Opinion No. 59-75

July 20, 1959

BY: Hilton A. Dickson, Jr., Attorney General

TO: Mr. James L. Dow City Attorney Harris Building Carlsbad, New Mexico

1. The provisions of Chapter 333, Laws 1959, dealing with liability of a municipality for the negligent acts of its officers and employees, bar the defense of the municipality of immunity from suit because the acts were committed during the carrying out of a governmental function.

2. The provisions of Chapter 333, Laws 1959 repeal by implication that portion of Section 14-17-11, N.M.S.A., 1953 Compilation, which provides for liability of a municipality for the negligent acts of its officers and employees.

OPINION

*{*118}* This is written in reply to your recent request for an opinion on the following questions:

1. Does Chapter 333, Laws 1959 bar the defense of immunity from suit by the municipality because it is performing a governmental function?

*{*119}* 2. Does Chapter 333, Laws 1959 repeal by implication § 14-17-11, N.M.S.A., 1953 Compilation?

3. If the above Section is repealed, then if the municipality is self-insured and not liable under Chapter 333, Laws 1959 are the employees and officers liable in their individual capacity for negligent acts done in the performance of their duties?

In answer to your questions it is my opinion that:

1. Yes, Chapter 333 does bar such a defense.

2. Only that portion of § 14-17-11 which provides for liability on the part of the municipality is repealed by by implication.

3. See discussion under question No. 2.

The conclusion that Chapter 333, Laws 1959 does allow suits against a municipality even when it is in the performance of a governmental function is arrived at by virtue of the fact that a similar statute has been construed by the New Mexico Supreme Court to remove this immunity. § 14-17-11, N.M.S.A., 1953 Compilation exempts employees of municipalities from suit and further provides that in all such cases the municipal

corporation shall be responsible. This **statute** was construed in **Brown v. City of Deming,** 56 N.M. 302, 243 P. 2d 609, to mean that the liability of the municipality no longer depends upon the distinction between a governmental function and a proprietary function. These two statutes are similar in the respect that they both provided for liability on the part of the municipality for the acts of its employees and officers without mention of any particular function being exercised. The Court in the **Brown Case,** supra, said:

"Much is said in the briefs about whether the defendant village was acting in a governmental or proprietary capacity in instituting the prosecution, the defendant contending it was acting in a governmental capacity and as an agent of the state in enforcing its criminal statute when it caused the complaint to be filed. We are, however, unable to see where the capacity in which it was acting makes any difference under the statute [14-17-11] and our decisions heretofore cited."

It is my opinion that the analysis of the Court in that case dealing with § 14-17-11 applies with equal force to Chapter 333, Laws 1959. This interpretation is strengthened when it is remembered that even without a statute, a municipality is liable for the negligent acts of its officers and employees when performing a proprietary function. The efforts of the legislature would therefore be useless unless the statute applied with equal force to acts done in carrying out a governmental function. It is therefore my opinion that Chapter 333, Laws 1959 does bar the defense of immunity from suit by a municipality even when it is carrying out a governmental function.

The answer to your second question is not an easy one. It is always with great caution and hesitancy that this office presumes to find that the legislature intended by implication to repeal a statute or portion thereof by the enactment of a subsequent one. No other course is available in this instance however. While it is true that repeals by implication are not favored by the courts, when two statutes or portions thereof are **irreconcilable** and repugnant the later pronouncement of the legislature will prevail and the earlier one will be deemed to be repealed by implication. **State v. Melendrez,** 49 N.M. 181, 159 P. 2d 768; **Rader v. Rhodes,** 48 N.M. 511, 153 P.2d 516; **In re Martinez' Will,** 47 N.M. 6, 132 P. 2d 422. Such is the case here. § 14-17-11 provides in part:

". . .; in all such cases the *{*120}* municipal corporation shall alone be responsible."

Chapter 333 provides that no judgment shall be brought against a municipality unless it carries a liability insurance policy and, even if it does, liability under the judgment is limited to the amount of the policy. It therefore appears that when a municipality carries no insurance but only acts as a self-insurer, a conflict between the two statutes arises. § 14-17-11 provides that the municipal corporation shall be liable whenever the employee or officer is acting with the authority of the municipality; Chapter 333 provides that the municipality will only be **liable** for negligent acts of its employees or officers when it carries a liability **insurance** policy. The above conflict is plain in view of the New Mexico Supreme Court's interpretation of the above quoted portion of § 14-17-11 in the **Brown Case,** supra and **Baca v. City of Albuquerque,** 19 N.M. 472, 145 Pac. 110. It is

therefore my opinion that the portion of § 14-17-11, N.M.S.A., 1953 Compilation, which provides for liability of a municipal corporation was repealed by implication by Chapter 333, Laws 1959. The repealed language is:

". . .; in all such cases the municipal corporation shall alone be responsible."

Only the above quoted portion of the section is held repealed since that is the only portion that is repugnant to and **irreconcilable** with Chapter 333. The remainder of § 14-17-11 deals with exempting officers and employees of the municipality from liability in their individual capacity. It seems clear that the intent of the legislature was not to repeal this language in the section since it is perfectly compatible with Chapter 333. Only the portion of the earlier statute which is repugnant to the subsequent statute is repealed by implication. **Kemp Lumber Co. v. Howard,** 237 Fed. 574; **Baca v. Board of Commissioners of Bernalillo County,** 10 N.M. 438, 62 Pac. 979; **Territory v. Matson,** 16 N.M. 135, 13 Pac. 816.

In view of the above discussion no further analysis is needed in answering your third question since the portion of § 14-17-11 dealing with exemption from suit of employees and officers in their individual capacity is unaffected and still in full force and effect.