

ORIGINAL

In the
Supreme Court of Ohio

LARRY ENGEL, JR.,	:	Case No. 09-1735
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Franklin County
	:	Court of Appeals,
UNIVERSITY OF TOLEDO COLLEGE OF	:	Tenth Appellate District
MEDICINE,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 09AP-53
	:	

MERIT BRIEF OF DEFENDANT-APPELLANT
UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE

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INTRODUCTION

To ensure that they can perform their public duties without fear of personal indebtedness, R.C. 9.86 immunizes “officers” and “employees” of the State from liability. As long as these individuals act within the scope of their employment, and not with some improper intent, they are personally immune from suit, and the State assumes liability for their actions in the Court of Claims. *Id.*; see also R.C. 2743.02(A)(2).

This case concerns whether volunteers are entitled to personal immunity, and thereby tests the outer limits of what it means to be a State “officer or employee.” Specifically at issue is whether immunity extends to volunteer instructors at Ohio’s public medical schools. These are private-practice physicians who invite medical students to observe their practices for short rotations. The Tenth District granted immunity to these volunteers based on a cursory and out-of-context reading of the definitional statute for immunity, R.C. 109.36. That decision improperly expands immunity far beyond its logical bounds and should be reversed.

In the life of an aspiring physician, classroom learning is only part of the journey to becoming a medical doctor. To further their professional development, medical students periodically visit the offices of practicing physicians in the community. These private-practice physicians volunteer to have medical students observe their practices for short periods of time, to allow them to see how real-world medicine works. Nearly 8,000 physicians and health care professionals serve in this capacity for Ohio’s six public medical schools and other health sciences schools, and they play an important role in the development of the students they encounter.

But agreeing to perform this admirable volunteer service for Ohio’s public medical schools does not transform these private-practice physicians into State officers or employees. The fact remains that at all times these physicians are treating their own patients, in their own private

practices, with no State oversight. They receive no salary or compensation from the State universities, and the universities pay none of their insurance premiums. Nonetheless, the Tenth District extended immunity to these physicians because they receive letters “appointing” them as volunteer faculty members, and one definition of “officer or employee” includes those serving in an “appointed office or position.” See R.C. 109.36(A)(1)(a). As a result of the lower court’s decision, these volunteer physicians and their insurers are off the hook for the costs of any malpractice committed in view of a medical student, and Ohio’s public universities are now their de facto insurers.

This novel interpretation, premised entirely on a superficial and out-of-context reading of the word “appointed,” misses the forest for the trees. It is antithetical to the very definition of a volunteer—one who serves without compensation or benefits—to compel Ohio’s public universities to accord these volunteer physicians the benefit of one of the largest professional overhead costs there is: malpractice liability coverage. “Appointed” or not, the volunteer instructors at issue here are fundamentally different from those individuals acting on behalf of the State and under the State’s direction, and therefore very different from the university-employed faculty who unquestionably *are* State employees. The lower court’s broad reading of the immunity statute exceeds the plain meaning of these provisions, runs contrary to this Court’s established jurisprudence, and upends the purposes underlying governmental immunity. The decision also disregards numerous other sections of the Ohio Revised Code, which make clear that the General Assembly does not regard a volunteer as a State “officer or employee.” And the decision exposes Ohio’s public universities to significant monetary liability, throwing the continuing viability of the medical student rotation programs into doubt.

For these and the other reasons below, this Court should reverse the Tenth District's decision and hold that a volunteer private-practice instructor for a State medical school is not an "officer or employee" of the State under R.C. 9.86.

STATEMENT OF THE CASE AND FACTS

The role of volunteer clinical instructors for Ohio's public medical schools as well as the specific facts of this case are important for resolving whether a volunteer instructor is a State "officer or employee" entitled to immunity under R.C. 9.86.

A. Volunteer instructors play a limited role at Ohio's public medical schools.

All of the universities with health education programs in Ohio, including Appellant, the University of Toledo College of Medicine (the "University" or the "College of Medicine"),¹ use a mix of employed faculty and volunteer instructors to train their students and residents. These physicians fall into two general categories for purposes of the immunity analysis: (1) clinical faculty members who are university employees and (2) private-practice physicians who serve as volunteer instructors.

Employed clinical faculty members unquestionably are State employees for purposes of R.C. 9.86 immunity. The State universities hire and credential them first and foremost as clinicians; their duties also include teaching and research. The universities pay them salaries and benefits, and as a condition of employment, these clinicians must conduct their practices exclusively through the university, or through university-run practice plans, which are a series of not-for-profit corporations authorized by a State university's Board of Trustees and controlled or overseen by the Dean of the medical school. In a few instances, employed faculty members

¹ 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.

practice through a non-university practice plan, but these physicians have other contracts with the universities that replicate many of the financial arrangements and other controls achieved through the university practice plans.

For the University of Toledo, nearly all of the employed clinical faculty members practice through the University's primary faculty practice plan—University of Toledo Physicians, LLC (“UTP”)—over which the University has significant control. For instance, the UTP-affiliated faculty physicians pay the College of Medicine 6.5% of all collections, and the Dean of the College of Medicine is the Chair of the corporate entity that holds UTP. The UTP-affiliated faculty are paid through UTP collections, and they also receive a salary directly from the University for their teaching duties. The few faculty members who are not affiliated with UTP practice through separate contracts with the University and are University employees who also receive a salary directly from the University. In sum, all employee clinical faculty receive a salary from the University, practice medicine under meaningful supervision and control by the University, and remunerate a significant portion of their collections to the University.

By contrast, the University's volunteer instructors are private-practice physicians. They receive no salary from the University, and their practices are entirely private and independent of the State, administered from their own offices and without any connection to the University. The University does not appoint or credential these physicians as clinicians—they are recognized only as volunteer instructors. Their only relationship to the University is that they volunteer to allow medical students to observe their care of patients through short rotations. These are services that all physicians vow to perform when they take the Hippocratic Oath, which opens with the duty “to consider dear to me as my parents him who taught me this art . . . to look upon his children as my own brothers, to teach them this art if they so desire without fee or written

promise.” In this way, all physicians are obligated to volunteer their services in educating the next generation of medical professionals.

While some volunteer clinical instructors receive a small stipend for each student they host, this sum is paid by private, non-profit corporations dedicated to volunteer clinical teaching. For instance, the physician in this case was paid \$225 by an organization called the Bryan/MCO Area Health Education Center, Inc., which is wholly independent of the University of Toledo. No State funds are used for these stipends, and many volunteer instructors at Ohio’s medical schools receive no stipend at all. And, as noted, *none* receive any salary or payment from the State universities.

Volunteer physicians for the University are asked to abide by a few basic guidelines, such as those concerning faculty conduct or research. But because these private-practice physicians are not credentialed as clinicians, but rather are recognized only as instructors, these guidelines speak only to the basics of professionalism in instruction. They do not govern how these volunteers actually practice medicine. Moreover, whereas employed clinical faculty members are at all times subject to the oversight of the University’s medical quality assurance committee, volunteer instructors are not. And while these physicians receive “appointment” letters recognizing them as volunteer instructors, these letters confer no office or employment on these physicians, but are simply to satisfy the requirement of medical school accreditation agencies that volunteer instructors be “appointed” as such before students can rotate through their practices. Indeed, the appointment letters are merely acknowledgement letters, and they specifically refer to the physician as a “volunteer” and confirm the volunteer nature of the position: “This appointment is conferred in recognition and appreciation of your commitment to

devote professional time and effort to official programs and activities of” the University. (Ct. of Claims, 9/5/2008 Stip. of Facts, Exhibit B, Ltr. of 3/18/2005).

Nearly 8,000 medical professionals across Ohio serve as volunteer instructors for the students at Ohio’s health sciences schools, including its six public medical schools—the University of Toledo College of Medicine, 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—and the practice is also standard nationwide. The University of Toledo alone has almost 1,300 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 of Toledo.

Dr. Marek Skoskiewicz became a volunteer clinical faculty member for the University of Toledo College of Medicine in 1995. 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 or university-approved practice plan, nor is it an instrumentality of the State of Ohio in any other respect.

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. Shortly before trial, Dr. Skoskiewicz invoked his role as a volunteer instructor 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 parties stipulated to the basic facts in the Court of Claims, see Apx. 13-14. 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 instructor. *Engel v. Univ. of Toledo Coll. of Med.* (Ct. of Claims 2008), 2008-Ohio-7058, ¶ 23. (Apx. Exhibit C). The court concluded that Dr. Skoskiewicz was “[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)(a), 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 Tenth District Court of Appeals affirmed. The court noted that Dr. Skoskiewicz was a “volunteer faculty member,” but, relying on R.C. 109.36(A)(1)(a), the court ruled that he was an “officer or employee” of the State, and therefore entitled to immunity, because he was

“appointed” a volunteer through a letter from the University. *Engel v. Univ. of Toledo Coll. of Med.* (10th Dist.), 2009-Ohio-3957, ¶¶ 4, 10–11. (Apx. Exhibit B).

This Court accepted jurisdiction over the University’s discretionary appeal. 124 Ohio St. 3d 1479, 2010-Ohio-354.

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.

For three reasons, 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” in R.C. 109.36(A)(1)(a) to include the volunteer physicians at issue here conflicts with the plain meaning of the terms “officer or employee,” as used in the immunity statute, R.C. 9.86. Indeed, such an expansive reading upends the very purposes behind immunity. 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. Finally, affording immunity to these volunteers represents a sea change, one that the State’s medical schools neither could have nor should have expected, and one for which they are not adequately insured. If such a massive liability burden is to be foisted upon Ohio’s public universities, it should come from the General Assembly through a clear directive, not a superficial and novel reading of the statutes.

A. A volunteer instructor providing medical care to his own patients and in his own practice is not a State “officer or employee” within the plain meaning of R.C. 109.36.

The Tenth District’s decision to grant immunity to volunteer instructors hinges entirely on the coincidental appearance of the word “appointed” in the immunity definitional statute, R.C.

109.36, and the volunteer acknowledgment letter sent by the University. But statutory interpretation is not a word-match game that begins and ends once a familiar word is spotted. A reading of the immunity statutes in their entirety, bolstered by the jurisprudence in this area, confirms that personal immunity exists solely to protect those acting in an employment relationship with the State or exercising a measure of the sovereign's power as a State officer. Because volunteer clinical faculty members are not State employees and lack any indicia of a State officer, they are not entitled to immunity under R.C. 9.86.

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, ¶ 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.

Courts must also strive to effectuate the General Assembly's intent in enacting the *entire* statute: “[A] court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.” *State v. Wilson* (1997), 77 Ohio St. 3d 334, 336. Indeed, it is a well-established principle of statutory construction that words do not have the same meaning in all contexts, and that a reviewing court must glean the appropriate meaning from the specific context at hand. See *United States v. Am. Trucking Assns., Inc.* (1940), 310 U.S. 534, 542 (“To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute.”).

As this Court has noted, R.C. 9.86 creates a two-part analysis: Was the individual a State officer or employee, and if so, was the individual acting within the scope of his employment

when the cause of action arose? *Theobald v. Univ. of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208, ¶14. If a State officer or employee meets these eligibility requirements, 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).

While *Theobald* involved the second question (concerning whether State university-employed physicians were acting within the scope of their employment when the alleged injury occurred), this case concerns the predicate question: whether the individual even *is* a State “officer or employee” in the first place. The meaning of the terms “officer or employee” in R.C. 9.86 and R.C. 109.36(A)(1), which is cross-referenced in R.C. 9.86, provide the criteria for answering that question. See *State ex rel. Sanquily v. Ct. of Common Pleas* (1991), 60 Ohio St. 3d 78, 79; see also R.C. 2743.02(A)(2), (F).

Section 109.36(A)(1) offers four definitions for the phrase “officer or employee” of the State:

- (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, at the time a cause of action . . . arises, 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, at the time a cause of action against the 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 a board of alcohol, drug addiction, and mental health services described in section 340.021 of the Revised Code.

R.C. 109.36(A)(1)(a)–(d). The Tenth District did not examine the meaning of the terms “officer or employee,” as this Court has interpreted them, nor the larger context of R.C. 109.36(A)(1). The lower court focused instead on the word “appointed” in R.C. 109.36(A)(1)(a) and the simple fact that Dr. Skoskiewicz was “appointed” as a University volunteer; from that alone, the lower court concluded that Dr. Skoskiewicz must have been an “officer or employee” of the State under R.C. 109.36(A)(1)(a). This cursory and selective examination misses the forest for the trees and mistakenly sweeps all sorts of individuals—however attenuated their relationship to the State institution—into the circle of State officers or employees.

1. Dr. Skoskiewicz has no contractual relationship with the University.

Section 109.36(A)(1)(b) of the Revised Code specifically addresses medical providers and shows that where the General Assembly wants to extend immunity to physicians “rendering medical . . . services” who are neither employees of the State nor 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—or any other type of contract—existed here, and such contracts are not part of the volunteer instructor arrangement. This is because these private-practice physicians are not “rendering medical . . . services” for the University at all. At all times, Dr. Skoskiewicz treated his own patients, in his own private practice, without any State oversight or control. Nor was he ever appointed or credentialed by the University as a *clinician*.

Under the statutory canon *expressio unius est exclusio alterius*—the express inclusion of one thing implies the exclusion of the other, see *State ex rel. Butler Twp. Bd. of Trs. v. Montgomery County Bd. of Elections*, 124 Ohio St. 3d 390, 2010-Ohio-169, ¶ 21—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 volunteer instructors in the list of medical providers who are entitled to immunity under

R.C. 109.36(A)(1)(b), but it did not. And the Court may not create an additional exception to personal liability that the General Assembly itself did not recognize. *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St. 3d 390, 2004-Ohio-6549, ¶ 20 (courts may not create “an additional statutory exclusion not expressly incorporated into this statute by the legislature.”).

2. The University does not exercise any control over Dr. Skoskiewicz’s practice of medicine.

Even if the Court did not view the medical providers provision in R.C. 109.36(A)(1)(b) as dispositive—although it should—there is similarly no basis for finding Dr. Skoskiewicz an “officer or employee” of the State under the other definitions in R.C. 109.36(A). A full reading of the definitions in R.C. 109.36(A)(1)(a)—which the Tenth District relied on—reveals a striking similarity between them. Each requires the indicia of employment, or at the very least, that the State exercise meaningful control over the individual’s actions. In addition to appointed positions, R.C. 109.36(A)(1)(a) includes those serving in elected positions, who are both employees and fiduciaries of the state, and those directly employed by the State. Similarly, subsections (b), (c), and (d) refer to individuals who provide services to the State pursuant to service contracts or agreements. In those circumstances, individuals are performing tasks assigned by the State and they act under the State’s direction.

It is not surprising that these definitions hinge on the State’s right to control the work performed, as control is the touchstone of the common law’s definition of employment, a definition—ensconced in the Restatement of Agency—that this Court has repeatedly recognized. As the Restatement says, “[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” Restatement (Second) of Agency § 220(1). This Court has followed this “control” analysis when deciding whether an individual is an

employee in a number of contexts. See *Bostic v. Connor* (1988), 37 Ohio St. 3d 144, 146; *Hanson v. Kynast* (1986), 24 Ohio St. 3d 171, 173; *Gillum v. Indus. Comm'n* (1943), 141 Ohio St. 373, 381; *Behner v. Industrial Comm'n* (1951), 154 Ohio St. 433, 436; *Bobik v. Indus. Comm'n* (1946), 146 Ohio St. 187, 191 (following *Gillum*); *Pusey v. Bator* (2002), 94 Ohio St. 3d 275, 278-79 (following *Bobik*). An employment relationship exists only “when one party exercises the right of control over the actions of another.” *Hanson*, 24 Ohio St. 3d at 173.

Thus, applying to R.C. 109.36(A)(1) the statutory construction canon *noscitur a sociis*—where the Court looks to the surrounding words to ascertain another word’s meaning—reveals that “appointed” positions in subsection (a) must be those where the appointee performs State duties under State control. Indeed, other appellate court cases have recognized this. In *Walton v. Ohio Dep’t of Health* (10th Dist.), 162 Ohio App. 3d 65, 2005-Ohio-3375, ¶¶ 15-22, the appeals court held that a volunteer who was “appointed” to a 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, where State had no meaningful control over his work, and where the position was created not by State law, but in order to comply with a federal requirement.

Physicians like Dr. Skoskiewicz, though “appointed” as volunteer instructors at Ohio’s public medical schools, are not “appointed” or in any other respect employed as *clinicians*, and therefore they are in no way subject to State control when they treat their own patients at their own practices. And this is true regardless of whether medical students are present or not. The State medical schools do not pay these physicians any salary or stipend, approve or dictate the terms of their practice plans, or pay their insurance premiums. Nor do the State universities assign patients to them, set their work schedules, mandate where they practice, or implement treatment protocols. The few basic guidelines that apply to these physicians relate strictly to

their *instructional* services, not their clinical practices. Indeed, unlike the employed clinical faculty, volunteer instructors at the University of Toledo are not subject to any oversight by the University's medical quality assurance committee nor subject to any of the rules or oversight applicable to employed *clinicians*. In short, the University has no ability to control how these physicians practice medicine, and the University could have done *nothing* to change how Dr. Skoskiewicz treated Mr. Engel.

In fact, the only connection between these private-practice physicians and the medical schools is that the schools have accepted these physicians' voluntary offers to pass along their knowledge to the next generation of medical professionals, as per their duties under the Hippocratic Oath. This service is admirable, and it plays an important role in the development of medical students. But it in no way transforms these independent actors into State officers or employees.

Until now, courts dealing with physician immunity under R.C. 9.86 have properly recognized that a physician's status as a State "officer or employee" hinges on whether the university exerted meaningful control over the physician's practice. See, e.g., *Theobald v. Univ. of Cincinnati* (10th Dist), 160 Ohio App. 3d 342, 2005-Ohio-1510, ¶¶ 20–51, *affirmed*, 111 Ohio St. 3d 541, 2006-Ohio-6208 ("dual status" physicians were State employees entitled to immunity because of university's symbiotic relationship with physician's practice plan and university's control over the practice plan and the physician); *Potavin v. Univ. Med. Ctr.* (10th Dist. Apr. 19, 2001), 2001 Ohio App. Lexis 1787, *8–16 (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); *Latham v. Ohio State University Hospital* (10th Dist. 1991), 71 Ohio App. 3d 535, 537–39 (physician not entitled to immunity where he

acted in his private capacity and not in his role as a clinical assistant professor, and where there was no evidence that the State “could control the mode and manner of the work involved”).

These cases vindicate the logical principle that where the State lacks the ability to control a physician’s actions it makes no sense to extend immunity to him. The purpose of Ohio’s personal immunity statute, R.C. 9.86, is to immunize “officers and employees” of the State from civil liability for damages or injuries caused in the performance of their official duties. As the United States Supreme Court has explained, 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 such protection is “necessary to preserve their ability to serve the public good.” *Id.* (emphasis added); see also *Conley v. Shearer* (1992), 64 Ohio St. 3d 284, 287. Cases involving volunteer clinical faculty members do not fit that bill at all. Dr. Skoskiewicz was not performing the procedures at issue pursuant to any State “duties”—he was operating on his own patient, from his own private practice, in a private, not-for-profit corporate hospital. That a State university medical student happened to be observing these procedures at the time changes *none* of that.

Put differently, to the extent immunity exists to safeguard the ability of government employees to carry out their official duties, there are simply no grounds for immunity in these cases. Dr. Skoskiewicz does not perform vasectomies on his private-practice patients because of any governmental duty; nor would the *absence* of immunity hinder his ability to conduct his practice. These physicians are simply independent practitioners who have agreed to welcome medical students into their pre-existing professional lives on a short-term basis. They are not

State officers or employees, and extending immunity to them distorts the purposes underlying governmental immunity.

3. Dr. Skoskiewicz is not a State officer because the “position” to which he was “appointed” neither was created by Ohio law nor entails the performance of any sovereign function of government.

Finally, any attempt to characterize Dr. Skoskiewicz as a State “officer,” by virtue of his “appointment,” fares no better. Pursuant to R.C. 109.36(A)(1)(a), an “officer” includes a person “serving in an . . . appointed . . . position with the state.” The Tenth District concluded that it should read the terms in that phrase without any qualifications. *Engel*, 2009-Ohio-3957, at ¶ 12. But that is wrong, and it leads to nonsensical results. Broadly construed, someone “appointed” to a “position” with a university would include *anyone* designated for *any* sort of post—be it the captain of the baseball team, volunteer docent for a university art museum, or a volunteer lawyer serving as a mock trial judge. Such an unbounded reading ignores the requirement that any such “position” be imbued with the qualities of a public office—a requirement that unquestionably underlies the immunity grant contained in R.C. 9.86.

As this Court has long recognized, the definitions of public office, and who are public officers, are numerous. But certain minimal requirements are clear. “A public officer as distinguished from an employee must possess *some sovereign functions of government*, to be exercised by him for the benefit of the public, either of an executive, legislative or judicial character. . . . The chief and most-decisive characteristic of public office is determined by the quality of the duties with which the appointee is invested, *and by the fact that such duties are conferred upon the appointee by law.*” *State ex rel. Newman v. Skinner* (1934), 128 Ohio St. 325, 327-28 (emphasis added). As a volunteer instructor, Dr. Skoskiewicz and other private-practice practitioners exercise no sovereign governmental power. Nor are these volunteer arrangements created or prescribed by statute or the Ohio Constitution—they were created

simply to comply with a requirement of the medical school accreditation organization that volunteer instructors receive an “appointment” as such. *Walton*, 162 Ohio App.3d 65, 2005-Ohio-3375, at ¶¶ 15-22 (volunteer not a State “officer or employee” where position was not created by State law, but in order to comply with funding requirement prescribed by federal government).

The fundamental underlying characteristics of a State “officer” cannot be ignored when interpreting the meaning of that term. See *INS v. St. Cyr* (2001), 533 U.S. 289, 312, n.35 (where the legislature “borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts . . . the meaning its use will convey to the judicial mind unless otherwise instructed.”). Indeed, the consequences of such an error are substantive, and not merely semantic. To regard volunteer instructors as State “officers,” as the Tenth District did, elevates those individuals with the *weakest* relationship to the State universities to a status that is even *more powerful*, in terms of sovereign authority, than that held by State employees. That incongruous result should not stand.

In sum, volunteer instructors for Ohio’s public medical schools are not entitled to immunity reserved for officers or employees of the State under R.C. 9.86.

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 allow 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.”). Statutes unrelated to governmental immunity also distinguish between officers, employees, and volunteers. See, e.g., R.C. 2919.223 (defining “child care provider” as “[a]n owner, provider, administrator, or employee of, or volunteer at, a child care facility”); R.C. 1702.12 (non-profit corporation may authorize indemnification for “a director, officer, employee, or agent of or a volunteer of the corporation”); R.C. 3701.20 (no private cause of action against poison control center’s “officers, employees, volunteers, or other persons associated with the center”).

In all of the examples above, the reference to “volunteers” would be surplusage if the terms “officer” or “employee” already included volunteers, as the Tenth District found.

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., 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.”); S.C. Code 8-25-40 (“Volunteers in state service shall enjoy the protection of sovereign immunity of the State to the same extent as employees.”); Virginia Code 2.2-3600 *et seq.* (Virginia State Government Volunteers Act) (providing immunity for volunteers of State agencies so long as act or omission was not caused by volunteer’s malfeasance).

In sum, related sections of the Revised Code and the practice of other States confirm that a volunteer is categorically different from a State “officer or employee” 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.

C. If volunteer instructors are to receive immunity for their actions in treating their own patients, the change should come from the General Assembly.

For the reasons above, “officer or employee” immunity does not extend to volunteer clinical faculty members like Dr. Skoskiewicz. But even if that result were not apparent, the most that could be said of the immunity statute is that it leaves unclear whether immunity should extend that far. It is worth noting, then, that deciding to extend immunity to these physicians would have far-reaching consequences. It would subject Ohio’s public universities to potentially

millions of dollars in liability and force them to make dramatic changes to their medical education programs. If such a sea change is to occur such that volunteers are included in the meaning of “officer or employee” under R.C. 9.86, the General Assembly should say so explicitly; it should not be inferred from a superficial reading of the statute.

The problems of extending immunity to volunteer instructors in these circumstances are legion. First, the sheer monetary impact of such a rule is staggering. Under the lower court’s novel reading of these statutes, the State universities are now the *de facto* malpractice insurers for nearly 8,000 private-practice physicians and health care professionals whom the universities have always regarded as mere volunteers, not employees. And medical malpractice claims are costly affairs. The plaintiffs sometimes have significant injuries and economic losses. And even where a claim is ultimately shown to have no merit, merely *defending* a medical malpractice case can cost tens or hundreds of thousands of dollars. These considerable financial burdens have now been foisted upon the State universities. What is more, because the universities had no reason to expect that they would be held liable for malpractice committed by these volunteer private-practice physicians, they have not carried adequate professional liability coverage for their actions. Rather, the physicians, like the one in this case, had their own private professional liability insurance in place to cover such claims. And the fact that the Tenth District’s decision was not made prospective exacerbates the problem, since the court’s rule extends to all *pending* medical malpractice cases, not just new claims. The State universities will now be joined in such actions, even ones that have been pending for years without their participation. As such, under the Tenth District’s decision, all potential awards and litigation expenses will come *directly* from the State universities’ coffers.

Second, this decision will significantly complicate the adjudication of many malpractice claims. Plaintiffs commonly sue multiple medical providers who may be partially responsible for their injuries. Under the Tenth District's decision, many plaintiffs will now have to file suit in two different forums: the common pleas court for the case against the private parties, and the Court of Claims for the case against the volunteer faculty member. See R.C. 2743.02(A)(1), 2743.02(D), 3345.40(B). Hence, more trials will have to play out in two different forums.

Finally, the Tenth District's decision threatens the very viability of clinical programs at Ohio's public medical schools. At present, nearly 8,000 private-practice physicians and health care practitioners volunteer as clinical instructors for these schools. These physicians are important resources for medical students, giving them the opportunity to observe the day-to-day practice of health care at an early stage in their careers.

But the State universities are simply not equipped to maintain professional liability coverage for thousands of private-practice physicians. And even if funds were on hand to cover this massive new liability, the schools would need a complex administrative infrastructure to manage risks and establish quality control for such a large number of physicians practicing at disparate sites. Because these measures are simply not feasible on the scale required to sustain the current level of volunteer clinical instructors, the public medical schools in the State may be forced to curtail severely, if not altogether eliminate, these clinical education opportunities. This would be a crippling blow to the quality of medical education at Ohio's public universities and threatens to diminish the nationwide stature of Ohio's programs. Before such a drastic change to Ohio's medical school programs is made, it should be clear that such effects are compelled.

It is hard to believe that the General Assembly intended to hand mere volunteers such a windfall, and to impose such a costly burden on State universities for countless medical

malpractice claims. It is similarly implausible that the legislature wanted to impose such a challenging litigation structure on claims involving these volunteers based on their tenuous connection to the State.

If the General Assembly wants to take these dramatic steps in its role as “the ultimate arbiter of public policy,” *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St. 3d 126, 2002-Ohio-7041, ¶ 21, its mandate should appear in clear statutory language, not inferred through a broad, out-of-context interpretation. 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. Because no such language exists, this Court should refrain from recognizing such a vast extension of the immunity rule.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant-Appellant University of Toledo College of Medicine was served by U.S. mail this 27th day of April, 2010, on the following counsel:

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EXHIBIT A

In the
Supreme Court of Ohio 09-1735

LARRY ENGEL, JR.,	:	Supreme Court Case No. _____
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Franklin County
	:	Court of Appeals,
v.	:	Tenth Appellate District
	:	
UNIVERSITY OF TOLEDO COLLEGE OF	:	Court of Appeals Case
MEDICINE,	:	No. 09AP-53
	:	
Defendant-Appellant.	:	

**NOTICE OF APPEAL OF APPELLANT
UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE**

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 CLERK OF COURT
 SUPREME COURT OF OHIO

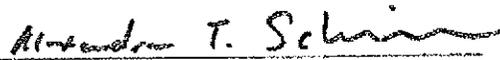
**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE**

Defendant-Appellant University of Toledo College of Medicine gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Franklin County Court of Appeals, Tenth Appellate District, journalized in Case No. 09AP-53 on August 11, 2009. Date-stamped copies of the Decision-Entry of the Court of Claims of Ohio and the Tenth District's Judgment Entry and Decision are attached as Exhibits 1 and 2, respectively, to Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Appellant University of Toledo College of Medicine has been served upon the following counsel of record by depositing it in ordinary United States mail, postage prepaid, this 25th day of September, 2009:

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[Cite as *Engel v. Univ. of Toledo College of Medicine*, 184 Ohio App.3d 669, 2009-Ohio-3957.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

D E C I S I O N

Rendered on August 11, 2009

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

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

APPEAL from the Court of Claims of Ohio

KLATT, Judge.

{¶ 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} The parties stipulated that the UT¹ 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

¹ 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 nonprofit 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,

[e]xcept 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 a person 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). 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 informed him that the UT Board of Trustees had "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. 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, ¶ 20, quoting *Pizza v. Sunset Fireworks Co., Inc.* (1986), 25 Ohio St.3d 1, 4-5, 25 OBR 1, 494 N.E.2d 1115 (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.²

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

² 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" 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.

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

EXHIBIT C

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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LARRY ENGEL, JR.

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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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AMR/cmd
Filed December 18, 2008
To S.C. reporter January 20, 2009

OHIO REVISED CODE**§ 9.86. Civil immunity of officers and employees; exceptions**

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.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

HISTORY:

138 v S 76. Eff 3-13-80.

OHIO REVISED CODE

§ 109.36. Definitions

As used in this section and *sections 109.361 [109.36.1] to 109.366 [109.36.6] of the Revised Code*:

(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 the 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 a 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.

(B) "State" means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(C) "Political subdivisions" of the state means municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographical areas smaller than that of the state.

(D) "Employer" means the general assembly, the supreme court, any office of an elected state officer, or any department, board, office, commission, agency, institution, or other instrumentality of the state of Ohio that employs or contracts with an officer or employee or to which an officer or employee is elected or appointed.

HISTORY:

138 v S 76 (Eff 3-13-80); 139 v S 204 (Eff 7-26-82); 145 v H 715 (Eff 7-22-94); 145 v H 571 (Eff 10-6-94); 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 179. Eff 4-9-2003.