

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 84

COUNTIES - Responsibility for indemnifying fire district employees;  
COUNTY COMMISSIONERS - Responsibility for indemnifying fire district employees;  
COUNTY OFFICERS AND EMPLOYEES - Responsibility for indemnifying fire district employees;  
EMPLOYEES, PUBLIC - Responsibility for indemnifying fire district and fire service area employees;  
FIRE DISTRICTS - Responsibility for indemnifying employees in fire districts and fire service areas;  
INSURANCE - Responsibility for indemnifying fire district employees;  
MONTANA TORT CLAIMS ACT - Indemnification of fire district and fire service area employees;  
MONTANA CODE ANNOTATED - Sections 2-9-101(2), (3), (5), 2-9-102, 2-9-305, 7-33-2104, 7-33-2109, 7-33-2403;  
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 71 (1974).

- HELD: 1. Fire district employees in a district operated by trustees must be indemnified under the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973 by the fire district, rather than the county in which the fire district is located. 35 Op. Att'y Gen. No. 71 (1974) is overruled insofar as it conflicts with the holding of this opinion.
2. Employees of a fire service area operated by trustees must be indemnified under the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973 by the fire service area, rather than the county in which the fire service area is located.

18 May 1988

Harold F. Hanser  
Yellowstone County Attorney  
Yellowstone County Courthouse  
Billings MT 59101

Dear Mr. Hanser:

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You have requested my opinion concerning the relation of the Montana Comprehensive State Insurance Plan and Tort Claims Act, particularly section 2-9-305, MCA, to fire districts and fire service areas operated by trustees pursuant to sections 7-33-2104(2) and 7-33-2403, MCA. I have phrased your questions as follows:

1. In light of 35 Op. Att'y Gen. No. 71 (1974) which held that salaried employees of a fire district are county employees, are the county commissioners or the fire district trustees responsible for indemnifying fire district employees under the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973?
2. Would the answer be the same regarding indemnification of employees of a fire service area?

Under the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973 (hereinafter the Act), all governmental entities in Montana became liable for the tortious conduct of their employees "acting within the scope of their employment or duties." § 2-9-102, MCA. As an incident to this waiver of sovereign immunity, the Legislature provided for the indemnification of governmental employees as follows:

(2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee's office or employment, the governmental entity employer ... shall defend the action on behalf of the employee and indemnify the employee.

....

(4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit ....

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§ 2-9-305, MCA. (Emphasis added.)

In determining which governmental entity is responsible for indemnifying fire district employees, it is helpful to consider the following definitions from the Act:

(2) "Employee" means an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity temporarily or permanently in the service of the governmental entity whether with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity ....

(3) "Governmental entity" means and includes the state and political subdivisions as herein defined.

....

(5) "Political subdivision" means any county, city, municipal corporation, school district, special improvement or taxing district, or any other political subdivision or public corporation.

§ 2-9-101, MCA. Although the definition of "political subdivision" does not specifically mention "fire district," the plain language of the definition evinces a legislative intent to distinguish between counties and taxing districts as distinct types of political subdivisions, and therefore, as distinct types of governmental entities. Fire districts are taxing districts in the contemplation of section 7-33-2109, MCA, which provides in pertinent part:

[T]he board ... may levy a special tax upon all property within such [fire] districts for the purpose of buying or maintaining fire protection facilities and apparatus for such districts or for the purpose of paying to a city, town, or private fire service the consideration provided for in any contract with the council of such city, town, or private fire service for the purpose of furnishing fire protection service to property within such district.

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In addition, section 7-33-2105(3), MCA, provides that "[t]he [fire district] trustees shall prepare annual budgets and request special levies therefor." It follows that fire districts operated by trustees are political subdivisions distinct from counties, and are thus governmental entities as those terms are used in the Act.

However, because the county commissioners have authority to establish, divide, annex, dissolve, and appoint the trustees of a fire district, a question arises as to which governmental entity is liable for indemnifying fire district employees. See §§ 7-33-2101 to 2104, 7-33-2122, 7-33-2123, 7-33-2125, 7-33-2126, 7-33-2128, MCA. In other words, are the employees employed by the county or the fire district within the meaning of the Montana Comprehensive State Insurance Plan and Tort Claims Act?

That question is best answered by determining which governmental entity, the county or the fire district, would more likely be held liable for the tortious conduct of a fire district employee. Courts and commentators alike have focused that inquiry on the existence of a master-servant relationship between the government employer and government employee, and in particular on the right of the government employer to exercise control over the conduct of the government employee.

The test generally, however, narrows down to the power to control. The right to control the action of the person doing the alleged wrong, at the time of and with reference to the matter out of which the alleged wrong sprung, which is a general test of the relationship of master and servant, governs, at least to a very great extent, in determining whether a municipality is liable under the rule of respondeat superior; and the right to discharge or terminate the relationship is important.

18 McQuillin, Municipal Corporations § 53.66 (3d ed. 1984).

The Montana Supreme Court employed a similar analysis in a 1976 case involving a suit brought under the Act against both the City of Billings and the State of Montana for the allegedly negligent conduct of several Billings police officers. State v. District Court, 170 Mont. 15, 550 P.2d 382 (1976). In concluding that the

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City, and not the State, was liable for the action of the officers, the Court stated:

The power in the City to control its policemen in both broad and detailed affairs related to their work brings the policemen squarely within the definition of "employee" and subjects the City to liability under the terms of [the Act] for torts of its employees acting within the scope of their employment or duties.

While the police officers are the servants of the City, it cannot be said that they are servants or agents of the State. The State exercises no direct, detailed or daily supervision over City policemen; it is powerless to avoid or prevent negligent acts by them. It cannot pay, hire or fire City policemen, and it does not provide police services for the City. In short, the State does not control the activities of City police officers and cannot be held responsible for their negligence.

State v. District Court, 170 Mont. at 19-20, 550 P.2d at 384. See also Orser v. State, 178 Mont. 126, 131-32, 582 P.2d 1227, 1231 (1978).

In the case of a fire district operated by trustees, it is the trustees who "govern and manage the affairs of the fire district." § 7-33-2104(2), MCA. The trustees are required to "prepare and adopt suitable bylaws," and have authority to provide the district with various firefighting equipment and facilities. § 7-33-2105(1), (2), MCA. The responsibility of hiring fire district personnel devolves upon the trustees, § 7-33-2105(2), MCA; the trustees are charged with managing fire district budgets, § 7-33-2105(3), MCA; and they have authority to contract for various equipment and services, § 7-33-2107, MCA. Clearly, it is the trustees who "govern and manage the affairs" of the fire district, and not the county commissioners. Thus, the government entity responsible for the indemnification of fire district employees is the fire district itself, rather than the county in which the district is located.

My conclusion is the same regarding your second question. When a fire service area is operated by trustees under section 7-33-2403(1)(b), MCA, then the fire service area must indemnify its own employees. It should be noted that fire service areas and fire districts can be governed either by trustees or by the

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county commission. §§ 7-33-2403, 7-33-2104, MCA. If the county commissioners opt to govern the fire service area or fire district themselves, then the responsibility for indemnification would rest with the county.

THEREFORE, IT IS MY OPINION:

1. Fire district employees in a district operated by trustees must be indemnified under the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973 by the fire district, rather than the county in which the fire district is located. 35 Op. Att'y Gen. No. 71 (1974) is overruled insofar as it conflicts with the holding of this opinion.
2. Employees of a fire service area operated by trustees must be indemnified under the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973 by the fire service area, rather than the county in which the fire service area is located.

Very truly yours,

MIKE GREELY  
Attorney General