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IN THE SUPREME COURT OF OHIO

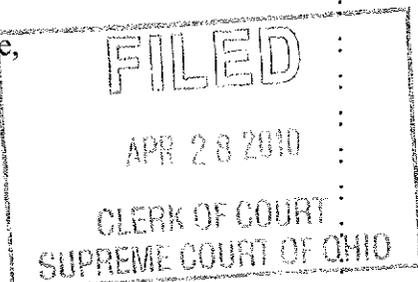
Larry Engel, Jr.,

Plaintiff-Appellee,

v.

University of Toledo
College of Medicine,

Defendant-Appellant.



Case No. 2009-1735

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

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE
ON BEHALF OF DEFENDANT-APPELLANT
UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE

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PROPOSITIONS OF LAW

Proposition of Law Accepted for Review:

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

Alternative Proposition of Law:

A health-care practitioner who is an officer or employee of the State but who is treating a private patient in the practitioner’s private practice, is not acting within “the scope of his employment or official [teaching] responsibilities” within the meaning of R.C. 9.86 merely because a student is present

INTEREST OF *AMICUS CURIAE*
THE OHIO ASSOCIATION FOR JUSTICE

The Ohio Association for Justice (“OAJ”) is Ohio’s largest victims-rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The Association is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

The OAJ believes that the court of appeals decision in this case, if upheld, would shift multi-million-dollar risk from private insurers to Ohio taxpayers, exacerbate the deformities in medical malpractice civil procedure, and expand R.C. 9.86 immunity beyond constitutional limits.

R.C. 9.86 was enacted in 1980 as part of the State’s waiver of sovereign immunity. It cannot seriously be contended that at that time, or at any time, the General Assembly intended to make the State solely and directly liable for malpractice committed by the State’s more than 6,000 volunteer medical faculty members every time a student happened to be present during treatment. According to the federal Bureau of Labor Statistics, Ohio has 13,200 physicians.¹

The State correctly notes that the court of appeals decision in this case creates a whole new category of immunized negligence. Volunteers such as Dr. Skoskiewicz, though required to maintain private insurance, would now be personally immune, forcing the State under the Court of Claims Act to defend the action and pay the damages – simply because a student was present. This court of appeals decision shifts the risk and cost from the for-profit insurance companies that have been collecting premiums based on this risk, to Ohio’s taxpayers.

¹ <http://www.bls.gov/oes/2004/may/oes291069.htm#st>

The Court of Appeals decision, if permitted to stand, would also exacerbate the mushrooming deformities in medical malpractice civil procedure. These deformities materially complicate medical malpractice litigation, to the detriment of the victims, the defendants, and the courts. Victims of medical malpractice are increasingly compelled to file duplicative lawsuits – one in a court of common pleas and one in the Court of Claims – to avoid the limitations bar after an immunity determination forecloses jurisdiction in one court or the other. Victims are also now compelled to sue every practitioner who might have participated in their care, lest a culpable business association escape liability under *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, for the victim’s failure to name the correct employee. And victims are compelled to sue every business association of every practitioner, lest the claim be lost if the practitioner is ruled immune. These procedural deformities in the system carry incalculable costs to plaintiffs, defendants, and the courts.

The court of appeals decision also expands R.C. 9.86 immunity beyond constitutional limits. Any law that conditions a citizen’s right to pursue recovery against the tortfeasor and right to jury trial upon irrelevant trivialities such as whether some third person is in the building is an irrational, unconstitutional violation of the guarantees of due process of law, due course of law, equal protection, and jury trial – guarantees for which the OAJ strives to be a leading advocate.

STATEMENT OF FACTS

Amicus curiae the Ohio Association for Justice adopts the Statement of Facts in the brief of Appellant the University of Toledo College of Medicine (hereinafter “the State”).

SUMMARY OF ARGUMENT

The State cannot reasonably be compelled to answer for the negligence of medical practitioners who are in no way beholden to the State. State “officers and employees” have qualified immunity from liability for their conduct within the scope of their “employment or official responsibilities.” R.C. 9.86. Thus, analysis of R.C. 9.86 individual immunity has two parts: Was the individual a State “officer or employee,” and if so, was the individual acting within “the scope of the officer’s or employee’s employment or official responsibilities.” *See Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14; *accord id.* at ¶ 31.

The OAJ supports the State’s proposition of law – that a physician serving as a volunteer faculty member for a State medical school is not entitled to immunity under R.C. 9.86. The State address only the first R.C. 9.86 prong, arguing that volunteer faculty members are not “officers or employees” within the meaning of R.C. 9.86. The OAJ joins in all of the State’s arguments but in this brief focuses on one argument: that the Court of Appeals decision imprudently deviates from the settled rule that the State’s right to control and direct an individual is the lodestar for determining whether the individual is an “officer or employee” within the meaning of R.C. 9.86. Under those precedents, volunteer faculty members such as Dr. Skoskiewicz are not State “officers,” because the State exercises *no* control over their medical practices. This Court should hold that a health-care practitioner who is a volunteer faculty member at a State institution, and who only treats private patients in the practitioner’s private practice, is not a State “officer or employee” within the meaning of R.C. 9.86.

If this Court rules that Dr. Skoskiewicz was a State officer, then the Court should address the second prong of R.C. 9.86 analysis and hold that a health-care practitioner who *is* an officer or employee of the State, but who is treating a private patient in the practitioner’s private practice, is not acting within “the scope of his employment or official [teaching] responsibilities”

within the meaning of R.C. 9.86 merely because a student is present. Such a holding would represent a much-needed explanation of this Court's holding in *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶¶ 23, 31, regarding the second prong of R.C. 9.86. Contrary to Tenth District Court of Appeals and Court of Claims decisions, the otherwise inconsequential presence of a student should not be the lodestar for determining issues as consequential as immunity, insurance coverage, court jurisdiction, and the right to a jury trial (juries not being a feature of the Court of Claims, R.C. 2743.03(C)(1) and 2743.11).

For both of these reasons, this Court should reverse the judgment of the Court of Appeals.

ARGUMENT

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

A. Introduction.

State officers and employees have qualified immunity from liability for their conduct within the scope of their “employment or official responsibilities.” When the tortfeasor is immune, the plaintiff's only recourse is suing the State in the Ohio Court of Claims. The immunity is provided by R.C. 9.86, which reads:

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, [1] unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities*, or [2] unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

R.C. 2743.02(F) uses the same language in limiting action to suit against the State in the Court of Claims:

A civil action against an *officer or employee, as defined in section 109.36 of the Revised Code*, that alleges [1] 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 [2] 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.

Thus, analysis of R.C. 9.86 individual immunity has two parts: Was the individual a State "officer or employee," and if so, was the individual acting within "the scope of the officer's or employee's employment or official responsibilities." See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14; *accord id.* at ¶ 31.

In this appeal, the State addresses only the first prong, arguing that volunteer faculty members are not "officers or employees" within the meaning of R.C. 9.86. The Tenth District Court of Appeals, until its decision in this case, had consistently used the State's right to control and direct the individual as the lodestar for determining whether the individual is an "officer or employee." Under those precedents, volunteer faculty members such as Dr. Skoskiewicz are not State "officers," because the State exercises *no* control over their medical practices.

B. Standard of review

The issue of personal immunity for State officers and employees under R.C. 9.86 is a question of law that appellate courts review *de novo*. See *Theobald*, 111 Ohio St.3d 541, 2006-Ohio-6208, at ¶ 14.

C. A health-care practitioner who is a volunteer faculty member at a State institution, and who only treats private patients in the practitioner’s private practice, is not a State “officer or employee” within the meaning of R.C. 9.86.

The State presents multiple arguments for why a volunteer faculty member is not an “officer or employee” within the meaning of R.C. 9.86. The OAJ concurs in all of those arguments.

The OAJ wishes here to focus upon one argument – that the Court of Appeals decision imprudently departs from the settled rule that an individual is not an “officer or employee” within the meaning of R.C. 9.86 unless the State possesses a significant degree of control over the individual’s conduct. This departure from precedent is particularly noteworthy because it concerns construction of the immunity and Court of Claims statutes. This Court and the Tenth District Court of Appeals have exclusive appellate jurisdiction over the Court of Claims, which is the only trial court with jurisdiction to determine immunity under R.C. 9.86. R.C. 2743.02(F). Thus, the Tenth District’s decision is the last word on the subject absent review by this Court.

R.C. 2743.02(F) expressly incorporates the R.C. 109.36 definition of “officer or employee,” which reads:

“Officer or employee” means any of the following: . . . A person who, at the time a cause of action against the person arises, is *servi***ng in an elected or appointed office or position** with the state or is employed by the state.

R.C. 109.36(A)(1)(a) (emphasis added). Of the many Tenth District cases construing R.C. 9.86, three address the question of when a volunteer is “serving in an elected or appointed office or position”:

- *Potavin v. Univ. Med. Ctr.* (10th Dist. Apr. 19, 2001), No. 00AP-715, 2001 Ohio App. LEXIS 1787;
- *Walton v. State Dept. of Health* (10th Dist. 2005), 162 Ohio App.3d 65, 2005-Ohio-3375; and
- *Theobald v. Univ. of Cincinnati* (10th Dist. 2005), 160 Ohio App.3d 342, affirmed, 111 Ohio St.3d 541, 2006-Ohio-6208.

Under these precedents – the only Ohio cases on point – Dr. Skoskiewicz is not a State “officer,” because the State does not control his medical practice.

The oldest of these cases is still the standard bearer. In *Potavin*, the physician who committed the alleged malpractice was an ob/gyn classified by the University of Cincinnati Medical Center (UCMC) as a “volunteer” faculty member. UCMC had strong ties to a practice group, the Foundation for Obstetrics and Gynecology (FOG), which administered and controlled such volunteers. The primary factor upon which the court relied was the “degree of control” that UCMC, through FOG, exercised over the volunteer:

A review of R.C. 109.36 shows that the issue whether a person is an officer or employee of the state cannot be answered simply by an admission that a person is not an employee of the state or by a showing that the employee was not directly compensated by the state. . . . [I]n order to determine whether appellant was an “employee or officer” of the state, *we must analyze the relationships* between appellant, UCMC, and FOG.

A review of the testimony given [by the] director of the OBGYN Department at the time of the incident forming the basis of appellees’ complaint, shows UCMC had a *high degree of control over FOG*. FOG was required to operate within the guidelines provided by the university

Potavin, 2001 Ohio App. LEXIS 1787 at *8-9 (emphasis added.) Although the physician’s letter of appointment called her a “volunteer,” *id.* at *13, FOG was created by UCMC and could not exist without UCMC, *id.* at *10-14. The court ruled that the use of the term “volunteer” was not as good a fit as the term “employee,” given the strong relationship between the state medical school and the practice group that employed the defendant doctor.

The Court of Appeals in this case purported to distinguish *Potavin* on the basis that the physician in *Potavin* was found to be an “employee” rather than a volunteer. The better characterization of *Potavin* is that it illustrates that the parties’ use of the terms “volunteer” and “employee” are not dispositive, and that the dispositive factor is the degree of control the State exerts

over the individual. And in this case, the parties' stipulations establish, in stark contrast to *Potavin*, that the University of Toledo did not restrict, govern, or call Dr. Skoskiewicz to account for his practice in any way. (Dr. Skoskiewicz's only obligation to the State was to obtain approval for professional journal articles and research projects which identified him as an MCO faculty member. See *Engel v. Univ. of Toledo College of Medicine*, Ct. Claims, 2008-Ohio-7058, ¶ 22.)

In *Walton v. State Dept. of Health* (10th Dist. 2005), 162 Ohio App.3d 65, 2005-Ohio-3375, ¶ 10, the court held that the individual was not an "officer or employee" entitled to defense representation by the attorney general pursuant to R.C. 109.361. The court looked beyond the parties' characterizations of themselves and relied upon the degree of control the State exercised over the individual:

Merely because the notice [of appointment] states that plaintiff was appointed to the group [by the State] does not mean that he was serving in an "appointed" office or position with the state under R.C. 109.36(A). Plaintiff also notes that he was elected co-chair of the statewide group. Again, merely because plaintiff was elected by the group to be a co-chair does not mean that he was "elected" for purposes of R.C. 109.36(A).

Notwithstanding defendant's apparent ability to entirely dissolve the community planning process and/or its ability to modify its structure, the state lacked control over plaintiff's actions as a volunteer in the process.

Id. at ¶¶ 18-19 (emphasis added). The *Walton* court went to great lengths to detail the State Department of Health's lack of control over these volunteers. *Id.* at ¶¶ 20-22. The court concluded that the plaintiff had not been entitled to have the State defend him in federal court and was not entitled to reimbursement of his legal expenses. *Id.* at ¶ 22. The Court of Appeals wrongly distinguished *Walton* on the basis that the volunteer program in *Walton* was not created by an Ohio statute, while the University of Toledo is. The rule of *Potavin* and *Walton* is that immunity and

defense at State expense are reserved for persons who are meaningfully under the control of the State.

The Tenth District Court of Appeals applied the *Potavin* “control” rule in its *Theobald* opinion, holding that a volunteer nurse was a State “employee”:

UC **had significant control** over UAA, the private practice plan at issue here, during 1998. Dr. Phillip Bridenbaugh, M.D., the Chairman of the Department of Anesthesia within the UC College of Medicine and president of UAA, testified that UAA was “the practice plan portion of the academic Department of Anesthesia of the College of Medicine.” UAA’s purpose was to bill and collect payment for clinical services provided by its employees and disburse the revenue collected to the Department of Anesthesia to meet the Department’s expenses. Without the revenue collected by UAA, UC would not have had any means to compensate the Department’s clinical faculty members. Further, **UC exerted control** over the outlay of the funds UAA collected by requiring UAA to receive the approval of the Dean of the College of Medicine for its budget and the amount of the salaries it paid its employees. Therefore, we conclude that although UC and UAA were separate legal entities, their relationship was sufficiently close that UAA-employee Nurse Parrott, even though only a volunteer clinical instructor for UC, was an employee of the state for purposes of immunity.

Theobald v. Univ. of Cincinnati, 160 Ohio App.3d 342, 352-353, ¶ 30 (emphasis added), affirmed, 111 Ohio St.3d 541, 2006-Ohio-6208. This Court placed its imprimatur on the *Potavin* “control” rule by affirming *Theobald* without disturbing the Court of Appeals’s rationale.

Under *Potavin* and its progeny, Dr. Skoskiewicz’s arrangement with the University of Toledo College of Medicine did not make him a State “officer or employee” within the meaning of R.C. 9.86. For this reason, and for the other reasons advocated by the State, this Court should reverse the Court of Appeals and hold that a health-care practitioner who is a volunteer faculty member at a State institution, and who only treats private patients in the practitioner’s private practice, is not a State “officer or employee” within the meaning of R.C. 9.86.

D. A health-care practitioner who is an officer or employee of the State, but who is treating a private patient in the practitioner’s private practice, is not acting within “the scope of his employment or official [teaching] responsibilities” within the meaning of R.C. 9.86 merely because a student is present.

R.C. 9.86 immunity analysis has two prongs: whether the individual was a State “officer or employee,” and if so, whether the individual was acting within “the scope of the officer’s or employee’s employment or official responsibilities.” See *Theobald*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14; accord *id.* at ¶ 31. All of the State’s arguments in this case concern only the first prong -- whether Dr. Skoskiewicz was an “officer or employee.”

But the anomalous outcome in the Court of Appeals that the State seeks to reverse is as much a product of overly broad statutory construction in Prong 2 (scope of responsibilities) as it is of overly broad construction in Prong 1 (officer or employee). If this Court rules that Dr. Skoskiewicz was a State officer, then the Court should consider Prong 2 and hold that a health-care practitioner who is an officer or employee of the State, but who is treating a private patient in the practitioner’s private practice, is not acting within “the scope of his employment or official [teaching] responsibilities” within the meaning of R.C. 9.86 merely because a student is present.

In *Theobald*, this Court held that the practice of medicine is within the scope of the practitioner’s teaching responsibilities if “the practitioner was in fact educating a student or resident when the alleged negligence occurred”:

[T]he question of scope of employment must turn on what the practitioner’s duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury. . . .

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, 111 Ohio St.3d 541, 2006-Ohio-6208, at ¶¶ 23, 31.

The Tenth District Court of Appeals and Court of Claims have interpreted *Theobald* as standing for the proposition that the mere presence of a student brings the otherwise private practice of medicine within “the scope of employment or official [teaching] responsibilities.”

In *Clevenger v. Univ. of Cincinnati College of Medicine*, 10th Dist., 2010-Ohio-88, ¶ 9, the court affirmed a finding of immunity based on the mere presence of a student: “The Ohio Court of Claims [correctly] applied the opinion in *Theobald* and found that Dr. Tew was supervising and educating two separate interns during his treatment of Ms. Clevenger, especially one specific intern who observed the surgery.”

In *Meredith v. Ohio State Univ. Med. Ctr.*, Ct. Claims, 2007-Ohio-5145 (adopting magistrate’s decision reported as 2007-Ohio-3867), the court found immunity based on the mere presence of a student, saying that “the case presents the classic teaching scenario contemplated in *Theobald*.” 2007-Ohio-3867 at ¶ 17.

The Court of Claims has actually ruled a physician immune even when no student was present or involved in the negligence. In *Chappelear v. Ohio State Univ. Med. Ctr.*, Ct. Claims, 2009-Ohio-7059, the physician properly performed a surgery. The alleged negligence was the physician’s failure to either give proper discharge instructions or examine the patient before discharge. *See id.* at ¶ 14. Despite the fact that the alleged negligence was an omission – a failure to act or be present – the court ruled that the alleged negligence was within the scope of the physician’s teaching responsibilities, because a student resident had participated in the surgery. *Id.* at 21.

And in this case, the Court of Claims (the late former Justice Wright) found immunity, relying on Dr. Skoskiewicz’s affidavit statement “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.” *Engel v. Univ. of Toledo College of Medicine*, Ct. Claims, 2008-Ohio-7058, ¶ 17. The Court of Claims, having concluded that Dr. Skoskiewicz was a State “official,” felt compelled by *Theobald* to rule that the Engel surgeries were performed within Dr. Skoskiewicz’s scope of official teaching responsibilities.

Although that result may be logically compelled by *Theobald* (Mr. Engel did not even contest the point, *id.*), the State correctly characterizes the result as an absurdity in the real world. (Memorandum in Support of Jurisdiction 8, 9, 12.) The otherwise inconsequential presence of a student should not be the lodestar for determining issues as consequential as immunity, insurance coverage, court jurisdiction, and the right to a jury trial (juries not being a feature of the Court of Claims, R.C. 2743.03(C)(1) and 2743.11).

This case is an opportunity for this Court to explain that *Theobald* does **not** stand for the proposition that the mere presence of a student transforms the private practice of medicine (or any other health-care discipline) into “official [State teaching] responsibilities.”

If this Court does not so explain *Theobald*, then even more disturbing judgments lie ahead. For example, consider a physician treating a patient while students observe from 200 miles away via video cameras, rather than in person. Or imagine the same facts, but with the video not viewed live but rather recorded for possible future viewing. Under *Theobald*, in both circumstances, the physician is educating students just as much as if the students were in the treatment room. Consider the same facts, only now the videographer forgets to turn the camera on, so nothing is ever recorded, even though the physician believes that a recording for his students is being made.

The serious questions of immunity, insurance coverage, jurisdiction, and the availability of jury trial should not turn on such trivialities. This Court should use this opportunity to explain that *Theobald* does not stand for the proposition that the mere presence of a student transforms the private practice of medicine (or any other health-care discipline) into “official [teaching] responsibilities” within the meaning of R.C. 9.86 and R.C. 2743.02(F). Even assuming that Dr. Skoskiewicz was a State “official,” his performance of the Engel surgeries should not be immunized merely because a student was present.

E. Upholding the Court of Appeals decision would shift multi-million-dollar risk from private insurers to Ohio taxpayers, exacerbate the deformities in medical malpractice civil procedure, and expand R.C. 9.86 immunity beyond constitutional limits.

1. Upholding the Court of Appeals decision would shift multi-million-dollar risk from private insurers to Ohio taxpayers.

As explained at page 1 above, there is no reason to believe that the General Assembly intended to make the State solely and directly liable for malpractice committed by the State’s volunteer medical faculty members every time a student happened to be present. The Court of Appeals decision is a windfall for insurance companies, who have written coverage and collected premiums based on the expectation that private physicians will be held accountable for their malpractice. Under the Court of Appeals decision, any health-care practitioner with any official association with a State college can obtain immunity by keeping a student in the vicinity while seeing patients and shift the liability risks onto the State’s taxpayers.

2. Upholding the Court of Appeals decision would exacerbate the deformities in medical malpractice civil procedure.

Since this Court’s 2006 *Theobald* decision, civil procedure governing medical malpractice claims in Ohio has devolved into an Orwellian nightmare of Catch-22’s, traps for the unwary, and wasteful redundancy. There are three causes:

- the lower courts' overly broad interpretation of this Court's *Theobald* decision;
- the subsequent Tenth District decisions declining to toll the statute of limitations while parties await immunity decisions; and
- this Court's decision in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, which defendants are using to argue that there is no *respondeat superior* vicarious liability if the agent cannot be held liable.

This Court's decision in *Theobald*, 111 Ohio St.3d 541, 2006-Ohio-6208, as interpreted by the Tenth District Court of Appeals and the Court of Claims (*see* Part D above) has created a hair-trigger threshold for immunity for health-care practitioners. Any health-care practitioner with a dual role as private practitioner and State employee or officer (a status enjoyed by most instructors at Ohio's medical colleges) can obtain personal immunity from liability by merely having a student in tow while seeing private patients.

The Tenth District Court of Appeals in *Theobald v. Univ. of Cincinnati*, 10th Dist., 2009-Ohio-5204, held that the statute of limitations is not tolled when a case is bouncing among common pleas court, Court of Claims, and appellate courts while immunity is being adjudicated. Thus, the *Theobald* plaintiffs, despite timely filing a medical malpractice action in the court of common pleas in October 1999,² were barred by the statute of limitations because they did not file in the Court of Claims until 2001.³ The plaintiffs in *Clevenger v. Univ. of Cincinnati College of Medicine*, 10th Dist., 2010-Ohio-88, ¶¶ 15-18, similarly lost their otherwise timely-asserted medical-malpractice claim to *Theobald* and the statute of limitations.

In *Wuerth*, this Court reaffirmed the general proposition that there can be no *respondeat superior* vicarious liability unless there is an employee who is liable. *Wuerth*, 122 Ohio St.3d

² *Theobald*, 111 Ohio St.3d 541, 2006-Ohio-6208, at ¶ 5.

³ *Theobald*, 10th Dist., 2009-Ohio-5204, at ¶¶ 3, 21.

594, 2009-Ohio-3601, at ¶¶ 20-24. Medical-malpractice defendants are citing *Wuerth* to argue that there is no *respondeat superior* vicarious liability for medical-practice business associations unless one of its employees is actually adjudicated liable.

Thus, when a health-care practitioner is immune under R.C. 9.86, his private-practice business association (corporation, limited liability company, *etc.*) could be relieved of liability – even if the practitioner’s malpractice was a completely private, non-State affair except for say, the presence of student. *See, e.g., Hyatt v. Summa Health Systems* (Mar. 17, 2010), Summit C.P. No. CV-2008-04-2722, jury instructions, p. 10 (instructing the jury, based on *Wuerth*, that “you are not to consider any of the actions and/or alleged omissions of Dr. [B] or any physician or resident not named as a defendant in considering whether the greater weight of the evidence supports claims of negligence against the hospital for the actions or omissions of its employees”).

The combined effect of these decisions is a burden upon victims of medical malpractice (and a corresponding professional duty on the part of their attorneys) to:

- file identical lawsuits in both a common pleas court and the Court of Claims;
- name as a defendant every person who possibly could have been involved in any part of the victim’s care; and
- name as a defendant every business association associated with every person.

The victim is compelled to file identical lawsuits in both a common pleas court and the Court of Claims. Under *Theobald*, practitioner immunity and court jurisdiction depend upon facts that are unknowable to a plaintiff at the time suit is filed. Thus, unless suit is filed in both courts, the victim risks losing common pleas jurisdiction if it is later discovered that one of the practitioners had some association with a State institution. And the case is lost to limitations if suit is not timely filed in what the Court of Claims eventually determines to be the correct court –

regardless of whether suit was filed in another court. See *Theobald*, 2009-Ohio-5204, at ¶ 21; *Clevenger*, 2010-Ohio-88 at ¶¶ 15-18.

The malpractice victim is compelled to name as a defendant every person who possibly could have been involved in the victim's treatment, so that those persons' business associations cannot attempt to use *Wuerth* to escape liability. And in this regard the medical-malpractice victim begins at a great informational disadvantage. The reality of modern healthcare is that a victim of medical malpractice cannot possibly know all of the facts upon which the Court of Claims might base an immunity decision. And yet in the balance hang critical decision points: which court has jurisdiction; whether the physician's insurance might cover the loss; and whether the victim has a right to a jury trial.

First, a malpractice victim must determine which practitioners and students might have been involved in the treatment. The nature of modern health-care is that patients rarely know the names of the practitioners beyond the primary treating physician – especially with regard to surgeries, and even less so in urgent-care situations (two situations where the patient might not even be conscious). Medical records are often incomplete, inconsistent, and/or illegible. And they certainly will not reveal in most cases whether students were in the vicinity. Even when medical records appear to tell the whole story, they may not. Deposition and trial testimony can add, explain, or change the “truth” as reflected in paper and electronic records.

Second, the victim must determine which practitioners might be State “officers or employees.” There is no publicly available registry of State health-care employees – much less volunteer “officials.”

Third, if a practitioner appears to be a State “officer or employee,” the plaintiff must determine whether the practitioner was acting within the scope of his “employment or official re-

sponsibilities.” As explained in Part D above, that could require knowing otherwise trivial details as whether a student is in the building, whether a student participated the treatment remotely, or whether the practitioner has some ulterior “educational” purpose in treating the patient.

Finally, the victim is compelled to name as a defendant every business association associated with every practitioner, so as to avoid losing the claim if the business association’s practitioner is later ruled immune.

This wasteful suing of every conceivable individual and business association – not once but twice, in a court of common pleas and the Court of Claims – is necessary because under current law the facts upon which immunity and court jurisdiction depend can be so trivial and nuanced that exhaustive discovery is required simply to determine the correct parties and court. None of which has anything to do with the merits of the claim. Such waste affects health-care practitioners as much as it does the victims. Even practitioners with no connection to the State suffer, with their cases in the common pleas court often hanging over their heads for years, the case stayed while the courts decide the immunity status of other practitioners.

The *status quo* in medical malpractice civil procedure is bad for the victims, bad for the health-care practitioners, and bad for Ohio’s courts. No one likes to be sued; and no plaintiff’s lawyer wants to sue more people than necessary. The dysfunction and misery will only be compounded by adding to the immunity pool the 6,000 private physicians who, like Dr. Skoskiewicz, serve as volunteers for the State’s medical schools. (According to the federal Bureau of Labor Statistics, Ohio has 13,200 physicians.⁴)

⁴ <http://www.bls.gov/oes/2004/may/oes291069.htm#st>

Another case pending in this Court could further increase the necessity of naming every conceivable defendant. In *Erwin v. Bryan*, 5th Dist., 2009-Ohio-758, accepted for review, No. 2009-0580, 122 Ohio St.3d 1454, 2009-Ohio-3131, the issue is whether a discovery rule or a “John Doe” rule should apply to health-care practitioners named as defendants after the statute of limitations has expired, when the practitioners’ alleged negligence is identified only by other named defendants. The Ohio State Bar Association has filed an *amicus* brief advocating (at pp. 9-13) for the discovery rule to apply, so as to mitigate the “shotgun” approach to pleading that malpractice plaintiffs are increasingly being compelled to take.

Nothing in this brief has anything to do with the substantive law of medical malpractice. All of this argument pertains only to procedural traps and burdens. The goal of our civil justice system should be to do substantial justice with the minimum transaction costs, complexity, and delay. Ohio is moving in the wrong direction. This Court would slow this regress by declining to extend immunity to the 6,000 volunteers – and would accomplish still more by explaining that *Theobald* does not stand for the proposition that the mere presence of a student transforms the private practice of medicine (or any other health-care discipline) into “official [teaching] responsibilities” within the meaning of R.C. 9.86 and R.C. 2743.02(F).

3. Upholding the Court of Appeals decision would expand R.C. 9.86 immunity beyond constitutional limits.

A law that conditions citizens’ right to pursue recovery against an individual tortfeasor and the right to jury trial upon irrelevant trivialities – such as whether some third person is in the building – violates the constitutional guarantees of jury trial, a right to a remedy, due course of law, and equal protection. Such law survives neither strict scrutiny nor rational-basis review.

Right to a jury trial. “Section 5, Article I of the Ohio Constitution guarantees the right to trial by jury in medical malpractice cases and provides that the right ‘* * * shall be inviolate

* * *.” *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 702. “The right to a trial by jury is a fundamental constitutional right which derives from the *Magna Carta*.” *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 556.

Right to a remedy and due course of law. Article I, Section 16 of the Ohio Constitution guarantees that “[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” “This section of the Ohio Constitution protects the right to seek redress in Ohio’s courts when one is injured by another.” *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466. “The ‘due course of law’ provision is the equivalent of the ‘due process of law’ provision in the Fourteenth Amendment to the United States Constitution.” *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 422. This right is “fundamental.” *Id.* at 423.

Right of equal protection. Article I, Section 2 of the Ohio Constitution states that the government is instituted for the “equal protection and benefit” of the people. Governmental discrimination that impinges upon fundamental rights is subject to strict scrutiny. *Id.*

Legislation that impinges upon fundamental rights is reviewed under the “strict scrutiny” test, which requires that the legislation be narrowly tailored to serve a compelling government interest. *Sorrell*, 69 Ohio St.3d at 423.

R.C. 9.86 – if construed to extend personal immunity in the circumstances of this case – does not survive strict scrutiny review. Immunizing medical malpractice based on trivialities such as whether another person happened to be in the building neither serves a “compelling governmental interest” nor is “narrowly tailored” to serve any interest. Indeed, a statute immunizing medical malpractice based on such trivialities does not even survive the more forgiving rational-basis review (requiring only that the statute be rationally related to a legitimate government in-

terest, *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, 116 Ohio St.3d 468, ¶ 66). If the condition of the individual's right is a factor irrelevant to the victim's harm or any reasonable procedure for adjudicating a claim based thereon, the condition is irrational and unconstitutional.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted



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CERTIFICATE OF SERVICE

A copy of this document was sent on April 28, 2010 by regular, first-class U.S. Mail to:

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