

HIGHWAY COMMISSION, STATE: Liability of Commission to pay attorneys' fees and to defend suits brought against contractors in rights-of-way proceedings; also liability to pay attorneys' fees of employees involved in tort actions.

March 4, 1937.

Hon. James D. Adams, Chairman,
State Highway Commission,
State House Annex,
Indianapolis, Indiana.

Dear Sir:

Acknowledgment is hereby made of your request of March 1, 1937, which reads as follows:

"The commission would be pleased to have you give us your opinion as to the right and duty of the Highway Commission upon the following statement of facts:

" (1) 'A,' an employee of the commission was engaged in removing snow from State Road 7, using a grader drawn by a truck. Red lanterns were displayed. This was a regular duty that 'A' was employed to perform. While adjusting the grader he was using, it was run into by an automobile driven by 'B.' 'B' demanded damages from the commission, which of course could not be allowed for the reason that the State is not liable for damages for tort under such circumstances. 'B' then sued 'A' for damages both for property and personal injuries, and 'A' employed an attorney who successfully defended the case, and who charged \$75.00 for his services. 'A' is now requesting the commission to reimburse him for the amount of this attorney fee. The commission would like to know if the commission has the legal right and it is its duty to make such payment. If so, out of what specific appropriation made to the commission should the amount be paid?"

The State, of course, is not liable for damages in tort. Therefore, in an accident between an employee of the commission and another person, that person cannot proceed against the State. That he can proceed against the employee

is not necessary to be decided. Attorneys' fees arising out of the defense of the suit against patrolmen, while perhaps a moral obligation against the Highway Commission, cannot constitute a legal obligation. Consequently, it is the opinion of this department that the commission is under no legal duty and has no legal right to make such a payment of attorneys' fees.

The second question is on the following statement of facts:

"(2) The commission procured a grant for the right of way upon which to construct U. S. 30 from one Kreicher and wife and from one Fleming and wife. The first were the owners and the last tenants. The consideration for the grant was \$3,300.00 which was by the grant authorized to be paid to the owners, the tenants agreeing to look to the owners for any amount due them. Afterwards the commission let a contract for grading the road to one McAfee. After the contract was let Kreicher and Fleming commenced separate suits against the commission and McAfee to set aside the grant and to enjoin the prosecution of the work. The Attorney General defended the action for both the State and McAfee and succeeded in defeating it, the court holding that the grant was valid and that the State could proceed. Fleming then brought a second suit for an injunction against McAfee alone and obtained a temporary injunction, giving the undertaking required by law. This department aided McAfee in the case which was dismissed after a partial hearing. McAfee is now demanding that we pay the amount of the attorneys' fees he incurred in defending the case. Under the circumstances, has the commission the legal right to pay such attorneys' fees and if so, out of what specific appropriation to the commission should it be paid?"

The regular road construction contract used by the Highway Commission with McAfee is silent with regard to the obligation of the commission to provide the rights-of-way to the contractor. However, the case of *State v. Feigel*, 204 Ind. 438, holds "that the plainest principles of justice require the implication of a covenant on the part of the State to provide a right-of-way so as to enable the contractor (appellee) to

prosecute his work to the utmost advantage and economy." In *State v. Snyder* (Ind.) 183 N. E. 680, the court held that the procurement of rights-of-way by the State Highway Commission was not a governmental function, but the proper subject for contract and one upon which a suit for breach of contract to secure the right-of-way must lie. The general language of the Feigel case is so broad that we are justified in concluding that the obligation of the State to secure, furnish and provide rights-of-way to the contractor is absolute.

In the present fact set-up, the State, through the Attorney General, defended a suit against the commission and the contractor which was instituted by the grantor tenant. The State succeeded in dissolving the injunction and securing a holding that the grant was valid. The grantor tenant then filed an injunction suit against the contractor alone in a different court. In this second injunction suit the right-of-way department and the commission co-operated in furnishing material for the preparation of the case but refused to furnish attorneys to defend in behalf of the contractor. It is apparent that the contractor could not proceed with the paving of this road as long as this injunction was hanging over him. The fact that the suit was not meritorious or that it may be almost called malicious prosecution is of no importance.

It is our opinion that the obligation of the Highway Commission to provide the right-of-way to the contractor was not fully discharged until the contractor could in fact proceed with the paving of the road without interference by court action. It is true that the contractor might have rested on his rights—not contesting the suit and not proceeding with the paving of the road—and then sued the commission on his contract; that he elected to employ attorneys, dissolve the injunction and proceed with his contract, does not waive his claim against the Highway Commission for damages occasioned by delay or for damages in the form of attorneys' fees necessitated by the injunction suit.

In the case of *Selden Breck Construction Company v. Regents of the University of Michigan*, 274 Fed. 982, the court said:

"The correct rule is that upon a breach of a building contract by the failure of the owner to perform his

obligations under such contract, which delays the contractor in completing his work thereunder, the latter is not obliged to abandon such work but may elect to continue therewith after such breach and upon performance of the contract, upon his part, is entitled to recover the damages sustained by him as a result of the delay of such owner."

The doctrine of this citation would seem to allow by analogy the contractor to hire attorneys to fight the injunction suit, proceed with his contract and then file claim for his attorneys' fees with the Highway Commission. If the Highway Commission would pay these attorneys' fees, they would be subrogated to the rights of the contractor as against the injunction bond necessarily filed by Fleming in the injunction proceeding. The fact that the contractor could proceed on the injunction bond himself is not an answer to the question whether the State is discharged from considering this claim because they have once before succeeded in securing an adjudication of the validity of the right-of-way grant.

In this case, as in the statement of facts submitted under question one, the problem of moral obligation cannot be considered, but here the legal duty or obligation of the State arises out of the contract.

It is our opinion that the claim for attorneys' fees should be paid out of the fund provided for special payments for personal service under the general division "miscellaneous services." (See Acts of 1935, Ch. 109, p. 385, second proviso, clause "c").

The third question is submitted on the following statement of facts:

"(3) McAfee proceeded to clear the right-of-way and in doing so removed some small buildings belonging to Fleming off the right-of-way. In the granting Fleming agreed to remove the buildings which he failed to do after notice. McAfee's contract required him to clear the right-of-way. Fleming has now sued McAfee for damages, and McAfee is requesting the State to defend the action. We have requested a copy of the complaint from McAfee's attorneys but have not received it. His attorneys are Galvin, Galvin and Leeney, Hammond, Indiana. If it is the duty of the State to defend the present action pending against McAfee, we should like to have your office do so."

The right-of-way grant provided that the grantors should move all buildings, et cetera, from and off said right-of-way within thirty days after receipt of said warrant or at such time as might be determined by the Highway Commission. In this case the grantor failed to move the building even after notice, whereupon the Highway Commission directed the contractor to clear the right-of-way. Moreover, the contractor's contract required him to clear the right-of-way. The contractor did in fact move the buildings off and has now been sued by the tenant grantor for damages.

It is our opinion that the State, as requested by the contractor, should defend this action as the subject matter forms a part of the State's obligation to provide an unimpaired right-of-way to the contractor. This is especially true since the Commission by letter has directed the contractor, as its agent, to proceed to clear the right-of-way and remove these buildings.

In the light of this opinion, we have instructed Judge Lindsey to act for the Commission and to defend the damage suit against McAfee.

ACCOUNTS, STATE BOARD OF: Salary of advisory board members.

March 5, 1937.

Hon. William P. Cosgrove,
State Examiner,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Sir:

This is in response to your recent request for an opinion as to the proper salary of members of the advisory board of certain townships. You submit the following question:

“Are members of advisory boards of townships, having in whole or in part a city of the first or second class located therein, and not having a public park under the jurisdiction of such township, entitled to receive the compensation provided in section 4, chapter 74, Acts of 1931?”

Your inquiry also involves a construction of chapter 116 of the Acts of 1935.