

[Cite as Metz v. Ohio State Univ., 2004-Ohio-3181.]

IN THE COURT OF CLAIMS OF OHIO

BRIAN L. METZ	:	
Plaintiff	:	CASE NO. 2001-11642
v.	:	Judge J. Warren Bettis
THE OHIO STATE UNIVERSITY	:	<u>DECISION</u>
Defendant	:	
	:	: : : : : : : : : : : : : : : :

{¶1} An evidentiary hearing was conducted in this matter to determine whether Rodney Tomczak, M.D. is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. The parties submitted stipulated facts and post-hearing briefs.

{¶2} At all times relevant to this action, Dr. Tomczak was employed as an assistant professor of medicine by defendant, The Ohio State University Medical Center (OSUMC). He was also employed by the Department of Surgery Corporation (DSC), Division of Orthopaedics.

{¶3} This case concerns medical treatment provided to plaintiff by Dr. Tomczak from November 1996 to April 1999. Plaintiff was a student at the university's law school at the time. He initially sought treatment through the Student Health Center for pain that he was experiencing in his left foot. Physicians at the health center diagnosed the problem as tendinitis; however, when his condition failed to respond to conservative treatment, plaintiff was referred to Dr. Tomczak for a second opinion. Thereafter, plaintiff visited Dr. Tomczak at the DSC offices for continued treatment until his graduation from law school.

{¶4} There is no assertion that in his care and treatment of plaintiff Dr. Tomczak acted with malice, in bad faith, or in a wanton or reckless manner. Therefore, the issue

before the court is whether Dr. Tomczak was acting within the scope of his state employment with OSU when the alleged injury occurred.

{¶5} R.C. 2743.02(F) states, in part:

{¶6} "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. ***"

{¶7} R.C. 9.86 states, in part:

{¶8} "*** 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. ***"

{¶9} The determination of 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.

{¶10} As this court has stated in other decisions, there is no bright-line rule for determining whether or not a physician acted within the scope of state employment. In *Ferguson v. The Ohio State University Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863, the Tenth District Court of Appeals set forth 15 factors to be considered in making

these determinations. In subsequent decisions, that court refined the *Ferguson* factors in terms of two essential considerations: 1) whether the patient was the physician's private patient or a patient of the university medical facility; and 2) the relative financial gain for the university as compared to that of the physician. Of those two, it has been held that "the key factor" is whether or not the patient was essentially the doctor's private patient. See *Wayman v. University of Cincinnati Med. Ctr.* (June 22, 2000), Franklin App. No. 99AP-1055; *Barkan v. The Ohio State Univ.*, Franklin App. No. 02AP-436, 2003-Ohio-985.

{¶11} In the instant case, having considered the testimony, exhibits, stipulated facts, and the arguments of counsel, the court finds in accordance with the above-referenced case law that plaintiff was Dr. Tomczak's private patient and that Dr. Tomczak is, accordingly, not entitled to civil immunity.

{¶12} After the referral, plaintiff visited Dr. Tomczak at his DSC offices; he did not return to the Student Health Center for treatment. Both plaintiff and Dr. Tomczak testified at the evidentiary hearing that, after the referral, Dr. Tomczak became "plaintiff's doctor." Although medical students and residents were present from time to time, Dr. Tomczak described himself as the attending physician and ultimate decision maker with respect to all medical treatment rendered while plaintiff was in his care.

{¶13} The DSC is a an Ohio medical professional corporation consisting of medical practitioners engaged in the private practice of medicine. Each member of the DSC received a separate income for the services that they performed for the corporation. (Stipulation No. 4; the DSC Close Corporation Agreement, Exhibit C.) Beginning in 1995, Dr. Tomczak received a salary of \$81,920 from the DSC; he also received \$28,080 from OSUMC for his faculty position. (Stipulation 9; Exhibit A.) Although Dr. Tomczak's salary varied from year to year, the disparity between his income from the DSC and that which he received from OSUMC remained relatively the same. (See Stipulations 8 and 9.)

{¶14} With respect to billing considerations, the DSC managed all billing for treatment rendered by the members of its practice group. (Stipulation No. 5.) The DSC

determined the fees that it charged its patients. All medical bills for Dr. Tomczak's care and treatment of plaintiff were generated by the DSC and none were generated by OSUMC. (Stipulation 17 and 18; Exhibit D.) Pursuant to the terms of Dr. Tomczak's employment, "[a]ll patient care related revenue (except for speaking honoraria, book royalties, and other exclusions provided for in the College of Medicine Practice Plan) revert[ed] to the Department of Surgery Corporation." (See Stipulation 10; Exhibit A.)

{¶15} Although plaintiff agreed with all of these facts, he contends that the case "present[s] a unique situation in which the patient is a referral from a physician on staff at a student health center under the umbrella of the state entity *** to another physician on the faculty of the OSUMC." Plaintiff also notes that Dr. Tomczak was obligated to engage in teaching, research, service and patient care activities as an employee of OSUMC and was required to be a member of the DSC. Conversely, defendant argues that this is "a classic situation of an attending physician rendering care and treatment to a patient in his capacity as an employee of his private practice corporation that subsequently billed and monetarily benefitted from the services rendered." The court agrees with defendant's analysis.

{¶16} For these reasons, the court finds by a preponderance of the evidence that Dr. Tomczak treated plaintiff as a private patient of the DSC for the financial gain of the DSC, and not OSUMC. Accordingly, Dr. Tomczak is not entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶17} The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 2743.02(F) and 9.86. Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Rodney Tomczak, M.D. is not entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Therefore, the courts of common pleas have jurisdiction over civil actions against Dr. Tomczak based upon the allegations set forth in plaintiff's complaint.

{¶18} 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.

J. WARREN BETTIS
Judge

Entry cc:

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