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ATTORNEY GENERAL OPINION NO. 80-187

The Honorable Tom Rehorn
State Senator, Fourth District
460-E, State Capitol
Topeka, Kansas 66612

Re: Corporations--Religious, Charitable and Other Organizations--Liability for Negligent Acts

Synopsis: The enactment of 1980 Senate Bill No. 657 would have rendered charitable organizations immune from negligence suits resulting from their distribution of free food which caused death or personal injury when consumed. The measure also would have granted similar immunity to the donors of such food, but in neither case would such immunity have extended to harm stemming from gross negligence, recklessness or intentional misconduct. Such grants of immunity are in violation of Section 18 of the Kansas Bill of Rights, which guarantees all persons who suffer injury a remedy by due course of law, and would therefore be unconstitutional if enacted. Cited herein: K.S.A. 84-2-314, 84-2-315, Sec. 18, Kansas Bill of Rights.

* * *

Dear Senator Rehorn:

During the most recent session of the Legislature, you introduced a measure which would have provided limited immunity to charitable organizations which distribute free food, as well as to the donors of such items. The passage of this bill, 1980 Senate Bill No. 657, would have afforded protection to these persons and organization from "criminal or civil liability arising from an injury or death due to the condition of such food." However, certain conduct was specifically excluded from this immunity, namely gross negligence,

recklessness or intentional misconduct. The bill was not acted on during the session, and you now wish to know whether the measure is necessary in view of existing Kansas law, if any, in this area.

The concept of immunity for charitable associations first found its way into Kansas law in 1916, when, in Nicholson v. Hospital Association, 97 Kan. 480, the Supreme Court held that a hospital could not be found liable for the negligence of its employees, unless it was itself negligent in hiring them initially. The concept was broadened in Webb v. Vought, 127 Kan. 799 (1929), when charitable organizations were given immunity for the negligent acts of their employees, without regard to whether they had been carefully selected. This position was reaffirmed in Ratliffe v. Wesley Hospital, 135 Kan. (1932) and in Leeper v. Salvation Army, 158 Kan. 396 (1944).

However, with the case of Noel v. Menninger Foundation, 175 Kan. 751 (1954), the Court changed course, holding that the doctrine of charitable immunity was based upon "very dubious grounds" and concluded that:

> "It would seem that a sound social policy ought, in fact, to require such organizations to make just compensation for harm legally caused by their activities, under the same circumstances as individuals before they carry on their charitable activities. All persons, organizations and corporations stand on an equality before the law. All should be bound alike or excused alike. If one is liable for a negligent act of his agent or employee, all should be liable. It would seem that the policy of the law would require individuals to be just before being generous, and the same rule should be applicable to charitable organizations. To require an injured individual to forego his cause of action for the wrongful acts of another when he is otherwise entitled thereto because the injury was committed by charity, is to require him to make an unreasonable contribution to charity against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy." 175 Kan. at 762.

The Court also found such immunity repugnant to Section 18 of the Kansas Bill of Rights, which states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law. . . ." Immunity from suit of course denies an injured

person any remedy, and the court, in closing, condemmed the doctrine, noting that:

> "It takes from individuals the right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for the injuries done. It prevents all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged charitable, nonprofit organization. It frees one set of corporations from obligations to which their competitors, and individuals, are subjected. In short, it destroys equality and creates special privilege." 175 Kan. at 763.

Noel remains the law today, and a subsequent statutory attempt to resurrect the charitable immunity concept was likewise struck down. See, Neely v. St. Francis Hospital & School of Nursing, 192 Kan. 716 (1964) (statute preventing attachment of charity's assets following judgment held unconstitutional, as violative of Sec. 18, Kansas Bill of Rights).

Therefore, it is our opinion that, if enacted, 1980 Senate Bill No. 657 would have created the same kind of privileged class which was found impermissible in Noel, and hence be unconstitutional. This is not to say, however, that such charitable institutions, as well as their benefactors, are left wide open to suit. Rather, they could be held liable only in situations (apart from those recognized in the bill) where their negligence somehow caused the food to be tainted, or where they should have discovered the pre-existing condition in the exercise of due care. Malone v. Jones, 91 Kan. 815, affm. on reh. 92 Kan. 708 (1914) (tainted meat served to guests at boarding house). In the absence of any commercial transaction involving a seller, merchant or dealer, more stringent standards such as implied warranties of merchantability and fitness [K.S.A. 84-2-314, 84-2-315] or strict liability [Brooks v. Dietz, 218 Kan. 698 (1976)] do not apply. Accordingly, good faith donors are afforded a large degree of protection from groundless suits, yet those who have suffered are not barred from seeking redress for their injury.

In conclusion, the provisions of 1980 Senate Bill No. 657 would have rendered charitable organizations immune from negligence suits resulting from their distribution of free food which caused death or personal injury when consumed. The measure also would have granted similar immunity to the donors of such food, but in neither case would such immunity have extended to harm stemming from gross negligence, recklessness or intentional misconduct. Such grants of immunity are in violation

of Section 18 of the Kansas Bill of Rights, which guarantees all persons who suffer injury a remedy by due course of law, and would therefore be unconstitutional if enacted.

Very truly yours,

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