

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

LARRY ENGEL, JR.

Plaintiff

v.

UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE

Defendant

Case No. 2008-03572

Judge J. Craig Wright

DECISION

{¶ 1} On September 11, 2008, the court issued an entry granting the parties' joint motion to submit stipulations and briefs in lieu of an evidentiary hearing to determine whether Marek Skoskiewicz, M.D., Ph.D. is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. On September 23, 2008, the court issued an entry approving the parties' "joint stipulation of facts relevant to immunity." The parties filed their briefs on October 30, 2008.

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

{¶ 5} “[N]o 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.”

{¶ 6} The parties have stipulated the following facts:

{¶ 7} “1. At all relevant times Marek Skoskiewicz, M.D., practiced general surgery at the Henry County Hospital in Napoleon, Ohio.

{¶ 8} “2. Henry County Hospital, Inc. is a private, not-for-profit corporation; it is not affiliated with or a part of any state university, and is not an instrumentality of the State of Ohio.

{¶ 9} “3. On January 13, 2005, Dr. Skoskiewicz performed a bilateral segmental vasectomy on Mr. Engel at the Henry County Hospital. Because pathology results showed that Dr. Skoskiewicz failed to resect the vas deferens on the right side, Dr. Skoskiewicz thereafter performed a redo vasectomy on January 27, 2005. Mr. Engel alleges in his lawsuit that Dr. Skoskiewicz performed these surgeries negligently, which proximately caused the loss of his right testicle.

{¶ 10} “4. At no time relevant to this case was Dr. Skoskiewicz a member of the regular faculty of the Medical College of Ohio (MCO). At all times relevant to this case, regular faculty members of the Medical College of Ohio were paid academic salaries directly from MCO. Dr. Skoskiewicz did not receive any such salary. Further, regular faculty members were required to conduct their clinical practices only through an MCO-approved practice plan corporation. At that time, the primary practice plan corporation was known as the Associated Physicians of the Medical College of Ohio (APMCO). Dr. Skoskiewicz was not employed by and did not receive any compensation from APMCO or any of the other approved plans.

{¶ 11} “5. Rather, Dr. Skoskiewicz held an appointment as a volunteer faculty member of the Medical College of Ohio with the academic title of Clinical Assistant

Professor in the Department of Surgery, as is set forth in the appointment letters which are attached hereto as Exhibit B. The purpose of this appointment was so that third-year medical students of MCO could rotate through Dr. Skoskiewicz's practice as a part of one-month clerkships that were arranged and sponsored by the Bryan/MCO Area Health Education Center, Inc. (BAHEC).

{¶ 12} "6. BAHEC is a private, non-profit corporation that was affiliated with MCO as a part of that institution's outreach to underserved areas in northwest Ohio. BAHEC is one of many Area Health Education Centers that were set up nationwide to provide educational resources to students and practitioners, and to provide better medical coverage in outlying areas. * * *

{¶ 13} "7. BAHEC paid Dr. Skoskiewicz a small stipend of \$225 for each student who rotated through his practice. As is evidenced by documentation provided by Dr. Skoskiewicz's counsel, the stipends were written on the account of the 'Bryan/MCO Area Health Education Center, Inc.' The stipends were not paid by MCO or by any other state entity, and the stipends were not paid out of state funds. * * *

{¶ 14} "8. As a volunteer faculty member, Dr. Skoskiewicz did not receive any salary from MCO, and no fringe benefits or insurance premiums were paid on his behalf by MCO. MCO did not file W-2 statements or any other income tax documents concerning Dr. Skoskiewicz."

{¶ 15} The Supreme Court of Ohio has held that "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. * * *

{¶ 16} "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." *Theobald v. University of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶30-31.

{¶ 17} In his affidavit, Dr. Skoskiewicz states that he was instructing David Essig, a third-year medical student at MCO, “[a]t all time pertinent to the care and treatment of Larry Engel” and that Essig was present in the operating room during the surgeries at issue. Defendant does not dispute that Dr. Skoskiewicz was educating Essig when the alleged negligence occurred. Accordingly, the question before the court is whether Dr. Skoskiewicz was a state employee at the time of the surgery.

{¶ 18} Plaintiff asserts that Dr. Skoskiewicz’s appointment to the position of Assistant Clinical Professor of Surgery at MCO constitutes state employment for the purposes of civil immunity.

{¶ 19} 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.” *Id.* at ¶15, citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 287, 1992-Ohio-133. “A ‘state employee,’ for purposes of R.C. 9.86, is defined in R.C. 109.36(A)(1)” which provides that an “[o]fficer or employee’ means any of the following:

{¶ 20} “(a) A person who, at the time a cause of action against the person arises, is serving in an elected *or appointed* office or *position with the state* or is employed by the state.” (Emphasis added.) *Id.* at ¶14.

{¶ 21} Defendant argues that Dr. Skoskiewicz’s faculty appointment does not have the “indicia of employment” inasmuch as defendant did not pay him a salary or exercise control over his medical practice. However, Dr. Skoskiewicz’s appointment conferred upon him the right to hold himself out as a faculty member of MCO and “R.C. 9.86 is inclusive and makes no exception for persons who may simultaneously have other employment interests.” *Id.* at ¶25.

{¶ 22} Although the evidence shows that Dr. Skoskiewicz derived most of his income from his private practice, he was both entitled to certain privileges and subject to some control by defendant with regard to his status as a faculty member. The March 18, 2005 letter from defendant notifying Dr. Skoskiewicz that defendant’s board of trustees had approved his appointment explained that, as a condition of the appointment, he was subject to “the MCO Faculty Rules and Regulations, and Medical College of Ohio policies and procedures, including those governing research.” Dr.

Skoskiewicz was further advised that professional journal articles and research projects which identified him as an MCO faculty member would be subject to review and approval by MCO officials.

{¶ 23} Based upon the evidence submitted, the court finds that Dr. Skoskiewicz was acting in furtherance of the interests of the state when he performed the procedures at issue. There is no dispute that Dr. Skoskiewicz was acting in his appointed position as an Assistant Clinical Professor of Surgery when Essig observed him perform the procedure. The plain language of R.C. 109.36(A)(1) provides that a person who serves in an appointed position with the state is a state employee for the purposes of personal immunity under R.C. 9.86. Consequently, the court concludes that Dr. Skoskiewicz performed the operations as a state employee.

{¶ 24} For the foregoing reasons, the court finds that Dr. Skoskiewicz is 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 him based upon the allegations in this case.

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JUDGMENT ENTRY

The issue of civil immunity was submitted to the court via stipulations and briefs. The court has considered the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Marek Skoskiewicz, M.D., Ph.D. is 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 him based upon the allegations in this case. The case shall be set for trial.

J. CRAIG WRIGHT
Judge

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AMR/cmd
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