

Court of Claims of Ohio

The Ohio Judicial Center
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KIMBERLY MEREDITH, et al.

Case No. 2006-04946

Plaintiffs

Judge Clark B. Weaver Sr.
Magistrate Lee Hogan

v.

MAGISTRATE DECISION

THE OHIO STATE UNIVERSITY
MEDICAL CENTER

Defendant

{¶1} An evidentiary hearing was conducted in this matter to determine whether Gregory Guy, M.D. and Ali Rikabi, M.D. are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. At the outset of the proceedings, the parties entered into a stipulation with respect to a third physician, Charles Love, M.D., wherein it was agreed that Dr. Love is entitled to immunity and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case. The stipulation is hereby APPROVED.

{¶2} R.C. 2743.02(F) states, in part:

{¶3} “A civil action against an officer or 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. ***”

{¶4} R.C. 9.86 states, in part:

{¶5} “*** 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

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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. ***"

{¶16} In *Theobald v. University of Cincinnati*, 111 Ohio St.3d 541, 548, 2006-Ohio-6208, the Supreme Court of Ohio held that:

{¶17} "**** in an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02[F], the Court of Claims must initially determine whether the practitioner is a state employee. If there is no express contract of employment, the court may require other evidence to substantiate an employment relationship, such as financial and corporate documents, W-2 forms, invoices, and other billing practices. If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.

{¶18} "If the court determines that the practitioner is a state employee, the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting 'manifestly outside the scope of employment' for purposes of R.C. 9.86. *If there is evidence that the practitioner's duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred.*" (Emphasis added.)

{¶19} The parties do not dispute that Dr. Guy or Dr. Rikabi were faculty members at defendant's College of Medicine and that they qualify as state employees for the purposes of R.C. 9.86. Therefore, the issue before the court is whether these physicians were acting on behalf of the state when the alleged injury occurred and, because there is evidence that the physicians' duties included the education of students and residents, whether these physicians were in fact educating a student or resident at the time of the alleged negligence.

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{¶10} Plaintiff Kimberly Meredith¹ was referred to Dr. Love for both a revision to a pacemaker that had previously been implanted and a balloon angioplasty to expand her superior vena cava (SVC). Dr. Love was a specialist in the placement of electronic pacemakers and the lead wires that are required to make them operate. At the time of the injuries in question, Dr. Love was a clinical professor of internal medicine with a sub-specialty in electrophysiology. He was also the director of the cardiology labs at defendant's Ross Heart Hospital. Dr. Love performed the lead wire placement and revision; the balloon angioplasty was performed by Drs. Guy and Rikabi, both of whom are specialists in interventional radiology and clinical professors of radiology.

{¶11} The pacemaker procedure was performed at a facility know as the "cath lab" which was equipped to allow radiologic observation of the lead placement and revision. Medical students, residents, and fellows could observe the procedures from the cath lab "control room" where the lab's scopes and cameras were wired to computers and monitoring screens. The cath lab was separated from the control room by a leaded glass partition, but the equipment allowed the observers and the faculty physicians to communicate while procedures were being performed.

{¶12} Plaintiff's procedure was performed on August 2, 2005. Dr. Love placed temporary lead wires for plaintiff's new pacemaker and removed her existing pacemaker and wires. Dr. Love then instructed one of the lab nurses to inject a contrast dye into plaintiff's heart so that Drs. Guy and Rikabi could evaluate the constriction between the SVC and the atrium before beginning their portion of the work. However, instead of the contrast dye, plaintiff was injected with bupivacaine, a drug that was known to cause cardiac and respiratory distress. As a result, Dr. Love immediately called a "code blue," and numerous medical staff responded, including Dr. Rotil Mehta, a cardiology fellow assigned to work with Dr. Love, and who had been observing the procedure from the

¹ Use of the term "plaintiff" in this case refers to Kimberly Meredith.

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control room. Plaintiff was successfully resuscitated. Thereafter, Drs. Love, Guy and Rikabi consulted with one another and decided to continue with the procedure. Drs. Guy and Rikabi took over and performed the balloon angioplasty on the SVC. Dr. Mehta returned to the control room to observe that procedure but, because he had dressed in the appropriate leaded clothing for the code blue, walked in and out of the control room during that time. Unfortunately, a complication occurred that required a surgical repair after plaintiff's new pacemaker was connected. Plaintiff was transferred to University Hospital for that repair, which was successful, and she was discharged on August 8, 2005.

{¶13} Plaintiffs contend that this is, in essence, two cases of malpractice: 1) the injection of the bupivacaine despite Dr. Love's orders to inject contrast dye and; 2) the complication that occurred during the angioplasty performed by Drs. Guy and Rikabi. With regard to the latter, plaintiff contends that Drs. Guy and Rikabi used the wrong size balloon and that plaintiff did not need an angioplasty in the first instance. As has been stated, the parties stipulated that Dr. Love was entitled to immunity and the evidence is clear that Dr. Love was involved in educating students; that his fellow, Dr. Mehta, was observing from the control room during both procedures; and that Dr. Mehta participated in the code blue. The crux of plaintiffs' argument regarding Drs. Guy and Rikabi is that those physicians did not have a radiology fellow assigned to them in 2005,² and that they were not at the cath lab on August 5, 2005, to teach any particular students in their speciality. Plaintiffs argue that Dr. Mehta was not involved in the decision to proceed with the angioplasty, nor did he decide what size balloon to use. Further, much like Justice Pfeifer's dissent in *Theobald*, supra, plaintiffs argue that there is a difference between "teaching" and "learning," and that the mere presence of a student does not establish that teaching is taking place.

²According to the testimony, the procedure was beyond a resident's level of expertise and, thus, residents from the radiology department would not have been involved.

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{¶14} As noted in *Theobald*, “[f]or purposes of personal immunity under R.C. 9.86, a state employee acts within the scope of employment if the employee’s actions are ‘in furtherance of the interests of the state.’ *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 287, 1992 Ohio 133, 595 N.E.2d 862. Thus, a state employee’s duties should define the scope of employment.”

{¶15} The deposition testimony of Robert Bornstein, Ph.D., Associate Dean of the College of Medicine, establishes that the primary duties of Drs. Guy and Rikabi, as faculty members on the “regular clinical track,” were “patient care and teaching.” (Defendant’s Exhibit B, page 12, lines 10-19.) Dr. Bornstein stated that, “[M]ost of the teaching by our physician faculty tends to occur with medical students who are in their third or fourth year, that is, that they’re doing their clinical rotations and with residents and specialty fellows. So the majority of teaching in the clinical departments is basically patient care. There [are] some didactic lectures *** but the vast majority is patient based.” (Defendant’s Exhibit B, Bornstein Deposition, page 13, lines 10-11.) Dr. Bornstein further explained that the clinical method is important for a variety of reasons: “First of all, our faculty have to be active, engaged clinicians in order to have them be aware of the current state of the art in terms of the practice of medicine. *** If they’re not, they can’t teach.” (Defendant’s Exhibit B, page 13, lines 20-24, page 14, line 1.) In short, “[i]n many instances, the line between these two roles (practicing and teaching) is blurred because the practitioner may be teaching by simply providing the student or resident an opportunity to observe while the practitioner treats a patient.” *Id.* at ¶16 quoting *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510.

{¶16} In affirming the holding of the Tenth District Court of Appeals, the Supreme Court agreed that “the question of scope of employment must turn on what the practitioner’s duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury.” *Id.* at ¶23. The Court of Appeals further explained that: “a practitioner is acting within the scope of his employment if he educates a student

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or resident by direct instruction, demonstration, supervision, or simple involvement of the student or resident in the patient's care." *Theobald*, supra, 160 Ohio App.3d 342, 2005-Ohio-1510, at ¶47.

{¶17} Notwithstanding plaintiffs' arguments to the contrary, the court finds that Drs. Guy and Rikabi were clearly within the scope of their employment, performing their teaching duties, when the balloon angioplasty was taking place. This was not a situation where, as suggested by plaintiffs' counsel, a group of practitioners, performing their private practice duties, simply invited any available resident or fellow along in order to create artificial immunity. To the contrary, regardless of whether there were any students present from their own specialty area, the procedure performed by Drs. Guy and Rikabi was relevant to the students of Dr. Love and Dr. Mehta. Both Dr. Love and Dr. Mehta testified credibly at the evidentiary hearing that it was important for them to know how the procedure was done for purposes of their own specialty practices. Dr. Love testified that he learned the procedure from Drs. Guy and Rikabi, that he had since been able to perform it autonomously, but that he asked Drs. Guy and Rikabi to be present because he wanted the benefit of their expertise for plaintiff's particular case. Dr. Mehta testified that he specifically wanted to observe the entire procedure because it was unique, and because one of the reasons he chose to attend defendant's medical college was because of its "fluid" structure that allowed students to pick and choose those learning opportunities that were of most interest to them. Thus, in this court's view, the case presents the classic teaching scenario contemplated in *Theobald*.

{¶18} Accordingly, it is recommended that the court find that Gregory Guy, M.D. and Ali Rikabi, M.D. are entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against them based upon the allegations in this case.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day

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period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

LEE HOGAN
Magistrate

cc:

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LH/cmd
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