COUNTY HOSPITALS:
LIABILITY OF COUNTY:

Neither the county nor the board of trustees of a county hospital are liable for the torts committed by its staff or employees, and are not liable for property damage or injuries received by reason of the negligent maintenance of the hospital building or the premises adjacent thereto.

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Mr. John M. Cave
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Cave:

I.

You have requested an opinion from this department upon the following questions:

> "1. What is the liability of the individual members of the staff of the Callaway County Hospital for damages or injuries sustained by patients through negligence of the staff in the care of the patient, or by mistake in the administering of medicines or drugs by a registered nurse or other authorized person, practicing physicians excluded?
>
> "2. What is the liability of the County, either as the County per se or through the Board of Trustees, for such damages or injuries as mentioned above?
>
> "3. What is the liability of the County, either as the County per se or through the Board of Trustees, for damages or injuries sustained by members of the public, other than patients, as a result of the negligence in the maintenance of the premises of the County Hospital?
>
> "4. What is the liability of the individual members of the staff or of the Board of Trustees for damages or injuries mentioned in paragraph 3?

"This request for opinion is made on behalf of the Board of Trustees of the Callaway County Hospital."

II.

In regard to the first question we wish to inform you that we are not permitted by Section 12899, R. S. Mo. 1939, to give advice to private individuals. We feel that the question of the liability of the individual members of the staff of the Callaway county hospital is a private matter because they are paid for their services, and any liability that they might have is not a problem concerning the Callaway county hospital.

Your second question is in regard to the liability of the county, either as the county per se or through the board of trustees for damages or injuries suffered by patients as a result of negligence on the part of the staff in the care of patients, or by mistakes in the administering of medicine or drugs by a registered nurse or other authorized person.

Your third question concerns the liability of the county, whether as the county per se or through the board of trustees for damages or injuries sustained by members of the public, other than patients, as a result of the negligence in the maintenance of the premises of the county hospital.

We will first consider the general liability of the county and the board of trustees of the Callaway county hospital, and then we will attempt to answer each of the specific questions.

The Constitution of Missouri of 1945, at Article IV, Sec. 37, provides as follows:

> "The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

This makes the protection of the health of the people an essential governmental function. We believe that the maintenance and operation of the Callaway county hospital promotes the protection and betterment of public health.

> "A county is not liable, in the absence of statute for torts committed by it in the exercise of its governmental functions, but it is liable for torts committed in a proprietary capacity or for a tortious

appropriation of property." (20 C.J.S. page 1067, Sec. 215)

There is no statutory or constitutional provision in this state for imposing any liability upon a county for torts committed by it in the exercise of its governmental functions.

"In the absence of statute, a county is generally not liable for injuries arising from the condition or maintenance of public buildings, places or property. * * *" (20 C.J.S. page 1069, Sec. 217)

"The general rule, as to which courts have been said to be practically unanimous, is that in the absence of statute creating such liability, a county is not liable for the tortious acts or omissions of its officers, agents, servants, or employees; but this rule is not of universal application, and it is more particularly held that in the absence of statute a county is not liable for tortious acts of its officers, agents, or servants committed by them while engaged in a governmental capacity or in the discharge of a governmental function. The general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured, is not ordinarily applied to counties; and the rule as to nonliability holds good even though the officer or agent is acting under the direction of the county board or other county authority. These rules have been applied to suits against the county by prisoners and by patients in county hospitals. * * *" 20 C.J.S., page 1075.

"It is well settled that since counties are organized for public purposes and charged with the performance of duties as arms or branches of the state government, they are never to be held liable in a private action for neglect to perform such duties, for acts done while engaged in the performance of such duties, or because they are not performed in a manner most conducive to the safety of employees or the public, unless such liability

is expressly fixed by statute. The fact that counties are declared by statute to be municipal corporations does not change the rule in the absence of anything in the statute imposing any additional liability. Moreover, no new liability for torts is imposed upon a county by a statute making it a municipal corporation for exercising the powers and discharging the duties of local government and administering public affairs, and providing that actions for damages for any injury to property or rights for which it is liable shall be in the name of the county. * * *" (14 Am. Jur. 215, Sec. 48)

"The principal ground upon which it is held that counties are not liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for public purposes connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation or even the consent of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are in fact no less than public agencies of the state, invested by it with their particular powers, but with no power to decline the functions devolved upon them, and hence, are clothed with the same immunity from liability as the state itself. In other words, the rule of nonliability for torts is dictated by public policy. Since a suit against the county is in effect a suit against the state, an action will not lie without the consent of the legislature." (14 Am. Jur. Sec. 49, page 216.)

"It is a general rule that counties are not liable at common law for injuries resulting from the negligence of their officers or agents. It has been said that the powers and duties of counties bear such a close analogy to the governmental functions of the state at large that 'as well might the state be held responsible for the negligent acts of its officers as counties.' When duties are imposed upon a board of county

> commissioners by law rather than by the county, the latter will not be responsible for their breach of duty or for their nonfeasance or misfeasance in relation to such duty. Furthermore, where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim 'respondeat superior' does not govern. In some instances, however, the distinction between municipal corporations proper and counties has been disregarded and counties are held responsible for the negligent acts of their officers. * * * *"(Sec. 50, 14 Am. Jur. page 217.)
>
> "In the absence of statutory provision to the contrary a hospital created and existing for purely governmental purposes and under the exclusive ownership and control of the state or a governmental subdivision is not liable for the negligence or misconduct of its employees, or for personal injuries sustained by an employee, although a statute may declare it to be a corporation which may sue and be sued. Likewise the state is not liable, and even if the statutes do permit a suit against the state therefor, no recovery can be had where there is no showing of negligence on the part of its officers or agents. * * *" (41 C.J.S. Sec. 8, page 341.)

In the case of Henderson v. Twin Falls county, Idaho, 50 P.(2d) 597, 101 A.L.R. 1151, the Supreme Court of Idaho considered a case where a paying patient in a county hospital sued to recover damages for personal injuries sustained in said hospital. A nurse in the county hospital injected boric acid into the sides and thighs of the patient instead of a saline solution prescribed by the physician. The court held that a county empowered by statute but not required to establish and operate a county hospital primarily for the care of indigent sick but to which paying patients may be admitted, is in so doing acting in a proprietary and corporate rather than a governmental capacity, so as to be liable to a paying patient for the negligence of hospital employees. The court said:

> "The immunity of state governments for the negligence of their officers and employees also rests upon the early English common-law

doctrine, as above stated, adopted in the United States, that the 'King can do no wrong.' And the immunity counties and cities likewise enjoy rests upon that doctrine. As to towns and cities, it is generally held that they possess a double character: The one governmental, legislative, or public; the other, in a sense, proprietary or private. 1 Dillon, Mun. Corp. (5th ed.) p. 181; Strickfaden v. Greencreek Highway Dist., 42 Idaho, 738, 248 p. 456, 458, 49 A.L.R. 1057. And in its capacity as a private corporation a municipality stands on the same footing as would an individual or body of persons upon whom a like special franchise had been conferred. Strickfaden v. Greencreek Highway Dist., supra. The advance of counties into fields of private enterprise did not commence as early and has not progressed as rapidly as that of the cities, so that the liability of a county for its torts in private enterprise has not become so well settled. However, it was somewhat recently held by the Supreme Court of Pennsylvania, in Bell et ux. v. City of Pittsburgh and Allegheny County, 297 Pa. 185, 146 A. 567, 64 A.L.R. 1542, that a county is liable for the negligence of its employees in operating an elevator in a city and county building, jointly owned, maintained, and operated by the county and the city of Pittsburgh, partly for business and partly for governmental purposes although the person injured was on the way to the office of a governmental department of the city, and that a county which engages in activities not of a governmental nature is liable for the torts of the employees therein. See, also, Cleveland v. Town of Lancaster et al., 239 App. Div. 263, 267 N.Y.S. 673."

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"* * *'it is well settled that, in the absence of an express statute to that effect, the state is not liable for damages either for nonperformance of its powers or for their improper exercise by those charged with their execution. Counties are generally likewise relieved from liability, for the same reason. They are involuntary subdivisions or arms of the state through which the state operates for convenience in the performance of its functions. In other words, the county is merely an agent of the state, and, since the state cannot be sued without

its consent, neither may the agent be sued.'

* * * * * *"

We see from this case that the Supreme Court of Idaho found that the operation of a county hospital was not a required governmental function but was a voluntary proprietary function and thus held the county liable for a tort.

The only Missouri case that we have been able to find holding similar to the above Idaho case is the case of Hannon v. St. Louis County, 62 Mo. 313, in which it was held that the laying of a water pipe from the water mains of a nearby city to an insane asylum maintained by the defendant county, was a private function since the county could not have been compelled to lay the pipe and could have employed private contractors to do the same, and that the defendant was therefore held liable for the death of plaintiff's son because of the cave-in of the ditch dug for the laying of the pipe.

This case (Hannon v. County of St. Louis) was impliedly overruled in Swineford v. Franklin County, 72 Mo. 279, and was expressly disproved in the case of Moxley v. Pike County, 276 Mo. 449.

The Supreme Court of Missouri in Cochran v. Wilson, 287 Mo. 210, considered the liability of a school district for personal injuries received by the plaintiff and said at l.c. 219:

> "The question as to the liability of quasi-corporations for the negligence of their directors, officers or employees has, in regard to other than school districts, been frequently considered by this court. * * *"

The court then discussed numerous Missouri cases upon this question. The court in discussing said cases, said:

> "* * *In Reardon v. St. Louis County, 36 Mo. 555, an action was brought by a widow against the county for the death of her husband alleged to have been caused by the negligence of the county in failing to keep a bridge in repair. A demurrer was sustained to the petition and upon appeal to this court the judgment was affirmed.

"The basis for this ruling, briefly stated, is that counties are quasi-corporations created by law for purposes of public policy and are not answerable in damages for a failure to perform the duties enjoined on them unless the right of action is given by statute.

"In Swineford v. Franklin County, 72 Mo. 279, the plaintiff brought suit against the county for damages caused by the county court ordering the filling up of a mill race which crossed a public highway. By a divided court the plaintiff was held not entitled to recover, on the ground of the non-liability of the county as a quasi-public corporation in its control, through the county court, of the public highways.

* * * * * * * * * * * * * * *

"In Moxley v. Pike County, 276 Mo. 449, l.c. 453, this court ruled that a county was not liable for an injury caused by a defective highway. The reasons for the court's ruling are stated somewhat elaborately and may not inappropriately be quoted in this connection.

"'When, for convenience in the administration of its laws, the State, through the Legislature, calls to its aid those territorial organizations sometimes called, with more or less accuracy, quasi-corporations, such as counties, townships and school districts, the question has frequently arisen whether these agencies share, with the State itself, immunity from common-law liability for the negligence of their officers in the exercise of their territorial duties. The answer, from the courts of this State, has generally been a negative one. From Reardon v. St. Louis County, 36 Mo. 555, down to Lamar v. Bolivar Special Road District, 201 S.W. 890, are many cases which will be found collected in the case last cited which have settled the general principle so firmly that it is not questioned by this appellant. On the other hand, it has been equally well settled that municipal corporations, which include cities, towns and villages, are, in the control, management and maintenance of their streets, alleys and public places, subject to such liability. The cases

recognizing this doctrine are so numerous and so constantly before our appellate courts and their doctrine so well recognized as to render citations not only unnecessary but unjustifiable. This general doctrine is also recognized and admitted by the parties to this appeal.'

* * * * * * * * *

"In Nicholas v. Evangelical Hospital, 281 Mo. 182, a patient sued the hospital for damages for burns inflicted from the negligence of a nurse. The court, in holding the hospital not liable, said: 'The law has been firmly established by the great weight of authority that the funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering and cannot be diverted or absorbed by claims arising from the negligence of the trustees or their employees in administering the trust or charity.' In thus ruling the court cited with approval two Courts of Appeals cases in which the exemption of hospitals from the rule of respondent superior was clearly set forth.

"In Adams v. University Hospital, 122 Mo. App. 675, suit against the hospital had been brought by a patient burned with hot-water bottles while under the influence of an anesthetic. The court held that the hospital, being a charitable institution, was not liable for the negligence of either its managers or its employees. ELLISON, J., at page 686, thus states the reason for this ruling: 'But it is manifest that if we uphold a rule which would make an institution of charity liable to a patient who has been injured by an incompetent servant, negligently selected, we destroy the principle we have endeavored to make plain, that charitable trust funds cannot be diverted from the purposes of the donor. For it can make no difference, so far as the integrity of the fund is concerned, whether it be sought after by one who is injured by the negligence of a servant, or the negligent selection of such servant.'

> "In Whittaker v. Hospital, 137 Mo. App. 116, an employee brought suit against the hospital for injuries. In denying liability Goode, J., at page 120, said: 'Two rules of law, both founded on motives of public policy, come into conflict here; the rule of respondent superior (or if not technically that, one akin to it) and the rule exempting charitable funds from executions for damages on account of the misconduct of trustees and servants. As both rules rest on the same foundation of public policy, the question is whether, on the facts in hand, the public interest will best be subserved by applying the doctrine of respondent superior to the charity, or the doctrine of immunity; and we decided this cause for respondent because, in our opinion, it will be more useful on the whole not to allow charitable funds to be diverted to pay damages in such a case; and, moreover, the weight of authority is in favor of this view, as expressed not only in cases where the parties, seeking damages were patients in the institution, but where they were not.'"

The Supreme Court of Missouri in the case of Todd v. Curators of Missouri University, 347 Mo. 460, 147 S.W.(2d) 1063, considered a suit to recover for personal injuries against the state university received by the plaintiff while making repairs to one of the buildings of the university. The court said:

> "(1) There is no doubt that this defendant has the right to sue and is liable to be sued in some kinds of action. That right and that liability are expressly provided by statute and said defendant has frequently sued and been sued in the courts of this State. Appellant cites a number of such cases, but none of them discusses the liability of this corporation to be sued for negligence. The cases cited by appellant on this branch of the case, with two exceptions, fall under the following classes; mandamus, injunction, suits on contract or to construe wills. The two exceptions are: Niedermeyer v. Curators, 61 Mo. App. 654, and Babb v. Curators, 40 Mo. App. 173. The Niedermeyer case seems to have been a suit for money had and received to recover alleged excess in tuition fees paid under

protest. The Babb case was a suit for damages for discharge of sewage on plaintiff's land. The only issues discussed or decided were in reference to evidence or instructions.

"The defendant, The Curators of the University of Missouri, is a public corporation.* * *"

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"In the absence of express statutory provision, a public corporation or quasi corporation, performing governmental functions, is not liable in a suit for negligence. (Cochran v. Wilson, 287 Mo. 210, 229 S.W. 1050; Dick v. Board of Education (Mo.) 238 S.W. 1073; Krueger v. Board of Education, 310 Mo. 239, 274 S.W. 811, 40 A.L.R. 1086; Robinson v. Washtenaw, Circuit Judge, 228 Mich. 225, 199 N.W. 618; Reardon v. St. Louis County, 36 Mo. 555; Clark v. Adair County, 79 Mo. 536; Moxley v. Pike County, 276 Mo. 449, 208 S.W. 246; Lamar v. Bolivar Special Road District (Mo.), 201 S.W. 890; State ex rel. v. Allen, 298 Mo. 448, 250 S.W. 905; Zoll v. St. Louis County, 343 Mo. 1031, 124 S.W.(2d) 1168; Bush v. State Highway Commission, 329 Mo. 843, 46 S.W.(2d) 854; Broyles v. State Highway Commission (Mo. App.), 48 S.W.(2d) 78; Arnold v. Worth County Drainage District, 209 Mo. App. 220, 234 S.W. 349; D'Arcourt v. Little River Drainage District., 212 Mo. App. 610, 245 S.W. 394.)

"(3) A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. '* * *But the waiver by the State for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the State is quite another thing.' (Bush v Highway Commission, 329 Mo. 843, l.c. 849, 46 S.W.(2d) 854. See also Hill-Behan Lumber Co. v. State Highway Commission 347 Mo. 671, 148 S.W.(2d) 499, and cases cited, supra.)

"(4) The cases heretofore cited are mainly based upon the principle that a public corporation,

> performing governmental functions, is an agency or arm of the State and entitled to the same immunity as the State itself, in the absence of express statutory provision to the contrary. Another reason for immunity of public educational institutions, not organized for profit, from suits for negligence rests upon the public policy which has existed in this State from its beginning. The funds of the State University, whether raised by taxation, endowments or tuition fees, are dedicated to the beneficient purpose of education. It has no funds, nor means of raising funds, for the purpose of paying damages for tort nor is its property subject to execution for such purpose. Courts should maintain such public policy unless and until it be changed by positive legislative enactment. (Cochran v. Wilson, 287 Mo. 210, l.c. 226, 227, 229 S.W. 1050; Dick v Board of Education (Mo.), 238 S.W. 1073; Meadow Park Land Co. v. School District, 301 Mo. 688, 257 S.W. 441, 31 A.L.R. 343; Nicholas v. Evangelical Deaconess Home, 281 Mo. 182, 219 S.W. 643.)"

The Supreme Court of Missouri considered the question of liability for negligence of the Y.W.C.A. in the case of Eads v. Y.W.C.A. 325 Mo. 577, 29 S.W.(2d) 701. The court considered in this case numerous cases decided by appellate courts in other states which held charitable associations exempt from liability for injuries caused by negligence of the Association or its servants to strangers as well as cases involving injury to patients or employees of the charitable association or hospital. The Supreme Court of this state said in this case, l.c. 589:

> "* * *The courts of this state, upon careful consideration, have decided that it is better public policy to hold them exempt and have adopted what has sometimes been called the trust-fund doctrine, viz., that the funds of such institutions constitute a trust fund for the charitable purposes of the organization which may not be diverted to the payment of claims for damages for injuries due to negligence of managers, officers and servants of the institution, thereby depleting the fund. In a well considered opinion, in which numerous authorities are reviewed the Kansas

> City Court of Appeals, in Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453, held that a charitable hospital association was not liable to a 'pay patient' who was injured through the negligence or incompetence of a nurse while being treated in the hospital, the court holding that the hospital was exempt from liability whether injury was due to negligence of a servant in whose selection due care had been used or to negligence of the managing authorities in selecting an incompetent servant; and holding further that the fact that the patient paid for the service and attention received made no difference, the payment being treated as in the nature of a contribution to the support of the institution.
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> "* * * *We are not persuaded that it would be the better public policy to abandon the doctrine heretofore followed in this State."

In regard to your third question, the question of the liability of the county hospital for damages or injuries sustained by members of the public, other than patients, as a result of the negligence in the maintenance of the premises occupied by the county hospital is also controlled by the question of whether or not the use of the premises and building is in the exercise of the governmental functions of the county. Since the maintenance of a county hospital is deemed to be a governmental function then a county would not be liable for injuries caused by defects due to negligence in the county hospital building or premises used in connection therewith or by the negligent operation of elevators in said building. See Pearson v. K. C. 331 Mo. 885, 55 S.W. (2d) 485, and the cases cited in said case on page 891 of the Mo. Rep.

The maintenance of a city hospital has been held the performance of a governmental function by municipality. The City of St. Louis, therefore, was held not liable to a charitable hospital patient for injuries resulting from the negligence of its servants and that institution in the case of Murtaug v. St. Louis, 44 Mo. 479.

In a more recent case the city of Kansas City was held not liable for the death of patient's husband killed by an insane patient in whose cell he was placed, in the case of Zummo v. Kansas City, 285 Mo. 222, 225 S.W. 934. We believe that the operation of a county hospital is for the preservation of public health and is therefore the performance of a proper governmental

function.

In the Pearson case, supra, the court cited from 43 C.J. 1167, Sec. 1930, in regard to elevator accidents as follows:

> "'The maintenance and operation of an elevator in a court house, city hall or other building used for governmental purposes, is the exercise of a public, governmental function, and hence the municipality is not liable for injuries due to the negligent maintenance and operation of the elevator.'"

The court in the Pearson case does not decide the question of liability of a municipality for personal injuries caused from maintaining a nuisance upon city property used for governmental purposes. Your third question does not concern itself with the question of liability for the maintenance of a nuisance on the premises by the county hospital. The Pearson case, supra, discusses the general law in regard to the liability of a municipality for injuries caused by the maintenance of a nuisance on the city's property.

In 160 A.L.R. at page 70 the question of the liability of public schools for the creation or maintenance of a nuisance on school premises resulting in damages is considered. This annotation states that the immunity of municipal corporations from liability for acts done in the performance of governmental functions does not extend to cases of personal injuries resulting from a nuisance created or maintained by a municipality even though the nuisance was created or maintained in the course of the discharge of public duties or governmental functions, according to a majority of the courts.

The Supreme Court in the Pearson case, supra, said:

> "A nuisance does not rest on the degree of care used, but on the degree of danger existing with the best of care. * * * * * " (Underscoring ours.)

Said court again in the Pearson case quoted from Schnitzer v. Excelsior Powder Mfg. Co. (Mo. App.) 160 S.W. 282, l.c. 284, as follows:

> "'Nuisance and negligence are different kinds of torts, not only in legal classification but in their essential features. Negligence is not a necessary ingredient of the wrong of maintaining a nuisance,

> and, given the fact that a nuisance was maintained, the question of whether the wrongdoer was careful or negligent in the manner of its maintenance is wholly immaterial.'"

If you wish to have an opinion from this department on the question of liability of the county for the creation or maintenance of a nuisance in the county hospital building or upon the premises connected therewith, then you should make another request on this particular question.

In regard to your fourth question, we do not see how the individual members of the hospital staff could be involved with the maintenance of the premises of the county hospital, and the individual members of the board of trustees would not be liable for the reason stated above.

CONCLUSION

The county of Callaway and the board of trustees of the Callaway county hospital are engaged in the performance of a governmental function while maintaining and operating a county hospital, and the staff and employees of said hospital are not considered by the courts of Missouri to be agents of the county or the board of trustees of said hospital and therefore the doctrine of respondeat superior does not apply so that neither the county nor the board of trustees of said county hospital are liable for the torts committed by the staff or employees of said hospital.

The county of Callaway and the board of trustees of the Callaway county hospital are not liable for damages or injuries sustained by the public as a result of negligence in the maintenance of the hospital building or premises adjacent thereto.

Respectfully submitted,

APPROVED

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
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