



STATE OF KANSAS

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February 13, 1986

ATTORNEY GENERAL OPINION NO. 86- 18

Marilyn Wilson
Greenwood County Clerk
P.O. Box 268
Eureka, Kansas 67045

Re: State Departments; Public Officers and Employees--
Kansas Tort Claims Act--Liability of Governmental
Entities; Townships

Townships and Township Officers--Disorganization,
Reorganization and Consolidation--Consolidation;
Procedure

Synopsis: A township board member who is acting within his scope of employment is immune from liability for actions which fall within the exceptions to liability listed in K.S.A. 75-6104. The township is also immune from liability for such employee actions. In the event none of the exceptions apply, the township must provide a defense for the board member, if such defense is properly requested, and must indemnify the board member for any damages awarded as a result of the claim. The township is not, however, responsible for a board member who acts outside the scope of his employment or with actual malice or actual fraud, and need not indemnify or defend a board member if the board member does not cooperate in good faith in the defense of the claim. Liability is limited under the act to \$500,000 per occurrence, and the township may, if it chooses, acquire insurance against such claims.

K.S.A. 80-1109 provides the procedure required for consolidating townships. Cited herein: K.S.A. 75-6102, 75-6103, 75-6104, 75-6105, 75-6108, 75-6109, 75-6111, 75-6113, 80-1109.

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Dear Ms. Wilson:

As Greenwood County Clerk, you have requested our opinion regarding the liability of township board members both in their official capacity and individually. You also request information regarding the procedure for consolidating two or more townships into a single township.

In answer to your question regarding the liability of township board members, we direct your attention to the Kansas Tort Claims Act, K.S.A. 75-6101 et seq. This act sets forth the liability of governmental entities in the State of Kansas, making them, as well as the employees of such entities, liable when the employees are "acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state." K.S.A. 75-6103(a). The common law theory of "respondeat superior" is thus made applicable to governmental entities as well as private entities. In essence, the "respondeat superior" doctrine stands for the proposition that when an employer is acting through its employee, and that employee incurs tort liability while acting within the scope of his employment, then the employer must accept the responsibility. Plains Resources, Inc. v. Gable, 235 Kan. 580, 590 (1984).

"Governmental entity," "municipality" and "employee" are defined in K.S.A. 75-6102. A township, as a municipality, is clearly a governmental entity for purposes act, and a township board member is clearly an employee. As such, the general rule of the act, (stated at K.S.A. 75-6103) applies, making the township liable for "damages caused by the negligent or wrongful act or omission of any of its [board members] while acting within the scope of their employment"

K.S.A. 75-6104 contains list exceptions to the general rule of liability of the governmental entity, and states as follows:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from" (Emphasis added.)

The statute thus limits the employee's, as well as the governmental entity's, liability in the listed circumstances.

Two exceptions to the rule of liability which are of particular interest to township board members appear at K.S.A. 75-6104(d) and K.S.A. 75-6104(m). The first of these is a broad exception which states that the governmental entity, or an employee acting within the scope of his employment, will not be held liable for damages resulting from "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;. . ." This exception in effect gives the governmental entity and its employees immunity from liability for those acts which are planning decisions involving some exercise of judgment and discretion. On the other hand, purely ministerial acts may be subject to liability if they do not fit into one of the other exceptions.

K.S.A. 75-6104(m) grants immunity to the governmental entity and its employees for "failure to provide, or the method of providing, police or fire protection;. . ." The inclusion of this exception, in addition to the exception for discretionary functions, seems to indicate "an intent to provide governmental entities and employees maximum protection while performing these necessary functions." 19 W.L.J. 260, 278 (1980). It is necessary to remember, however, that the act provides protection only for employees acting within the scope of their employment, and without actual malice or actual fraud. K.S.A. 75-6103 and 75-6108(c). Finally, K.S.A. 75-6104 states that the exceptions to liability which are listed in that section "shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature," thus making it clear that the list of exceptions to liability is not meant to be all-inclusive.

In the event an employee incurs liability while acting within the scope of his employment, and none of the exceptions of K.S.A. 75-6104 apply, the governmental entity is required to provide a defense for the employee with its own counsel, hired counsel, or insurance counsel if the employee requests such a defense pursuant to K.S.A. 75-6108(e). The exceptions to this requirement are listed in K.S.A. 75-6108(c). In addition to providing the employee's defense, the governmental entity must also indemnify its employees against damages. K.S.A. 75-6109. Neither the entity nor the employee are liable for punitive damages, unless it is shown that the employee acted with actual

malice or actual fraud. K.S.A. 75-6105(c). The township is also not liable for any payment made pursuant to an insurance policy, and may further "recover any payments made by it for any judgment, or portion thereof, and costs or fees incurred by or on behalf of an employee's defense if the employee fails to cooperate in good faith in the defense of the claim or action or if the trier of fact finds that the act or omission of the employee was because of such employee's actual fraud or actual malice." K.S.A. 75-6109.

K.S.A. 75-6111 allows the governmental entity to obtain insurance to provide for:

"(1) its defense, (2) for its liability for claims pursuant to this act, including liability for civil rights actions as provided in K.S.A. 75-6116, (3) the defense of its employees, and (4) for medical payment insurance when purchased in conjunction with insurance authorized by (1), (2) or (3) above."

That section also outlines the methods for obtaining such insurance. K.S.A. 75-6113 lists other sources from which a municipality may pay a judgment or settle a claim covered by the act. In choosing such options, the township should be aware that K.S.A. 75-6105 limits liability under the act to \$500,000 per occurrence.

Your second question involves the procedure for combining, or consolidating, two or more townships. K.S.A. 80-1109 provides as follows:

"Two (2) or more townships located in the same state representative district may consolidate into a single township which may be one of the consolidated townships or a new township to be formed by means of such consolidation. The members of the township boards or a majority of them on the respective boards shall by resolution declare such consolidation to be desirable and arrange for a meeting between the respective boards. Said boards may enter into an agreement signed by them prescribing the terms and conditions of the consolidation and designate the officers of the township until new township officers are elected and take office as now provided by law. Such resolutions of the agreement and consolidation duly certified by the respective township

clerks shall be presented to the board of county commissioners of the county in which said townships are situated by delivering the same to the county clerk of said county. Within ten (10) days after such receipt by the county commissioners they [sic] shall call an election, noticed and called in the manner as bond elections under the general bond law in said townships for the purpose of approval or disapproval of agreement of consolidation. . . ."

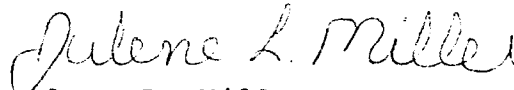
The statute requires both "resolutions by the townships themselves and an election called by the county commission." Attorney General Opinion No. 85-57.

In conclusion, a township board member who is acting within his scope of employment is immune from liability for actions which fall within the exceptions to liability listed in K.S.A. 75-6104. The township is also immune from liability for such employee actions. In the event none of the exceptions apply, the township must provide a defense for the board member, if such defense is properly requested, and must indemnify the board member for any damages awarded as a result of the claim. The township is not, however, responsible for a board member who acts outside the scope of his employment or with actual malice or actual fraud, and need not indemnify or defend a board member if the board member does not cooperate in good faith in the defense of the claim. Liability is limited under the Act to \$500,000 per occurrence, and the township may, if it chooses, acquire insurance against such claims. K.S.A. 80-1109 provides the procedure required for consolidating townships.

Very truly yours,



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Attorney General of Kansas



Julene L. Miller
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