OFFICIAL OPINION NO. 84-12, Necessity of conservation district to purchase liability insurance

February 23, 1984

Mr. Maxwell M. Finke
Hughes County Conservation District
225 South Pierre Street, Rm. 303
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 84-12

Necessity of conservation district to purchase liability insurance

Dear Mr. Finke:

You have requested an official opinion based upon the following factual situation:

FACTS:

Several conservation districts own and lease equipment to operators on a rental basis. In other instances district employees will operate the equipment and the pertinent district will receive a rental fee.

Based on this information, you have asked the following question:

QUESTION:

Should a conservation district organized under SDCL 38-8 carry a liability insurance policy to protect itself and its employees?

To answer this question it is first necessary to ascertain the extent of potential liability of a conservation district and its employees. The pertinent constitutional provision is South Dakota Constitution, Article III, § 27 which states: 'The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.'

Our Supreme Court has implied that this provision sets up a general rule of immunity for all units of government, including state, political divisions and local units of government. See Budahl v. Gordon and David Associates, 287 N.W.2d 489, 493 (S.D. 1981). See generally, Shaub v. Moerke, 338 N.W.2d 109 (S.D. 1983); Kringen v. Shea,

333 N.W.2d 445 (S.D. 1983); Krueger v. Wilson, 325 N.W.2d 851 (S.D. 1982); Sioux Falls Construction Company v. City of Sioux Falls, 297 N.W.2d 454 (S.D. 1980). However, the court has also developed rules which are essentially exceptions from the general rule of immunity. These rules are apparently based upon a trichotomy of governmental units; the finding that a governmental unit is of a particular character carries with it a determination of the extent to which that unit of government will be subjected to suit.

The first unit of government is the state itself. The state is the generic body politic and thus partakes totally of the constitutional immunity from tort. See generally, Conway v. Humbert, 145 N.W.2d 524, 526 (S.D. 1966); State v. Board of Commissioners, 222 N.W. 583, 587-593 (S.D. 1928). The state, incidentally, has provided for a limited waiver of its immunity and that of its employees from suit in SDCL 21-32-15 to 17. See Norgeot v. State of South Dakota, 334 N.W.2d 501 (S.D. 1983). (I am not here addressing any questions relating to this legislation and the South Dakota Constitution, Article III, § 1.)

The second and third units of government are created by the state. They are the municipal corporation and the quasi-municipal corporation.

The familiar municipal corporation is the city. The municipal corporation may be liable, that is, it does not have immunity, when its acts are of a 'proprietary' as opposed to a 'governmental' nature. See Jensen v. Jeul, 278 N.W. 6, 8 (S.D. 1938). See also, Conway v. Humbert, 145 N.W. at 526. Thus, there is a broad area in which a city might be found to be liable. SDCL 9-24 sets up procedures which direct a manner in which suit might be brought against the city.

Quasi-municipal corporations, on the other hand, include, according to Jensen v. Jeul, 278 N.W. at 8, 'counties, civil townships and school district.' These are said to be 'mere instrumentalities of the state for carrying into affect the functions of government and are not liable for damages caused by neglectful performance of such duties, unless cause of action is expressly given by statute.' Id. See also Bailey v. Lawrence County, 59 N.W. 219, 222, (S.D. 1894).

The Supreme Court in 1913 described the immunity of one type of quasi- municipal corporation, the school district, in these words:

School districts are state agencies exercising and wielding a distributive portion of the sovereign power of the state, and the officers of the school districts are the living agencies

through whom the sovereign state act is carried into effect. A school district officer in the performance of his duties acts in a political capacity, as much so as the Governor of a state, and is not liable for negligent acts of omission occurring in the performance of such political or public duties, unless the sovereign power of the state has authorized and consented to a suit for such negligence.

Plumbing Supply Co. v. Board of Education, 142 N.W. 1311, 1132 (S.D. 1913). This language was recently repeated in Merrill v. Birhanzel, 310 N.W.2d 522 (S.D. 1981).

The question which must be addressed, then, is obviously whether a conservation district fits into the category of a municipal corporation (such as a city) or into the category of a quasi-municipal corporation (such as a school district, county or township). In my view, a conservation district is more nearly akin to a school district or township and should be classified as a quasi-municipal corporation.

The major reason for this conclusion is that a municipal corporation, such as a city, commonly exercises a comprehensive range of governmental authority; it has substantial power to enact ordinances for the governance of its citizens with regard to many of their activities. A quasi-municipal corporation, such as a school district, on the other hand, exercises its functions only within a very limited range.

Second, but less significantly, the municipal corporation commonly wields its authority over a limited geographic area; the quasi-municipal corporation, in contrast, typically exercises its authority over a wide geographic area.

The distinction between municipal and quasi-municipal corporation thus seems to be that the municipal corporation will commonly exercise broad authority over a limited geographic area, while a quasi-municipal corporation will commonly exercise narrow authority over a broad geographic area.

The conservation district, as one which can exercise but a limited authority over a wide geographic area, thus falls within the definition of the quasi- municipal corporation.

The law of immunity relating to the quasi-municipal corporation, including, in my view, the conservation district, is that such a unit of government will not be liable for its torts. Further, the employees and officers of such a unit of government, including a

conservation district, will likewise not be liable for their torts insofar as the action at issue was within the scope of employment of the officer or employee.

There is, however, a very significant limitation to this statement with regard to officers and employees and their personal liability. The Supreme Court has essentially recognized that an officer or employee acting within the scope of his employment may be liable if two obstacles are overcome. The leading case is National Bank of South Dakota v. Leir, 325 N.W.2d 845 (S.D. 1982). In Leir the Supreme Court of South Dakota considered the case of the individual liability of an employee of the South Dakota Department of Social Services. The court stated that the immunity of the state would not protect an employee of the state when a finding of negligence would not subject the state itself to liability. 325 N.W.2d at 847. This rather surprising conclusion, see 325 N.W.2d at 850 (Fosheim, C.J., dissenting); Kringen v. Shea, 333 N.W.2d 445, 447 (S.D. 1983) (Fosheim, C.J., concurring and dissenting) means essentially that the state may be immune from an employee's action, while the employee might himself be liable. Cf. Shaub v. Moerke, 338 N.W.2d 109 (S.D. 1983). Further, it means that the courts will look to the actions of the particular employee to determine whether or not that action itself exposes the state to liability. The court has not set out definitive rules to determine when the state might find itself liable if the employee was found liable. However, it can be said that the immunity for state employees has been very substantially weakened by the Leir decision. Indeed, except for the very narrow class of cases involving highway engineers, see High Grade Oil v. Sumner, 295 N.W.2d 736 (S.D. 1980), I have substantial doubts that the Supreme Court will hereafter find that an employee has any immunity for his actions when he is sued in his individual capacity.

Once this first hurdle is passed by plaintiff, that is, once it is shown that the action of the state employee could not result in liability being imposed upon the state itself, the Supreme Court applies a further distinction to determine whether or not the individual might himself be personally liable. The court has declared that an employee acting within the scope of his employment might be liable when he is acting in a 'ministerial' capacity as opposed to a 'discretionary' capacity. National Bank of South Dakota v. Leir, supra. The precise contours of this distinction are not clear. The Supreme Court quoted from the Restatement (2d) of Torts, § 895B (1979) in its explanation of the nature of this distinction and I will not reiterate that discussion here. It does seem to me, however, that the Supreme Court has declared that any action other than an action weighing policy considerations at the highest

levels of the governmental unit in question will be deemed to be a ministerial action. Thus, most actions in government will hereafter be deemed to be ministerial ones.

In National Bank of South Dakota v. Leir, supra, for example, the Supreme Court stated that the very difficult task of making a judgment on whether children should be removed from a home, an action which is almost inevitably based on conflicting evidence and upon the weighing of subtle nuances, and the differences in human character, was a ministerial one. Given the Leir characterization of the 'ministerial' capacity, I can only conclude that the courts will continue to construe the category in a very broad fashion and that, consequently, many if not all of a typical employee's actions could subject that employee to liability.

What, then, is the extent of probable liability of the conservation district and its officers or employees? The conservation district is, as I interpret the law, entirely immune from liability for its torts. On the other hand, the officer or employee of a conservation district is very probably not immune from personal liability from his torts unless his actions involve policymaking decisions at the highest level. Finally, implicit in the foregoing, an officer or employee may not be immune even with regard to policymaking decisions if his actions are found to be not within the scope of his employment or his duties.

Your specific questions may now be answered. You ask whether the conservation district or its employees might be found liable when a district leases equipment to private operators for conservation projects. In accordance with the views expressed above, I believe that the district would not be liable in the event of a tort committed by the private operator. However, an employee of the district might be found liable if he negligently maintained equipment leased to the private operator and it caused injury to the private operator. Further, it is possible that a district employee might so involve himself in the activities of a private operator of conservation district equipment that he finds himself liable for the private operator's actions.

You also ask about the situation in which the district supplies both the equipment and the manpower to perform a conservation task. Again, it is my view that the district itself would not be liable for the torts of its employees. However, the employees themselves may well be liable should they commit a tort in the performance of their duties.

In my view, a conservation district should purchase insurance at the minimum to cover the activities of its employees insofar as possible.

Further, I feel constrained to warn you, as I noted in my opinion to the Division of Conservation in 1979, see AGR 79-8, p. 18, 20, that the courts do not appear to be consistent on the issue of sovereign immunity. As Chief Justice Fosheim has implied, the South Dakota Supreme Court appears to be unwilling to allow the Legislature to perform its duties as set out by Article III, § 27 of the Constitution. See Kringen v. Shea, 333 N.W.2d 445, 447 (S.D. 1983) (Fosheim, C.J., concurring and dissenting). Thus, the law of sovereign immunity is subject to change which could subject the district itself to liability.

In addition, the precise status of the conservation district as a quasi- municipal corporation has never been established in South Dakota case law. It is possible that the court may indeed find the district to be a municipal corporation and not a quasi-municipal corporation although my analysis is to the contrary. In such a case the district itself, and not merely its employees, would be liable for torts committed by it or by its employees when the torts were committed in pursuance of a 'proprietary' as distinguished from a 'governmental' function. While I do not believe that this would be a logical development of present law, it is not impossible that this development could occur.

A conservation district may, therefore, be well advised to purchase liability insurance to cover not only the individual liability of its employees (because such liability is probably a matter of existing law) but also to cover the liability of the district itself (because such liability may be declared as part of the developing law in this area). To provide against such a contingency would be, in my opinion, good business.

Respectfully submitted,

Mark V. Meierhenry
Attorney General