

The State of South Carolina



Office of the Attorney General

see 10/10/89

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July 28, 1989

Mr. George L. Vogt
Director
South Carolina Department of
Archives & History
P. O. Box 11,669
Columbia, South Carolina 29211

Re: Department Liability

Dear Mr. Vogt:

You have asked the opinion of this Office regarding the liability of the South Carolina Department of Archives and History where an employee or volunteer suffers injury or property damage when working with the Department in emergency recovery efforts. I note at the outset that the use of volunteers by public agencies is encouraged and authorized by state law. Section 8-25-10, et seq., Code of Laws of South Carolina, 1976 (1988 Cum Supp.).

Your question relates to the common law tort of "negligence," which contains the following elements:

- (1) A duty or care owed to the plaintiff by the defendant;
- (2) A breach of that duty of care by negligent act or omission; and
- (3) Damage to the plaintiff proximately resulting from the breach.

Andrews v. Piedmont Airlines, ___ S.C. ___, 377 S.E.2d 127 (Ct. App. 1989). A state agency's liability for the tort of negligence is determined by the South Carolina Tort Claims Act. Sec-

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tion 15-78-10, et seq., Code of Laws of South Carolina, 1976 (1988 Cum. Supp.); Summers v. Harrison Construction, Op. No. 1346 (Ct. App. June 5, 1989). The Tort Claims Act does not create causes of action; rather, it removes the common law bar of sovereign immunity in certain circumstances, but only to the extent provided by the Act. Summers, Slip Op. at 6. Thus, whether the Department would be liable depends in part upon whether sovereign immunity has been waived by the Tort Claims Act. Such a determination would depend upon the particular facts giving rise to the claim. However, I do refer you to Section 15-78-60(19) of the Act which provides,

[t]he governmental entity is not liable for a loss resulting from:

- (19) emergency preparedness activities and activities of the South Carolina National Guard and South Carolina State Guard while engaged in state or federal training or duty. This exemption does not apply to vehicular accidents;
....

Moreover, the common law defenses to a negligence claim, such as "assumption of risk," "contributory negligence" or "fellow-employee negligence" may bar the claim; but again, analysis would depend upon the particular facts. As a final comment relative to the Tort Claims Act, the Budget and Control Board is required to provide liability insurance sufficient to cover liability exposure created with the limited waiver of sovereign immunity (Section 15-78-140); accordingly, if your Department has procured the liability insurance offered by the Budget and Control Board, the Department's exposure to negligence claims by employees and volunteers should be adequately insured.

Specifically with regard to negligent claims for personal injuries by employees, most probably the claims against the Department would be barred by the exclusive remedy provision of the South Carolina Workers Compensation Act (Section 42-1-540).¹ This is most probably true even where the employee is not engaged in the actual performance of the duties for which he was expressly employed at the time of the injury provided he is

1. See also Section 15-78-60(14) of the South Carolina Tort Claims Act which retains immunity for any claim against the governmental entity covered by the South Carolina Workers' Compensation Act.

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pursuing an undertaking which, in some logical manner, pertains to or is incidental to his employment. Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973). Of course, the Workers' Compensation Act does not provide a remedy for claims for damages to the employee's automobile and, thus, those claims would be considered within the context of the Tort Claims Act.

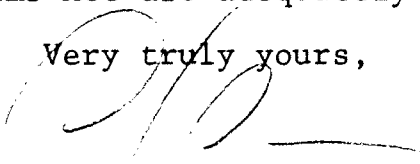
With regard to "volunteers," the exclusivity of the compensation remedy is most likely inapplicable since the Act provides an exclusive remedy only for "employees" and that term is statutorily defined to mean

every person engaged in an employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written ...; and as relating to those so employed by the State, ... all officers and employees of the State, except only such as elected by the people, or by the General Assembly, or appointed by the governor, either with or without the confirmation of the Senate;

Section 42-1-130. Ordinarily, voluntary, non-compensated public service work does not establish the requisite employment relationship. LARSON'S WORKMEN'S COMPENSATION (1986) Section 47.41 (a); but see, McCreery v. Covenant Presbyterian Church, et al., Richland County Court of Common Pleas, 87-CP-40-6425 (Order Affirming Award filed April 21, 1988).

In conclusion, I advise that with regard to a negligence claim against the Department by an employee, the exclusive remedy for personal injury probably lies under the workers' compensation laws and, thus, a negligence claim by an employee against the Department would probably not be cognizable in tort. On the other hand, the Department's liability for injuries to a volunteer based upon a claim of negligence would probably be subject to determination and limitation by the South Carolina Tort Claims Act. Assuming the Department has procured liability insurance from the Budget and Control Board, its risk for claims cognizable under the Tort Claims Act are adequately insured.

Very truly yours,


Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

A handwritten signature in cursive script that reads "Robert D. Cook". The signature is written in black ink and is positioned above a horizontal line.

ROBERT D. COOK
EXECUTIVE ASSISTANT FOR OPINIONS