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HIGHWAYS: Liability of governmental units performing maintenance operations on State trunkline highways under maintenance contracts with Michigan State Highway Commission.

Governmental units performing maintenance on State trunkline highways under maintenance agreements with the Michigan State Highway Commission are not liable for bodily injury or property damage sustained by third parties by reason of failure to maintain the highway in reasonable repair.

Detours established by the Michigan State Highway Commission, as a necessary incident to construction and reconstruction of State trunkline highways, become part of the trunkline highway; and the Michigan State Highway Commission, in the maintenance of such detours, is subject to the statutory liability created by Act 170 of the Public Acts of 1964.

No. 4455 March 15, 1966.

Mr. Howard E. Hill
State Highway Director
Michigan State Highway Commission
Stevens T. Mason Building
Lansing, Michigan

You ask the following questions:

1. Are governmental units performing maintenance on state trunkline highways pursuant to maintenance agreements with the commission liable under the provisions of Act 170, P.A. 1964?

2. Are temporary detours on county roads established by the Michigan State Highway Commission as an incident to construction and reconstruction to state trunkline highways within the purview of Act 170, P.A. 1964?

Act 170, P.A. 1964 [M.S.A. Current Mat. § 3.996 et seq.] became effective July 1, 1965. Section 2 thereof, reads in part:

"Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him from such governmental agency. . . ."

Article V, Section 28, of the Michigan Constitution of 1963 reads:

"There is hereby established a state highway commission, which shall administer the state highway department and have *jurisdiction and control over all state trunkline highways* and appurtenant facilities, and such other public works of the state, as provided by law." (Emphasis supplied)

The legislature by enactment of Act 51, P.A. 1951, amended, [C.L.S. 1961 § 247.651(a) et seq., M.S.A. 1958 Rev. Vol. § 9.1097(1a) et seq.] provided in Section 1a thereof as follows:

> "All state trunkline highways now or hereafter established as provided by law, shall be constructed, *maintained* and improved in accordance with the provisions of this act *under the direction, supervision and control of the state highway commissioner* . . . " (Emphasis supplied)

Section 1b of said act reads in part as follows:

> "The state highway department shall bear the entire *cost of maintaining, in accordance with standards and specifications of the department,* all state trunkline highways including such highways within incorporated cities and villages . . . " (Emphasis supplied)

The state highway commission is authorized to contract for the maintenance of its state trunkline highways pursuant to Section 2, Act No. 17, P.A. 1925, amended, [C.L. 1948 § 250.62, M.S.A. § 9.902] as follows:

> "The state highway commissioner is hereby authorized to contract with boards of county road commissioners, township boards, or with any person, persons, firm or corporation for the . . . maintenance of trunkline highways. . . ."

By Act No. 286, P.A. 1964 [M.S.A. Current Mat. § 9.216(2)] Section 2 thereof, the office of State Highway Commissioner was abolished and the powers and duties of that office were transferred to and vested in the State Highway Commission. Said section also provides ". . . Any law referring to the state highway commissioner or office of state highway commissioner shall be deemed to refer to the commission. . . ."

All maintenance agreements entered into by the Michigan State Highway Commission with governmental units are the same as to form and content. These contracts provide that the governmental unit shall perform maintenance work at the direction of the chief maintenance engineer of the Michigan state highway department. The general scope of the work is dictated by the office of maintenance in the Michigan state highway department. Special maintenance work not covered by line budget items can only be performed upon the written authorization of the state highway department. The commission dictates the type of material required in the maintenance work and can supply same. Reimbursement for wages are per schedules set forth in the contract. Profit is not contemplated.

The Michigan state highway commission has control and jurisdiction over all state trunkline highways under the aforesaid constitutional and statutory provisions. There is nothing contained in either the constitution or legislative acts that imposes any duty for maintaining state trunkline highways on any other governmental unit.

I am mindful of the conflict that existed between the cities and the state highway commissioner with respect to jurisdiction and control over state trunkline highways located within cities and which arose by virtue of the

language set forth in Section 28, Article VIII of the Michigan Constitution of 1908, which reads in part as follows:

> ". . . The right of cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

Specific problems in this area were decided in *Allen v. State Highway Commissioner*, 338 Mich. 407; *City of Dearborn v. Sugden & Sivier, Inc.*, 343 Mich. 257, and other Supreme Court cases.

This conflict, however, is now resolved by Section 29 of Article VII of the Michigan Constitution of 1963, which reads in part:

> ". . . *Except as otherwise provided in this constitution* the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." (Emphasis supplied)

Section 28, Article V, Michigan Constitution of 1963 which created the highway commission vested in the commission *jurisdiction and control over all state trunkline highways*. Thus, it is clear that state trunkline highways are excepted from Section 29, Article VII of the 1963 Constitution and the state highway commission has the same measure of jurisdiction and control over state trunkline highways located within cities as it has over the general system of state trunkline highways.

It is patently clear that Section 2 of Act 170, P.A. 1964 imposes the duty of maintenance upon "Each governmental agency having jurisdiction over any highway . . ." and anyone injured or damaged ". . . by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, . . . may recover . . . *from such governmental agency*." (Emphasis supplied)

Thus, by this language, recovery for personal injury and damage is limited to that governmental agency which has jurisdiction over the highway involved.

The state highway commission does not divest itself of jurisdiction over state trunkline highways by the maintenance agreements involved. Jurisdiction is imposed as aforesaid by constitutional provisions. Therefore, it appears that liability could not attach to other governmental units for negligent acts arising out of failure to maintain state trunkline highways.

The question then arises as to whether the governmental units which perform the maintenance work under contract with the commission share in the highway commission's liability as aforesaid.

In the case of *Johnson v. Board of County Road Commissioners of Ontonagon County*, 253 Mich. 465, the Michigan Supreme Court concluded that the Ontonagon County Board of Road Commissioners performing maintenance work pursuant to contract with the state highway commissioner was only, as the court said at page 470 ". . . a governmental agency in the hands of the State highway commissioner used in the discharge of certain governmental duties, i.e. the repair and maintenance of State highways. . . ." The contract to which the court made reference in

said case is similar in terms to the ones presently in use by the Michigan State Highway Commission.

In *Jourdin v. City of Flint*, 355 Mich. 513, the City of Flint was held liable for damages resulting from its negligent maintenance of a state trunkline highway which the city agreed to maintain. An equally divided court affirmed the circuit court's decision which premised its judgments in favor of plaintiff on its interpretation of C.L. 1948 § 242.3, M.S.A. § 9.593. The circuit court reasoned that the statute required the City to keep in reasonable repair *all* highways and streets within its city limits, thus including state trunkline highways. The four supreme court justices voting affirmatively on the circuit court's decision relied upon the similar construction of said statute. However, Justice Kavanaugh who wrote the opinion for reversal, set forth the rule in the *Johnson* case, *supra*, describing the legal relationship between the City and the State highway department under the maintenance agreement as follows:

> "In the instant case the city was performing the same duties as the county was in the *Johnson Case*, and the Court therein held the county was performing purely a governmental function, and that it was performing it on behalf of the State highway commissioner, that is, the repair and maintenance of a State trunk-line highway. The city of Flint was performing a governmental function in maintaining Dort highway at the time and place in question in this suit, which it had no duty to perform except under the contract, it being the responsibility of the State to maintain such highway in a reasonably safe condition. . . ."

The court in the *Johnson* case in effect, declared that because Ontonagon county was doing the state's work in performance of the state's governmental function, the county under the maintenance agreement, was acting as an agency of the state and that anyone injured or damaged thereby must look to the state for relief.

The rationale of decision in the *Johnson* case was not changed by the *Jourdin* case. Chapter 22 of Act 283, P.A. 1909, as amended, under which liability was imposed upon the City in the *Jourdin* case, has been repealed by Act 170, P.A. 1964.

Accordingly, it is my opinion that governmental units which perform maintenance work on state trunkline highways under contract with the state highway commission are not liable for negligence arising therefrom.

The answer to your second question involves consideration of statutory authority of the state highway commission to establish detours on state trunkline highways as a public safety measure. Section 497, Act 328, P.A. 1931, as amended, [C.L. 1948 § 750.497; M.S.A. 1954 Rev. Vol. § 28.765], authorizes the state highway commissioner, by appropriate order, to detour traffic from or upon trunkline highways, to provide the direction of traffic, and to close or limit the traffic on said highways whenever, in the opinion of the Highway Commissioner, unusual congestion of traffic exists thereon. Act 165, P.A. 1917 [C.L. 1948 § 247.291, et seq.; M.S.A. 1958 Rev. Vol. § 9.1421, et seq.], requires as a condition precedent to the closing of a highway, that suitable detours be provided.

The Michigan Supreme Court has held that a detour, legally established by the highway commissioner as part of the trunkline highway, becomes part of the main road. *Sivak v. Swan Ice Cream Company*, 335 Mich. 651. The Michigan court has also ruled in *Shoniker v. English*, 254 Mich. 76, that a detour established by the state highway department under statutory authority becomes part of the trunkline highway.

I therefore, conclude that detours established by the Michigan State Highway Commission as a necessary incident to construction and reconstruction of state trunkline highways are but continuations of the trunkline highway and, in the maintenance of such detours by the highway commission, the commission is subject to the statutory liability created by Act 170, P.A. 1964.

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FRANK J. KELLEY,
Attorney General.

LEGISLATURE: Attorneys at law serving in the legislature.
ATTORNEYS AT LAW: As officers of the court – not prohibited from serving in the legislature.

Attorneys who are officers of the court upon their admission to practice are not exercising the powers of the judicial branch of state government and are not prohibited under the Constitution of 1963 from serving in the legislature if duly elected and otherwise qualified. A lawyer-legislator may vote on matters before the legislature involving the judicial branch of government without violating the State Constitution. The State Constitution does not prohibit a lawyer-legislator from practicing law on behalf of his clients before boards, commissions, and agencies of the state government; however the legislature could consider this matter, if it wishes, as a question of public policy.

No. 4522

March 16, 1966.

Hon. E. D. O'Brien
State Representative
The Capitol
Lansing, Michigan

Your decent letter contains a statement of your understanding that "attorneys legally authorized to practice law in the state of Michigan are officers of the court." You point out that a substantial number of attorneys have been elected to and are now serving in each house of the current legislative session. You direct my attention to Article III, Section 2, Constitution of 1963, which you quote as follows:

> "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

You also direct my attention to Sections 8, 9 and 10 of Article IV, Constitution of 1963, which read as follows: