

Opinion No. 57-161

July 9, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Earl M. Coffee, Administrator, Miners' Hospital of New Mexico, Raton, New Mexico

QUESTIONS

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Would the Miners' Hospital of New Mexico be liable for damages in tort for malpractice of an attending physician?

CONCLUSION

No.

OPINION

ANALYSIS

§ 13-3-1, N.M.S.A., 1953 Comp., designates the trustees of the Miners' Hospital a body corporate with the right to sue and to be sued. The question then becomes whether in view of the above statute making the trustees of the Hospital a body corporate and authorizing their being sued, said Hospital is immune from suit in tort by reason of its being an agency of the State?

This question was answered in the affirmative by the Supreme Court of this State, in *Vigil et al v. Penitentiary of New Mexico*, 52 N.M. 224 (1948). The question in that case was whether an individual could maintain an action in tort against the Penitentiary of New Mexico, a corporation, for damages. The Court held that a suit against the State Penitentiary was in fact a "suit against the State" and the language "right to sue and to be sued", as used in the statute designating the Penitentiary a body corporate, did not include the right to sue the Penitentiary in tort.

The above decision is in accord with the overwhelming majority of cases in this country which hold that an action against a corporation such as the Miners' Hospital is an action against the State and cannot be maintained in the absence of a specific statute authorizing it. (See 49 Am. Jur. 288).

The further question arises as to the liability of the Hospital in tort when injury occurs to a paying patient, since under the statute paying patients are admitted. There are no

decisions on this question in this State but the law in other jurisdictions, on the subject as enunciated in 49 Am. Jur. 289, is as follows:

"The distinction recognized in municipal law, in determining the liability of municipal corporations for tort, between acts and duties which are strictly public and governmental in their nature and those which are of a private or proprietary nature does not appear to control the question of liability of the state for tort. The rule of non-liability of the state for torts of its officers, although often stated in terms indicating it to be a rule of non-liability when the officer is exercising a governmental function, does not appear to be limited to cases where the act of the officer or agent occurred in the discharge of some purely governmental function of the state."

Thus, in *Riddoch v. State*, 68 Wash. 329, 123 P. 450, the court held that a state does not become liable for the torts of its officers by permitting the leasing of its armory for pay on the theory that it thereby engages in private enterprise and abandons its right to immunity from suit.

In view of the above, it is the opinion of this office that the Miners' Hospital of New Mexico would not be liable for damages in tort for the malpractice of an attending physician. Nor would there be any liability for injury occurring to a paying patient.