

Office of the Attorney General
State of North Dakota

Opinion No. 87-24

Date Issued: December 18, 1987

Requested by: Terry Elhard
McIntosh County State's Attorney

--QUESTIONS PRESENTED--

I.

Whether a county may use its insurance reserve fund to purchase liability insurance for the operation of a county fair association.

II.

Whether a county may purchase property insurance from the Fire and Tornado Fund for county fairground buildings which are not owned by the county.

--ATTORNEY GENERAL'S OPINIONS--

I.

It is my opinion that a county may use its insurance reserve fund to purchase liability insurance only for the operation of a county fair association which has been established and is maintained and supervised by the county.

II.

It is my further opinion that a county may not purchase property insurance from the Fire & Tornado Fund for county fairground buildings which are not owned by the county.

--ANALYSIS--

I.

Counties are authorized by N.D.C.C. § 32-12.1-08(1) to "establish and maintain an insurance reserve for insurance purposes." Counties may purchase insurance or self insure for claims brought against them for injuries caused by them or their employees acting within the scope of their employment or office. N.D.C.C. § 32-12.1-02(1); 1985 N.D.Op.Atty'y Gen. 96. Therefore, it is necessary to determine the relationship between a county fair association and the county itself to decide whether the county has any liability which it may insure against for operation of the fair.

N.D.C.C. §§ 4-02-26 through 4-02-37 provide two different methods for the organization, operation, and financing of county fairs. First, N.D.C.C. § 4-02-26 provides that a county fair association may apply to the board of county commissioners "for a grant to aid in the erection of suitable buildings and other improvements" and the board of county commissioners may levy for the first year's grant of aid a tax not exceeding 1/2 mill. N.D.C.C. § 4-02-27.1 provides for an additional annual levy upon approval by the electors of the county.

Second, N.D.C.C. § 4-02-31 provides the board of county commissioners, upon approval of the electors of the county, to purchase real property and construct such buildings and improvements on the land as it deems necessary for the operation and management of a fair. N.D.C.C. § 4-02-33 gives the board of county commissioners "full control and supervision over the county fair" and requires the board to "make rules, regulations, and by-laws for the operation and management thereof." Finally, N.D.C.C. § 4-02-37 provides for the operation of multi-county fairs under the same general guidelines just described for other county fairs.

County fairs may be established and operated directly by a county commission or independent of the county. Two North Dakota Supreme Court cases illustrate how the liability of a fair association will depend upon its relationship to the county.

In the two companion cases of *Hadler v. Northwest Agricultural, Live Stock, and Fair Association*, 224 N.W. 193 (N.D.1929) (Hadler No. 1), and *Hadler v. Northwest Agricultural, Live Stock, and Fair Association*, 239 N.W. 736 (N.D.1931) (Hadler No. 2), the North Dakota Supreme Court addressed the liability of county fair associations for damages in tort. Both Hadler No. 1 and Hadler No. 2 dealt with the liability of the Northwest Agricultural, Live Stock and Fair Association's (Ward County Fair Association's) liability for damages sustained by a plaintiff who was injured through the alleged negligence and carelessness of the Association's officers in supervising and conducting an automobile race on the fairgrounds. The issue in Hadler No. 1 was whether the defendant, Fair Association, was a public department of the state of North Dakota, organized for the purpose of carrying on governmental enterprises, and engaged in governmental functions and therefore protected by governmental immunity. The court in its opinion noted that there were two statutory methods for organizing county fairs. The first method for the organization of a fair provides for a private entity to apply to the county commissioners under Section 1867 of the Compiled Laws of 1913 (since recodified as N.D.C.C. § 4-02-26). The second method for organizing a county fair was for the county commissioners to establish the fair, purchase land, and operate and manage the fair when authorized by the voters of the county pursuant to Sections 1874(a)(1) to 1874(a)(4) of the Supplement to Chapter 102

of the Laws of 1919 (since renumbered N.D.C.C. §§ 4-02-31 through 4-02-34). The court assumed in its opinion that the Ward County Fair Association was not the County of Ward engaged in maintaining the fair, but rather an association organized under the provisions of Section 1867 of the Compiled Laws of 1913. Thus, an important distinction is drawn between how a county fair is organized and operated insofar as the public or private nature of the entity is concerned.

The court noted that "[a] fair association is not necessarily a public corporation, even though its object be of a public character ... [cite omitted]; or that it is not incorporated for pecuniary profits [cite omitted]; or that it may receive appropriations from the state for certain specific purposes [cite omitted]." The court said the test to determine whether a fair association is public or not "is whether a public trust is imposed upon the property so that the general public has a definite and fixed use of the property, a use independent of the will of the private person or corporation in whom the title is vested; a public use which cannot be defeated by the private owner, but which is guarded and controlled by the law." Therefore, the court noted that an "ordinary fair association may be liable for tort goes without question." Hadler No. 1 at 195-196.

The court recognized case law from other states suggesting that where a defendant fair corporation organized and managed county fairs independent of the board of county commissioners but were eligible to receive county funds, the fairs could be sued and held liable for the damages. Again, the court emphasized the difference between the county fair association, which under Section 1867 could be organized independent of the board of county commissioners with executive officers and directors who were citizens of the county, as compared to fairs actually organized by the board of county commissioners upon the vote of the people where the board has "full control and supervision over such county fair." The court also found important the fact that a fair association could be organized as an arm of the government but noted that in these cases "not only was the property owned by the state, but those in control were made a department of the government...." Hadler No. 1 at 197.

The court concluded that the action in Hadler No. 1 was not an action brought against the county or the state and damages could therefore be awarded against the fair association. The matter was thereafter remanded for trial.

In Hadler No. 2, the Supreme Court, after a district court trial on the merits, determined that the Ward County Fair was established pursuant to Chapter 102 of the 1919 Session Laws by the board of county commissioners after a vote of the electors. The Fair Board's by-laws provided that the management and control of the association was vested in a board of directors comprised of the county commissioners and six additional directors selected by the board of

county commissioners. All expenditures by the Fair Association Board were made only after being approved by the Ward County Commissioners in the same manner that other bills against Ward County were approved and allowed. The court then discussed general legal principles applicable to counties acting as political subdivisions and the immunity of political subdivisions for the misfeasance or nonfeasance of the officers through whom they must act. The court noted that this immunity is granted "because they are performing governmental functions and the government is not liable to the individual unless made so by statutory or constitutional enactment." Hadler No. 2 at 739. The court then concluded that the Ward County fair was in fact conducted by the county as an agency of the state and therefore enjoyed immunity from suit.

The discussion above is important in determining any county's liability for the operation of a county fair. Based on the precedent discussed above, it would appear that a county fair association could be established under N.D.C.C. § 4-02-26 and operate independent from the board of county commissioners. Such an association therefore may not qualify as an agency of the county which is a political subdivision of the state. The county can have no liability for the operation of a fair it does not supervise. On the other hand, a county fair which is operated under the supervision of county commissioners pursuant to N.D.C.C. § 4-02-33 would qualify as an agency of the county in which they are located. N.D.C.C. ch. 32-12.1 imposes limited liability on the county for its activities in this regard.

N.D.C.C. § 32-12-1.-05 permits political subdivisions to provide insurance coverage for liability it is charged with for personal injury, death, or property damage, through a claim against the political subdivision or an employee of it. N.D.C.C. § 32-12.1-08 permits political subdivisions to levy annual taxes in "such amounts as are determined by the governing board to be necessary for the purposes and uses of the insurance reserve fund."

Based upon the above discussed statutes and case law, it is my opinion that the county commissioners of a county responsible for the supervision and control of a county fair which the county itself established pursuant to law may insure against its liability for damages in tort from monies in the county's insurance reserve fund.

II.

N.D.C.C. § 26.1-22-05 and 26.1-22-10 require that all buildings belonging to or owned by political subdivisions must be insured through the Fire & Tornado Fund unless insured through an insurance company on the basis of competitive sealed bids.

Therefore, only those buildings which are actually owned by the county and used for county fair purposes may be insured through the State Fire & Tornado Fund.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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