

Opinion No. 57-128

June 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: The Honorable W. T. Scoggin, District Judge, Third Judicial District, Las Cruces,
New Mexico

QUESTIONS

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1. May a district judge be reimbursed for expenses incurred in defending a civil suit brought against the judge as an individual but for acts committed while in the capacity of district judge?
2. If the judge is entitled to reimbursement, may the same be made out of the judicial district court fund?

CONCLUSION

1. See opinion.
2. Yes.

OPINION

ANALYSIS

The question asked is apparently one of first impression in the State of New Mexico, and, we believe, one of prime importance. It could concern any state official for acts committed by him while acting in his official capacity, or in performing his official duties. A judge, while acting in a judicial capacity in almost every case, is called upon to exercise both discretionary and judicial powers which call upon his wisdom, integrity and judgment in the performance of his duties. As pointed out by Cooley on TORTS, 4th Edition, Volume 2, Section 312, page 421, the very nature of the judge's authority is inconsistent with responsibility in damages for the manner of its exercise, since to hold the officer to such responsibility would be to confer a discretion and then make its exercise a wrong. The above text continues:

"As a general rule, the only liability of the officer is to the criminal law in case he shall wrongfully and maliciously neglect to perform his duties or shall perform them improperly. The weight of authority holds that a judge is not liable in a civil case for acts committed in his official capacity unless it can be satisfactorily shown that he has

abused a discretion through malice, or that his judgment was perverted through favoritism or other improper motive, or that the judge has acted completely without jurisdiction."

The above rule is in accord with public policy, and, as stated by Cooley on TORTS, supra, § 312, p. 421, the public interest would suffer if such suits are brought because:

"1. The necessary result of a liability would be to occupy the judge's time and mind with the defense of his own interests;

"2. The effect of putting the judge on his defense as a wrong-doer necessarily is to lower the estimation in which his office is held by the public;

"3. The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments;

"4. Such civil responsibility would constitute a serious obstacle to justice in that it would render essential a large increase in the judicial force.

"5. Where the judge is really deserving of condemnation a prosecution at the instance of the state is a much more effectual method of bringing him to account than a private suit."

Turning to the specific question raised in question one, -- that of costs sustained by a judge in defending himself, -- many cases hold that a municipality, board of commissioners, and similar bodies may pay the expenses, including attorney's fees, incurred in suits brought against officials for acts, though beyond their authority, committed by them in the honest discharging of their duties. 43 CJ 890, **Messmore v. Kracht**, 172 Mich. 120, 130 NW 549; **Clark v. Smith**, 250 App. Div. 233, 294 NYS 106; **Calvin v. Brant**, 172 NYS 738. The reason for the above rule is well expressed in the case of **Roper v. Laurinburg**, 90 NC 427, in which the court stated:

"A municipal corporation has the right to provide an indemnity for its officers who might incur liability to others in the bona fide exercise of their functions while in the discharge of their duties. The consequences might be serious if officers were left to struggle alone and unaided in every action that persons might choose to bring upon an allegation of abused authority, though honestly exercised in the maintenance of the public peace and the preservation of good order."

Conversely, where acts of public officials were not in the discharge of their duties, it has been held that they may not be indemnified. It would appear to be a general rule that members of a public governing body can not expend public moneys to shield themselves from the consequences of their own unlawful and corrupt acts. **Birmingham v. Wilkinson**, 239 Ala. 199, 194 So. 548.

By way of summary in answer to question one, we are of the opinion that a district judge should be reimbursed for expenses incurred in defending a civil suit brought against him for acts committed in his capacity as a district judge if he is successful in defending himself. If, however, he is not successful in defending himself, it follows that he must have acted through malice or other improper motive, or acted completely without jurisdiction; and in that case he should bear the costs of his action himself.

Turning to the second question, we find no statutory or case precedent providing for the legal defense of New Mexico state and county officials or for the reimbursement of their costs when they are sued individually for acts performed in an official capacity. The only exception to the above is the state police who are specifically provided for at § 39-2-27, N.M.S.A., 1953 Comp., Pocket Supplement, which provides that the Attorney General's Office is directed to act in the event any officer of the state police is named as a party in any civil suit or proceeding in connection with an act or acts growing out of the performance of his line of duty.

Section 16-3-22, N.M.S.A., 1953 Comp., referring to the disbursements of the district court maintenance fund states in part:

". . . when collected it shall be turned over to the county treasurer to be by him disbursed for the payment of the expenses of the district court in his county only as provided by law or upon a certificate of the clerk of the district court of the district in which his county is situated, that an allowance has been made by said court, and no court shall authorize the issuance of any certificate on any account whatsoever unless there shall be at the time money in the county treasury to meet and pay such certificate, and said clerk shall immediately after the close of any term of court, transmit to said treasurer a certified list of all allowances made by said court at such term, and any such treasurer who shall disburse any of the money provided for in this section except as provided by law or as herein provided shall be deemed guilty of a felony, and upon conviction thereof shall be confined in the state penitentiary not less than two (2) years nor more than ten (10) years."

In Attorney General's Opinion No. 3383, written January 6, 1940, the late Honorable A. M. Fernandez, at that time an Assistant Attorney General, wrote an opinion construing the above section. His opinion pointed out that in the disbursement of this fund the only restriction upon the authority of the court is that no certificate should be issued unless there is sufficient money in the fund to meet the same. He said the court fund is under the absolute control of the court. The Opinion went on to state:

"It is my opinion that the legislature intended to give the court a wide discretion in the use of the fund **for any purpose connected with the administration of justice.**"

As indicated in this opinion, the very nature of judicial authority is opposed to the theory that a judge should be held civilly liable for action taken in a judicial capacity, and is contrary to public policy. All courts have upheld the above rule excepting certain acts noted herein. Certainly, the weight of authority authorizes the reimbursement of

expenses incurred in defending civil action, and to do so is connected with the the maintenance and administration of justice. We believe that a district judge can be reimbursed from the court fund for expenses incurred in defending himself from civil liabilities if the suit arose from acts committed while performing his official duties, and if he is successful in defending himself in that action. It follows that such reimbursement should be made at the conclusion of the civil action, at which time a complete accounting and reimbursement could be made.