



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Joe Fultz
County Attorney
Grimes County
Anderson, Texas

Dear Sir:

Opinion No. O-4153
Re: Liability of the State of Texas for damages resulting from a failure to properly place a culvert under a designated State Highway at the time of its construction which highway was constructed by the county and subsequent thereto its maintenance taken over by the State Highway Department.

We are in receipt of your letter of October 17, 1941, which is as follows:

"I shall thank you to render me an opinion on the following question under the following statement of facts:

"In the year 1925, Grimes County acquired by purchase the right-of-way of what is now designated as 'State Highway No. 6' leading from Navasota to the Waller County line in the direction of the town of Hempstead. Road superintendents of Grimes County supervised the construction of the highway. Federal funds supplemented Grimes County funds. As a result of the building of the highway, the natural flow of a small auxiliary creek was changed by a failure to properly place a culvert through a ramp. Since the construction of the highway, the State Highway Department has taken over the maintenance of the highway and has continuously maintained the road for the past fifteen years. Damage has now resulted to an adjacent landowner, and this damage is directly attributable to the failure to put a culvert in.

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QUESTION: Is Grimes County or the State of Texas liable for damages resulting from a failure to properly place a culvert under a designated State Highway, provided permission to bring suit is obtained?

"This question does not seem to have ever arisen in the reported cases.

"The argument from the county's side is this: Full management and control of the highway is exercised by the State Highway Department. Grimes County no longer has any authority in the premises; and therefore it appears that the State Highway Department is liable. The State Highway Department has since reconstructed the right-of-way in the immediate vicinity of the damaged property.

"The change in control of the highway is what makes the problem complex. I find no statute touching the question."

Upon this state of facts you have submitted to us the following question:

"QUESTION: Is Grimes County or the State of Texas liable for damages resulting from a failure to properly place a culvert under a designated State Highway, provided permission to bring suit is obtained?"

Subsequent to receiving your letter of October 17, 1941, we wrote you on November 18, 1941, requesting that you advise us whether the reconstruction or maintenance of the highway in question by the State Highway Department in any manner caused the damage in question and whether or not the culvert in question was changed or reconstructed in any manner. In reply to this inquiry on November 25, 1941, you wrote us as follows:

"This is in answer to your letter dated November 18th asking whether or not the reconstruction of the highway by the State Highway Department in any manner caused the damage in question and whether or not the culvert in question

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was changed or reconstructed in any manner.

"To both of these questions the answer is 'No'. The Highway Department has merely maintained the particular section of the highway. Heavy rains each year wear the embankment down considerably, and naturally new dirt and fill are used to periodically restore the embankment. So the statement: 'The State Highway Department has since reconstructed the right-of-way in the immediate vicinity of the damaged property' simply means that the department has maintained it.

"It is true that Grimes County constructed the culvert in question where it now is. The Highway is now a main arterial highway, and was taken over by the State Highway Department very soon after its completion by Grimes County.

"I shall gladly answer any further questions which you may have."

We have been unable to find any controlling statutes covering the situation presented by your letter nor have we been able to find any reported case dealing with the express question presented, however by the Acts of 1925, 39th Legislature, Chapter 186, page 456, Section 2, being Article 6674b, of Vernon's Revised Civil Statutes of 1925, the Legislature provided that all highways in this State included in the plan providing a system of State Highways as prepared by the State Highway Engineer in accordance with Section 11 of Chapter 190 of the General Laws of the Regular Session of the 35th Legislature, are hereby designated as the State Highway System.

Chapter 186, pages 456-458 of the Acts of the 39th Legislature of 1925, being Article 6674c through 6674n, together with amendments thereto, provide for the location, relocation, construction and maintenance of all State highways by the Highway Department. Commissioners' Court of counties of this State have never exercised any jurisdiction over State highways except by virtue of the laws of the State as enacted by the Legislature, and the Legislature has authority to take away the jurisdiction once conferred upon commissioners' courts over public highways of the State, and this the Legislature has done by Article 6674b through 6674n of the Revised Civil Statutes of Texas of 1925. *Heathman v. Singletary* (Comm. App.) 12 S.W. (2d)

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150. As a result of this vesting of exclusive jurisdiction over the location, relocation, construction and maintenance of State highways in the State Highway Department, the State and not the counties are liable for damages to private property resulting from the construction and maintenance of State highways. *Wilbarger County v. Hall*, (Comm. App.) 55 S.W. (2d) 797. This rule however would not apply in our opinion where the damage by the county rather than from the maintenance of such highway by the State Highway Department.

It is our understanding from your letters above quoted that the highway in question was originally built by Grimes County, and that the failure at the time of such construction to provide a culvert in said highway has diverted certain water resulting in damage to abutting property. Subsequent to the construction of said highway by the county the State Highway Department took same over and has maintained it since such time. This being the case it is our opinion that the damage, if any, to the abutting property by virtue of failure to install a culvert resulted immediately upon completion of the highway although water may not have been diverted by it until some subsequent time. Therefore, we are of the opinion that the damage resulted from the construction and not from the maintenance of such highway.

You are, therefore, advised that it is the opinion of this department that under the facts set forth the county and not the State is liable for any damage resulting from the failure to provide the culvert in question.

We trust that this fully answers the question presented by you.

Very truly yours

APPROVED DEC 11, 1941

ATTORNEY GENERAL OF TEXAS

s/ Grover Sellers

FIRST ASSISTANT
ATTORNEY GENERAL

By

Douglas E. Bergman
Assistant

DEB:db

APPROVED OPINION COMMITTEE BY BWB CHAIRMAN