1977 S.C. Op. Atty. Gen. 87 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-100, 1977 WL 24442

Office of the Attorney General

State of South Carolina
Opinion No. 77-100
April 8, 1977

***1** Sufficient doubt exists as to whether public defenders are immune from liability for malpractice suits so as to make advisable their obtaining insurance. Liability insurance should also be considered for board members and employees of the defender corporation since they are unlikely to be immune from suit if no immunity is available to public defenders.

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QUESTIONS PRESENTED:

Are public defenders and members of the board and employees of defender corporation immune from liability for professional malpractice?

CASES, STATUTES AND OTHER AUTHORITY:

Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); John v. Hunt, 489 F.2d 786 (7th Cir. 1973); Sanders v. Belue, 78 S.C. 171, 78 S.E. 762, (1907); Spring v. Constantino, 168 Conn. 563, 362 A2d 871 (1975). 1962 South Carolina Code, as amended, §§ 17–285 to 17–290, 1971–72 Opinion Attorney General #3367

DISCUSSION:

Apparently no South Carolina cases have considered the issue of immunity of public defenders from malpractice suits; however, a recent Connecticut case, Spring v. Constantino, 168 Conn 563, 362 A2d 871 (1975) found no immunity for public defenders from such actions while two federal circuit court decisions, Brown v. Joseph, 463 F.2d 1046 (3rd Cir 1972) and John v. Hunt, 489 F.2d 786 (7th Cir 1973) held that immunity was extended to those attorneys in actions under 42 USC 1983.

Spring found that public defenders were not protected by judicial immunity, sovereign immunity, or a state statute providing for the immunity of state officials and employees. South Carolina has no statute similar to that in Connecticut. As to sovereign immunity, Spring found that public defenders were not state officials under a four point test for determining whether suits against such officers would amount to suits against the state. The court held that 'the public defender, when he represents his client, is not performing a sovereign function and is, therefore, not a public or state official to whom the doctrine of sovereign immunity applies.' The court did not feel that the obligation of the state to insure that indigents were represented by competent counsel made the conduct of public defenders in defending those individuals a sovereign act.

The position taken by Spring as to sovereign immunity would seem to be applicable in South Carolina. Sanders v. Belue, 78 S.C. 171, 78 SE 762 (1907) accepted a definition of a public officer based on a person exercising some portion of the sovereign power. When the public defender in South Carolina works under an eleemosynary corporation and with minimal restrictions

and control by the state, he would not appear to be exercising any sovereign or governmental power (See §§ 17–285 to 17–290 of the South Carolina Code, as amended and 1971–72 Op. Attorney General #3367 which held that public defendants were not state or county employees.)

***2** The issue of judicial immunity considered in Spring is the basis for the conflict between the decision in that case and Brown v. Joseph, supra., and John v. Hunt, supra, the two circuit court decisions. Spring rejected the argument of the state that the public defender 'is appointed by the judiciary to a judicial office and that in performing his functions he is, as is a state attorney or prosecutor, in the performance of an integral part of the judicial process.' Instead the court found that the public defender was '. . . like any other attorney whose duties as an officer of the court and to an individual client and 'whose principled and fearless' conduct of the defense are not deterred by the prospect of liability.' When in South Carolina, the public defenders are appointed by the governing eleemosynary corporation, Section 17–285 of the Code, as amended, instead of the judiciary, the link between the defenders and the judiciary seems loss close than that in Connecticut. Thus, the reasoning of the Spring court would seem to be applicable so as to deny judicial immunity to public defenders in South Carolina.

In contrast to Spring and possibly just as applicable in South Carolina, two circuit court decisions, Brown and John, supra thought that judicial immunity would protect public defenders from suit in § 1983 actions. Although suit under § 1983 is not the same as an action for malpractice the extension of immunity in those cases did not appear to be controlled by the peculiar nature of the civil rights action. John, held that '. . . public defenders, like state prosecutors, and state and city attorneys, enjoy a qualified immunity for acts performed in the discharge of their official duties.' Brown, also thought that there was 'no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state appointed and state subsidized defenders.' Both cases relied somewhat on public policy consideration such as encouraging desirable attorneys to take positions as public defenders.

Although these considerations might be more relevant to 1983 actions which could not be brought against a private attorney possessing no ties with the state, they could be applied to malpractice cases as well if clients of public defenders might be more inclined to bring such suits than would clients of private attorneys.

Although Brown and John, supra, give some support to the extension of judicial immunity to public defenders in malpractice cases, when a state court has specifically considered that issue and denied immunity, Spring supra, reliance on the existence of such immunity does not seem to be advisable. Until the issue is considered and resolved by the South Carolina Supreme Court, public defenders in South Carolina should consider obtaining malpractice insurance.

If no immunity is to be extended to public defenders then no immunity would be extended to the governing board of the defender corporation or to its employees. Judicial immunity would, of course, be unavailable to the board and its employees. Additionally, if the public defender is not exercising any portion of the sovereign power of the state it is doubtful that the board and employees do also. Possibly an argument could be made that a board member would be protected by sovereign immunity for acts related to his policy-making duties but this argument might not succeed because of the independence of the board from state influence and control. Of course this argument for immunity would be unavailable to employees of the board. Thus, since the immunity of board members and employees is doubtful, obtaining insurance for them should be considered.

CONCLUSION:

***3** Sufficient doubt exists as to the existence of immunity of public defenders in South Carolina from suit for professional malpractice so as to make advisable their obtaining malpractice insurance. Liability insurance for board members and employees should also be considered since they are unlikely to be immune from suit if no immunity is available to the defenders.

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