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ATTORNEY GENERAL OPINION NO. 79- 55

The Honorable Norman E. Gaar
State Senator, Seventh District
Kansas Senate
State Capitol
Topeka, Kansas 66612

Re: Civil Procedure--Limitations of Action--Limitations
Applicable to Public Bodies

Synopsis: Whether a statute of limitations operates against the state of Kansas in a cause of action for building design or construction defects depends on whether the particular building serves a governmental or proprietary function, with limitations of actions being applicable to cases involving the latter.

* * *

Dear Senator Gaar:

You have inquired whether there is a statute of limitations controlling legal actions brought by the state arising out of errors and omissions made during design and construction of state buildings. The answer to that question may only be determined by asking another question about the building which is the subject of a particular dispute: What function does the building serve?

Whether a statute of limitations operates against the state of Kansas in a cause of action for building design or construction defects depends on whether the particular building serves a

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governmental or proprietary function. This distinction of functions is made in K.S.A. 60-521, which statute abolishes the common law maxim "time does not run against the king" as to proprietary activities or functions of public bodies. The statute provides, with two exceptions not relevant to your inquiry, as follows:

"As to any cause of action accruing to the state, any political subdivision, or any other public body, which cause of action arises out of any proprietary function or activity, the limitations prescribed in this article shall apply to actions brought in the name or for the benefit of such public body in the same manner as to action by private parties"

Simply stated, the above-cited section makes statutes of limitations prescribed in the Kansas Code of Civil Procedure (Article 5 of Chapter 60, Kansas Statutes Annotated) applicable to the state in suits arising out of proprietary activity or functions of the state. The Kansas Supreme Court has declared that since governmental functions are omitted from the text of the statute, it is to be construed as excluding those actions; that is, no causes of action accruing to the state arising out of governmental activity are affected by any statute of limitations. State Highway Commission v. Steele, 215 Kan. 837, 838-39 (1974). The Steele case also reaffirmed the long-standing principle that "statutes of limitations do not run against the state unless specifically provided by statute." Id. at 839. See also, Riggan v. Director of Revenue, 203 Kan. 129 (1969).

Thus, determining whether the state is engaged in a governmental or proprietary function is the threshold inquiry, and oft-litigated issue, in actions brought by the state. The most recent pronouncement on this issue was made by the Kansas Court of Appeals in State, ex rel. Schneider v. McAfee, 2 Kan. App.2d 274 (1978) (petition for review by the Kansas Supreme Court denied, September 26, 1978). In that case, the attorney general on behalf of the state brought an action against the architect employed to prepare plans, drawings and specifications used for construction of the McKnight Fine Arts Center at Wichita State University. The state alleged that the defendant architect delivered "inadequate and faulty" drawings and specifications resulting in serious constructional deficiencies. Id. at 274. These deficiencies necessitated extensive redesign and reconstruction of portions of the building at considerable cost to the state. The state brought the action for recovery of damages some three and one-half

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years after discovery of the architectural errors. The trial court dismissed the state's action, holding "that the activity of hiring an architect is proprietary in nature, the gravamen of the action sounded in tort, and the action was barred by the two-year statute of limitations [K.S.A. 60-513(4)]." Id. at 275.

The state appealed the dismissal, and the Court of Appeals reversed and remanded the case to the district court for trial holding that, in this case, the state was performing a governmental function such that no statute of limitations would bar the action. The Court defined the distinction thusly:

"Governmental functions are those which are performed for the general public with respect to the common welfare and for which no compensation or particular benefit is received, while proprietary functions are exercised when an enterprise is commercial in character or is usually carried on by private individuals or is for the profit, benefit or advantage of the governmental unit conducting the activity." [citing Brown v. Wichita State University, 217 Kan. 279 (1975) (Brown I) and Brown v. Wichita State University, 219 Kan. 2 (1976) (Brown II).] Id. at 276.

The Court stated that "[t]here is no question but that the state was performing its governmental function of providing public education when it exercised the powers conferred by the legislature to hire [the defendant] architect." The Court reasoned that "[t]he procuring of the architect's services is incidental to and a part of the state's overall duty to provide public education for the citizens of the state" and, thus, also is a governmental function.

Interestingly, the Court cited the Brown cases as authority for its definition and distinction of governmental and proprietary functions. In Brown I, however, after reviewing a long list of Kansas cases and various tests applied therein, and noting they are "replete with conflicts and inconsistencies," the Supreme Court expressly declined "to set forth a precise definition of the terms." Rather, it urged that "[t]he law will be better served by evolving controlling principles out of the realities of specific cases." 217 Kan. at 304-306.

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In contrast, the Court of Appeals in McAfee does not seem troubled by the uncertainty and inconsistency of the terms identified by the Brown I court. That the Supreme Court denied review of McAfee may indicate the high court's approval of the test enunciated in the case, but the problem of application of that test nonetheless remains in future cases, and is still the stuff of which arguments are made, especially as was noted in Brown I, "when an activity partakes of both governmental and proprietary characteristics." 217 Kan. at 305.

How the Kansas courts have characterized various activities in the past may provide some guidance for future reference, and also serves to illustrate, at least in some cases, the confusing nature of the governmental-proprietary distinction. For example, in City of Lawrence v. French, 136 Kan. 687 (1933), the purchase and use of fuel "for municipal purposes" were found to be proprietary actions. Construction and maintenance of a dike providing protection from flood waters for city residents was held to be a proprietary function, as the Supreme Court ruled in Krantz v. City of Hutchinson, 165 Kan. 449 (1948). But in Board of County Commissioners v. Lewis, 203 Kan. 188 (1969), the purchase of supplies and materials used to maintain public roads and bridges and to control fires in county yards and buildings was held to be a governmental function.

Ownership and operation of municipal hospitals and municipal airports are proprietary activities. See Stolp v. City of Arkansas City, 180 Kan. 197 (1956) and Wendler v. City of Great Bend, 181 Kan. 753 (1957). In contrast, the operation of high school buildings and county jails are governmental activities. See Smith v. Board of Education, 204 Kan. 580 (1970) and Mt. Carmel Medical Center v. Board of County Commissioners, 1 Kan.App.2d 374 (1977).

With respect to certain state functions, the Supreme Court declared in Carroll v. Kittle, 203 Kan. 841 (1969), that the proprietary function exception in K.S.A. 60-521 should be applicable to the state of Kansas, and held that operation of the University of Kansas Medical Center is a proprietary function. Operation of the Kansas Public Employees Retirement System and the "business" of intercollegiate football are also proprietary activities. See Shapiro v. Kansas Public Employees Retirement System, 216 Kan. 353 (1975), and Brown I, supra, at 307.

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In summary, the question you have raised admits of no ready and precise answer. Whether a statute of limitations is applicable to a lawsuit brought by the state for defective design or construction of a state building depends primarily upon whether a particular defendant argues, and a court finds, that the subject building serves a proprietary, and not a governmental, function.

Very truly yours,



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