CHAPTER VII

THE UNIVERSITY MEDICAL CENTER AND
SOVEREIGN IMMUNITY

1. INTRODUCTION

The great medical center of the University of Michigan provides academic functions of teaching and research, and also functions much like many other state institutions for the treatment of ill persons. State-sponsored programs for the treatment of various classes of patients are provided for in statutes which have been interpreted in a series of opinions of the Attorney General. Apparently no court case has been brought under these statutes.

The issue to which the courts have at length addressed themselves is the liability of the University for the malpractice of its medical staff. Of course, the classic case is that of the surgeon who leaves sponges inside his patient after an operation.

In the first case in this series, Scott, the hospital was not involved, but rather the University of Michigan Athletic Association. The Association was sued by persons injured in the collapse of bleachers at a Michigan-Wisconsin football game of long ago. Since the Association was a voluntary group legally separate from the University itself, it did not claim sovereign immunity, and the court held that it was liable for negligence, if such could be proved.

The Bancroft case was settled on procedural grounds alone. The Supreme Court would permit no appeal before a final judgment in the Circuit Court below.

The Robinson case laid down the substantive rule that the University, as a charitable institution, was not liable for sponges left in its patients by surgeons. In Herrst, which involved the destruction by fire of both a University-owned barn and neighboring property, the court ruled that the University could not be held for the negligence of the neighbor boys whose careless
smoking was thought to have set the blaze.

Both the procedural and substantive rules of the early cases were disregarded in the Christie case. No final judgment had been entered in the Circuit Court, but an appeal was permitted from a pretrial discovery order requiring the University to produce its public liability insurance policy. Although the opinion is confused on this point, the official proceedings of the Board of Regents make it clear that the University had for some time maintained such an insurance policy which would protect injured parties unless the Regents specifically authorized the pleading of the defense of sovereign immunity.

The immunity of the University from suit was, however, not as clear as it had been at the time of the Robinson case because the court had already abolished the immunity from suit of all charitable institutions. Absent charitable immunity, sovereign immunity was now in question, and the different opinions expressed by the justices in this case demonstrate their confusion over which branch of government should have the authority to abolish it. Justice Black thought that because of the constitutional autonomy of the University, the legislature was unqualified for the task, and that if they had authorized the purchase of insurance, the Board of Regents had implicitly abolished immunity themselves. The dissenters still favored legislative competence in this area, but although a majority of the court did not completely agree with Justice Black's reasoning, and, technically, only affirmed the discovery order, it now seems clear that the judicial branch no longer favors the doctrine of sovereign immunity.

The effect of this apparent abolition of the doctrine of sovereign immunity was mitigated, in the transitional period, by the Glass and Fox cases which held that suits against the universities continued to be regarded as suits against the state. The result was that the Court of Claims had exclusive jurisdiction over these cases and the statute of limitations protected the universities against suits which had been wrongfully filed in the Circuit Courts.²

It remained, however, for the Michigan Court of Appeals to confront squarely the issue of whether the legislature could waive the sovereign immunity of the constitutionally established universities. In the case of Branum v. Board of Regents of
University of Michigan, that court finally disposed of the issue by upholding the statute waiving immunity and conferring exclusive jurisdiction on the Court of Claims.

The legal question of whether the University is immune to suit in the federal courts was decided in the last two cases in this chapter. In both cases the University is accorded the same Eleventh Amendment protection from suit that the State of Michigan itself would have received. In the case of Huckins v. Board of Regents of University of Michigan the court ruled that the University could be sued under the Jones Act for injuries to a seaman employed on a research vessel, since the Supreme Court had ruled that a state was subject to suit in similar cases. In the MacDonald case the Court of Appeals ruled that the University’s protection from suit under the Eleventh Amendment was not waived by a technical error in pleading.

2. JUDICIAL DECISIONS


152 Mich. 684, 685-88; 116 N.W. 624 (1908)

OSTRANDER, J. Testimony was given from which the jury might have found that plaintiff was injured by the collapse of a stand, or bleacher, erected by the defendant association, for the use of and used by the public, at a game of football to which the public was invited and required to pay an admission fee for the profit of said association; that the stand, designed to support 5,000 spectators, collapsed, from inherent and discoverable weakness, when put to its intended use, when occupied by less than 3,000 persons. At the trial, both parties introduced testimony and the court, without so far as the record discloses, assigning reasons, directed a verdict for defendants. Judgment was entered on the verdict.

Plaintiff, appellant, contends that the case should have been submitted to the jury. Defendants make three contentions. They are (1) that the plaintiff has in any event no right of action against these, or any of these, defendants; (2) that plaintiff has not shown that defendants were guilty of any negligence; (3) that if the circumstances made out a prima facie case of negligent construction of the stand, the undisputed testimony for defendants established the fact of the
exercise of due care on the part of defendants to render the premises safe.

And first, as to the parties defendant. They are the voluntary association and its officers, of whom defendant Baird is one, filling the position of graduate director. The active members of the association are the undergraduates and alumni who contribute money, with an associate membership of business men. Defendant Pipp is the person employed by the association to erect, and who did erect, the stand. The theory of defendants is:

"Mr. Baird as agent of the board of regents was authorized by Regent Fletcher to put up the bleacher; he did so, had it inspected, and the board of regents had it inspected. Not only does the record fail to show any act whatever on the part of the Athletic Association in regard to the building of the bleacher, but it shows affirmatively that the Athletic Association could not have built a bleacher had it desired to do so. Ferry Field was a recreation ground for the students, and the students, of course, used the field and the structures standing upon it. As Regent Fletcher testified, the association was simply the student in another form. It appears, therefore, that while the Athletic Association had nothing to do with the erection of this bleacher, it was allowed by the regents to use the field and the bleacher for the purpose of carrying on and exhibiting the football game between Michigan and Wisconsin Universities on November 18, 1905. But the board of regents never surrendered full and absolute control of Ferry Field. While the association was using the field it was as much subject to the control of the board of regents as at other times. In other words, Ferry Field is exactly like other University property; it is owned and controlled by the board of regents for the use of the students, but such use can never be hostile to or exclusive of the continued control by the board. Having no independent right in Ferry Field the Athletic Association could sustain no independent liabilities consequent upon its use.

"It seems clear that the Athletic Association, under its permission from the board of regents to use Ferry Field pursuant to the general purposes of the University, at most merely represented the board of regents in conducting the game in question. So far as the public is concerned, the association might therefore be deemed the agent of the board of regents in conducting and exhibiting the game for the benefit of all who wished to witness it. And in that capacity the liability of the Athletic Association would appear to be the same as that of Mr. Baird himself. Each is liable, if at all, as agent of the board of regents.
"Now, it is an elementary principle of the law that an agent is not liable for mere acts of nonfeasance, but only for acts of misfeasance. This principle has been applied in a great variety of cases."

Whether the fact is or is not controlling, a point not precisely involved, we do not find in the record any testimony tending to prove that the regents, directly or indirectly, constructed or supervised the construction of the stand, or that the defendant association or Mr. Baird was an agent of the regents in that behalf. The record discloses that while Mr. Baird applied to the chairman of the committee on buildings and grounds for and received permission to build the bleacher, it and all other structures upon the grounds were paid for out of the moneys of the defendant association. The funds of the association are devoted to athletics and to the furnishing and maintaining of Ferry Field. The association receives and disburses its money and the regents exercise no control of its funds except to insist that there shall be a proper auditing of accounts. Assuming that the regents might have refused permission to erect the particular bleacher, they did not do so. They did not erect it. Assuming, further, that Mr. Baird is paid for his services as adviser of the association's athletic policy by the regents, and that his position of graduate director is dependent upon his engagement with the regents, he is nevertheless one of the directors of defendant association, and by its constitution is a member of its financial committee, and he also exercises such powers and performs such duties as its board of control may from time to time determine and require. Whether the related facts affect alike all of the defendants, whether for any reason the judgment should be affirmed as to some of the defendants, are subjects not referred to in argument and questions not considered.

The remaining contentions may be considered together. The testimony goes much beyond proving merely an accident and resulting injury. That relied upon to show that defendants exercised due care tends to prove that the stand was erected by a competent and experienced builder, of good materials; that before it was used it was inspected by engineers and others admittedly competent to perform the work of inspection, who pronounced it safe. It is clear, however, that a wholly inadequate structure was in fact tendered for public use, and it cannot be determined, upon this record, as matter of law, that a latent and not a patent defect, discoverable in the exercise of proper care, existed. The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee and did not occupy the stand by mere invitation. Whether responsibility to
the plaintiff is grounded, in the form of action instituted, upon a contract or upon a duty, it exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put; the duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profit­ing persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety, they did not contract that there were no unknown defects, not discoverable by the use of reasonable means; but, having constructed the stand, they did contract that, except for such defects, it was safe. 1 Thompson on Negligence, §§ 994-997; 21 Am. & Eng. Enc. Law (2d Ed.), p. 472; Francis v. Cockrell, L. R. 5 Q. B. 184, 39 L. J. Rep. (N. S.) Q. B. 113, 291. See, also, Fox v. Buffalo Park, 21 App. Div. (N. Y.) 321, 163 N. Y. 559.

The judgment is reversed, and a new trial granted.

GRANT, C. J., and BLAIR, MONTGOMERY, and CARPENTER, JJ., concurred.

Bancroft v. Board of Regents of University of Michigan


PER CURIAM. Plaintiff filed her suit to recover damages for personal injuries which she claims to have incurred and which she avers were occasioned by the negligence of defendants. The defendants demurred to the declaration, and after argument the same was sustained. This was followed by the issuance of a writ of error from this court without any final judgment having been entered in the trial court, and, so far as the record shows, we are not advised that a final judgment has since been entered therein. Under this state of facts the practice will not permit of a review of the case in this court. Green v. Eaton Probate Judge, 40 Mich. 244; Delaney v. Lumber Co., 144 Mich. 351 (108 N. W. 77); Barribeau v. City of Detroit, 146 Mich. 392 (109 N. W. 665); In re Vetter's Estate, 162 Mich. 109 (127 N. W. 306).

The writ will be dismissed, with costs to appellee.
STEERE, J. Plaintiffs in the above entitled cases are husband and wife. Each commenced a tort action in the circuit court of Washtenaw county against Dr. Scott C. Runnells and the regents of the University of Michigan to recover damages resulting from injuries alleged to have been wrongfully inflicted upon her (Fay Robinson) while a surgical patient in the University hospital. The questions involved in these mandamus proceedings are substantially the same in both cases and they were submitted upon the same briefs. Service was duly had upon defendants and similar declarations, each containing two courts of like import, were filed and served. Counsel for defendant appeared specially in said cases and entered motions requesting the court for orders dismissing the declarations “or in the alternative, in case such relief cannot be granted, to dismiss the second count in said declarations against said regents of the University of Michigan,” stating various grounds therefor. The court denied said motions as to Dr. Runnells and granted them as to the regents. Plaintiffs ask mandamus to compel defendant herein to set aside his orders dismissing the declarations against the regents.

The first count in the declarations alleges that Mrs. Fay Robinson being ill consulted Dr. Runnells, a physician and agent of the regents of the University, who advised her that an abdominal operation was necessary, to which she consented and was operated upon at the University hospital by him; and charges that in performing the operation he negligently permitted a sponge which he had placed in her abdomen to remain after the wound caused during the operation had been closed, in consequence of which she suffered greatly and became yet more dangerously ill, rendering another operation necessary in order to save her life, which disclosed the presence of the sponge left there during the former operation. The second count in the declarations more distinctly charges such neglect and lack of skill, with the serious results which followed, to the regents of the University of Michigan, their physicians, nurses, agents, servants, etc.

Plaintiffs' counsel in his brief points out that the actions are not brought “against the hospital of the University of Michigan, but against the regents of the University of Michigan,” and urges that the question is disposed of by the provision of section 1159, 1 Comp. Laws 1915, providing that “The board of regents shall constitute a body corporate, with right as such of suing and being sued,” contending that the regents are in no sense an eleemosynary institution
entitled to be excepted from the general rule that a corporation is liable for the torts of its agents; while counsel for the regents urge that no cause of action is stated against them because the University hospital, maintained under the direction of the regents in connection with its medical department, is a charitable institution, eleemosynary in character. Other objections are raised but this is the only one which we regard as calling for serious consideration.

The regents of the Michigan University are constitutional State officers, their selection and election being on the same basis as that of the judges of the Supreme and circuit courts, the State superintendent of public instruction and other specified State officers who are elected at the biennial spring election, all of whose names are required by law to be placed upon an official State ballot in a designated order, those of the regents being second on the list.

Our Constitution recognizes "Education" as a subject of governmental concern and activity. Its article 11 is so entitled and devoted to that subject, three sections of which relate exclusively to regents of the University, who are to be eight in number, hold office for eight years, two to be elected at each regular biennial spring election. They are to constitute a "body corporate known as 'The Regents of the University of Michigan.'" They are given, as a board, "general supervision of the University and the direction and control of all expenditures from the University funds." Section 10 of the article contains the mandate that "The legislature shall maintain the University" and other named State educational institutions, "and also such normal schools and other educational institutions as may be established by law." With such provisions in our Constitution it seems clear that the general supervision of the University, and direction and control of all expenditures from its funds is a governmental activity, and the board of regents a State agency to carry out the will of the people, as expressed in the Constitution they adopted, in regard to the educational institution committed to its care and supervision.

Prior to adoption of the old Constitution of 1850 the University was supervised and its affairs administered by a board of trustees as a body corporate to whom the regents succeeded under substantially the same provision as in our present Constitution of 1909. Its corporate character was, and is, clearly that of a public corporation, created for public purposes only, for no private emolument or advantage, and therefore an agency of the State government. It is required by law in broad terms to provide the inhabitants of the State the means of "acquiring a thorough knowledge of the various branches of literature, science and the arts." To that end it is required
to establish and maintain numerous departments of schools devoted especially to instruction in various callings and professions, including a medical department in connection with which its hospital is maintained for the benefit of the public at public expense. Special laws of charitable import have been passed from time to time such as providing admission to the hospital and free treatment of indigent persons and others, admission of indigent children afflicted with curable deformity or chronic diseases with both medical and surgical treatment, board, lodging and nursing free of charge, for maintenance of said hospital in operation during the summer vacations of the University, etc., all of which, furnished and maintained by the State, gives that adjunct of the medical department of the University the character of a public charitable hospital. The money raised by the State to maintain it, as well as the other activities of the University, is a trust fund of which the board of regents is trustee. As was said in *Downes v. Harper Hospital*, 101 Mich. 555 (25 L. R. A. 602, 45 Am. St. Rep. 427):

"If, in the proper execution of the trust, a trustee or an employee commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.

"The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not for private gain, but contribute to the more effectual accomplishment of the purpose for which the charity was founded."

So far as we discover, the authorities are practically all to the effect that charitable or eleemosynary institutions supported wholly or in part by a State or municipality are not liable for personal injuries suffered through the negligence of an employee, servant or agent of the institution. Plaintiffs' counsel cites no authority to the contrary, and apparently contends that decisions to that effect are
not in point because the actions are against the regents made by statute capable of suing and being sued. The fact that the regents as a public body corporate have the right of suing and being sued in a proper case, involving property rights or based on contract relations, is immaterial here. The question before us is whether these declarations sounding in tort based on personal injuries state a cause of action against the board of regents.

The hospital is an adjunct of the medical department of the University, which is a State educational instrumentality maintained by the public at public expense, controlled and operated by the board of regents, a governmental agency which receives in trust and expends the public money devoted to that purpose. In the exhaustively discussed case of Bruce v. Central M. E. Church, 147 Mich. 230, 238 (10 L. R. A. [N. S.] 74, 11 Ann. Cas. 150), it is said by Justice OSTRANDER in his dissenting opinion:

"An examination of cases, including most of those cited in the opinion in the Downes Case, shows that in many instances the institutions were in fact State instrumentalities, as well as charities, and the denial of liability might have been rested in such cases wholly, as it was in some of them in part, upon that ground."

On the case stated in plaintiffs' declarations we think denial of liability as to the regents could safely be rested on either ground. The writs of mandamus applied for are therefore denied.

CLARK, C. J., and MCDONALD, BIRD, SHARPE, MOORE, FELLOWS, and WIEST, JJ., concurred.

_Herrst v. Regents of the University of Michigan_

231 Mich. 369; 204 N.W. 119 (1925)

WIEST, J. Plaintiffs own a lot on Belser street in the city of Ann Arbor. The regents of the University own a lot on Volland street in the same city. Plaintiffs' lot and the University lot abut at the rear. Defendant Edward C. Pardon, in July, 1923, was superintendent of buildings and grounds held by the regents and, as such, had permitted Earl Rising, tenant of the Volland street lot, to build a barn on the lot, so close to the line and near a barn standing on plaintiffs' lot that, when the Rising barn burned, July 26, 1923, it
set fire to plaintiffs' barn and destroyed it and its contents. This suit was brought to recover the loss suffered by plaintiffs, and verdict was had against both defendants, but judgment against defendant Pardon alone. The regents were discharged from liability under the authority of Robinson v. Washtenaw Circuit Judge, 228 Mich. 225. Defendant Pardon reviews by writ of error. Plaintiffs claim it was the duty of Mr. Pardon to supervise the use made by the tenant of the property rented from the regents and prevent the tenant from endangering plaintiffs' property. It is claimed the tenant of the regents built his barn within about three feet of the rear lot line and within about four feet of plaintiffs' barn, fastened some pieces of 2x4 to plaintiffs' barn in violation of the housing code of the State, piled combustible material between the barns and permitted children to frequent the barn. The day of the fire a 12-year-old boy, it is claimed, came out of the barn with a cigarette and soon thereafter the Rising barn was discovered on fire, and the fire spread to and destroyed plaintiffs' barn. What negligence of defendant Pardon was the proximate cause of this fire? Assuming, but not deciding, that the liability of Mr. Pardon is the same as that of an owner, did the duty rest upon him to so supervise the use of the barn by the tenant as to prevent children from being permitted therein or to prevent some trespassing boy from visiting the premises and smoking therein? We think not.

A landlord is not liable for the use of premises by a tenant in such a way as to occasion damage to a neighboring proprietor, merely because there was a possibility of their being so used. The wrong in such a case is that of the tenant and the liability therefor will step with the tenant. The erection of the barn was lawful and its use legitimate. Any abuse of rights of neighboring proprietors in the use of the barn by the tenant was not chargeable to the landlord unless such abuse was sanctioned by the landlord; and such sanction could not rest upon implied notice and acquiescence. If the fastening of the 2x4 to plaintiffs' barn was wrongful, still there is nothing in the case to show defendant directed, sanctioned, or even knew that it had been done, and besides, it cannot be said to have had even a causal connection with the fire. The same may be said of the claimed combustible material piled between the barns, for the fire did not originate in such material, neither was such material the cause of carrying the fire to plaintiffs' barn. Up to the very hour of the fire there had been nothing done by the tenant which would have justified the landlord in ending his tenancy. If in law the landlord could not have interfered with the use made by the tenant of the premises, surely liability for such use does not fasten to the landlord. There is no evidence in the case of a violation of the State housing code.
Section 18, Act No. 326, Pub. Acts 1919 (Comp. Laws Supp. 1922, § 5180 [19]), upon which plaintiffs rely, has no bearing. This section regulates the space between buildings on the same lot with a dwelling; permits a stable at the rear of a lot but requires a passage at least three feet wide from the yard to an alley. The barn built by the tenant was wholly upon the land of the regents and there was no negligence on the part of the regents or of their agent in permitting it to be built close to the line. Plaintiffs' claim the fire was set in the Rising barn by the 12-year-old boy lighting a cigarette therein. This boy, so far as the record shows, was a trespasser. The tenant had no children. But it is said the tenant had ponies in the barn and this called children and it was the duty of defendant Pardon to notice such fact. The evidence fails to show smoking by children about the barn previous to the date of the fire. It was not the duty of Mr. Pardon to pay attention to the fact that the tenant had ponies in the barn and this called children, nor should he have anticipated that some boy might visit the barn and smoke therein.

The circuit judge instructed the jury that:

"Something was said to you about the construction of the barn contrary to the housing code. Unless you find that was the proximate cause of the injury complained of, of course you could not find for the plaintiffs in this cause."

We have searched this record to discover what violation, if any, with reference to the provisions of the housing code, was before the jury, and find none. If there was no violation of the housing code permitted or acquiesced in by Mr. Pardon, then he is not liable in this case. The building of the barn did not violate the housing code. The two barns being less than four feet apart rendered it inevitable that the burning of one would spread to the other and the combustible material, if any, lying between the two barns, cannot be said to have caused the fire to spread from one barn to the other. The proximate cause of the fire was under plaintiffs' evidence the careless act of an intruding boy.

Rowland v. Kalamazoo Sup'ts of Poor, 49 Mich. 553, relied on by plaintiffs, involved liability arising from negligently permitting set fires to spread, to the injury of a neighboring proprietor, and lays down no rule aiding plaintiffs in this case. We find no negligence chargeable to defendant Pardon rendering him liable in this case. The proximate cause of the fire was not his failure to perform any duty or in permitting the tenant to perpetrate a wrong. The court should, notwithstanding the verdict, have entered judgment in favor of Mr. Pardon.
The judgment is reversed and the case remanded with direction to enter such judgment. Defendant Pardon will recover costs.

McDONALD, C. J., and CLARK, BIRD, SHARPE, MOORE, STEERE, and FELLOWS, JJ., concurred.

Christie v. Board of Regents of The University of Michigan

The Supreme Court of Michigan, 1961

BLACK, J. Comes the intruder spoilsport as the legislative and judicial branches continue their gambol o'er the field of sovereign immunity. Here the recurrent problem—what to do with another aspect of such immunity—cannot be buck-lateraled to the legislature. By the Constitution that august body has been rendered ineligible to receive, in today's game, any kind of a pass from the judicial branch.

Plaintiff, at 7 years of age, sues for personal injury said to have been negligently inflicted while he was a patient—during early infancy—in the university hospital. The asserted negligence consists of permitting him to fall "from an unattended crib from which all restraints had been removed."

Suit was commenced by summons. With commencement of suit plaintiff filed a petition for discovery, asking among other things that the defendant board of regents be compelled "to produce its policy of liability insurance for the inspection and examination by the plaintiff." The circuit judge entered an order for production and inspection of the policy, doing so on theory that the policy should be ordered in as possibly admissible evidence tending to establish that the defendant board had waived its immunity from liability, to the plaintiff, to the extent of the insurer's monetary obligation.

On application of defendant and grant of leave we review such order for production and inspection. Plaintiff's statement of the reviewable question is comprehensive and fully explanatory:

"In civil action against board of regents of university of Michigan for personal injuries suffered by infant patient of university hospital through negligence of defendants' servants, agents and employees, did circuit judge abuse his discretion on plaintiff's amended petition for discovery filed prior to declaration when he ordered defendants to produce for plaintiff's examination the contract of
I would affirm on ground that the questioned order is well within the discretionary authority Court Rule No 40 (1945) provides. The relevantly sole requirement of that rule is that there be fair showing that the petitioning plaintiff needs such production and inspection in order to declare properly the cause his petition supposedly portrays.

Does this plaintiff need the policy in order to declare? From the face of his untraversed petition I conclude he does. *McNair v. State Highway Department,* 305 Mich 181, has made it abundantly clear that when an apparently immune public body is sued on allegation of tort liability the plaintiff must allege facts which, if true, overcome the standard posture of such body that "no court can hold us liable." In a word, a part of this plaintiff's burden is that of duty to plead and prove some status which legally impairs or destroys the defendant board's seeming exemption. No waiver by neglect to raise the question can exist (*McNair, supra*), and so it is necessary to explore the ultimate and decisive question: Whether the resolution of the defendant board to acquire and maintain such liability insurance operates as a matter of law to waive its immunity to the extent of the insurer's obligation.

I agree with the statement of the annotator of a recent and exhaustive appraisal of this question who says (annotation headed "Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability"; 68 ALR2d 1437, 1448):

"In a few jurisdictions the courts have taken the view (which is worthy of characterization as enlightened) that to the extent that a liability insurance policy protects a governmental unit against tort liability, the otherwise-existing immunity of the unit is removed."

In this case there are 2 good reasons for concurrence with the annotator's conclusion that such is the "enlightened" view. The first is that the fact of such insurance has eliminated the classically suave reason for immunity of the defendant board from liability (if proven) to this plaintiff.* The other and specially distinctive reason is that

*See, for recent exposition and repudiation of the doctrine that immunity is required to protect public revenues from dissipation on account of torts of public servants, *Molitor v. Kaneland Community Unit District No. 302,* 18 Ill2d 11 (163 NE2d 89), and *Muskopf v. Corning Hospital District,* 55 Cal2d 211 (11 Cal Rptr 89, 359 P2d 457).
the defendant board is so far autonomous and constitutionally independent as to clothe it with plenary as well as exclusive power of waiver of such immunity and that it has already exercised such power so far as concerns this case.

The first point—that the board’s determination to acquire and carry liability insurance removes the historic reason for immunity—requires no extended analysis. We are yet free to pick and choose among authorities extant. My choice, if it were presently necessary to choose, would be with the “enlightened”—and visibly growing—minority. As the cited annotation shows, the more numerous authorities adhere to position that public bodies, having spent public money for liability protection thereby incur no liability; a game which in fact if not by design unjustly enriches the insurer for carrying a risk where there is no risk.* Other authorities, “enlightened” I repeat, pursue the opposite and more explicable view.

Whatever view one may take of this diversity, the majority rule becomes irrelevant when it is shown that the critical bastion thereof (that the legislature only may waive) is nonexistent. Such is the case here. If the defendant board is by the Constitution given the exclusive power to waive, then it would surely seem that the reasoning of such minority is best for the specific case at bar.

The board of regents is a separate and self-governing body corporate, made so by the Constitution (Const 1908, art 11, § 4). By our decisions it is “a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature.” It has “independent control of the affairs of the university by authority of these constitutional provisions” (quotations from Board of Regents of the University of Michigan v. Auditor General, 167 Mich 444, 450), and so its counsel are right when they insist in their brief that the legislature (as in the case of the State proper and its statutory agencies) cannot waive the immunity of the board without consent of the board.**

*The majority rule, and the reasoning submitted in support of it, was comprehensively summarized in the recent case of Maffei v. Incorporated Town of Kemmerer, 80 Wyo 33 (338 P2d 808, 817):

“There are many decisions from other jurisdictions which hold there can be no waiver of a municipality’s immunity unless by specific legislative authority, and they are persuasive. [Citing cases.] We, therefore, hold it is beyond the power of a municipality to waive an immunity which it possesses by virtue of its being an arm of the State’s government and that any waiver of such an immunity must come by direct action of the legislature or through the clear and unmistakable implication of its legislative acts.”

**Counsel for the board do not stop with assertion that the legislature cannot waive the board’s immunity. They take a 7-league step farther by this
But this is a knife with 2 edges. If the board by the Constitution stands separate from and declaredly equal to the legislature, then it alone has a right to waive and, by the same token, a right to reject any legislative act of waiver in its behalf. By the past and tried reasoning of this Court the board is, "within the scope of its functions," its own legislator and may legislate that which I find implicit in its decision to carry the insurance that this plaintiff would unearth for the purpose of pleading.

Consider these interpretations we have made of the eleventh article and its predecessor:

* * *

Summary: The board of regents has exclusive power to waive the immunity our decisions have bestowed on it.* Such may be done by implication from action of the board as well as by express resolution thereof. Here the board has solemnly resolved to carry and pay for, out of funds of the university committed to its discretion, such insurance against liability as is quite inconsistent with an immunity from such liability. Originally there was no liability. Now, by voluntary and lawful action of the board, there is liability and insurance against loss occasioned by such liability. If this is not true, then we must instead attribute to an unusually exalted group of constitutional officers the intent solely of awarding some politically influential insurance agency a fat and steady premium account for insuring the board and the university against risks which do not exist. That I am unwilling to do. The board does not sit and govern in the midst of partisan pressures and it should be accorded the presumption that each determination of its members to spend university funds imports a consideration; something for something which is valuable to the university.

It requires no Churchillian-worded resolution of the board of regents—adorned say with red ribbon and blue seal—to waive a status which at best stands precariously at bay before the developing impact of judicial authority (see discussion and exhaustive examination of authorities in *Parker v. Port Huron Hospital*, 361 Mich 1, and the

(Footnote Continued)

*Robinson v. Washtenaw Circuit Judge*, 228 Mich 225, is not opposed to these conclusions. The effect of acquisition of liability or indemnity insurance was not considered on that occasion and we may assume from the Court's opinion that the board did not carry such protection at the time.
most recent case in point, *Muskopf, supra*). In the law as elsewhere actions sometimes speak louder than words. Here, by force of contemplative action of the board, we must either by our decision tacitly approve dissipation of university funds to no useful end or draw from that action whatever liability the judicial process may decide is a reasonable incident thereof. I prefer the latter and accordingly agree with the reasoning of Chief Justice DETHMERS, recorded in *Peters v. Michigan State College*, 320 Mich 243, 251.

Plaintiff’s undenied petition for discovery discloses good reason for exercise of the discretion Court Rule No 40 (1945) confers. The defendant board should be required to bare its policy—insurance policy, that is. Further, and if the inspected policy fairly suggests additional inquiry, the minutes or other evidences of corporate action by which the insurance was acquired should be discovered under the rule.

I vote to affirm, without an award of costs.

SUPPLEMENT (September 1, 1961).

This case of Christie was duly assigned to the writer prior to commencement of our April term. In pursuance of such assignment the foregoing opinion was prepared and delivered to other members of the Court under date of June 6, 1961. Since then Mr. Justice CARR, writing under date of August 30, 1961, for reversal, has called attention to an affidavit, “executed by 1 of the attorneys for defendant, indicating that a search of the files and records of the university had not disclosed any copy of such a policy, and such had not been otherwise discovered or made known to defendant.”

The affidavit to which my Brother refers was prepared (and included in defendant’s appendix) long after Judge Breakey’s presently reviewed order for discovery was entered, and long after we had granted (July 11, 1960) defendant’s application for leave to appeal. No one claims that it or the thrust thereof—that no policy can be produced—was ever brought to the trial judge’s attention, and no motion designed to include same in the record on appeal (see Court Rule No. 72, § 1[d], [e] [1945]) has been made at any time.

In order that the exact content of this “unable to find” affidavit may be read by the profession with verbated accuracy, same is quoted in full as follows:

“1. That on December 18, 1959, the circuit court ordered the production of the defendant’s liability insurance policy which was in force in September of 1953, for the purpose of permitting the plaintiff to inspect the same.
2. That from said order application for leave to appeal to the Supreme Court was taken and said application was granted on July 11, 1960.

3. That at the time the matter was being considered by the circuit court and during all of the time that appeal proceedings were pending the defendant did not know that the said policy was not capable of being produced.

4. That upon request of your deponent, a search was made of the files and records of the University of Michigan for the policy, which could not be found, and on information and belief a search was made of the files and records of the defendant's insurance carrier, both in the Detroit office and in the New York office, and no copy of such policy was discovered. That as of this date, a continuing search of the company's New York office is being made.

5. That this fact was not known conclusively by the defendant or by this deponent until on or about October 28, 1960."

It will be noted that the affiant carefully refrains from saying that no policy was ever existent or in effect, and the fact that an instrument once at hand has since been lost provides no way for evasion of discovery. In such case the law employs its tried rules of best and secondary evidence.

I do not care to encourage the growing practice of bolstering circuit court records by post-appeal ex parte affidavits of fact (see Chircop v. City of Pontiac, 363 Mich 693). Such affidavits usually—as here—set forth facts which have never been brought to the attention of the trial judge or chancellor. It is suggested instead that we have no right to consider instruments of that nature unless and until they have been made a part of the record pursuant to said Court Rule No 72 (1945).

If in this case it is shown—ultimately—that the defendant at no time acquired a policy such as Judge Breakey ordered produced, the judge will surely modify his order. Until such showing is made we should proceed to review upon the circuit court record as it stood when the order of discovery was made and our order granting leave to review that order was entered.

My vote to affirm, without costs, is cast again.

EDWARDS, J. (concurred). We concur in affirmance on the grounds stated in sentences 4 through 14 of the opinion of Mr. Justice BLACK.

KAVANAGH and SOURIS, JJ., concurred with EDWARDS, J.
CARR, J. (dissenting). The determination of the issue here is of vital concern not only to the university of Michigan but also to the State, governmental institutions and agencies of the State, municipalities, governmental subdivisions, and school districts. It requires our most serious consideration. Shall basic principles of law and public policy, uniformly recognized and upheld in this State up to this time, be now abandoned?

The case now before us was instituted by issuance of a summons from the circuit court of Washtenaw county, requiring defendant’s appearance within 15 days after service thereof. The writ specified that plaintiff claimed damages in an amount not exceeding $375,000. On the same date that the summons was issued counsel for plaintiff filed a petition, or motion, for an order of discovery. It was set forth therein that on or about September 13, 1953, plaintiff was a patient in the university of Michigan hospital, and that as a result of negligence on the part of hospital attendants he was allowed to fall in such manner as to cause serious physical injuries. Disclosure of certain facts and of exhibits presumably desired for admission on the trial was asked, including “the insurance contract of defendants and their liability carrier.”

Apparently all information sought by the petition was furnished to plaintiff’s counsel pursuant to agreement with attorneys representing defendant, with the exception of the liability insurance policy. By subsequent amendment to the petition it was asserted on behalf of plaintiff that access to said policy, if in existence, was necessary to enable his counsel to properly allege the cause of action relied on in the declaration to be filed. The language of the petition for discovery indicated that counsel representing plaintiff were proceeding on the theory that, if liability coverage was afforded by a policy of the character in question at the time of the injury to plaintiff, public funds, at least to the extent of such coverage, would not be jeopardized, that the taking out of the policy eliminated pro tanto the right of governmental immunity, and that a cause of action was in consequence created as against defendant (or the insurance carrier) to the extent of the liability coverage specified in such policy, assuming that there was such.

Following a hearing on the discovery petition the circuit judge before whom the matter was heard entered an order directing that:

“The defendants produce for plaintiff’s examination the contract of insurance which was existing between defendants and their liability insurance carrier on the 13th day of September, 1953. Said contract may be photographed by plaintiff.”
It will be noted that the order above quoted, from which defendant on leave granted has appealed, assumes the existence of a policy of the general nature suggested by the petition for discovery. Said petition did not aver the actual fact in this regard, the request for the order sought, and granted, apparently resting on the theory that a general liability insurance policy covering defendant and its agents, representatives and employees, might be in existence, and that if so it should be produced to the end that the cause of action might be averred accordingly. In appellant’s appendix we find an affidavit, executed by 1 of the attorneys for defendant, indicating that a search of the files and records of the university had not disclosed any copy of such a policy, and such had not been otherwise discovered or made known to defendant. Whether there was a sufficient basis afforded by the petition for discovery to entitle plaintiff to the order sought may well be questioned, but in view of the importance of the basic question at issue it will be assumed herein that compliance with the order of the circuit court is possible.

Counsel for plaintiff contend in substance that if defendant procured to be issued to it a policy of insurance covering liability for negligence of its agents and employees generally it thereby waived the right to assert governmental immunity as a defense. The argument concedes the existence of the immunity doctrine and that it is applicable to defendant. This, of course, is in accord with prior decisions of this Court. Counsel apparently base their argument on the theory that such immunity is a matter of defense, but such is not the fact. If immunity exists there is no cause of action. In consequence, we are not here concerned with the problem of waiver of a defense to an action for damages. Rather, the question before us is whether the taking out of a liability insurance policy, if such there was, abrogated, at least pro tanto, the immunity that otherwise would exist.

Necessarily involved in the problem before us are 2 questions: First, did the board of regents have the power to abrogate as to itself the doctrine of governmental immunity, either wholly or in part?; Second, would the taking out of an insurance policy against liability for negligent acts of employees and others have the effect of abolishing such governmental immunity, either partly or wholly? Both of these questions must be given a negative answer. Emphasis is placed on the fact that under the Constitution of the State (article 11, § 5) the board of regents is charged with “the general supervision of the university and the direction and control of all expenditures from the university funds.” Section 10 of the same article requires that the legislature “shall maintain the university” and other designated educational institutions. The supervision of the university and the expenditure of its funds do not involve the exercise of legislative
authority. Nowhere in the Constitution of the State do we find granted to the defendant board authority of such character. The making of appropriations for the support of the institution was expressly committed to the legislature, such action obviously falling within the scope of legislative powers.

Article 5, § 1, of the Constitution declares that “The legislative power of the State of Michigan is vested in a senate and house of representatives”, such vesting being subject to the powers reserved to the people under the initiative and referendum provisions in said section. In Harsha v. City of Detroit, 261 Mich 586, 590 (90 ALR 853), it was stated that:

“The legislative power is the authority to make, alter, amend, and repeal laws. 1 Cooley, Constitutional Limitations (8th ed), p 183.”

The doctrine of immunity in connection with the performance of governmental functions has been accepted in Michigan, and in the other States of the Union as well, as a part of the common law. The 3 Constitutions adopted in the past expressly recognized the continuing force of the common law, the Constitution of 1850 declaring in section 1 of the schedule thereof that:

“The common law and the statute laws now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature.”

In the Constitution of 1908 the last 3 words quoted were omitted, the record of the proceedings of the Constitutional Convention indicating that such omission resulted from the plan for local self-government for cities and villages, adopted by the convention, such plan contemplating the preparation and acceptance of home-rule charters to take the place of existing legislative charters. Obviously it was deemed expedient to eliminate any question as to the necessity of having a legislative repeal of existing special charters. The omission of the words in question did not alter the fact that all legislative power was vested, under the specific provisions of the Constitution, in the legislative department of government. Such power extended to and included specifically the repeal or modification of the common law recognized by the Constitutions, including the present fundamental law of the State. The conclusion necessarily follows that the board of regents of the university of Michigan was not vested with legislative authority to abrogate as to itself the existing doctrine of governmental immunity.
It was declared by this Court in *Lucking v. People*, 320 Mich 495, 503, that:

"The lands, buildings and equipment under the management, supervision and control of the board of regents of the university are public property, owned by the State of Michigan."

As before noted, the Constitution of the State commits to the defendant board the duty and responsibility of exercising supervisory control over the university and also responsibility for the expenditure of its funds. The duty thus created exists and must be exercised for and on behalf of the people of the State. No one will seriously contend that the authority so granted would permit gifts of property or money, belonging to defendant board, required to be used for the purpose above indicated. By the same process of reasoning defendant in the exercise of the supervisory and administrative functions vested in it by the Constitution may not surrender or abrogate valuable rights recognized by the fundamental law of the State, and created and existing for the benefit and protection of defendant in the performance of its governmental duties. Had defendant by express resolution undertaken to abolish or modify the doctrine of governmental immunity as to it, such action would have been ineffective. Nor could such result follow from a contract executed in connection with the carrying on of functions of the board.

A State agency or municipal governmental authority may not bind itself by a contract into which it is not authorized to enter. As above pointed out the Constitution of Michigan, by which defendant board is bound, contains no grant of power to invade the legislative field nor to enter into contractual undertakings other than in furtherance of the authority granted and in the exercise of the purposes thereof.

[Out of state cases are discussed.]

By analogy the above cited cases sustaining the majority rule are in accord with the holding of this Court in *DeGroot v. The Edison Institute*, 306 Mich 339. In that case the plaintiff brought an action for damages claimed to have resulted from negligence on the part of the defendant. The proofs indicated that the Institute was a nonprofit and public benevolent institution. The trial court granted defendant's motion for judgment notwithstanding the verdict of the jury in plaintiff's favor, and this Court approved under the rule that eleemosynary institutions are exempt in Michigan from liability based on the grounds asserted in plaintiff's declaration. It was stated that (pp 343, 344):
“Nor does the fact that the nonprofit corporation carries liability insurance so change its status as to make the corporation liable for an injury for which it would not otherwise be liable.”

Other decisions in States adhering to the majority rule are in accord with the above cases, the opinions in which indicate the weight of authority and the reasons on which the prevailing rule rests. The New Hampshire decision, supra, fairly epitomizes the proposition at issue with its statement indicating that the purpose of a policy of insurance is to indemnify the insured rather than to create liability. As hereinbefore noted, however, the acceptance of plaintiff's claim as to the effect that may be given to the existence of a general policy of indemnity insurance rests on the theory that by such a contract the abrogation or modification of the doctrine of governmental immunity has resulted.

In the instant case it is clear that under the provisions of our Constitution the board of regents of the university of Michigan is not invested with legislative powers. Its powers and duties have reference to the administration of the affairs, educational and financial, of the university. Whether the rule of governmental immunity should be modified or abrogated is a legislative matter, and in the final analysis the authority must be exercised in accordance with Constitutional provisions relating to the legislative department of government. Obviously the people, by Constitutional amendment, have full authority to act. Whether the State legislature may by general law abrogate or modify the existing rule of governmental immunity as to defendant board of regents is not involved in the instant case. No such law has been enacted. So far as the instant case is concerned, defendant board of regents has not by express resolution undertaken to abolish or alter such rule of immunity which it has possessed from the time of its creation. For the reasons above pointed out it is without power to take such action, and what it may not do expressly may not be accomplished impliedly through or by means of a contract of indemnity insurance.

The conclusion follows that the examination of the policy to which the order of the circuit court had reference would not enable counsel for plaintiff to allege in their declaration a cause of action against defendant board of regents. Such policy would not be entitled to admission in evidence in the trial of the case and, in consequence, it must be said that Michigan Court Rule No 35, § 6 (1945).* on which plaintiff's petition for discovery was based did not authorize the order from which the appeal has been taken.

Counsel for appellant calls attention to the decision of this Court in Robinson v. Washtenaw Circuit Judge, 228 Mich 225, in which it was held that the hospital of the university of Michigan was a charitable or eleemosynary institution, because supported at public expense, and that the regents of the university were not liable for damages for injuries, alleged to have been suffered by plaintiff while a surgical patient in the hospital, because of the status thereof, as well as on the ground that as an agency of State government the general rule of immunity was applicable. Attention is directed to the fact that the injuries sustained by plaintiff in the instant case were suffered in 1953. In the prevailing opinion in the case of Parker v. Port Huron Hospital, 361 Mich 1, it was held that the change in the rule as to the liability of charitable nonprofit hospital organizations should apply in that case and (p 28) "to all future causes of action arising after September 15, 1960." It is suggested in substance that the decision in Parker may not be applied to the instant case in view of the limitation as to the effective time of the holding. Also involved is the question whether such holding is applicable to the hospital of the university of Michigan which under the provisions of the State Constitution is subject to supervision and control by the defendant board of regents. However, we think that the instant case should be determined on the basis that the doctrine of governmental immunity is applicable to the defendant.

The case should be remanded with directions to set aside the order from which defendant has appealed.

KELLY, J., concurred with CARR, J.

DETHMERS, C. J., and TALBOT SMITH, J., did not sit.

The Christie case was decided September 22, 1961. The Board of Regents held its September meeting one week later. The official Proceedings of the Board of Regents for that meeting contains the following paragraph with the marginal notation "Sovereign Immunity":

The Vice-President in charge of business and finance commented upon a report from the Interim Committee of the legislature on sovereign immunity. He referred to a letter from the Attorney General and to his reply to that letter. The Vice-President said that the Board of Regents in 1939 directed that public liability insurance be taken out
(R.P., 1936-39, p. 968), and that at present the University carries a public liability policy with limits of $500,000 to $1,000,000 for bodily injury and $50,000 to $500,000 for property damage. He said that this policy also contains insurance against malpractice with an aggregate limit of $1,000,000. The liability policy in effect contains a provision that the insurer will not invoke the defense of sovereign immunity without the specific authorization of the Board of Regents in individual cases.


Glass v. Dudley Paper Company

365 Mich. 227, 228-31; 112 N.W. 2d 489 (1961)

DETHMERS, C. J. Plaintiffs, husband and wife, sued in the Ingham county circuit court for damages resulting from injuries allegedly sustained by the wife when a glass milk container, purchased from defendant State board, crumbled in her hand. Defendant board moved to dismiss as to it on the ground of lack of jurisdiction in that court, contending that it reposes exclusively in the court of claims. The motion was granted. Plaintiffs appeal.

The question presented is a jurisdictional one. Michigan Constitution of 1908, art 11, § 8, provides that the defendant, the State board of agriculture, now known as "The Board of Trustees of Michigan State University of Agriculture and Applied Science",* "shall have the general supervision of the college, and the direction and control of all college funds". With respect to this and the like constitutional provision relating to the University of Michigan,† this Court has held that they have invested the governing bodies of the 2 universities with the entire control and management of the affairs and property of these institutions, to the exclusion of all other departments of the State government from any interference therewith. Weinberg v. Regents of University, 97 Mich 246; Agler v. Michigan Agricultural College, 181 Mich 559 (5 NCCA 897). For discussion of point, see, also, Peters v. Michigan State College, 320 Mich 243.

*See PA 1959, p. 485.—REPORTER.
†Michigan Const 1908, art 11, § 5.
It is on the above basis that plaintiffs contend that the legislature could not include the defendant board within the exclusive jurisdiction of the court of claims because this would represent an invasion by the legislature of the board's exclusive right of control of the affairs and property of the university.

It is to be noted that the mentioned constitutional article 11, § 8, in nowise empowers the board to create courts or to confer upon or withhold jurisdiction from any court. On the contrary, article 7, § 1, after establishing certain courts, provides for "such other courts of civil and criminal jurisdiction, inferior to the Supreme Court, as the legislature may establish by general law." That expressly conferred power the legislature exercised in creating the court of claims by the enactment of PA 1939, No 135 (CL 1948, § 691.101 et seq. [Stat Ann 1959 Cum Supp § 27.3548(1) et seq.]). By that act the legislature conferred exclusive jurisdiction upon the court of claims over "claims and demands", over $100, "against the State or any of its departments, commissions, boards, institutions, arms or agencies". That language is broad enough to include defendant board. In thus conferring exclusive jurisdiction on the court of claims, the legislature has also exercised the power contemplated by Michigan Constitution of 1908, art 7, § 10, which provides that:

"Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this Constitution and not prohibited by law." (Italics supplied.)

By the enactment in question jurisdiction in this matter has become prohibited to the circuit court by law.

To conclude, involved in the jurisdictional question here presented is not the power to control university affairs and property, vested by the Constitution in defendant board, but, rather, the power to fix the jurisdiction of courts inferior to the Supreme Court, vested by Constitution in the legislature. The court of claims act is, therefore, in the respect here considered, constitutional.

Order dismissing is affirmed, without costs, a public question being involved.

KELLY, BLACK, EDWARDS, KAVANAGH, and SOURIS, JJ., concurred.

CARR, J., did not sit.

OTIS M. SMITH, J., took no part in the decision of this case.
v. Board of Regents of The University of Michigan

Mich. 238, 240-43; 134 N.W. 2d 146 (1965)

T. M. KAVANAGH, C. J. Separate actions were commenced in the Washtenaw county circuit court by the various plaintiffs against the board of regents of the University of Michigan and others.

In the Fox and Mitchell cases the declarations were filed in two counts:

Count one alleged that the University Hospital, an agency controlled by the board of regents, made warranties as to the qualifications, knowledge, and skill of its agents and employees, being doctors employed at the said hospital, which qualifications were ordinarily possessed and exercised by members of the medical profession in the locality, and that the warranties were breached in that the diagnosis, treatment, and surgery performed on plaintiff was unskillfully and negligently performed, resulting in permanent injury and disability to the plaintiff.

Court two was entitled "trespass on the case," in which the claim was made that the defendant board of regents was responsible for the negligent and unskillfull performance of surgery and treatment during plaintiff's hospitalization.

Subsequent amendments to the declarations alleged breach of contract and eventually an additional amendment was filed alleging that any immunity from liability on the part of the board of regents had been waived by the purchase of a comprehensive general liability insurance policy.

The Hyma case was begun by summons. No declaration was filed.

Motions to dismiss the cases as to the regents of the University of Michigan only were filed. The motions were based upon the ruling of this Court in Glass v. Dudley Paper Company, 365 Mich 227, in which it was held that the circuit courts of this State did not have jurisdiction to entertain claims against the governing body of Michigan State University, for the reason such jurisdiction is vested by statute exclusively in the court of claims. A similar rule would apply to the board of regents of the University of Michigan.

The trial court held that it did not have jurisdiction but that serious injustice would result by reason of the running of the statute of limitations in a court of claims action if dismissal were granted. The trial court instead ordered transfer of jurisdiction to the court of claims.

On leave granted, the board of regents of the University of Michigan presented the following question:

"Can the circuit court, which has acknowledged itself to be without jurisdiction to entertain and determine the issues of fact and law presented, by reason of the court of claims act, which vests that court with exclusive jurisdiction to hear and determine claims against the defendant, enter an order transferring the cause from the circuit court to the court of claims?"

Plaintiffs contend that the General Court Rules of 1963 are to be construed to secure the just, speedy, and inexpensive determination of every action so as to avoid the consequences of any error or defect in the proceedings which does not affect the substantial rights of the parties.

Plaintiffs further contend the spirit and effect of the revised judicature act of 1961\(^1\) is to eliminate the old concepts of "jurisdiction" and to assure that actions shall be justly and promptly heard without stilted concepts of territorial or other limitations, by permitting transfer to the proper forum if filed in an improper forum. They also argue that the law in Michigan prior to Glass permitted the bringing of such an action in the Washtenaw circuit court, since actions had previously been brought there and no one had ever questioned its jurisdiction. For this reason, they argue, that in justice and fairness they should not be deprived of a cause of action because of a change in the law.

Jurisdiction and venue are not the same thing. Lack of proper venue under the new General Court Rules\(^2\) can be corrected by transfer of a cause to the proper forum; lack of jurisdiction cannot.

When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void.

In In re Estate of Fraser, 288 Mich 392, this Court said (p 394):

"Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding."

\(^1\)CLS 1961, § 600.101 et seq. (Stat Ann 1962 Rev R 27A.101 et seq.)—REPORTER.

\(^2\)GCR 1963, 404.—REPORTER.
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7 MLP, Courts, § 24, p 627, is to the same effect:

"Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void.\(^1\)

"A court which has determined that it has no jurisdiction should not proceed further except to dismiss the action."\(^2\)

The orders of the circuit court in transferring the cases against the defendant board of regents of the University of Michigan to the court of claims are reversed and set aside, and the causes remanded to the lower court for entry of an order dismissing the actions. A public question being involved, no costs are allowed.

DETHMERS, KELLY, BLACK, SOURIS, SMITH, O'HARA, and ADAMS, JJ., concurred.

**Branum v. Board of Regents of University of Michigan**

The Michigan Court of Appeals, Division 2 (1966)

McGREGOR, P.J. This action arose as the result of an injury sustained by Joyce Branum on July 2, 1963. At about 3:15 p.m., plaintiff was struck by a truck owned by the University of Michigan, being driven by Harold F. Dresselhouse, an employee of the University of Michigan. Mrs. Branum was injured when the truck left the street, went over the curb and sidewalk, and struck her. The plaintiff Carl Branum is the husband of Joyce Branum and makes his claim for loss of consortium and medical expenses of his wife.

The statement of claim was filed in the court of claims on October 3, 1963. Plaintiffs argue that the legislature of the State of Michigan did abolish the defense of governmental immunity for the State of Michigan and the board of regents of the University of Michigan, or—alternatively—that the purchase of automobile liability insurance by the board of regents of the University of Michigan did waive any claim that it might have of governmental immunity. The plaintiffs argue that, in any event, the State of Michigan would be

\(^1\) *In re Braver* (ED Mich 1931), 51 F2d 123, affirmed by *Detroit Trust Co. v. Dunitz* (CCA 6, 1932), 59 F2d 905; *In re Dowling's Estate* (1944), 308 Mich 129 (probate court).

liable upon the accident because the State of Michigan was, in fact, the owner of the truck, even though it was registered in the name of the board of regents of the University of Michigan. The defendants based their defense on the governmental immunity of the board of regents of the University of Michigan. They argue that the legislature of the State of Michigan could not waive the governmental immunity of the University of Michigan, as it is a constitutional corporation and not subject to the control of the legislature.

On March 22, 1965, the court of claims ordered a summary judgment of no cause of action, based upon the defendants' previous motion to dismiss.

The decision of this Court could be simplified if we could adopt the plaintiffs' arguments that purchase of automobile liability insurance by the defendant board of regents of the University of Michigan acted to waive governmental immunity of the board of regents to the extent of the insurance coverage. Opinions from the courts of some sister States have adopted such a position. *Marshall v. City of Green Bay* (1963), 18 Wis 2d 496 (118 NW2d 715); *Schoening v. U.S. Aviation Underwriters, Inc.* (1963), 265 Minn 119 (120 NW2d 859); *Taylor v. Knox County Board of Education* (1942) 292 Ky 767 (167 SW2d 700, 145 ALR 1333); *Marion County v. Cantrell* (1933), 166 Tenn 358 (61 SW2d 477); *Vendrell v. School District # 266 (Oregon)* (1961), 226 Or 263 (360 P2d 282). The Supreme Court of the State of Michigan had the chance to adopt such a position in the opinion of Justice BLACK in *Christie v. Board of Regents of the University of Michigan* (1961), 364 Mich 202, but did not adopt such a position. It is noted that Justice BLACK, in the later case of *Sayers v. School District # 1 Fractional* (1962), 366 Mich 217, abandoned his former position in the face of the "overwhelming edict" on the part of his fellow Justices on the Supreme Court against his position. This Court cannot, therefore, rule that the board of regents waived governmental immunity by taking out a policy of automobile liability insurance, in view of the recent action on this question by the Supreme Court of the State of Michigan.


The defendants argue that historically, by judicial decisions of the Supreme Court of the State of Michigan, the board of regents of the University of Michigan has not been held subject to the control of the legislature. See *Weinberg v. Regents of University of Michigan*
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(1893), 97 Mich 246; *Sterling v. Regents of University of Michigan* (1896), 110 Mich 369, (34 LRA 150); *Board of Regents of University of Michigan v. Auditor General* (1911), 167 Mich 444; *Robinson v. Washtenaw Circuit Judge* (1924), 228 Mich 225. This Court recognizes the wisdom of establishing a separate governing body of the University of Michigan, free from the political influences that are necessarily a part of a State legislature. This Court recognizes that such independence must be maintained in educational matters in order to provide the highest quality education for the students of Michigan, and in order to maintain the outstanding national reputation of the University.

In spite of its independence, the board of regents remains a part of the government of the State of Michigan. The Supreme Court of the State of Michigan has ruled that the judicial doctrine of governmental immunity no longer exists in Michigan. Justice EDWARDS, in *Williams v. City of Detroit* (1961), 364 Mich 231, 250, so ruled, and was concurred in by three other justices. It is clear that the public policy of Michigan is that the defense of governmental immunity to tort actions should no longer exist.

The governing bodies of both the University of Michigan and Michigan State University are equal in both creation and power. In *Peters v. Michigan State College* (1948), 320 Mich 243, the Supreme Court, by handing down a split 4-4 decision, affirmed the lower court decision that Michigan State College was not immune from the workmen’s compensation act. It is the opinion of this Court that the legislature can validly exercise its police power for the welfare of the people of this State, and a constitutional corporation such as the board of regents of the University of Michigan can lawfully be affected thereby. The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without these confines, however, there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan.

The decision of the court of claims is reversed and the case remanded to the court of claims for determination upon the merits. No costs are awarded because of the public nature of the questions involved.

T. G. KAVANAGH and J. H. GILLIS, JJ., concurred.
LEVIN, Chief Judge.

This suit is based on three counts: I, the Jones Act, 4C U.S.C. § 688; II, unseaworthiness; and III, the duty of maintenance and care, the latter two counts under the general maritime law. The plaintiff was employed as a seaman by the defendant on the Myscis, a vessel owned by the defendant and used by it for scientific purposes on the Great Lakes and connecting tributaries, and alleges that the injuries occurred on July 8, 1964, while in the course of that employment. The defendant, the Board of Regents of the University of Michigan, a corporation created by the Constitution of the State of Michigan and generally known as a constitutional corporation, moves to dismiss or in the alternative for summary judgment on the ground that it is immune from liability and suit under the eleventh amendment to the Constitution of the United States.

[1] The motion to dismiss Count I is denied. The Jones Act provides in part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * * ."

The Federal Employers' Liability Act (FELA), to which the Jones Act refers, provides in part:

"Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * " and that "[u]nder this chapter an action may be brought in a district court of the United States * * *."


In Parden v. Terminal Railway of Alabama State Docks Department et al., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), the Supreme Court held that Congress intended to subject a state to suit under the FELA and had the authority under the commerce clause to do so.
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[2] The Jones Act, by express language, gives seamen injured in the course of their employment the equivalent rights available to railway employees. It is clear that Congress intended and had the power to subject a state to suit in a federal court under the Jones Act just as it did under the FELA. See Cocherl v. State of Alaska, 246 F.Supp. 328 (D.Alaska 1965).

[3] Counts II and III, based on the maritime law and not on congressional enactment, are dismissed. The eleventh amendment of the United States Constitution precludes suits against a state under the general maritime law in federal court absent the consent of the state. In Copper Steamship Co. v. State of Michigan et al., 194 F.2d 465, 468 (6th Cir. 1952), a libel against the State of Michigan for property damage caused by one of its ferries, the court said:

“We are of the opinion that the logical overall construction of the Court of Claims Act is that Michigan created a court to hear all claims against the State with the exception of any claims that were or might be enforceable in the federal courts; that with respect to claims of either nature a 3-year state of limitations would be applicable; and that there was no intention in creating the Court of Claims to enlarge or extend the existing jurisdiction of the federal court over the State or any of its departments, commissions, or agencies. This was the construction given to the Act by the Michigan Supreme Court in Manion v. State Highway Commissioner, 303 Mich. 1, on page 22, 5 N.W.2d 527, 529, where, in a case involving the Act, the Court stated: ‘Nor has the State waived its immunity from suit for a maritime tort in the courts of the United States.’ This expression of opinion was not necessary for the ruling which the Court gave in that case, and is not binding upon us as is usually the case where the state court of last resort has given its construction of a statute of the State. [omitting citations] However, it is persuasive as being in accord with our own view in this matter.”

[4] The plaintiff argues that the rules governing the immunity of municipalities are different from those governing the immunities of a state and that the Board of Regents of the University of Michigan is more akin to a municipality, and therefore the rule of the Copper case would not apply. It is not necessary to consider the law applicable to municipalities, as I am not persuaded by the analogy. The immunity of a state extends to its agencies and departments. The Board of Regents of the University of Michigan is a unique constitutional corporation, and is similar to a department of the state.

[5] The plaintiff also argues that the defendant waived its immunity by the purchase of liability insurance and cites Christie v.
Board of Regents of University of Michigan, 364 Mich. 202, 111 N.W.2d 30 (1961), in support of his position. In Grant v. Cottage Hospital Corp., 368 Mich. 77, 79, 117 N.W.2d 90 (1962), the court held that purchase of insurance by a hospital did not waive its immunity from suit and also remarked:

"The majority opinion in Christie v. Board of Regents of University of Michigan, supra, is not to the contrary since the effect of that opinion was simply to require the production of insurance policies for examination in order that a plaintiff might plead. There was no determination that, once having pleaded a waiver by the purchase of insurance, the plaintiff would have pleaded a good cause of action. That issue is here now determined adversely to the pleader."

Even if the existence of liability insurance had amounted to a waiver of immunity from suit, the State of Michigan did not consent to such suit in the federal court.

It is of interest to note that Public Act No. 170 of the Public Acts of 1964, Comp. Laws 1948, § 691.1401 et seq. M.S.A. § 3.996(101) et seq., effective July 1, 1965, subsequent to this accident, waives governmental immunity in certain cases. The case before the court is not one of them.

[6] The motion to dismiss Count I is denied; the motion to dismiss Counts II and III is granted; and the motion for summary judgment in the alternative, with respect to Count I, is denied because there are genuine issues of material fact.

MacDonald v. Board of Regents of University of Michigan

371 F. 2d 818 (6th Cir., 1967)

PER CURIAM.

Plaintiff-appellant is a citizen and resident of the Province of Nova Scotia, Canada. On February 2, 1965, she filed suit in the United States District Court for the Eastern District of Michigan against the Board of Regents of the University of Michigan, alleging that while a patient in the University of Michigan Hospital, she had suffered injuries as a result of the negligence of employees of that hospital.

Appellee Board of Regents filed an answer in this cause on February 24, 1965. On June 29, 1965, a pretrial order was entered by the United States District Judge which recited in part: "Defendant
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contemplates filing a motion challenging the jurisdiction of this Court and such motion shall be filed without delay." The order also granted defendant leave to amend its answer within 15 days in order to challenge jurisdiction.

Subsequently, on July 6, 1965, the Board of Regents filed a motion to dismiss, alleging: "That this court is without jurisdiction to hear the issues here involved and that the plaintiff's exclusive remedy, if any, is with the Court of Claims of the State of Michigan."

The parties concede that the defendant here, the Board of Regents of the University of Michigan, is for all legal purposes one and the same as the State of Michigan itself.

The Eleventh Amendment of the Constitution of the United States provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Appellant concedes that absent appellee's answer in this cause, the Eleventh Amendment would be a final bar to the United States District Court having jurisdiction over this litigation. Appellant, however, argues that filing of an answer should be read by this court, and should have been by the District Judge, as a waiver of its right to assert lack of jurisdiction.

We do not believe that a constitutional proscription against the judicial power of the United States being construed to extend to any suit commenced by a citizen of a foreign state against one of the United States can be waived by such a technical error. Ford Motor Co. v. Dept. of Treasury of State of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L. Ed. 389 (1945).

In the Ford case, the claim of lack of jurisdiction due to the Eleventh Amendment was first made and argued by the state in the Supreme Court. The Supreme Court therein stated:

"This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." Ford Motor Co. v. Department of Treasury of State of Indiana, supra at 467, 65 S.Ct. at 352.

The order of the District Court is affirmed.
3. OPINIONS OF ATTORNEY GENERAL

The statutes which provide for the treatment of children and poor people at the state expense by University Hospital have been the subject of many opinions of the Attorney General. In 1911 and again in 1920 the Attorney General read the statutes in an extremely literal way and ruled that the statutory words "medical care" did not include surgery for children. In 1915, however, the Attorney General was able to demonstrate that he could read language more liberally when he ruled that the words "University Hospital" included the homeopathic hospital which was then operated by the University.

In other rulings under these same laws, the Attorney General, in 1919, ruled that the superintendent of University Hospital could not refuse to admit a child brought to the hospital under an order of Probate Court; but in more recent opinions the Attorney General has ruled that the admission of state patients to the Neuropsychiatric Institute and the tuberculosis unit of University Hospital are subject only to the rules of the Board of Regents and not subject to the provisions of the Michigan Afflicted Children's Act or the regulations at the Tuberculosis Sanitarium Commission.

Despite the University's acknowledged constitutional independence in the framework already discussed in Chapters II and III, it is clear from subsequent rulings of the Attorney General that the University continued to cooperate with other state authorities who were acting under the various statutes. Under these laws, the Attorney General has ruled that a Judge of Probate may commission any person to transport children to University Hospital at state expense. The word "child" in the statutes was defined as any person who has not attained his majority. The authority of the former county superintendents of the poor to guarantee expenses at University Hospital has been examined, and the procedure for submitting separate invoices to the state for the same patient who received treatment under two different laws was prescribed in another opinion. In 1943, on the request of a social worker, the Attorney General was able to find four different sets of statutory provisions under which a child with homicidal tendencies might qualify for commitment at state expense to the Neuropsychiatric Institute on
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either a permanent or a temporary basis. In the same year the Attorney General ruled that the University could not collect additional charges from a patient admitted at state expense even though the patient could collect under an insurance policy.

A rather startling number of rulings have been issued under statutes providing that unclaimed bodies for which no private person has paid burial expenses shall be shipped to the Medical School for the use of its students. As early as 1886 the Attorney General ruled that the body of a deceased inmate of the Northern Michigan Asylum (today, the Traverse City State Hospital) might be buried at the asylum at the request of her widower even though the widower did not provide funds for burial. By 1890, however, the Attorney General's office seems to have abandoned its earlier position, and it ruled that the only alternative to shipment to the Medical School was burial at private expense. In 1907, the office made it clear that the statutory maximum of $15.00 for packing and shipping cadavers to the Medical School could not be exceeded, and, in 1910, the superintendent at Traverse City, who had requested most of the opinions in this series, was informed that he must continue to ship cadavers to Ann Arbor despite the fact that the Medical School was then oversupplied since the statute did not make any other provision for such a contingency. As late as 1930, the Attorney General had to advise the Auditor General that he should not pay for burial at public expense despite an order of the Circuit Court since the body should have been shipped to Ann Arbor.

A few opinions of the Attorney General have been concerned with the sovereign immunity of state institutions of higher education. In 1926, on the authority of the Robinson case, he ruled that University Hospital was not liable for burns suffered by a patient because of the negligence of an employee. A 1939 ruling held that the legislature could not waive the sovereign immunity of the then Michigan State College, and, therefore, a statute granting jurisdiction to the Claims Committee of the State Administrative Board to decide small claims was not constitutional as applied to claims against the college. (This opinion was overruled by the Branum case discussed in this chapter.) Finally, in 1948, the members of a faculty committee in charge of athletics at Central Michigan College were told that...
incorporation could not protect them from personal liability for injuries to athletes or patrons if their own negligence was the proximate cause of the injuries.\textsuperscript{18}

4. STATUTE ON JURISDICTION OF COURT CLAIMS


AN ACT to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act.

The People of the State of Michigan enact:

600.6419 Court of Claims

(1) Except as provided in section 6440, the jurisdiction of the court of claims as conferred upon it by this chapter over claims and demands against the state or any of its departments, commissions, boards, institutions, arms or agencies, shall be exclusive. The state administrative board is hereby vested with discretionary authority upon the advice of the attorney general, to hear, consider, determine and allow any claim against the state in an amount less than $100.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the said allowed claim by the secretary of the state administrative board to the clerk of the court of claims. The court has power and jurisdiction:

(a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms or agencies.

(b) To hear and determine all claims and demands, liquidated or unliquidated, ex contractu or ex delicto, which may be pleaded by way of counterclaim on the part of the state or any department, commission, board, institution, arm or agency thereof
against any claimant who may bring suit in such court. Any such claim of the state or any department, commission, board, institution, arm or agency thereof may be pleaded by way of counterclaim in any action brought against the state, or such or any other department, commission, board, institution, arm or agency of the state.

(2) The judgment entered by the court of claims upon any such claim, either against or in favor of the state or any department, commission, board, institution, arm or agency thereof, upon becoming final shall be res adjudicata of such claim. Upon the trial of any cause in which any demand is made by the state or any department, commission, board, institution, arm or agency thereof, against the claimant either by way of setoff, recoupment, or cross declaration, the court shall hear and determine each of such claims or demands and if the court shall find a balance due from the claimant to the state it shall render judgment in favor of the state for such balance. Writs of execution or garnishment may issue upon said judgment the same as from one of the circuit courts of this state. The judgment entered by the court of claims upon any such claim, either for or against the claimant shall be final unless appealed from as herein provided.

(3) The court of claims shall not have jurisdiction of any claim for compensation under the provisions of either:

(a) Act No. 10 of the Public Acts of the First Extra Session of 1912, as amended;
(b) Act No. 93 of the Public Acts of 1929, being sections 17.91 and 17.92 of the Compiled Laws of 1948, as amended; or
(c) Act No. 329 of the Public Acts of 1937, as amended.

(4) This chapter shall not be construed so as to deprive the circuit courts of this state of jurisdiction over actions brought by the taxpayer under the provisions of Act No. 167 of the Public Acts of 1933 or any other actions against state agencies based upon the statutes of the state of Michigan in such case made and provided, which expressly confer jurisdiction thereof upon the circuit courts, nor of the proceedings to review findings as provided in Act No. 1 of the Public Acts of the Extra Session of 1936, or any other similar proceedings expressly authorized by the statutes of the state of Michigan in such case made and provided.

(CL '48, § 600.6419.)
Section 1 - Introduction

1. The decisions mentioned appear after the Introduction.
2. See supra 248.

Section 3 - Opinions of Attorney General