

ORIGINAL

In the  
Supreme Court of Ohio

09-1735

LARRY ENGEL, JR.,

Plaintiff-Appellee,

v.

UNIVERSITY OF TOLEDO COLLEGE OF  
MEDICINE,

Defendants-Appellant.

: Case No. \_\_\_\_\_  
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:  
: On Appeal from the  
: Franklin County  
: Court of Appeals,  
: Tenth Appellate District  
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:  
: Court of Appeals Case  
: No. 09AP-53  
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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANT-APPELLANT UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE**

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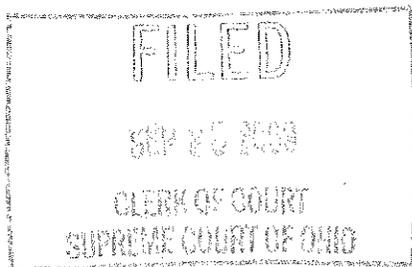
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## INTRODUCTION

This case arises out of a medical malpractice suit filed against a private-practice surgeon who was also a volunteer clinical faculty member at The University of Toledo College of Medicine (the “University”), one of Ohio’s six public medical schools. In the surgeries at issue, the physician operated on his own patient, from his own private practice, in a private, not-for-profit corporate hospital. Although a medical student from the University observed the procedures, this physician—just like the volunteer medical faculty at Ohio’s other public medical schools—received no salary or benefits from the University, nor was he employed by or affiliated with the University’s approved faculty practice plan.

The question in this case is whether a private physician serving as a volunteer clinical faculty member for a State medical school is entitled to personal immunity under R.C. 9.86. The answer is tremendously important because if these volunteers are entitled to immunity—as the Tenth District mistakenly held—then such private physicians are personally immune from these malpractice suits and, instead, the State universities will be held liable in the Court of Claims under R.C. 2743.02(A)(2) for their negligent acts or omissions.

The consequences of that decision are staggering. The Tenth District has improperly extended immunity to “volunteers,” who are not State “officers or employees” under R.C. 9.86. As a result, Ohio’s public universities are now the malpractice insurers for more than 6,000 private physicians who serve as volunteer faculty at Ohio’s public medical schools—physicians who are not employed by the universities and who carry their own professional liability insurance. The decision is nothing short of a windfall for these physicians—and more pointedly, their private insurers, who have advanced this novel defense. Indeed, it is antithetical to the very definition of “volunteer”—that is, one who serves without compensation or benefits—to suggest

that the State must remunerate them with the benefit of one of the largest professional overhead costs that exists: malpractice liability coverage.

The decision below exposes Ohio's public universities to significant monetary liability, and could also be applied in many other contexts to increase the economic burdens on other State entities. Moreover, because of the severe financial implications of the Tenth District's decision, volunteer clinical faculty programs—which are vital to medical education—will become prohibitively expensive for Ohio's public medical schools. The decision below therefore threatens to diminish the quality of medical education at Ohio's public universities.

For those reasons and the reasons below, this Court should review and reverse the Tenth District's erroneous decision.

#### **STATEMENT OF THE CASE AND FACTS**

##### **A. The role of volunteer faculty members at Ohio's public medical schools.**

All of the universities with health education programs in Ohio, including the University of Toledo College of Medicine (the "University"), use a mixture of employed and volunteer faculty members to train their students and residents.<sup>1</sup> The distinction between these two types of faculty members is critical, but has never been addressed by this Court.

Regular faculty members at the University unquestionably are State employees. They receive salaries and benefits directly from the University, and as a condition of employment, they must conduct their practices exclusively through University-approved faculty practice plans over which the University has significant oversight. In short, the University exercises extensive control over regular faculty members and their medical practices.

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<sup>1</sup> The injury alleged in this case occurred in 2005. At that time, the College of Medicine was a public medical school called the Medical College of Ohio at Toledo; it merged with the University of Toledo in 2006. See R.C. 3364.01.

By contrast, volunteer clinical faculty are private physicians with practices entirely separate from the University, but who agree to host medical students at their offices for short rotations. These physicians receive no salary or benefits from the University, and the University does not pay for their professional liability insurance. Nor are these physicians employed by or affiliated with the University's approved faculty practice plan. Rather, their practices are administered from their own offices, without any connection to the University. Aside from asking these physicians to abide by basic rules, such as those governing research and faculty conduct, the University does not control their practices, even when medical students are there.

While some volunteers for the University receive a small stipend (in this case \$225.00) for each student they host, this sum is paid by private, non-profit corporations. The physician in this case was paid by an organization called the Bryan/MCO Area Health Education Center, Inc., which is completely independent of the University. No State funds are used for these stipends, and many volunteer clinical faculty at Ohio's medical schools receive no stipend at all.

The reason volunteer faculty members at the University and Ohio's other public medical schools receive "appointments" as volunteers is not to create any form of employment relationship with these physicians, but rather because accreditation agencies for medical schools require that volunteer instructors be given faculty "appointments" before students can rotate through their practices.

More than 6,000 physicians across Ohio serve as volunteer clinical faculty members at Ohio's public medical schools, and the practice is also standard nationwide. The University alone has more than 1,200 clinical volunteers, including those in the University's other health sciences schools, including the College of Nursing, the College of Pharmacy, and the College of Health and Human Services.

**B. Dr. Marek Skoskiewicz, a volunteer clinical faculty member, allegedly committed malpractice while hosting a medical student from the University.**

On December 14, 2004, the University's Board of Trustees approved Dr. Marek Skoskiewicz's appointment as a volunteer clinical faculty member. Dr. Skoskiewicz practiced general surgery at the Henry County Hospital in Napoleon, Ohio. The hospital is a private, not-for-profit corporation. It is not affiliated with any State university, nor is it an instrumentality of the State of Ohio in any other respect.

One month later, in January 2005, Dr. Skoskiewicz performed two vasectomy operations on Plaintiff-Appellee Larry Engel, Jr. In the first operation, Dr. Skoskiewicz allegedly failed to resect the vas deferens on the right side, prompting a second operation. Engel alleges that the second operation also failed, leading to a third operation by another doctor to remove his right testicle, which had become necrotic. A third-year medical student from the University observed the two procedures performed by Dr. Skoskiewicz.

In May 2006, Engel filed a medical malpractice suit against Dr. Skoskiewicz in the Henry County Court of Common Pleas. Nearly two years into the lawsuit, and shortly before trial, counsel for Dr. Skoskiewicz, provided by his professional liability insurer, invoked his status as a volunteer for the University and claimed that he was entitled to personal immunity from liability under R.C. 9.86 as an "officer or employee" of the State. Pursuant to R.C. 2743.02(F), the Court of Claims has exclusive jurisdiction to determine personal immunity under R.C. 9.86. Accordingly, Engel filed an action against the University in the Court of Claims, and the common pleas court stayed the malpractice proceedings to allow the Court of Claims to determine Engel's entitlement to personal immunity.

**C. The lower courts concluded that volunteer medical school faculty members are entitled to personal immunity under R.C. 9.86.**

The Court of Claims concluded that Dr. Skoskiewicz was a “state employee” at the time of the operations by virtue of his status as a volunteer clinical faculty member. *Engel v. Univ. of Toledo Coll. of Med.* (Ct. of Claims 2008), 2008-Ohio-7058, ¶ 23. The court concluded that Dr. Skoskiewicz met one of the statutory definitions of a State officer—that is, “[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,” R.C. 109.36(A)(1)—because he had received an appointment letter for his volunteer position and was subject to some of the University’s basic guidelines, such as those governing faculty conduct and research. *Id.* at ¶ 22. Accordingly, the court concluded that Dr. Skoskiewicz was entitled to immunity, thereby shifting the cost of the litigation and his potential malpractice to the University.

The University appealed the grant of immunity to the Tenth District. The court of appeals affirmed. Relying on R.C. 109.36(A)(1)(a), the court ruled that Dr. Skoskiewicz was an “officer or employee” of the State, and therefore entitled to immunity, because he “serv[ed] in an . . . appointed . . . position with the state” by virtue of his status as a volunteer for the University. *Engel v. Univ. of Toledo Coll. of Med.* (10th Dist.), 2009-Ohio-3957, ¶¶ 10–11.

**THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

**A. Review is warranted because the Tenth District’s decision improperly extends personal immunity under R.C. 9.86 to volunteers.**

Personal immunity under R.C. 9.86 is a privilege granted to State officers and employees to protect them from liability arising from the performance of their State duties. The Tenth District’s decision upends these fundamental principles.

The lower court read the terms State “officer or employee” far too broadly. Volunteer clinical medical faculty, such as Dr. Skoskiewicz, do not receive any payment or benefits from

the medical schools, and they carry their own professional liability insurance through private insurers. In other words, these volunteers are independent physicians whose practices are not tied to the public universities in any respect. They simply invited medical students into their practices in order to be exposed to real-world health care.

The Tenth District’s decision to consider volunteer faculty State “officers or employees,” and to transfer their professional liabilities to the State, is nothing short of a windfall for them—and more pointedly, their private insurers. Indeed, it runs contrary to the very definition of “volunteer”—that is, one who serve without compensation—to require the State to remunerate such volunteers with one of the largest professional overhead costs that exists: professional liability coverage.

There is no basis for concluding that the General Assembly intended to foist such significant financial liability on Ohio’s public universities. Furthermore, it is equally illogical that the General Assembly intended to transfer such *litigation* burdens and expenses to the State. That is, as a result of the decision below, such malpractice claims will be brought in the Court of Claims and must be defended by the State’s attorneys, who will have little or no knowledge of these private physicians’ practices or hospitals. Indeed, the State’s defense often would have to be based primarily on materials subpoenaed from third parties, such as the physician’s practices or hospitals. In these ways, the very mechanics of such litigation prove the attenuated relationship between these physicians, and therefore, the unreasonableness of extending the benefit of immunity to them. Moreover, these private physicians will have a weaker incentive to assist the State with the defense, since their volunteer status means that they have no legal obligations to the State, and since neither they nor their practices or hospitals will feel any financial effect from the proceedings, regardless of how they turn out.

The Court should accept this case to address and correct these anomalous results. The need for review is even more pressing in view of the fact that the Court of Claims has exclusive, original jurisdiction over these immunity claims, see R.C. 2743.02(F), which means that the Tenth District's decision is the final word on this subject unless this Court intercedes.

**B. The Tenth District's decision exposes Ohio's public universities to significant monetary liability.**

Review is also warranted because the Tenth District's decision forces Ohio's public universities to incur excessive costs for the alleged malpractice of private, non-governmental, physicians—indeed, physicians who are not university employees and who are already covered by their own private insurance.

The sheer amount of the potential liability is staggering. More than 6,000 physicians across Ohio serve as volunteer clinical faculty at Ohio's public medical schools. These schools include, in addition to the University, The Ohio State University College of Medicine, the Northeastern Ohio Universities Colleges of Medicine and Pharmacy (NEOUCOM), Wright State University's Boonshoft School of Medicine, the University of Cincinnati Academic Health Center, and the Ohio University College of Osteopathic Medicine. Considering that each physician could be subject to multiple claims, and that the ruling will apply to ongoing professional liability claims against physicians who previously served as volunteer faculty, the State now faces an enormous number of potential claims.

What is more, the universities did not purchase professional liability insurance for these volunteers—both because there is no basis for granting them personal immunity and because these physicians carry their own insurance. Therefore, any damages arising from these malpractice suits must be paid *directly* from the already-stretched coffers of the universities and the State. Simply put, there is no insurance safety net for these claims. Not only does this thrust

a thoroughly undue burden on the State's universities, but it leads to the absurd result whereby the universities will incur greater out-of-pocket liability for *volunteers*—whose service, by definition, is uncompensated and unencumbered by any legal obligation to the State—than they do for their actual *employees*. And, of course, the Tenth District's decision could be applied to volunteers in numerous other contexts, thereby improperly increasing the financial burdens on other State entities as well.

In short, review of the Tenth District's decision is critical because of the significant potential costs to Ohio's public universities and other State entities. And the fact that these significant economic burdens hinge on a question of statutory interpretation makes this case all the more well-suited for this Court's review.

**C. The decision below threatens to diminish the quality of medical education at Ohio's public universities.**

The economic realities of the Tenth District's decision will seriously impede the ability of the State's public medical schools to continue using volunteer faculty members. Obtaining professional liability insurance for these more than 6,000 volunteers would be prohibitively expensive. And even if that could be achieved, the schools would need to establish control mechanisms, risk management protocols, and oversight over these physicians to mitigate future liability, which would require a significant new administrative infrastructure. In short, the medical schools will have little choice but to severely curtail their volunteer faculty programs, if not eliminate them altogether.

However, volunteer faculty members are important resources for medical students, since they offer students the chance to observe real-world health care and different practices. Cutting off Ohio's future medical professionals from these resources could only serve to diminish the

quality of their medical educations. In short, this case will determine whether the State’s public medical schools can continue to accept the help of these willing volunteers.

## ARGUMENT

### **Appellant University of Toledo’s Proposition of Law:**

*A physician serving as a volunteer faculty member for a State medical school is not entitled to immunity under R.C. 9.86.*

Volunteers for Ohio’s public medical schools are not entitled to immunity reserved for “officers or employees” of the State under R.C. 9.86 for acts committed as part of their own practices while they are hosting medical students. First, an expansive reading of the phrase “appointed office or position” is not consistent with the plain meaning of the terms “officer or employee,” as defined in R.C. 109.36. And reading the terms so broadly—as the courts did below—upends the fundamental purposes behind immunity and creates an absurd result. Second, other immunity-related provisions in the Ohio Revised Code make clear that the General Assembly does not regard a volunteer as a State “officer or employee” for purposes of immunity under R.C. 9.86.

#### **A. A volunteer faculty member acting on his own patients and in his own practice is not a State “officer or employee” within the plain meaning of R.C. 109.36.**

When construing a statute, a court must first look at the plain language of the provision, giving the words their normal, usual, and customary meanings. See *Medcorp, Inc. v. Ohio Dep’t of Job and Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, 906 N.E.2d 1125, ¶ 9. In this process, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42. When such a review yields a clear and unambiguous meaning, the statute must be applied as written. *Medcorp* at ¶ 9.

Pursuant to R.C. 9.86, “officers and employees” of the State are immune from civil liability for damage or injury caused in the performance of their State duties. If an individual is entitled

to statutory immunity, then his litigation and liability burdens are transferred to the State employer and litigated in the Court of Claims, pursuant to R.C. 2743.02(A)(2).

To determine who is an “officer or employee” entitled to immunity under R.C. 9.86, courts look to R.C. 109.36(A)(1), which offers four definitions for the phrase “officer or employee”:

- (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.
- (b) A person that, at the time a cause of action . . . arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased services contract with a department, agency, or institution of the state.
- (c) A person that . . . is rendering peer review, utilization review, or drug utilization review services . . . pursuant to a personal services contract or purchased services contract with a department, agency, or institution of the state.
- (d) A person who . . . is rendering medical services to patients in a state institution operated by the department of mental health, is a member of the institution’s staff, and is performing the services pursuant to an agreement between the state institution and a board of alcohol, drug addiction, and mental health services described in section 340.021 of the Revised Code.

The Tenth District concluded that Dr. Skoskiewicz was an “officer or employee” of the State simply by virtue of the fact that he had been “appointed” as a University volunteer. That is wrong.

First, for individuals to be covered by subsection (a), the State must exercise some meaningful control over them or there must be some indicia of employment. This is true of every other provision in the statute. For instance, in addition to appointed positions, subsection (a) lists includes those serving in elected positions, who are both employees and fiduciaries of the state, and those directly employed by the state. Subsections (b), (c), and (d) refer to individuals providing services to the state pursuant to service contracts or agreements. Each of these definitions shares a common bond: some meaningful control over the individual or indicia

of employment. Thus, under the statutory construction canon *noscitur a sociis*—where the Court looks to the surrounding words to ascertain another word’s meaning—“appointed” positions in subsection (a) must be those where the appointee exhibits these criteria. Compare *Potavin v. Univ. Med. Ctr.* (10th Dist. Apr. 19, 2001), No. 00AP-715 (physician was an “officer or employee” entitled to immunity because State had significant control over physician’s practice plan corporation and plan contributed significant funds to the university) and *Theobald v. Univ. of Cincinnati* (10th Dist), 160 Ohio App.3d 342, 2005-Ohio-1510, *affirmed*, 111 Ohio St.3d 541, 2006-Ohio-8208 (physicians were State employees entitled to immunity because of university’s symbiotic relationship with physician’s practice plan and university’s control over plan and physician) with *Walton v. Ohio Dep’t of Health* (10th Dist.), 162 Ohio App.3d 65, 2005-Ohio-3375 (volunteer who was “appointed” to statewide HIV planning commission established under the Department of Health was not an “officer or employee” of the State where he was not paid by the State and where State had no meaningful control over him)

Second, subsection (b) of R.C. 109.36(A)(1) specifically addresses medical providers and shows that where the General Assembly wanted to extend immunity to physicians who are not employees of the State or operating within a State institution, it requires a “personal services contract or purchased service contract” with the State entity. R.C. 109.36(A)(1)(b). But no such contract existed here, and such contracts are not part of the volunteer medical faculty arrangement. Pursuant to the statutory canon *expressio unius est exclusio alterius*—the express inclusion of one thing implies the exclusion of the other—it is clear that the legislature intended to extend immunity to non-employee medical providers only under narrow circumstances that do not exist here. Of course, the General Assembly could have included volunteers in the list of medical providers who are entitled to immunity under subsection (b), but it did not. And the

Court may not create an additional exception to liability that the General Assembly itself did not recognize.

Third, construing the term “officer or employee” to include volunteers contravenes the purposes behind statutory immunity and leads to absurd results, which courts must avoid in interpreting statutes. See *In re: T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 16. For all the benefits volunteer physicians provide to medical students, they are simply hosting students in their *independent* professional lives. Considering such volunteers State “employees” makes little sense when their medical practices remain their own, and the universities have no right or ability to control any aspects of their practices.

As R.C. 9.86 makes plain, immunity is reserved for State officers or employees who cause injury in performing their State duties. As the U.S. Supreme Court has recognized, state-employee immunity “strikes a balance between compensating those who have been *injured by official conduct* and protecting government’s ability *to perform its traditional functions.*” *Wyatt v. Cole* (1992), 504 U.S. 158, 167 (emphasis added). Accordingly, immunity is reserved for those for whom it is “necessary to *preserve their ability to serve the public good.*” *Id.* (emphasis added). In short, such immunity exists to safeguard the ability of government employees to carry out their official duties. *Id.*; see also *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 287.

But cases involving medical school volunteers do not fit that bill at all. While personal immunity flows naturally to actual State employees, over whom the State exercises meaningful control, volunteer medical faculty, such as Dr. Skoskiewicz, receive no payments or benefits from the State; they are independent physicians who simply invite medical students into their practices in order to be exposed to real-world health care. This case is a perfect example: Dr. Skoskiewicz was not performing the procedures at issue pursuant to any State duty—he was

operating on his own patient, from his own private practice, in a private, not-for-profit corporate hospital. Put differently, to the extent immunity exists to safeguard the ability of State employees to carry out their official duties, there is simply no rationale for considering volunteer faculty “employees” in these cases. Dr. Skoskiewicz does not perform vasectomies on his private-practice patients because of anything related to any governmental duty; nor would the absence of immunity hinder his ability to conduct his medical practice. And this is true whether medical students are present or not.

In short, cloaking volunteer physicians with the mantle of “employee” is inconsistent with the well-recognized purposes of immunity. As the U.S. Supreme Court properly observed, “private parties hold no office requiring them to exercise discretion” and “the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes.” *Wyatt*, 504 U.S. at 168. Indeed, to the contrary, the public interest will be impaired by *extending* immunity to these individuals—that is, by holding public universities accountable for the independent practices of independent physicians over whom they have no control.

In sum, if the General Assembly wants to take the dramatic step of shifting the professional liability costs for these volunteers onto the State, that mandate should come from clear language, not from inferences that lead to unreasonable results. See *Sheet Metal Workers’ Int’l Ass’n v. Gene’s Refrigeration, Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, ¶ 42.

**B. The General Assembly does not consider a volunteer to be a State “officer or employee.”**

A review of related statutes confirms that the General Assembly does not regard a volunteer as a State “officer or employee” entitled to immunity under R.C. 9.86.

For instance, R.C. 1501.23 concerns volunteers with the Department of Natural Resources and allows the director to “designate volunteers in a volunteer program as state employees for the purpose of . . . immunity under section 9.86 of the Revised Code.” Other statutes are to the same effect. See, e.g., R.C. 5907.12 (“The director [of Veterans Services] may designate volunteers as state employees for the purpose of . . . indemnification from liability incurred in the performance of their duties. . .”). There would be no need for the legislature to specially authorize certain agency directors to designate volunteers as “employees” for immunity purposes if such volunteers otherwise qualified as State “officers or employees” under R.C. 9.86.

Other immunity-related provisions confirm that the General Assembly views volunteers as categorically separate from “officers” and “employees.” See, e.g., R.C. 3701.20(G)(1) (Department of Health, Poison Control Network) (“A poison prevention and treatment center, its officers, employees, volunteers, or other persons associated with the center, . . . are not liable in damages in a tort action for harm that allegedly arises from advice or assistance rendered to any person unless the advice or assistance is given in a manner that constitutes willful or wanton misconduct or intentionally tortious conduct”); R.C. 121.404(B) (“A registered volunteer [with the Community Service Council] is not liable . . . in tort or other civil action . . . for injury, death, or loss to person or property that may arise from an act or omission of that volunteer.”).

Finally, the practice of other states is instructive. States wishing to immunize volunteers do so *explicitly* in their immunity laws, thereby confirming the view—shared by Ohio’s legislature—that a volunteer is categorically different from an “officer” or “employee.” See, e.g., 7 Colo. Rev. Stat. 24-10-103(4)(a) (Colorado Governmental Immunity Act) (defining “public employee” as “an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed. . . .”); Mich. Comp. Laws 691.1407(2)

(Michigan Governmental Liability for Negligence Act) (“[E]ach officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board . . . is immune from tort liability for an injury . . . caused . . . while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency.”).

In short, related sections of the Revised Code and the practice of other States confirm that volunteers are categorically different from State “officers or employees” and not entitled to immunity unless a statute explicitly so authorizes. No such statute exists here. Therefore, volunteer medical faculty at Ohio’s public medical schools are not entitled to immunity under R.C. 9.86.

#### CONCLUSION

For the above reasons, this Court should grant review and reverse the decision below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant University of Toledo College of Medicine was served by U.S. mail this 25th day of September, 2009, on the following counsel:

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Larry Engel, Jr.



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Alexandra T. Schimmer  
Chief Deputy Solicitor General



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LARRY ENGEL, JR.

Plaintiff

v.

UNIVERSITY OF TOLEDO COLLEGE  
OF MEDICINE

Defendant

Case No. 2008-03572

Judge J. Craig Wright

DECISION

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.

R.C. 2743.02(F) provides, 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 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."

R.C. 9.86 provides, in part:

"[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

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DECISION

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 parties have stipulated the following facts:

"1. At all relevant times Marek Skoskiewicz, M.D., practiced general surgery at the Henry County Hospital in Napoleon, Ohio.

"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.

"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.

"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.

"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

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DECISION

were arranged and sponsored by the Bryan/MCO Area Health Education Center, Inc. (BAHEC).

"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. \* \* \*

"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. \* \* \*

"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."

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. \* \* \*

"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.

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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.

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.

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:

“(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.

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.

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

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DECISION

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.

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.

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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# 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

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

cc:

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Assistant Attorney General  
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Columbus, Ohio 43215-3130

John B. Fisher  
3516 Granite Circle  
Toledo, Ohio 43617-1172

AMR/cmd

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COURT OF APPEALS  
FRANKLIN COUNTY OHIO

TENTH APPELLATE DISTRICT 2009 AUG 11 PM 12:06  
CLERK OF COURTS

Larry Engel, Jr.,  
Plaintiff-Appellee,  
v.  
University of Toledo College of Medicine,  
Defendant-Appellant.

No. 09AP-53  
(C.C. No. 2008-03572)  
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 11, 2009, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed.

KLATT, J., BRYANT & CONNOR, JJ.

By William A. Klatt  
Judge William A. Klatt

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EXHIBIT 2

ATJ  
IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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COURT OF APPEALS  
FRANKLIN CO. OHIO  
2009 AUG 11 PM 12:05  
CLERK OF COURTS

Larry Engel, Jr., :  
Plaintiff-Appellee, :  
v. : No. 09AP-53  
University of Toledo College of Medicine, : (C.C. No. 2008-03572)  
Defendant-Appellant. : (REGULAR CALENDAR)

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DECISION

Rendered on August 11, 2009

AUG 12 2009

ATTORNEY GENERAL'S OFFICE  
COURT OF CLAIMS DEFENSE

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*Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and John B. Fisher, for appellee.*

*Richard Cordray, Attorney General, and Anne Berry Strait, for appellant.*

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APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶1} Defendant-appellant, the University of Toledo College of Medicine ("UT"), appeals from a judgment of the Court of Claims of Ohio finding Marek Skoskiewicz, M.D., personally immune from the medical malpractice claims of plaintiff-appellee, Larry Engel, Jr. For the following reasons, we affirm.

{¶2} Engel originally filed his medical malpractice action against Skoskiewicz in the Henry County Court of Common Pleas. According to Engel's complaint, Skoskiewicz negligently performed two separate surgical procedures on Engel in January 2005,

proximately causing Engel pain, additional medical bills, lost wages, and emotional distress. As trial neared, Skoskiewicz filed a motion to dismiss or, in the alternative, for a stay in the proceedings. In his motion, Skoskiewicz claimed personal immunity under R.C. 9.86, which exempts state officers and employees from liability in any civil action arising under state law for damage or injury caused in the performance of the officer's or employee's duties, unless the officer or employee acted manifestly outside the scope of his employment or official responsibilities, or with malicious purpose, in bad faith, or in a wanton or reckless manner. Because only the Court of Claims can determine whether a state officer or employee is immune under R.C. 9.86, Skoskiewicz argued that the common pleas court lacked subject-matter jurisdiction to proceed. The court agreed and granted Skoskiewicz a stay pending the outcome of the Court of Claim's immunity determination.

{¶3} Following the common pleas court's ruling, Engel filed a medical malpractice action against UT in the Court of Claims and reiterated the claims he initially asserted in the common pleas court. As part of his complaint, Engel requested that the Court of Claims determine whether Skoskiewicz was entitled to immunity. Ultimately, the Court of Claims agreed to decide the issue of Skoskiewicz's immunity based upon a joint stipulation of facts and the parties' briefs.

{¶4} In relevant part, the parties stipulated that the UT<sup>1</sup> Board of Trustees appointed Skoskiewicz as a clinical assistant professor of surgery on December 13, 2004. The appointment made Skoskiewicz a volunteer faculty member, not a regular faculty

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<sup>1</sup> Before 2006, UT was known as the Medical College of Ohio and the Medical University of Ohio. To avoid confusion, we will refer to the school as "UT" throughout this opinion.

member. As a volunteer faculty member, Skoskiewicz did not receive a salary from UT. Nevertheless, Skoskiewicz was subject to the UT Faculty Rules and Regulations, as well as UT policies and procedures.

{¶5} The UT Board of Trustees made the volunteer faculty appointment so Skoskiewicz could act as a preceptor for third-year UT students. Bryan/MCO Area Health Education Center, Inc. ("BAHEC"), a non-profit corporation affiliated with UT, arranged for UT students to observe and assist local practitioners, and Skoskiewicz agreed to become an instructor in this apprenticeship program. BAHEC assigned UT student David Essig to Skoskiewicz so Essig could complete his required clinical rotation in surgery. Essig was present in the operating room while Skoskiewicz performed the two surgical procedures on Engel.

{¶6} Based upon these facts, the Court of Claims found that Skoskiewicz's appointment as a clinical assistant professor of surgery made him a state "officer or employee" as defined in R.C. 109.36(A)(1)(a). Additionally, the court found that Skoskiewicz was acting in the scope of his position when he performed the two surgical procedures at issue. Accordingly, in a December 18, 2008 judgment entry, the Court of Claims determined that Skoskiewicz was personally immune from Engel's claims pursuant to R.C. 9.86.

{¶7} UT now appeals from the December 18, 2008 judgment and assigns the following error:

The Court of Claims erred in holding that a physician who is a volunteer clinical faculty member of a state medical school is an "officer or employee" of the state as that term is defined in R.C. 109.36, and so is entitled to immunity from civil liability for medical negligence under R.C. 9.86.

{¶8} By its sole assignment of error, UT argues that Skoskiewicz is not entitled to personal immunity because he is not a state officer or employee. We disagree.

{¶9} Pursuant to R.C. 9.86:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee 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.

Generally, under this statute, a state officer or employee who acts in the performance of his or her duties is immune from liability. *Wassenaar v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-712, 2008-Ohio-1220, ¶25. Whether an individual is entitled to personal immunity is a question of law. *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶14.

{¶10} For the purposes of R.C. 9.86, "officer or employee" is defined by R.C. 109.36(A). See R.C. 2743.02(A)(2) and (F). R.C. 109.36(A)(1)(a) defines "officer or employee" to mean "[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." Engel argues that Skoskiewicz satisfies this definition because, at the time of the alleged malpractice, he was serving in an "appointed \* \* \* position with the state." Supporting Engel's argument, the March 18, 2005 letter from UT to Skoskiewicz informs him that the UT Board of Trustees has "approved [his] *appointment* to the volunteer faculty at its meeting December 13, 2004 as \* \* \* Clinical Assistant Professor \* \* \* Surgery." (Emphasis added.) Thus, Skoskiewicz was "appointed" to his "position" as a

clinical assistant professor of surgery. Additionally, UT is a state institution, created and authorized by the General Assembly. See R.C. 3350.01, repealed by Sub.H.B. No. 478, effective July 1, 2006 ("There is hereby created the medical university of Ohio at Toledo."); R.C. 3364.01(A) (combining the former Medical University of Ohio with the University of Toledo, both "authorized" under former provisions of the Revised Code). Thus, Skoskiewicz's position was "with the state." As Skoskiewicz was serving in an appointed position with the state at the time he allegedly committed malpractice, we conclude that he meets the statutory definition of "officer or employee."

{¶11} In arguing that Skoskiewicz is not a state "officer or employee," UT primarily focuses on the portion of R.C. 109.36(A)(1)(a) that defines an "officer or employee" as a person who "is employed by the state." However, the use of the disjunctive "or" between the two portions of the subsection indicates that each portion sets forth a separate and distinct definition of "officer or employee." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶19 (defining "or" as " 'a function word indicating an alternative between different or unlike things' " and concluding that the use of "or," instead of "and," evidenced an intent that each element of the disjunctive phrase be read separately from the others). Consequently, a person is an "officer or employee" if he is either "serving in an \* \* \* appointed \* \* \* position with the state" or he "is employed by the state." As Skoskiewicz meets the first definition, the second is irrelevant.<sup>2</sup>

{¶12} UT next argues that "appointed," as used in R.C. 109.36(A)(1)(a), only refers to appointments made by the governor or other state officials as authorized in the

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<sup>2</sup> Also irrelevant are *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, and *Potavin v. Univ. Med. Ctr.* (Apr. 19, 2001), 10th Dist. No. 00AP-715. Those cases address whether the medical providers at issue were employed by the state, not whether they were appointed to positions with the state. *Theobald* at ¶¶26-30; *Potavin*.

Revised Code. Thus, UT contends, if a person is not appointed to an office or position created by statute, then he is not an "officer or employee" as defined in R.C. 109.36(A)(1)(a). UT's argument ignores the primary rule of statutory interpretation—courts must apply a statute as written when its meaning is definite and unambiguous. *Columbia Gas Transm. Corp.* at ¶19; *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶52. Here, R.C. 109.36(A)(1)(a) conveys a clear, unequivocal meaning. To give R.C. 109.36(A)(1)(a) the narrow interpretation UT seeks, we would have to read into the subsection language qualifying and explaining the word "appointed." Courts, however, cannot insert language into a statute through the guise of interpretation. *Hall v. Banc One Mgt. Corp.*, 114 Ohio St.3d 484, 2007-Ohio-4640, ¶24.

{¶13} UT also argues that because it appointed Skoskiewicz to the volunteer faculty, instead of the regular faculty, he is not an "officer or employee" as defined in R.C. 109.36(A)(1)(a). To support this argument, UT relies upon *Walton v. Ohio Dept. of Health*, 162 Ohio App.3d 65, 2005-Ohio-3375. UT contends that in *Walton*, this court held that the volunteer status of an appointee to an HIV-prevention community planning group prevented him from being an "officer or employee" under R.C. 109.36(A)(1)(a). We find that UT mischaracterizes the holding of *Walton*. In that case, the Ohio Department of Health had appointed the plaintiff to an HIV-prevention community planning group, and the plaintiff claimed that his appointment made him an "officer or employee" under R.C. 109.36(A)(1)(a). The planning group, however, was neither created by state statute nor substantially controlled by the state. Because the planning group was, "to a significant extent, separate and distinct from the state," the plaintiff's appointment was not "with the state" as required by R.C. 109.36(A)(1)(a). *Id.* at ¶21.

{¶14} In the case at bar, no one disputes that UT is a state institution. Consequently, unlike the plaintiff in *Walton*, Skoskiewicz was appointed to a position "with the state." *Walton*, therefore, has no applicability here.

{¶15} Finally, UT argues that extending personal immunity to a volunteer faculty member is simply bad policy. UT directs this argument to the wrong branch of government. The General Assembly is the final arbiter of public policy; it is not the judiciary's role to weigh policy concerns or make policy decisions. *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, ¶34; *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶212.

{¶16} Because Skoskiewicz satisfies the definition of "officer or employee" contained in R.C. 109.36(A)(1)(a), we conclude that he is a state officer or employee. Accordingly, we overrule UT's assignment of error.

{¶17} For the foregoing reasons, we overrule UT's sole assignment of error, and we affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

BRYANT and CONNOR, JJ., concur.

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