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Office of the Attorney General

State of South Carolina
Opinion No. 79-127
November 14, 1979

SUBJECT: Motor Vehicles, State Agencies, Workman's Compensation, Charitable Organizations, Liability

***1** 1. The employees of a private employer or state agency which sponsored a vanpool would probably be covered under the provisions of the S. C. Workman's Compensation Act for injuries received traveling to and from work.

2. A private employer or state agency which sponsored a vanpool would not be liable for the torts of its vanpool employees traveling to and from work.

3. The Department of Highways and Public Transportation cannot purchase a van, and then subsequently transfer title to a member of the vanpool.

4. Neither private business nor an eleemosynary or other non-profit organization which allowed carpoolers and vanpoolers to meet at its site and leave their individual vehicles parked there during the working day would be liable for damage caused to or by the parked vehicles or riders.

QUESTIONS:

1. What is the liability of a private employer who sponsors a vanpool? Would Workers Compensation apply? Would tort liability apply?

2. What is the liability of DHPT and other state agencies who sponsor a vanpool?

3. Can the Department transfer title to the driver? Can it finance the purchase? Would it take a lien? How would such a transfer change the Department's liability?

4. What liability would be incurred by a private business (e.g. shopping center) which allows carpools and vanpoolers to meet at their site and leave their individual cars parked there during the working day?

5. What liability would be incurred by public or private, non-profits (e.g. church, school) allowing this parking?

STATUTES AND CASES:

South Carolina Code § 42–1–160

South Carolina Code § 15–77–230

South Carolina Code § 57–3–10

South Carolina Code § 57–3–610

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South Carolina Constitution Article X § 6

Bailey v. Santee River Hardwood Co., 205 S.C. 43, 32 S.E.2d 365 (1944)

Baldwin v. Pepsi-Cola Bottling Co., 234 S.C. 320, 10B S.C.2d 409 (1954)

Bickley v. South Carolina Electric & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1912)

Bolin v. Bostic, 235 S.C. 319, 111 S.E.2d 557 (1960)

Brown v. Anderson County Hospital Association, 268 S.C. 479, 234 S.E.2d 873 (1977)

E. I. dePont de Nemours Co. v. Hall, 237 F.2d 145 (4th Cir. 1956)

Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960)

Hinton v. North Georgia Warehouse Corp., 211 S.C. 370, 45 S.E.2d 591 (1947)

Holder v. Haynes, 193 S.C. 176, 7 S.E.2d 833 (1940)

Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977)

Hunt v. McNair, 403 U.S. 945 (1971), on remand 258 S.C. 97, 187 S.E.2d 645 (1972)

Jeffcoat v. Caine, 261 S.C. 75, 198 S.E.2d 258 (1973).

Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964)

Leonard v. Georgetown County, 230 S.C. 388, 95 S.E.2d 777 (1956)

Moore v. Family Service of Charleston County, 269 S.C. 275, 237 S.E.2d 84 (1977)

***2** Morris v. South Carolina State Highway Department, 264 S.C. 369, 215 S.E.2d 430 (1975)

Smiley v. Southern Railway Co., 184 S.C. 130, 191 S.E. (1937)

Southern Railway Co. v. South Carolina State Highway Department, 237 S.C. 75, 115 S.E.2d 685 (1960)

Truesdale v. South Carolina Highway Department, 264 S.C. 221, 213 S.E.2d 740 (1975)

Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965)

DISCUSSION:

Some of the issues which this opinion addresses concern the rights of private citizens vis-a-vis other private citizens. Generally, the Office of the Attorney General will not address such issues because they concern matters outside of the scope of authority of the Office. However, in this case, due to the unique efforts of the Interagency Council to encourage the concept of vanpooling through a program of volunteer participation among private employers, the prohibition against such opinions has been relaxed in order to provide the Council with legal opinions necessary to further its public

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purposes. It should be noted that this opinion does not have the effect of law, and private employers are urged to consult with their private attorneys concerning their particular situations since every case depends in large measure on its individual facts, and this opinion must necessarily address the questions posed in general terms.

1 (a). Private employers and employees may elect to be covered by the South Carolina Workmen's Compensation Law [hereinafter referred to as Workmen's Compensation]. South Carolina Code § 42–1–340 (1976). Unless they elect not to be covered, every employer and employee is presumed to be subject to Workman's Compensation. South Carolina Code § 42–1–310 (1976). Under Workmen's Compensation, compensation to an injured employee by the employer is not based on the tort concept of fault, but rather the employer is held strictly liable for injuries occurring to his employees by accidents 'arising out of and in the course of the employment . . ..' South Carolina Code § 42–1–160 (1976). Generally, and employee going to and from work is not engaged in performing any service growing out of and incidental to his employment, and he therefore may not recover for injuries sustained during such travel. E. I. duPont de Nemours Co. v. Hall, 237 F.2d 145 (4th Cir. 1956); Hinton v. North Georgia Warehouse Corp., 211, S.C. 370, 45 S.E.2d 591 (1947). However, one of the exceptions to this exclusion is where the employer furnishes the transportation. Bailey v. Santee River Hardwood Co., 205 S.C. 43, 32 S.E.2d 365 (1944).

The question which arises in this case is whether or not the employer who provides the initial capital outlay for a van to be used exclusively by his employees in a vanpool to go to and from work can be said to have furnished the transportation for the workers under Workmen's Compensation. The answer is unclear.

In determining whether an employer was 'providing transportation' within the scope of Workmen's Compensation, the court has looked at several different elements: (1) the ownership of the vehicle; c.f. Bailey, supra; (2) benefits which accrued to the employer by his providing transportation; Bailey, supra; (3) the obligation of the employer to provide transportation to the employee as an incident of employment, Baldwin v. Pepsi-Cola Bottling Co., 234 S.C. 320, 108 S.E.2d 409 (1954); (4) the degree of control the employer had over the vehicle or the injured employee at the time of the accident; Baldwin supra; Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960); (5) the special or emergency nature of the employee's going to or from work; Bickley v. South Carolina Electric & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972); and (6) the personal nature of the trip being made by the the employee; Leonard v. Georgetown County, 230 S.C. 388, 95 S.E.2d 777 (1956).

***3** While ownership of the vehicle is important, it is certainly not conclusive as both Fowler, supra and Leonard, supra clearly show. Consequently, the bare fact of the owner's retaining title to the van will not conclusively make him liable to compensate workers injured while riding in the van while they are traveling to and from work.

In the case of vanpooling, it would be difficult to show direct benefits to the employer except, perhaps, a reduction in the number of parking places required for workers. Certainly, the majority of benefits, such as reduced pollution, reduced energy consumption, reduced traffic congestion, and reduced commuting expenses, accrue either to the general public or to the workers, and cannot be said to benefit the employer directly. This lack of direct benefits to the employer tends to militate against his being held liable under Workmen's Compensation.

Because vanpooling will be limited, in most instances, to the regular trip to and from work, it would not automatically be included under Workman's Compensation because of the special or emergency nature of the employee's going to or from work. On the other hand, since the van would generally be used only to transport workers to and from work, the trip would not be of such a personal nature as to automatically exclude it from Workman's Compensation.

The question, therefore, devolves, upon consideration of the two final questions: the employer's obligation to provide transportation and the degree of control the employer has over the vehicle and employees at the time of injury. While an employer is clearly liable if he expressly agrees to provide transportation to the employee as an incident of employment, he may also be held liable if there is no express agreement but merely an implied agreement based on custom. Blankinship

Logging Co. v. Brown, 212 Ark. 871, 208 S.W.2d 778 (1948); Smith v. Industrial Accident Comm'n, 18 Cal.2d 843, 118 P.2d 6 (1941). This rule applies even though the employee receives no wages for the time spent in transit. Peski v. Todd & Brown, 158 F.2d 59 (7th Cir. 1946).

The fact that an employer charges for the transportation service does not prevent compensability. Id.; California Cas. Indem. Exchange v. Industrial Accident Comm'n, 21 Cal.2d 461, 132 P.2d 815 (1942), and the fact that the charge is deducted from the employee's wages definitely indicates the connection of the transportation with the contract of employment. Id. However, at least one case which supported this view, Neyland v. Maryland Gas Co., 28 So.2d 351 (La. App. 1946), seemed to rely on the fact that the amount paid by the employees did not completely defray the cost of the transportation provided. This is unlike vanpooling, where the vanpool is expected to be completely self-sufficient financially. Furthermore, many jurisdictions have looked carefully at the question of the employer's obligation and have found no compensability where the provision of transportation was merely an accommodation. Cases cited in 99 C.J.S. Workmen's Compensation § 235 Fn. 61.

***4** Thus, the answer is unclear to the question of whether the employer's providing a van and organizational and administrative assistance to the members of a vanpool would thereby be 'providing transportation' to the employees such that they would be eligible for compensation for injuries sustained while traveling to and from work. While the employer's degree of control over the employees and the vehicle is an important consideration, the peculiar facts of a vanpool do not tend to clarify the situation.

The employer owns the van and presumably may take it away from a vanpool which misuses it or abuses it. The employer hopefully would help to organize the pool and perhaps would even help to administer it, paying bills and collecting fares from the riders. On the other hand, the riders would not be obliged to use the vanpool, could select their own routes and procedures, and perhaps would have limited use of the van outside of ordinary transit hours. Thus, the question of control is unclear at least so far as being decisive of the issue of compensability under Workman's Compensation.

The total question of compensability under Workmen's Compensation for employee's injured while riding to and from work in a vanpool is thus unclear. Given the oft stated policy of the South Carolina Supreme Court to give a liberal construction to Workmen's Compensation to include injured employees within its protection rather than exclude them (see, e.g. Moore v. Family Service of Charleston County, 269 S.C. 275, 237 S.E.2d 84 (1977)), it is the view of this office that it is quite likely that such injured employees would be included under Workmen's Compensation.

1. (b) For the same reasons discussed in the answer to question 1(a), a state agency would probably be held liable under Workmen's Compensation for injures to its employees which occurred while they were traveling to and from work in an agency sponsored van-pool. While statutory abrogations of sovereign immunity are generally strictly construed against the claimant (e.g. Truesdale v. South Carolina Highway Department, 264 S.C. 221, 232, 213 S.E.2d 740, 745 (1975)), this rule has not been applied to Workmen's Compensation claims with the same vigor as in non-Workmen's Compensation cases (e.g., Williams v. South Carolina State Hospital, 245 S.C. 377, 140 S.E.2d 601 (1965)). Consequently, a state agency's status as a component of the State provides no ground to believe that it would be regarded any differently than a private employer for purposes of Workmen's Compensation.

2. (a) The answer to the question of whether or not an employer can be held liable to a third-party injured by his employee's operation of a vanpool sponsored by him turns on whether or not the employees are 'in the course of employment' when the injury occurs. Bolin v. Bostic, 235 S.C. 319, 111 S.E.2d 557 (1960).

Ordinarily, and employee traveling to or from work is not regarded as being in the course of employment for the purposes of an employee's liability. 57 C.J.S. Master and Servant § 570 d.(4). However, where the transportation is provided by the employer, the activity may be regarded as being within the course of employment, and the employer may thus be held liable for injuries caused by his employees. Id. The South Carolina Supreme Court has held that the relationship

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between the owner of a vehicle and one hired to drive it is the same as the relationship between master and servant generally, and the liability of the owner for the negligence of the driver is to be determined by an application of the general principles of law pertaining to the liability of a master for the negligence of his servant. Holder v. Haynes, 193 S.C. 176, 7 S.E.2d 833 (1940). Obviously, the responsibility of the owner would be less for the behavior of someone who drove the vehicle gratuitously.

***5** The general test under master-servant law is whether the employee was within the scope of his employment and the court has been somewhat more restrictive in this area than in the area of Workmen's Compensation. Compare Bolin v. Bostic, 235 S.C. 319, 111 S.E.2d 557 (1960), with Bailey v. Santee River Hardwood Co., supra. The ordinary test of ‘scope of employment’ under master-servant law is whether the act is reasonably necessary to accomplish the purpose of his employment and is in furtherance of the master's business. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964).

Traveling to and from work is generally regarded as a matter of personal businesses to the employee and therefore not within the scope of the employee's employment. Bolin v. Bostic, supra. This is true even if the employer provides the means of transportation. Blake v. Jefferson-St. Charles Transfer Co., 8 La. App. 310 (1927); Hinson v. Virginia-Carolina Chemical Corp., 230 N.C. 476, 53 S.E.2d 448 (1949); Senn v. Lackner, 157 Ohio St. 206, 105 N.E.2d 49 (1952); Geldnich v. Burg, 202 Wis. 209, 231 N.W. 624 (1930).

In the situation posed by your question, even though the employer might be deemed to have provided the means of transportation, he should not be held liable to a third-party for an accident which occurred while the employee was involved in what traditionally has been construed to be personal business, i.e. traveling to and from work. Those cases which have held the employer liable have uniformly involved situations where the employee was performing some special errand or function in furtherance of the employer's business or where the employer is found to derive some special benefit from the employee's use of his vehicle. See cases cited in 52 ALR2d 350 § 5. As previously mentioned in 1(a) the benefits which would accrue to the employer are very general in scope and endure to the population as a whole and thus would not be sufficient to create vicarious liability for the employer.

2. (b) The doctrine of sovereign immunity prohibits anyone from suing the State without having first received the express permission of the Legislature. The only general grant of authority to sue the State for damages resulting from a motor vehicle accident is found in the South Carolina Government Motor Vehicle Tort Claim Act. This act limits the State's liability to injuries arising ‘by reason of the negligent operation of any motor vehicle while being operated by an employee of a government entity while in and about the official business of such governmental entity . . ..’ South Carolina Code § 15–77–230 (Cum. Supp. 1978) (emphasis added). Unless the Department can be sued under this act; it would have no liability to third parties injured by the negligent operation of a vanpool it sponsored.

In a relatively recent case, the South Carolina Supreme Court found that the State's abrogation of sovereign immunity through the Tort Claims act did not extend to the operation by a uniformed South Carolina Highway Patrolmen of his patrol vehicle while he was off-duty performing a personal errand. Morris v. South Carolina State Highway Department, 264 S. C. 369, 215 S.E.2d 430 (1975). This finding was made despite the fact that the patrolman had express permission to use the patrol vehicle during off-duty hours for personal errands and was, in fact, encouraged to do so in order to increase the ‘presence’ of Highway Patrol vehicles on the road at any given time.

***6** The supreme court noted that the abrogation of sovereign immunity must be strictly construed against the claimant. Id. at 432. The court also found no real analogy between the liberal construction applied in Workman's Compensation actions, and the proper construction of the Tort Claims Act, which it found to be narrow. Id.

Therefore, the court refused to find that the operation of a highway patrol vehicle, admittedly owned by the Department and operated with the express permission of the Department, constituted ‘official business' within the meaning of the

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Tort Claims Act when it was being used for personal business. As noted in the discussion of paragraph 1(b) above, trips to and from work are almost uniformly regarded as strictly personal business, not in the course of employment, even if the employer provides the means of transportation. Thus, trips from home to work and vice versa would not be generally regarded as official business for purposes of the Tort Claims Act in the absence of the employee's performing some special duty for the Department going to or from work.

3. In the case of Southern Railway Co. v. South Carolina State Highway Department, 237 S.C. 75, 115 S.E.2d 685 (1960), the South Caroina Supreme Court stated that the Department of Highways and Public Transportation is a statutory creature of the state deriving its power from the Legislature. The Department has no inherent powers of its own and whatever power it exercises must be provided by some act of the Legislature. Thus, for the Department to transfer title of a van to a driver, it must have some authority to do so. There is no specific provision in Title 57 or any other portion of the South Carolina Code of Laws which authorizes the transfer or sale by the Department of public property to private persons except as relates to surplus real property (S. C. Code § 57–5–340) and 'entirely unserviceable' materials and equipment (S.C. Code § 57–3–740. Additionally, there is a provision requiring the State Budget and Control Board to dispose of publicly owned property not being used for public purposes (S.C. Code § 11–9–630).

Sections 57–3–10 and 57–3–610 provide for the general functions and responsibilities of the Department and grant to the Department its general powers. The Department's authority to conduct pilot projects to further research and development of public transportation and to cooperate with the federal government in the development of improved public transportation service, techniques and methods and in planning and research in connection therewith provide ample authority for the Department to participate in van-pool programs and even to sponsor them by purchase of a van. However, they do not provide the implied authority to transfer title to vans to private individuals.

Even if the Department could transfer title to the vans to a private person under the implied authority of the statutes mentioned above, there would remain a constitutional impediment to its doing so. Article X § 6 of the South Carolina Constitution of 1895 prohibits the lending or pledging of the State's credit for the benefit of any individual, company, association or corporation. Despite the fact that a public purpose exists to conduct a vanpool pilot project, the fact remains that the transfer of title is not necessary to conduct this type of project and would confer a clear benefit (i.e. ownership of a van) to private persons and thus would be in contravention of Article X § 6 of the constitution.

***7** A possible alternative might be to seek statutory authorization to sell bonds secured only by liens on the vehicles purchased. Such arrangements have previously been approved by the South Carolina Supreme Court as not violative of Article X § 6. See, e.g., Hunt v. McNair, 403 U.S. 945 (1971), on remand, 258 S.C. 97, 187 S.E.2d 645 (1972), aff'd, 413 U.S. 734 (1973).

4. (a) The duty which a private business owes to someone using his parking lot depends on the purpose for which he is using it and the scope of the invitation issued to the public by the private business. 65 C.J.S. Negligence § 63(130). As a general rule licensees are treated differently and are owed a lesser duty of care than are invitees. This is especially true of that category of licensees classified as gratuitous, permissive, bare, or mere licensees. This group is generally defined as those persons who are present on the landowner's property with permission but whose presence on the premises is solely for the licensee's own purposes, benefit, or convenience in which the possessor of the property has no interest, either business or social, and to whom the privilege is extended as a mere favor or sufferance. In terms of the duty owed to this group by landowners and other possessors of land, it has been frequently held that it is no different than the duty owed to trespassers, namely, not to injure the licensee wilfully or wantonly. 65 C.J.S. Negligence § 63(30)–63(32).

The distinction between the duty owed to invitees, or those persons invited to the property by the possessor for business or social purposes, and licensees has not been dealt with in specific terms by the South Carolina Supreme Court, but it has been impliedly recognized and approved in a number of cases. See, e.g. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977); Smiley v. Southern R. Co., 184 S.C. 130, 191 S.E. 895 (1937). In Smiley the court noted that a

licensee (in this case a man crossing a railroad track) could not recover from an injury caused by known dangers or risks inherent to the premises but went on to hold that, where a license existed, the possessor of the premises had an obligation to point out or safeguard against hidden dangers unknown to all persons who had the implied license to use the premises.

In the case in question, the carpoolers and vanpoolers would, under the circumstances presented, be considered as mere or gratuitous licensees. Under established law, the possessor of the land would only have a duty not to willfully or wantonly harm the vanpoolers or carpoolers or their property in addition to having the duty to point out hidden dangers or changes of circumstances. It should also be noted that he would have a greater duty of care to those persons invited onto his premises to do business with him, and, since both groups would be using the same property, he would usually want to maintain a high standard of care anyway.

***8** Under general negligence law principles, the possessor of the land would owe no duty to prevent third-parties from injuring the carpoolers and vanpoolers or vice-versa, at least in the absence of knowledge of previous problems. 65 C.J.S. Negligence § 92.

4. (b) The analysis above would also generally protect public or private non-profit organizations. However, most of these organizations can be categorized in this state as charities, and, for those which can, the doctrine of charitable immunity would absolutely insulate them from liability for all but intentional torts and acts done in heedless and reckless disregard of the rights of the injured party. Brown v. Anderson County Hospital Ass'n, 268 S.C. 479, 234 S.E.2d 873 (1977); Jeffcoat v. Caine, 261 S.C. 75, 198 S.E.2d 258 (1973). This would mean that these charities would be immune even from injuries caused by a failure to warn of a hidden or new danger of which it had actual knowledge or those injuries caused by the so-called active negligence of the charity. The doctrine of charitable immunity has been eroded somewhat by recent South Carolina Supreme Court decisions. However, the doctrine still seems to be intact for acts or omissions constituting ordinary negligence. See Brown, supra; Survey, Torts 30 S.C.L.R. 164 (1979).

CONCLUSION:

1. The employees of a private employer or state agency which sponsored a vanpool would probably be covered under the provisions of the S. C. Workman's Compensation Act for injuries received traveling to and from work.

2. A private employer or state agency which sponsored a vanpool would not be liable for the torts of its vanpool employees traveling to and from work.

3. The Department does not have the authority to transfer title of a van to an employee who is a member of a vanpool. The answer to this first part of the question makes the other portions moot and, consequently, they will not be addressed.

4. Neither private business nor an eleemosynary or other non-profit organization which allowed carpoolers and vanpoolers to meet at its site and leave their individual vehicles parked there during the working day would be liable for damage caused to or by the parked vehicles or riders.

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