



STATE OF KANSAS

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April 9, 1981

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ATTORNEY GENERAL OPINION NO. 81- 87

The Honorable Nancy Parrish
State Senator, Nineteenth District
State Capitol, Room 403-N
Topeka, Kansas 66612

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

Synopsis: Charitable immunity, in contrast to governmental immunity, did not exist in the common law prior to the enactment of the Kansas Constitution. As a result, a legislative grant of immunity to charitable organizations from suits arising out of the negligence of the organization in distributing free food would violate Section 18 of the Kansas Bill of Rights, which guarantees all persons who suffer injury a remedy by due course of law. Attorney General Opinion No. 80-187 is affirmed. Cited herein: K.S.A. 48-915, 48-936, 65-1127, 65-1462, 65-1652, 65-2891, 65-2898, Section 18, Kansas Bill of Rights.

* * *

Dear Senator Parrish:

You have requested the opinion of this office on a measure which would confer a limited immunity on charitable organizations which distribute food which later causes injury to a recipient. Under this proposed legislation, donors of the food would also receive immunity, which would extend to injuries which were not the result of gross negligence, recklessness or intentional misconduct.

As you mentioned in your letter, the measure you enclosed (1980 House Bill No. 2938) is extremely similar to 1980 Senate Bill No. 657, which was the subject of a formal opinion of this office last year (Attorney General Opinion No. 80-187). While

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neither measure has been re-introduced this session, you wish to know whether the conclusion that was reached in the prior opinion would be applicable to the House Bill, as well. After reviewing both measures, the statutes you cited in your letter and the prior opinion, we would conclude that the rationale of 80-187 applies here as well, i.e., both measures are an infringement of an individual's right to seek recovery of damages from a charitable institution, and hence are unconstitutional.

As was noted in the prior opinion, the doctrine of charitable immunity was introduced into this state by the Kansas Supreme Court in 1916 and was ushered out by the same court in 1954. Finding the grant of immunity to charitable institutions to be neither socially desirable nor consistent with sound policy, the Court in Noel v. Menninger Foundation, 175 Kan. 751, held that the doctrine also violated the Kansas Bill of Rights. Specifically, section 18 thereof states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law" Noel has been repeatedly affirmed, most notably in Brown v. Wichita State University, 219 Kan. 2 (1976). Also known as Brown II, this case at p. 10 states that charitable immunity, in contrast to governmental immunity, violates section 18 and is therefore impermissible.

The distinction between the two concepts is important, for a number of the statutes you cite in your letter could be construed as involving grants of immunity to those performing governmental functions. See, e.g., K.S.A. 48-915 (grant of immunity to local governments and individual volunteers for actions during a state of disaster), K.S.A. 48-936 (grant of immunity to others who make their property available for shelter during disasters), K.S.A. 65-1127, 65-1462, 65-1652, 65-2898 (reporting of malpractice allegations to various state boards). The only possible exception to the above is K.S.A. 65-2891, which codifies the "Good Samaritan" doctrine and thereby grants immunity from ordinary negligence to individual health care providers in certain emergency situations. However, as the court noted regarding governmental immunity in Brown II, K.S.A. 65-2891 creates no new right, but instead recognizes a common-law principle which has long existed, both in Kansas and elsewhere. Union Pacific Ry. Co. v. Cappier, 66 Kan. 649 (1903), 65 C.J.S. Negligence, §63 (107), p. 859-860 (1966). As such, the proscription of Section 18 would not apply.

Accordingly, there appears to be no significant difference between the House Bill you attached to your inquiry and the

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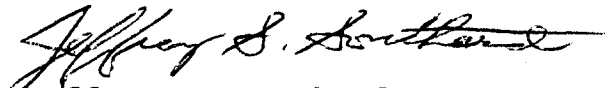
Senate Bill which was the subject of Attorney General Opinion No. 80-187. Both would give a type of immunity which the Kansas Supreme Court has held to be violative of the Kansas Bill of Rights, and would therefore be unconstitutional. As was noted in the prior opinion, however, the actual need for such legislation may be questioned, given existing law which would limit liability to those situations which the measures themselves set out, i.e., gross negligence, recklessness or intentional misconduct.

In conclusion, charitable immunity, in contrast to governmental immunity, did not exist in the common law prior to the enactment of the Kansas Constitution. As a result, a legislative grant of immunity to charitable organizations from suits arising out of the negligence of the organization in distributing free food would violate Section 18 of the Kansas Bill of Rights, which guarantees all persons who suffer injury a remedy by due course of law. Attorney General Opinion No. 80-187 is affirmed.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle