OPINION NO. 82-007

Syllabus:

1. A sheriff, and his deputies, owe a duty of ordinary care to prisoners in their custody. If their actions fall below this standard, they may be found liable by a court.

2. Boards of county commissioners have been protected from suit by the doctrine of sovereign immunity, and individual members of such boards have been protected by the doctrine of official immunity.

3. "The common law doctrine of governmental or sovereign immunity may, consistent with Section 16, Article I of the Ohio Constitution, be abolished or altered by the judicial branch of government." Schenkolewski v. Cleveland Metropark System, 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981) (paragraph one, syllabus).

4. A prisoner engaged in a work release program whereby the prisoner is allowed to leave the jail in order to continue employment held prior to sentencing is not an employee of the county for the purpose of the Ohio Workers' Compensation Act.

5. A prisoner engaged in a trustee program whereby the prisoner works in or about the county jail under the direct supervision of the sheriff and deputy sheriffs is not an employee of the county for the purpose of the Ohio Workers' Compensation Act.

To: James R. Unger, Stark County Prosecuting Attorney, Canton, Ohio
By: William J. Brown, Attorney General, March 1, 1982

I have before me your request for my opinion which presents the following questions:

(1) Is the sheriff or any of his deputy sheriffs liable for injuries sustained by a prisoner engaged in a "work release" program whereby the prisoner has continued employment held prior to sentencing and is not under the supervision of the sheriff or deputy sheriffs while engaged in such employment?

(2) What is the respective liability of the Board of County Commissioners based on the same facts set out in question number one?

(3) Are prisoners engaged in employment under the "work release" program "employees" within the meaning of the Workers' Compensation Act so as to be entitled to compensation under the Act for injuries they have incurred while working in the above program?

(4) If such prisoners are covered under the Workers' Compensation Act, what statute(s) or constitutional provision(s) would authorize the Board of County Commissioners to enter into a contract with the Ohio Bureau of Workers' Compensation for the purpose of extending benefits under the Act to prisoner employees involved in the work release program?

(5) What are the respective answers to the questions proposed in questions number one through three as to "trustees" engaged in work in or about the county jail under the direct supervision of the sheriff or deputy sheriffs?

For ease of discussion, I will consider your first, second, and fifth questions together. Obviously, questions of liability can be addressed only by considering the standards of care which have been imposed by courts in the past. Beyond that, whether a particular action breaches a standard of care is a question of fact which can be decided only by a court. In determining the potential liability of a sheriff, his deputies, and the county commissioners for injuries to prisoners working outside or inside the jail, it is necessary to understand what immunities might apply to each of them.

There are two types of immunity which may apply to this situation, sovereign immunity and official immunity. I will address sovereign immunity first. Prior to 1975, it was the rule of law in Ohio that the state, and its political subdivisions, were immune from suit. Ohio Const. art. I, §16; Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917). This rule was changed through the enactment of R.C. 2743.02 by Am. Sub. H.B. 800, 110th Gen. A. (1974) (eff. Jan. 1, 1975), which waives the state's immunity, and allows citizens to sue the state in the Court of Claims. However, this statute does not waive the immunity of the state's political subdivisions. Haas v. Hayslip, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977). Therefore, a county, as a political subdivision, enjoys immunity from suit.

It must be noted that while the sovereign immunity enjoyed by the state's subdivisions was not abolished by statute, the Ohio Supreme Court has recently held that the judicial branch of government has the power to abolish the common law doctrine of governmental or sovereign immunity. Schenkolewski v. Cleveland Metropark System, 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981). In other words, at any time in the future, a court may exercise its authority and abolish the immunity of counties from suit.

As noted above, the state has waived its sovereign immunity in R.C. 2743.02. However, the officers and employees of the state have been granted immunity for all civil suits, with the exception of "actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff." R.C. 9.86. There is no similar provision in the Revised Code protecting the officers and employees of political subdivisions. See 1981 Op. Att'y Gen. No. 81-060.

While county officers do not enjoy sovereign immunity or a specific statutory immunity, they have been protected by the common law doctrine of official immunity. Under this doctrine, a public officer has an absolute defense to a suit arising out of an exercise of the officer's judgment and discretion in the discharge of his duties, absent a showing that the officer acted out of a corrupt motive, or in bad faith. See Scot Lad Foods v. Secretary of State, 66 Ohio St. 2d 1, 418 N.E.2d 1368 (1981); State v. Bair, 71 Ohio St. 410, 73 N.E. 514 (1904); Thomas v. Wilton, 40 Ohio St. 516 (1884); Gregory v. Small, 39 Ohio St. 346 (1883).

It is not clear under what theory either a board of county commissioners, or individual members of the board, might be found liable for the negligence of the county sheriff or his deputies. However, it is worth noting that should someone attempt to sue the board, the doctrine of sovereign immunity, unless modified by the courts, would serve as a basis for dismissal of the action. Should an individual member of the board be sued, without a showing that he acted in bad faith or with a corrupt motive, the doctrine of official immunity would be available and, if accepted by the court, could act as an absolute defense on his behalf, since he is an officer of the county.[1] See R.C. 305.01(C).

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[1] I note that your question implies a concern with liability resulting from simple negligence. That is the only liability I address in this opinion. Please note that I am not addressing the complex issues which arise out of the denial of a prisoner's civil rights by a public official, in violation of 42 U.S.C. §1983.

County sheriffs are also officers of the county, see Thurlow v. Board of Commissioners, 81 Ohio St. 447, 91 N.E. 193 (1910); Seymour v. King, 11 Ohio 342 (1842), so it would seem that a sheriff would be protected from liability in the performance of some of his duties by the doctrine of official immunity. However, with respect to the care of prisoners, a sheriff has been held to a duty to "exercise ordinary care for the protection and safety of prisoners confined to his jail." Justice v. Rose, 3 Ohio Op. 2d 162, 165, 146 N.E.2d 162, 166 (C.P. Lawrence County 1956), aff'd, 102 Ohio App. 482, 144 N.E.2d 303 (Lawrence County 1957). A duty to act with ordinary care is greater than a duty to act without bad faith or a corrupt motive. This imposition of a higher duty of care by the court thus seems to render the doctrine of official immunity inapplicable to a sheriff with regard to the manner in which he keeps his prisoners.

A deputy sheriff is not an officer of the county. 1980 Op. Att'y Gen. No. 80-076; 1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603; see Theobald v. State, 10 Ohio C.C. (n.s.) 175 (Montgomery County 1907), aff'd, 78 Ohio St. 426, 85 N.E. 113 (1908); R.C. 311.04. Consequently, a deputy sheriff does not enjoy official immunity.

While it is the duty of "a sheriff [to] exercise ordinary care for the protection and safety of prisoners confined to his jail", Justice, 3 Ohio Op. 2d at 165, 146 N.E.2d at 166, exactly what action by the sheriff would violate this duty of ordinary care is a question which can only be decided by a court, on a case by case basis. See 1981 Op. Att'y Gen. No. 81-060. In the Justice case, cited above, a sheriff was not held liable for the death of a prisoner resulting from a beating inflicted by a fellow prisoner where the sheriff was without prior knowledge. However, in an earlier case a municipal marshal and his deputy were held liable for the death of a prisoner who burned to death in a shanty in which he was confined, where they locked the prisoner in the shanty, built a fire in a cracked stove, and then left the prisoner unattended. Alvord v. The Village of Richmond, 3 Ohio N.P. 136 (1896).

A question unanswered by the courts is whether a prisoner working outside the jail in a work release program is still legally confined to the jail for the purpose of a sheriff's duty of ordinary care to him. Work release programs are established by courts, which adopt rules for their operation. R.C. 5147.28. Thus, such programs are carried on pursuant to court order. If the sheriff is required to release the prisoner and has no authority to supervise or restrict the prisoner's actions while he is absent from the jail, arguably the sheriff owes no duty of care to the prisoner. On the other hand, if the sheriff has authority to oversee the prisoner's activities, it would seem that a duty of care also exists. It is clear that trustees working in the jail are still confined, and the sheriff therefore owes them a duty of ordinary care.

I am aware of no cases that set out the duty which a deputy sheriff owes to county prisoners. However, in Alvord the municipal deputy was held to the same standard as the municipal marshal. Reading Alvord together with Justice, which establishes a duty of ordinary care for sheriffs to their prisoners, it would appear that the duty of deputy sheriffs to prisoners is also one of ordinary care. It must also be noted that R.C. 311.05 states: "The sheriff shall be responsible for the neglect of duty or misconduct in office of each of his deputies."

Finally, R.C. 311.20 requires a sheriff to "furnish, at the expense of the county, to all prisoners or other persons confined in the jail, fuel, soap, disinfectants, bed, clothing, washing, and nursing, when required, and other necessaries as the court, in its rules, designates" (emphasis added). The "other necessaries" have been held to "include medical expenses both in the jail and hospital confinement." University Hospitals v. City of Cleveland, 28 Ohio Misc. 134, 138, 276 N.E.2d 273, 276 (Cuyahoga County 1971); 1980 Op. Att'y Gen. No. 80-084; 1976 Op. Att'y Gen. No. 76-012. Further, "[t]he injured [prisoner's] indigency has no bearing on the liability of. . .the. . .county sheriff. If the injured [prisoner] was under legal restraint by [the county] then that authority would be responsible for the cost of his medical care without regard to his financial status." University Hospitals, 28 Ohio Misc. at 139, 276 N.E.2d at 277. Thus, it is clear that

a county sheriff is under an absolute duty to provide medical care to his prisoners, regardless of whether or not the sheriff breached his duty of ordinary care.

Therefore, in response to your first, second and fifth questions I opine as follows. While it is not clear under what, if any, theory a cause of action could be brought against the board of county commissioners in simple negligence for injuries sustained by a prisoner who serves as a trustee or who is engaged in a work release program, it seems that the board would enjoy absolute immunity from suit under the doctrine of sovereign immunity. Should such a suit be brought against individual members of the board, absent a showing of corrupt motive or bad faith, the individual county officers would be able to argue that they were immune under the doctrine of official immunity. The board of county commissioner's sovereign immunity, as noted in Schenkolewski, is subject to judicial abolition. Official immunity, being judicially created, would also seem to be subject to judicial abolition under the theory of the Schenkolewski case.

Although the county sheriff is also a county officer, it appears that the doctrine of official immunity has no applicability to performance of his duty of care of prisoners in his custody. It seems that the sheriff and his deputies are held to a duty of rendering ordinary care to all prisoners. Further, the sheriff is statutorily liable for any breach of this duty by his deputies. R.C. 311.05. Exactly what action by a sheriff or his deputies would breach this duty is a matter which can only be decided by a court on a case by case basis. Op. No. 81-060.

The sheriff owes a duty of care to prisoners in his custody. It is unclear how far this duty extends when the prisoners are in a work release program pursuant to court order. It is clear, however, that since trustees work within the jail, the sheriff owes them a duty of ordinary care while they are working.

Finally, regardless of the sheriff's liability, R.C. 311.20 imposes upon the sheriff an absolute duty to provide medical care to his prisoners, whatever the cause of the injury. University Hospitals; Op. No. 80-084; Op. No. 76-012.

Your request also raises several questions concerning the prisoners entitlement to workers' compensation benefits if injured while engaged in the "work release" or "trustee" programs. In answering these questions it is most important to note that one of the fundamental elements necessary for the compensability of claims for workers' compensation benefits is the existence of the relation of employer and employee. Absent this relationship the provisions of the Workers' Compensation Act have no application. Acklin Stamping Co. v. Kutz, 98 Ohio St. 61, 120 N.E. 229 (1918).

With respect to the relation of employer and employee, R.C. 4123.01 provides:

> As used in Chapter 4123. of the Revised Code:
> (A) "Employee," "workman," or "operative" means:
> (1) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education;
> (2) Every person in the service of any person, firm, or private corporation, including any public service corporation, that (a) employs one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash

> in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, but not including any officer of a family farm corporation, or (b) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by Chapter 4123. of the Revised Code.

In order for a particular arrangement to constitute the relationship of employer and employee under the workers' compensation law the worker must be serving under an appointment or contract of hire express or implied. Industrial Commission v. Bateman, 126 Ohio St. 279, 185 N.E. 50 (1933). However, it is impossible to have a contract for hire without an obligation that the person denominated the employer pay the person employed. Coviello v. Industrial Commission, 129 Ohio St. 589, 196 N.E. 661 (1935).

As early as 1917 the Attorney General was called upon to render an opinion on the question of whether prisoners in the city workhouse were employees of the city and covered by workers' compensation. In answering that question the then Attorney General, Joseph McGhee, opined:

> It is true that certain provisions are made in [Sec. 2227-5 and Sec. 2227-6] of the General Code for a credit to be given a prisoner of some portion of his earnings. Still, I feel that this allowance to him is merely a matter of gratuity under the state law and does not change his status from one of custody to one of service under the terms of the workmen's compensation act. To my mind it was never considered by the legislature that the benefits and protection of the workmen's compensation law should be extended to those who by their own acts have violated the law and made necessary their confinement in some penal institution where service might be required of them as an incident of their imprisonment.

1917 Op. Att'y Gen. No. 278, vol. I., p. 707, 708.

Until recently the Ohio courts had not considered this question. However, in 1981 there were two court of appeals decisions on point. In Tyner v. State of Ohio, No. 9-80-46 (Ct. App. Marion County, decided March 31, 1981), the claimant, William Tyner, a prisoner at Marion Correctional Institution, while working on the institution farm, was severely injured. While in working status he received $18.00 per month credit in the institution commissary and $8.00 per month credit to his release account.

In affirming the trial court's granting of summary judgment in favor of the defendants, the court of appeals held that a person in Tyner's status at the time of injury was not an employee of the State of Ohio as defined by the Workers' Compensation Act. In reaching that decision the court recognized that the issue was one of first impression in Ohio and relied upon numerous decisions from other jurisdictions. The court specifically adopted the following rationale, which was expressed in Watson v. Industrial Commission, 100 Ariz. 327, 332, 414 P.2d 144, 148 (1966) (quoted in Tyner, slip op. at p. 4):

> There is complete absence of remuneration by prisoners as they are getting nothing for their labor except what they are entitled to by statute. They are in no position to bargain for higher wages and "the word 'hire' connotes payment of some kind." (Citation omitted.) A contract of employment contemplates at least two parties capable of giving their consent. Petitioner did not consent to do the work he was doing, but was performing the task as a convict by operation of law and not by consent or contract. We do not believe the essentials of a "contract of hire" are present in this factual situation. There was no agreement voluntarily entered, no consideration, no mutuality

> of agreement, or intent to contract between competent parties. It has been observed that:
>
> "It is inconceivable that a person who is serving a sentence duly imposed upon him by law and who is incarcerated in an institution established by a State, County or Municipal Government, because he is performing some work while a prisoner, be deemed an employee of the governmental agent in charge of the jail. To hold otherwise would mean that the officials of a penal institution would be employers of their prisoners whenever they delegate to any of the prisoners the performance of any work that may be necessary to maintain their morale and to aid in their rehabilitation. This would be contrary to public policy." Goff v. Union County, 26 N.J. Misc. 135, 57 A.2d at 481-482.

In the recent case of Schwartz v. Ohio Dep't of Administrative Services, No. CA-1977 (Ct. App. Richland County, decided June 4, 1981), the claimant, Charles Schwartz, was an inmate in the Ohio State Reformatory in Mansfield, Ohio. He was injured when the tractor he was operating to transport hay to the institution was struck by a civilian motor vehicle. As a working inmate he received 10 cents an hour up to 200 hours per month.

Here, also, the court of appeals affirmed the trial court's granting of summary judgment in favor of the defendants.

> It should be apparent that under this statutory scheme, the employer/employee relationship is a prerequisite for participation in Workers' Compensation benefits. Where in this case is the contract of hire, express or implied, oral or written? We find none and hold that without the employer/employee relationship in the form of a contract for hire, express or implied, Plaintiff-Appellant is not entitled to recover benefits provided under R.C. Chapter 4123.

Schwartz, No. CA-1977, slip op. at 4.

The court further stated:

> We find that prisoners do not enter the reformatory or other penal institutions in order to find work. The primary purpose of prison employment is rehabilitation and the reactivating of attitudes, skills and habit patterns which will be conducive to prisoner rehabilitation. The small reward of 10 cents per hour is merely an inducement to the inmate to cooperate with the corrections program. It is not paid as wages and does not create the relationship of employer/employee.

Schwartz, No. CA-1977, slip op. at 6.

I find the foregoing cases to be applicable to the facts presented in your request. Under this rationale it is clear that prisoners engaged in either the "work release" program or the "trustee" program are not employees of the county for the purposes of the Workers' Compensation Act and are not entitled to receive benefits under the county's workers' compensation coverage.

However, it must be noted that although a prisoner engaged in the "work release" program is not an employee of the county, he or she would, in all likelihood, be an employee of the employer to whom he or she is being released for work and would be entitled to be compensated for work related injuries under that employer's workers' compensation coverage.

Since I have concluded that the prisoners engaged in the "work release" program or the "trustee" program are not employees of the county for the purpose of the Workers' Compensation Act, it is not necessary to address your fourth question.

March 1982

Therefore, in specific answer to your questions, it is my opinion, and you are so advised, that:

1. A sheriff, and his deputies, owe a duty of ordinary care to prisoners in their custody. If their actions fall below this standard, they may be found liable by a court.

2. Boards of county commissioners have been protected from suit by the doctrine of sovereign immunity, and individual members of such boards have been protected by the doctrine of official immunity.

3. "The common law doctrine of governmental or sovereign immunity may, consistent with Section 16, Article I of the Ohio Constitution, be abolished or altered by the judicial branch of government." Schenkolewski v. Cleveland Metropark System, 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981) (paragraph one, syllabus).

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