

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-1735

LARRY ENGEL, JR.,

Plaintiff-Appellee,

vs.

UNIVERSITY OF TOLEDO  
COLLEGE OF MEDICINE,

Defendant-Appellant.

\* On Appeal from the Franklin County Court  
of Appeals, Tenth Appellate District

\*  
\* Court of Appeals Case No. 09AP-53

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MEMORANDUM OPPOSING JURISDICTION OF PLAINTIFF-APPELLEE LARRY  
ENGEL, JR.

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**I. The University of Toledo College of Medicine Raises No Constitutional Question Nor Legal Public or General Interest Question**

In its Memorandum the University raises no Constitutional questions.

In its Memorandum the University raises no legal questions of public or great general interest. What the University does raise in its Memorandum are questions of public policy, i.e., whether R.C. 109.36 as written should be the law, or whether that statute constitutes bad policy for the State of Ohio. This same argument was presented to the Tenth District Court of Appeals which soundly, and correctly, rejected that argument as follows:

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.

Engel vs. UTMC, 2009-Ohio-3957 (10<sup>th</sup> Dist.) (citations omitted), at ¶ 15

This Court has also recently reiterated that questions of public policy should be addressed to the General Assembly rather than to the judiciary. Roe vs. Planned Parenthood, 122 Ohio St. 3d 399, 2009-Ohio-2973, at ¶ 52.

**II. Introduction**

In the "Introduction" section of its Memorandum In Support of Jurisdiction of Defendant-Appellant University of Toledo College of Medicine ("University Memorandum")<sup>1</sup> the University barrages this Court with vitriolic hyperbole about why it believes the decisions of the Court of Claims and the Tenth District Court of Appeals constitute bad policy. In doing so the University misses the point that what is really at issue herein is a simple question of statutory application.

The courts below have applied the plain and unambiguous language of R.C. 109.36 regarding which classes of persons are entitled to immunity under R.C. 9.86 to the facts of this case, nothing

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<sup>1</sup> And indeed at numerous other places throughout its Memorandum.

more. Contrary to the implication in the University's Memorandum, the courts below have not misapplied the clear language of either of these statutes.

### **III. Facts**

In early 2005 Larry Engel, Jr. came under the care and treatment of Dr. Marek Skoskiewicz, a surgeon, seeking an elective bi-lateral vasectomy. The first attempt at this procedure took place on January 13, 2005, at the Henry County Hospital.

Following this procedure, routine pathological examination of the tissue resected by Dr. Skoskiewicz showed that the specimen removed from the right side was not vas deferens, but instead was a vascular structure whose purpose was to facilitate blood flow to the right testicle. Because a vasectomy must remove both the right and left vas deferens to successfully sterilize a patient, it was necessary for Dr. Skoskiewicz to re-do the vasectomy on Mr. Engel's right side. This second procedure took place on January 27, 2005. The Plaintiff alleges that this second procedure was also performed negligently by taking additional vascular structures along with the vas deferens.

As a direct and proximate result of the alleged negligence of Dr. Skoskiewicz in both procedures, Larry Engel, Jr.'s right testicle died due to lack of blood supply. This death of a testicle caused Larry Engel, Jr. extreme pain, and ultimately resulted in his having to undergo a third surgical procedure on January 31, 2005, to remove his necrotic right testicle.

At all relevant times Dr. Marek Skoskiewicz held an appointment with the then-named Medical College of Ohio ("MCO") as a Clinical Assistant Professor in the Department of Surgery.

This appointed position was one for which Dr. Skoskiewicz was not paid by the State of Ohio, but did impose certain restrictions upon Dr. Skoskiewicz and his practice. Pursuant to the March 18, 2005 letter from the then-Interim Dean of MCO and the then-Acting Chairman of the Department of Surgery, advising Dr. Skoskiewicz of his appointment:

As a condition of appointment, you will be subject to the MCO Faculty Rules and Regulations, and Medical College of Ohio policies and procedures, including those governing research.

As stated by the University in its Memorandum, physicians are appointed to clinical faculty positions of medical schools so that it can fulfill its accreditation requirements and have medical students and residents rotate through the practices of approved and formally appointed faculty members. (University Memorandum, p. 3) Without sufficient appointed faculty members for medical students to rotate through, a medical school would lose its accreditation.

The then-Medical College of Ohio was created by Act of the Ohio General Assembly, in enacting R.C. 3350.01 effective August 21, 1973 (repealed, now see R.C. 3364.01).

Dr. Skoskiewicz's appointment as Clinical Assistant Professor of Surgery was made by the Board of Trustees of MCO at its meeting of December 13, 2004. Members of the Board of Trustees of MCO were appointed by the Governor of the State pursuant to R.C. 3350.01.

The duties of the Board of Trustees of MCO were set forth in R.C. 3350.03, which statute specifically directs and authorizes that board to "employ, fix the compensation of... professors... [and to] do all things necessary for the creation, proper maintenance, and successful and continuous operation of the college."

The board of trustees of the medical college of Ohio at Toledo shall employ, fix the compensation of, and remove the president and such numbers of professors, teachers, and other employees as may be deemed necessary. The board shall do all things necessary for the creation, proper maintenance, and successful and continuous operation of the college. The board may accept donations of lands and moneys for the purposes of such college.

\* \* \*

(emphasis added)

Thus, the position to which Dr. Skoskiewicz was appointed, Assistant Clinical Professor of Surgery, was specifically contemplated and/or created by the General Assembly when it created MCO. Surely it was within the authority of the trustees of MCO to fix the compensation of some of its appointed clinical professors at zero so long as those persons are willing to accept the burdens and responsibilities of such an appointment in exchange for only the prestige and personal fulfillment from assisting in training the next generation of physicians.

It is undisputed that in his role as an Assistant Clinical Professor of Surgery Dr. Skoskiewicz was teaching a third-year MCO medical student who was present and assisted Dr. Skoskiewicz during both procedures on Mr. Engel. Therefore, there is no question but that at the relevant times Dr. Skoskiewicz was acting within the scope of his Assistant Clinical Professor of Surgery position at MCO.<sup>2</sup>

#### **IV. The University of Toledo College of Medicine Proposition of Law**

The University proposed the following 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.

This proposition of law completely misstates (or indicates a misunderstanding of) the issue decided by the courts below. Neither court below decided that merely being a volunteer offering services to a state medical school qualifies one for immunity under R.C. 9.86. Such a ruling would then apply to retirees who volunteered as guides, escorts, or to young candy-stripers, etc. Rather, the courts below correctly applied the definition of an “officer or employee” found in R.C. 109.36, and applied that definition to R.C. 9.86, to hold that if one is formally appointed to a position with the

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<sup>2</sup> The fact that at all relevant times Dr. Skoskiewicz was acting within the scope of his appointed faculty position was conceded by the University below.

state such as a professorship, it simply doesn't matter whether that appointment is in exchange for wages or for volunteer services.

In order to determine whether one is entitled to immunity pursuant to R.C. 9.86 it is necessary to examine the definition of "officer or employee" found in R.C. 109.36. See R.C. 9.85 (A) and Theobald vs. University of Cincinnati (2006), 111 Ohio St. 3d 541, 2006-Ohio-6208 at ¶ 14.

R.C. 109.36 states:

(A)(1) "Officer 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.

(b) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(c) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(d) A person who, at the time a cause of action against a person arises, 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 board of alcohol, drug addiction, and mental health services described in section 340.021 [340.02.1] of the Revised Code.

(2) "Officer or employee" does not include any person elected, appointed, or employed by any political subdivision of the state.

By use of "or" in subsection (a) above, the General Assembly clearly indicated that three separate classes of persons are "officers or employees" of the State of Ohio. Those three classes are

those serving in 1) elected office or positions, 2) appointed offices or positions or, 3) those employed by the State of Ohio.

In its Memorandum the University argues that subsection (b) of R.C. 109.36 (A)(1) is the only mechanism by which non-employee health care providers can be deemed to be an “officer or employee” of the state (University Memorandum, p. 11). In other words, the University argues that in order to meet the definition of an “officer or employee” of the state, a physician must either be an employee under subsection (1)(a) or be providing services under either a personal or purchased services contract under subsection (1)(b) of R.C. 109.36. This argument ignores the portion of subsection (a) that also defines those serving in appointed positions as “officers or employees” of the state. In order to reach this result the University submits that R.C. 109.36 must be construed, rather than simply applied.

Such a position flies in the face of the longstanding rule of statutory construction that courts are not free to ignore or add words to a statute. Portage County Bd. of Comm. vs. City of Akron, 109 Ohio St. 3d 106, 2006-Ohio-954 at ¶ 52.

Although not mentioned in the University’s Memorandum, in the courts below the University argued that under this Court’s decision in Theobald vs. Univ. of Cincinnati, 111 Ohio St. 3d 541, 2006-Ohio-6208, that under subsection (1)(a) of R.C. 109.36, only physicians who were actually employed by the state (i.e., received wages, benefits, etc.), were entitled to immunity under R.C. 109.36 and 9.86.

In Theobald, this Court decided that when physicians everyone agreed were employees of the State of Ohio were acting within the scope of their employment, those physicians were entitled to immunity under R.C. 9.86. Because the status of the physicians in Theobald was not in dispute, this

Court was not called upon to interpret or apply the definition of a state “officer or employee” found in R.C. 109.36.

In its Memorandum the University urges that under the doctrines of *noscitur a sociis* and *expressio unis est exclusio alterius*, R.C. 109.36 should be construed to exclude those formally appointed to volunteer clinical faculty positions with the state from immunity provided for in R.C. 9.86.

This Supreme Court has reminded us all as recently as 2007 that if a statute is clear and unambiguous, there is nothing for a court to construe. This Court has explained that resort to construction of statutes is unnecessary in the absence of ambiguity.

When analyzing a statute our primary goal is to apply the legislature intent manifested in the words of the statute. [citation omitted] Statutes that are plain and unambiguous must be applied as written without further interpretation. [citation omitted] In construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings. [citation omitted] Rules for construing the language (such as expression unius) may be employed only if the statute is ambiguous.

Proctor vs. Kardassilaris (2007), 115 Ohio St. 3d 71, 2007-Ohio-4838, at ¶ 12 (emphasis added)

Thus, the doctrines of statutory construction relied upon by the University have no bearing herein unless it is first determined that the statute in question is ambiguous. Only then is statutory construction permissible. Again, the University has suggested no ambiguity in either R.C. 109.36 or 9.86.

This Court has offered additional guidance on statutory construction.

Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.

State vs. Kreischer (2006), 109 Ohio St. 3d 391, 2006-Ohio-2706, at syllabus.

This Court has also instructed that, "... the strongest indication of the General Assembly's intent is the language it was in a statute." Shell vs. Ohio Veterinary Med. Licensing Bd. (2005), 105 Ohio St. 3d 420, 424, 2005-Ohio-2423 at ¶ 29.

See also:

The first rule of statutory construction is that a statute which is clear is to be applied, not construed. "There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." State ex rel. Foster v. Evatt (1944), 144 Ohio St. 65, 29 O.O. 4, 56 N.E. 2d 265, paragraph eight of the syllabus. Our obligation is to apply the statute as written. R.W. Sidley, Inc. v. Limbach (1993), 66 Ohio St. 3d 256, 257, 611 N.E. 2d 815, 817.

Vought Industries vs. Tracy (1995), 72 Ohio St. 3d 261, 265 (emphasis added)

Foster, cited to by Vought also states in paragraph seven of its syllabus:

7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of which it did enact. (*Slingluff v. Weaver*, 66 Ohio St., 621, approved and followed.)

(emphasis added)

The Foster court explained paragraphs seven and eight of its syllabus in the body of that opinion as follows:

Where statutes are ambiguous there is room for judicial interpretation but where instead of an ambiguity there is an absence of enactment, courts are without power to supply the deficiency. It has been held, too often to need any citation of authority, that in seeking legislative intention courts are to be guided by what the legislative body said rather than what we think they ought to have said.

Foster at 104

In its Memorandum the University does not claim either R.C. 9.86 or 109.36 are ambiguous. Rather the University simply asks this Court to ignore these longstanding bedrocks of statutory

construction, and to construe R.C. 109.36 by adding words, or meaning to the words used, to find that those appointed to unpaid, volunteer clinical professorships with the state are excluded from the class of those appointees entitled to immunity under R.C. 9.86. However, no such distinction is found, or even implied, in the language of R.C. 109.36.

In an analogous case this Supreme Court was called upon to determine whether a volunteer fireman was entitled to immunity under then-R.C. 701.02, the Court held that the volunteer status of a fireman does not change the fact for immunity purposes that he was a fireman. In syllabus law this Court held:

A volunteer fire fighter who is a member of the fire department of a municipal corporation is a "fireman" within the meaning of R.C. 701.02 and shall not be held personally liable for damages for injury or loss to persons or property while engaged in the operation of a motor vehicle in the performance of a governmental function.

Dougherty vs. Torrence (1982), 2 Ohio St.3d 69, at syllabus.

In explaining this holding the Court stated:

This statute uses only the general terms, "firemen" and "members of the fire department." It does not differentiate in any way between volunteer fire fighters and other types of fire fighters, and it does not specifically exclude any particular type of fire fighter. The language of the statute, therefore, indicates that volunteers were intended to benefit from the protection granted by the statute.

Id at 70 (emphasis added)

The same application of the clear and unambiguous words in R.C. 109.36 should apply herein.

An interesting point to note is that the Trustees of the Board of Trustees for MCO were themselves unpaid, volunteer, appointees.

The trustees shall receive no compensation for their services but shall be paid their reasonable and necessary expenses while engaged in the discharge of their official duties.

R.C. 3350.01 (repealed, now see R.C. 3364.01(C)).

Certainly the University would not argue that its members of its Board of Trustees are not entitled to immunity as appointed to a position with the state under R.C. 109.36 and 9.86.

The University's primary argument in its Memorandum is that the rulings of the lower courts are bad public policy because they may result in additional costs to the state. However, as this Court has stated, such concern has no place in applying the plain language of a statute.

In Kish vs. City of Akron (2006), 109 Ohio St. 3d 162, 2006-Ohio-1244, this Court flatly rejected Akron's argument that a particular interpretation of Ohio's public records law could be costly for municipalities. Rejecting this as a valid consideration in interpreting the plain words of a statute, and in ruling against the City of Akron's position, this Court stated:

In so concluding, we are cognizant of petitioner's suggestion that broad construction of the terms "record" and "violation" may portend fiscal peril for Ohio municipalities.

\* \* \*

Our role is to interpret existing statutes, not rewrite them.

Id at ¶ 43-44.

## V. Conclusion

The University of Toledo College of Medicine's entire Jurisdictional Memorandum is based upon its dislike of the application of the clear and unambiguous language of R.C. 109.36 to appointed clinical professorships in State medical schools. The University never once suggests in its Memorandum that the language of R.C. 109.36 is ambiguous, Instead, the University resorts to Chicken-Little type -- "the sky is falling" -- rhetoric to try to entice this Court to accept jurisdiction of this case so that it can construe R.C. 109.36 in a manner it deems a better public policy. In this

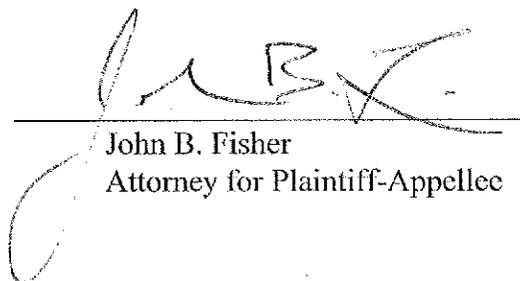
regard the University, to paraphrase William Shakespeare's famous line from Hamlet, "...doth protest too much, methinks."

However, as this Court has recently reaffirmed, the Judicial branch of government is not the place to argue the wisdom of the policy behind legislative enactments. Roe, supra. The University's rhetoric may fall on favorable ears in the General Assembly, which body may then decide to amend R.C. 109.36, but this Supreme Court is duty-bound to be deaf to such pleas.

This Court should decline to accept jurisdiction of this case and leave the University to pursue the changes it desires through the General Assembly.

Respectfully submitted,

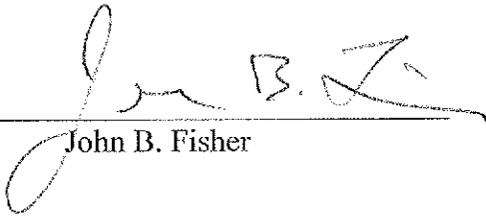
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**CERTIFICATION**

This is to certify that a copy of the foregoing has been sent by ordinary U.S. Mail, postage pre-paid this 21<sup>st</sup> day of October, 2009, to:

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