

[Cite as *Wilson v. Univ. of Cincinnati*, 2001-Ohio-1855.]

IN THE COURT OF CLAIMS OF OHIO

SAMANTHA L. WILSON, et al.	:	
Plaintiffs	:	CASE NO. 2000-12688
v.	:	<u>JUDGMENT ENTRY</u>
UNIVERSITY OF CINCINNATI, et al.	:	Judge J. Warren Bettis
Defendants	:	
	:	
	:	

The court held a non-oral evidentiary hearing in this case to determine whether Kevin Yakuboff, M.D., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

At all times relevant to this action, Dr. Yakuboff was employed by defendant, University of Cincinnati (UC), as an Assistant Professor of Clinical Surgery, and by the University Surgical Group of Cincinnati Incorporated, a private practice group for UC surgeons.

There is no assertion that Dr. Yakuboff acted with malice, in bad faith, or in a wanton or reckless manner in his treatment of plaintiff.<sup>1</sup> Therefore, the sole issue before the court is

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<sup>1</sup>"Plaintiff" will be used throughout this decision to refer to Samantha Wilson.

whether Dr. Yakuboff was acting within the scope of his employment with UC when the alleged injury occurred.

R.C. 2743.02(F) states, in part:

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 his 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. \*\*\*

R.C. 9.86 states, in part:

\*\*\* no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages 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. \*\*\*

The determination of whether state employees are entitled to personal immunity is a question of law. *Nease v. Medical College Hosp.* (1992), 64 Ohio St.3d 396, 400, citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284. However, the question of whether they acted manifestly outside the scope of their state employment is one of fact. *Lowery v. Ohio State Highway Patrol* (February 27,

1997), Franklin App. No. 96AP107-835, unreported; *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9.

In *Ferguson v. The Ohio State Univ. Med Ctr.* (June 22, 1999), Franklin App. No. 98AP-863, unreported, the court held that one of the key questions to be addressed in this context is whether a physician saw the patient only in his capacity as an attending physician supervising residents, or whether the physician saw the patient as a private patient through his private practice. In making this determination, the court set forth fifteen factors for consideration.

Upon review of the factors enumerated in *Ferguson* and based upon the totality of the evidence, the court finds that Dr. Yakuboff acted within the scope of his employment with defendant at all times and during all interactions with plaintiff that are at issue in this case. Consequently, Dr. Yakuboff is entitled to personal immunity pursuant to R.C. 9.86 and the courts of common pleas do not have jurisdiction over civil actions against him based upon his alleged actions and inactions in this case.

Accordingly, the clerk is directed to set this matter for trial in the normal course.

The court makes the express determination that there is no just cause for delay, pursuant to Civ.R. 54(B).

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J. WARREN BETTIS  
Judge

Entry cc:

Case No. 2000-12688

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JUDGMENT ENTRY

Joseph W. Shea, III  
Shirley A. Coffey  
401 East Court Street  
600 Flatiron Building  
Cincinnati, Ohio 45202

Attorneys for Plaintiffs

Karl W. Schedler  
65 East State St., 16th Fl.  
Columbus, Ohio 43215

Assistant Attorney General

KWP/cmd  
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