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OPINION NO. 86-345

September 18, 1986

Paul Mallard, Director
Arkansas State Building Services
Suite 700, 1515 Building
Little Rock, Arkansas 72201

Dear Mr. Mallard:

This letter is in response to your request for an opinion concerning State Building Services' involvement in asbestos abatement projects, specifically the following question:

1. What is the extent of State Building Services' liability as an agency and as individuals when preparing contract documents (plans and specifications) for asbestos abatement projects in state owned buildings?

First, we will examine the issue of the agency's liability. It appears that the agency would be immune from suit under Article 5, §20 of the Constitution. However, any claim for injury resulting from the agency's acts in preparing plans and specifications for asbestos abatement projects could be brought before the State Claims Commission. In addition the agency could be subject to suit in federal court under any theory cognizable in that court.

Secondly, the individual employees of the agency question their exposure to personal liability for their acts in drafting such project plans and specifications. Two statutes exist relevant to this issue. Ark. Stat. Ann. §13-1420 provides state employees are immune from civil liability for acts or omissions occurring in the scope and course of state employment excluding malicious acts or omissions. However, this statute does not prevent such employees from being sued in state courts.

In Carter v. Bush, 283 Ark. 76, 677 S.W.2d 837 (1984) the Court held that employees can be sued when the law imposes a duty of care upon them in common with all other people and

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they fail to meet that standard. But, the employee is to incur no personal liability for non-malicious acts.

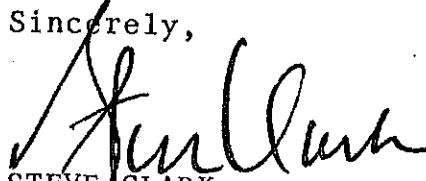
The Court further held that Ark. Stat. Ann. §12-3401 et seq provides a means of paying claims against employees who are uninsured or whose insurance does not cover the amount of the claim. The state shall pay actual but not punitive damages adjudged against a state employee for an act or omission in good faith and without malice and done in the performance of his official duties. Ark. Stat. Ann. §12-3401. The employee must notify the Attorney General of the litigation or demand for damages. Ark. Stat. Ann. §12-3404. Such claims shall be paid through State Claims Commission proceedings. Ark. Stat. Ann. §12-3405.

Other sections of that statute have conditions or limitations on payment by the State. The claimant is required to exhaust all claims against insurers before the Commission can hear the claim. Ark. Stat. Ann. §12-1417. No subrogation claims can be heard. Ark. Stat. Ann. §12-1419. The Commission must reduce awards where insurance proceeds have been paid from a policy the premiums on which were not paid by on or behalf of the claimant. Ark. Stat. Ann. §12-1418.

Therefore, it is my opinion that the agency is subject to liability as in other circumstances through the Claims Commission or possibly federal court. While individual employees may be subject to suit for negligence, they should incur no personal liability providing the act or omission was in good faith and without malice, was in the course and scope of employment while performing official duties, and otherwise meets the conditions of Ark. Stat. Ann. §12-3401 et seq and §12-1416 et seq.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Thomas S. Gay.

Sincerely,


STEVE CLARK
Attorney General

JSC:TSG:jk