

Opinion No. 39-3199

June 30, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. F. S. Merriau, Attorney, New Mexico Miners Hospital, Raton, New Mexico.

{*75} I have your letter of June 26th in which you inquire whether the Miners Hospital would be liable for damages in tort, as for injuries sustained by a visitor or patient in the hospital elevator, or for improper or insufficient care to miners who have been admitted to the hospital as such, or for malpractice of an attending physician.

Section 130-606, 1929 Compilation, declares that the trustees of the Miners Hospital "shall constitute a body corporate * * * with the right as such of suing and being sued." But for this provision, there would be no question that the hospital is merely an arm or agency of the state, and as such would be immune from liability for tort, and immune from suit of any character.

The question is whether by reason of the above statute making the trustees of the hospital a body corporate and authorizing their being sued, the hospital is thereby made liable for torts the same as any other corporation.

My opinion is that it is not. The weight of authority seems to be that apart from the liability of the state or its agencies to suit, there is no liability on the part of the state or its agencies for tort; that in order to hold the state or its agencies liable for negligence or misconduct of its officers or employees, the intent of the Legislature to make them liable must appear in clear and unambiguous language, and that a statute merely authorizing suit does not render the state or its agencies liable in tort. States, 59 C.J. 195, 196, Sec. 339 and 340; State Highway Commission vs. Knight, 154 So. 263, 170 Miss. 60; Collins vs. Commonwealth (Pa.), 106 Atl. 229; Asylums, 7 C.J.S. 150, Sec. 9; Leavell vs. Western Kentucky Insane Asylum, 91 S.W. 671, 122 Ky. 213, 4 L.R.A. (N. S.) 269, 12 Ann. Cas. 827; Maia vs. Eastern State Hospital, 34 S.E. 617, 97 Va. 507, 47 L.R.A. 577.

It is my opinion that the hospital is not liable for the negligence or misconduct of its officers or employees, although the matter is an open one in this state, and although it appears that liability and damages for creating and maintaining a nuisance may be enforced. 7 C.J.S. 150, supra.

Just what effect the language of the Supreme Court in State vs. Locke, 29 N.M. 148, 219 P. 790, and Dougherty vs. Vidal, 37 N.M. 256, 21 P (2d) 290, would have in the consideration of a suit for tort as distinguished from one on contract or for breach of contract, or other obligation liability for which may have been clearly and unambiguously imposed by statute upon these corporate state agencies, I cannot say; but I do not consider them as authority to the effect that these corporate state agencies have been made liable in tort. It will be observed that in Highway Commission vs. Knight, the

statute provided that the state Highway Commission "shall be **a body corporate**, and may sue and be sued as such," but the court held it not to be liable in tort.

Of course, with respect to this particular hospital, there is a further consideration that under the statute pay patients are admitted, and so long as they are admitted, it is not wholly dependent upon public funds for its support. Just what effect this fact would have on the question when injury to a pay patient is involved, { *76 } I am not prepared to say. Perhaps the hospital would be liable for breach of contract to a pay patient.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.