OPINION NO. 69-085

Syllabus:

A board of trustees of a county hospital may not make expenditures of hospital funds to pay the premium upon policies of professional malpractice insurance for interns and residents employed at the hospital.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: Paul W. Brown, Attorney General, July 9, 1969

I have before me your request for my opinion which reads as follows:

> "May the Board of Trustees of a County Hospital make expenditure of hospital funds to pay the premiums upon policies of professional malpractice insurance for interns and residents employed at the hospital?"

In Ohio, statutory power to purchase insurance for a county hospital is conferred by Section 339.06 of the Ohio Revised Code. That section reads in pertinent part as follows:

> "The board of county hospital trustees shall upon completion of construction or leasing and equipping of the county hospital, assume the operation of such hospital. The board of county hospital trustees shall have the entire management and control of the hospital and shall establish such rules for its government and the admission of persons as are expedient.
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> "The board of county hospital trustees has control of the property of the hospital, and all funds used in its operation. * * *
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> "* * * * * * * * *
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> "The board of county hospital trustees may designate the amounts and forms of insurance protection to be provided, and the board of county commissioners shall secure such protection.
>
> "* * * * * * * * *"

In the absence of limitations on the power, the above sec-

tion gives a board of county hospital trustees discretionary power in selecting insurance for the hospital or hospitals under its control. At least one limitation on this discretionary power comes from the well settled doctrine in Ohio that a county is not liable in tort in the absence of an express statute creating such liability. The Board of County Commissioners of Portage County v. Gates, 83 Ohio St. 19, 30 (1910), 93 N.E. 255 (1910); Schaffer v. Board of Trustees of Franklin County Veterans Memorial, et al., 171 Ohio St. 228 (1960).

One of my predecessors recognized the impact of the doctrine of county immunity in Opinion No. 2976, Opinions of the Attorney General for 1934. Paragraph one of the syllabus of that opinion reads as follows:

> "A board of county commissioners cannot legally enter into a contract and expend public monies for the payment of premiums on 'public liability' or 'property damage' insurance covering damages to property and injury to persons caused by the negligent operation of county owned motor vehicles."

The opinion bases its reasoning on an earlier opinion from this office which is Opinion No. 494, Opinions of the Attorney General for 1927. The syllabus of that opinion reads the same as Opinion No. 2976, supra, but in addition the latter portion of the syllabus adds the following which was adhered to in the later opinion:

> "* * * there being no liability to be insured against, the payment of premiums would amount to a donation of public moneys to the insurance company."

The fact that there was no liability to be insured against was the key point in Opinion No. 1201, Opinions of the Attorney General for 1960. The opinion covers public liability insurance for physicians and doctors and has a direct bearing on the question you have put forth. The syllabus of the opinion reads as follows:

> "A municipal corporation is without authority to purchase public liability insurance covering physicians and nurses employed in the municipal department of health for liability arising out of such employment."

The opinion discusses the tort liability of a municipal corporation for governmental and proprietary functions and decides that on the facts involved in that opinion the operation of a public health board is a governmental function of the city and thus there is no liability in tort. In your situation we are involved with the tort liability of a county in the operation of a county hospital.

Though there is not an abundance of case law on the subject, in Wiezbicki v. Carmichael, 118 Ohio App. 239 (1963), a demurrer was sustained as against a petition brought against a county hospital. The suit by a former patient sought damages

from the members of the board of trustees of the hospital for personal injury claimed to have been received as a result of the negligence of the members of the board, acting through their servants and employees in the operation of the hospital. In addition, the Ohio Supreme Court has held that a university-owned hospital such as the Ohio State University Hospital is not liable in tort since it is an instrumentality of the state. Wolf v. Ohio State University Hospital, 170 Ohio St. 49 (1959).

Wiezbicki, supra, was cited in Opinion No. 1109, Opinions of the Attorney General for 1964. The syllabus of that opinion reads as follows:

> "1. A joint township district hospital board organized pursuant to Section 513.07 et seq., Revised Code, and operated solely from funds received through charges for services, is not liable in tort to persons injured in the operation of its hospital.
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> "2. The board of governors of a joint township district hospital has no authority to purchase liability insurance for protection against loss by reason of liability for tort in the operation of the joint township district hospital."

In the opinion my immediate predecessor cited an earlier opinion which stated that it was immaterial whether the operation of the hospital constituted a proprietary or governmental function. Opinion No. 179, Opinions of the Attorney General for 1957. This 1957 Opinion states as follows at page 46:

> "* * * * * * * * *
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> "* * * The doctrine of governmental and proprietary functions recognized that with regard to some functions municipal corporations act as agents of the sovereign state, and when they do they partake of sovereignty and sovereign immunity. The purpose of the doctrine is to distinguish those functions where the municipal corporation does partake of sovereignty from those where it does not. But counties and townships have never been regarded otherwise than as agents of the state. There has never been any confusion between these governmental and corporate functions, for they are not corporations and are regarded as having governmental functions only. Therefore the doctrine of governmental and proprietary functions does not apply to them.
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> "* * * * * * * * *"

In addition, I am aware of no statutory provision which waives the immunity of a county from a suit for torts occurring in the operation of a county hospital. I thus must concur in the previously cited opinions of my predecessors. There being no potential liability, the board of trustees has no authority to purchase liability insurance.

It is, therefore, my opinion and you are accordingly advised that a board of trustees of a county hospital may not make expenditures of hospital funds to pay the premiums upon policies of professional malpractice insurance for interns and residents employed at the hospital.