

[Cite as *Johnson v. Univ. of Cincinnati*, 2004-Ohio-4565.]

IN THE COURT OF CLAIMS OF OHIO

JUDITH JOHNSON :
 :
 Plaintiff : CASE NO. 2003-07723
 : Judge Fred J. Shoemaker
 v. :
 : DECISION
 UNIVERSITY OF CINCINNATI :
 :
 Defendant :

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{¶1} This case was scheduled for an evidentiary hearing to determine whether Roy Jacobson, M.D., and Jeffery Heck, M.D. are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. The parties have submitted the case to the court upon briefs and stipulated exhibits.

{¶2} At all times relevant to this action, Dr. Jacobson was employed as an assistant professor of clinical family medicine by defendant, University of Cincinnati (UC), Department of Family Medicine. He was also employed by University Family Physicians, Inc. (UFPI), a practice group for physicians from UC. Dr. Heck was similarly employed by UC as a professor of clinical family medicine in its Department of Family Medicine, and by UFPI as well.

{¶3} Dr. Heck was hired by UC in 1987; Dr. Jacobson, in 1997. Both taught for UC, and both treated patients at a number of “satellite” clinics in Cincinnati. One of these clinics was the Wyoming Family Practice Center. Medical students and residents in these clinics frequently assisted physicians in treating patients in order to gain experience with realistic situations in the practice of family medicine.

{¶4} In late October and early November 2002, plaintiff was treated by Dr. Jacobson at the Wyoming Family Practice Center for complaints that eventually included coughing up blood, severe pain throughout her left leg, and discoloration of two toes on her left foot. On November 11, 2002,

Dr. Jacobson diagnosed plaintiff as having sciatica and bronchitis. He prescribed medication and advised her to return in one week if her condition had not improved. Plaintiff's condition did not improve and she returned to Wyoming Family Practice Center on November 15, 2002. During that visit she was seen by Dr. Heck. Dr. Heck diagnosed plaintiff as having an upper respiratory infection (URI) and bronchitis, as well as noting that plaintiff's left leg was markedly cold. Dr. Heck ordered an MRI and prescription medication for plaintiff. Plaintiff submitted to the MRI the following day, when due to excruciating pain in her left leg, she was also presented to the emergency room at Mercy/Mt. Airy Hospital. On November 22, 2002, the physicians at Mercy/Mt. Airy performed an above-the-knee amputation of plaintiff's left leg due to ischemia from blood clots.

{¶5} There is no assertion that Drs. Jacobson and Heck acted with malice, in bad faith, or in a wanton or reckless manner in their care and treatment of plaintiff. Therefore, the issue before the court is whether Drs. Jacobson and Heck were acting within the scope of their state employment with UC when the alleged injuries occurred.

{¶6} R.C. 2743.02(F) provides, in part:

{¶7} "A civil action against an officer of employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ****"

{¶8} R.C. 9.86 provides, in part:

{¶9} "**** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ****" (Emphasis added.)

{¶10} Whether a physician is entitled to personal immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 1992-Ohio-133. However, the question of whether the physician acted manifestly outside the scope of his state employment is one of fact. *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835; *Smith v. Univ. of Cincinnati*, Franklin App. No. 01AP-404, 2001-Ohio-3990.

{¶11} In determining whether a physician employed by both a state university and a practice group acted manifestly outside the scope of his or her employment with the state, this court uses the following two-pronged test established by the Tenth District Court of Appeals:

- 1) Whether the patient was a “private” patient of the physician or a patient of the university; and
- 2) The university’s financial gain in relation to the physician’s financial gain from the care rendered to the patient. *Norman v. The Ohio State Univ. Hosps.* (1996), 116 Ohio App.3d 69.

{¶12} As stated by the Court of Appeals, “[t]he key issue in determining whether [a physician] is entitled to personal immunity is whether he saw the patient only in his capacity as an attending physician supervising residents at OSUMC or whether he saw the patient as a private patient.” *Ferguson v. Ohio State Univ. Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863.

{¶13} Both Drs. Jacobson and Heck saw plaintiff at Wyoming Family Practice Center. While both doctors were routinely assisted by residents or medical students when seeing patients, there was never a resident or medical student present during any of plaintiff’s visits to the clinic. (Jacobson Deposition, p. 10; Heck Deposition, p. 6.) Dr. Heck stated that there were no residents in any training rotations at the Wyoming Family Practice Center during the time that plaintiff’s treatment was given. (Heck Deposition, p. 14.)

{¶14} A great majority of Dr. Jacobson’s income came directly from UFPI. (Stipulation No. 6.) Because Dr. Heck held a more time-consuming and senior position at UC, his income from UFPI and UC were comparable to each other. (Stipulation No. 14.) Both doctors received their medical

malpractice insurance and other fringe benefits from UFPI. (Stipulation Nos. 7, 15, 18; Jacobson Deposition, pp. 29-30; Heck Deposition, p. 20.) All of the billing that related to the treatment of plaintiff was done through UFPI. (Jacobson Deposition, p. 22.)

{¶15}Based upon the totality of the evidence presented, the court finds that Roy Jacobson, M.D., and Jeffery Heck, M.D., treated plaintiff as a private patient. Accordingly, the court finds that Drs. Jacobson and Heck are not entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86, and the courts of common pleas have jurisdiction over any civil actions against them based upon the allegations in this case.

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UNIVERSITY OF CINCINNATI : JUDGMENT ENTRY
Defendant :

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This case was submitted to the court upon stipulated exhibits and briefs to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon reviewing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Roy Jacobson, M.D., and Jeffery Heck, M.D. are not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas have jurisdiction over this matter. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER
Judge

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