be taken with reason and good conscience in the interest of protecting the rights of all parties and serving the ends of justice."

Examples of discretionary functions include the decision whether to place a traffic sign, Finkbiner v. Clay County, 238 Kan. 856 (1986), and the actions of police officers when asked to remove an intruder, Robertson v. City of Topeka, 231 Kan. 358 (1982). In Cansler v. State, *supra*, the court ruled that the duty imposed on the state by law to warn of prison escapes is a ministerial duty, not a discretionary function. "K.S.A. . . . 75-6104(d), therefore, provides no barrier to claims based upon acts or omissions which are ministerial and not discretionary." *Id.* at 554, Syl. ¶ 6. K.S.A. 2-1322 requires counties to sell chemicals to landowners to eradicate weeds. Clearly, this duty is not discretionary but ministerial in nature. K.S.A. 75-6104(d), therefore, provides no barrier to claims against the county for actions arising from the sale of chemicals.

In summary, it is our opinion that no exception under the Kansas Tort Claims Act would exempt a county from liability for claims arising from the sale of chemicals as required by the noxious weeds laws.

Very truly yours,



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