ORIGINAL

IN THE SUPREME COURT OF OHIO

LARRY ENGEL, JR.,	*	Case No. 2009-1735
Plaintiff-Appellee,	*	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	*	
UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE,	*	Court of Appeals Case No. 09AP-53
Defendant-Appellant.	*	

MERIT BRIEF OF PLAINTIFF-APPELLEE LARRY ENGEL, JR.

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Preliminary Statement

The Appellee, Larry Engel, Jr., wishes to preface his Appellee's Brief with this Preliminary Statement which sets forth his change of position on the issue before the Court herein.

In its Appellant's Brief the University of Toledo College of Medicine ("UTCM") argues that extending immunity to volunteer professors at state medical schools would represent a "sea change" in the interpretation of R.C. 9.86, and that such a change was not, nor should have been anticipated by the State of Ohio. (Appellant's Brief, p. 8) This position is, of course, based on the extension of immunity by the Tenth District Court of Appeals of its own decision, and this Court's affirmance thereof, in Theobald vs. Univ. of Cincinnati[1], to volunteer clinical faculty at state medical schools.

As will be explained below, this Court's decision in Theobald II was in and of itself a "sea change" in the law of how a physician's entitlement to immunity was to be determined. However, due to expansive interpretations of that decision, coupled with the fact that it was not made prospective only by this Court, the application of that case by both the Court of Claims and the Tenth District Court of Appeals has wiped out, on statute of limitations grounds, the previously vested rights of injured plaintiffs to sue for damages. This is true because, like Larry Engel, based on the then-existing pre-Theobald law, these other plaintiffs' claims had been timely brought in courts of common pleas rather than in the Court of Claims. With Theobald II now retroactively almost ensuring immunity for actors who under previous law would not have been entitled to that protection, plaintiffs are finding themselves in a court that lacks jurisdiction over the defendant, and then they are being dismissed from the Court of claims by virtue of Civ. R. 12(B)(6) motions for not

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1 There have actually been three relevant Theobald decisions rendered between the 10th District and this Court. For purposes of this writing the Appellee will refer to the 10th District's March 31, 2005 decision, 160 Ohio App.3d 342, as Theobald I; this Court's affirmance of that decision on December 13, 2006, 111 Ohio St. 3d 541, as Theobald II; and the 10th District's decision on remand of September 30, 2009, 2009-Ohio-5204, as Theobald III.

having brought their actions in that court within the statute of limitations.

As a result of these changes in the law, and the procedural arguments being adopted by the Court of Claims and the Tenth District, Larry Engel's original position below has been eviscerated to such a degree that if he were to win the "battle" before this Court, there is a good likelihood that he would later lose the "war" on remand. Such a pyrrhic victory is certainly not in Larry Engel's interest, nor, upon reflection, does he believe any longer that the decisions below were correct statements of law. Therefore Larry Engel now urges this Court to find that appointees of appointees are not entitled to immunity under R.C. 9.86, and to reverse the decision of the Tenth District below. In the alternative, Larry Engel, Jr. urges this Court to take this opportunity to modify Theobald II, or order that Theobald II be applied prospectively only, and/or to hold that Civil Rule 15 (C) applies to allow R.C. 2743.02(F) actions brought in the Court of Claims to relate back to the initial filing of an action in a Court of Common Pleas.

STATEMENT OF FACTS

In January of 2005 Larry Engel came under the care of Dr. Marek Skoskiewicz, a surgeon. Larry sought out the services of Dr. Skoskiewicz for a bilateral vasectomy. (See "Joint Stipulation of Facts Relevant To Immunity" filed in the Court of Claims on September 5, 2008).

Dr. Skoskiewicz first operated upon Larry on January 13, 2005. This surgery took place at the Henry County Hospital, which is not a state-affiliated hospital and which is located in Napoleon, Ohio, some 36 miles southwest of UTCM (per mapquest.com). Following this surgery the pathology report showed that Dr. Skoskiewicz had resected a vessel other than the vas deferens on the right side. Without both the right and left vas being properly resected, tied or otherwise occluded, a man is still fertile. Therefore, on January 27, 2005, Dr. Skoskiewicz performed a re-do vasectomy on Larry Engel's right side. (Id, ¶ 3) This surgery was also performed at the Henry County Hospital.

Following this second procedure Larry Engel's right testicle swelled significantly above normal size, and became excruciatingly painful. Within a few days it was determined that there was no blood supply to Larry's right testicle, causing it to become necrotic. Larry's right testicle was removed by another surgeon on January 31, 2005.

At all relevant times Dr. Skoskiewicz was in private practice, and not employed by UTCM or its then affiliated physicians group, Associated Physicians of the Medical College of Ohio. (Id at ¶ 4) However, Dr. Skoskiewicz did at all relevant times have an appointment as a volunteer faculty member as a clinical assistant professor in the Department of Surgery at the then Medical College of Ohio.

Larry Engel properly served a 180 day letter upon Dr. Skoskiewicz, and the Henry County Hospital, and later, within the 180 days, filed suit against Dr. Skoskiewicz only in the Henry County Court of Common Pleas on May 15, 2006.

On June 14, 2006, through counsel appointed by his professional liability malpractice carrier, Dr. Skoskiewicz filed his answer to Larry Engel's complaint. This Answer did not assert an affirmative defense of immunity or otherwise raise the issue of immunity.

On December 13, 2006, this Court issued its opinion in Theobald II. Theobald II upheld the Tenth District's decision in Theobald I which was, as the state has suggested, a "sea change" of how state actor immunity should be decided. In Theobald I the Tenth District announced a new test for determining a physician's immunity. This new test focused primarily on whether at the time of the alleged negligence the physician was educating medical students/residents (even peripherally or remotely), rather than the traditional evaluation of financial factors and business relationships between physicians and medical schools. 2005-Ohio-1510, at ¶ 46. Theobald I issued by the Tenth District Court of Appeals reversed a ruling from the Court of Claims which, applying Ohio law as it

existed up until that time, found that none of the four defendants therein were not entitled to immunity.

Later, on February 20, 2008, (21 months after suit was filed in the Henry County Court of Common Pleas, 17 months after the release of Theobald II, 24 months after the initial statute of limitations had expired, and 18 months past the 180 day extended statute of limitations), Dr. Skoskiewicz filed a Motion to Dismiss or Alternatively to Stay Proceedings in the Henry County Court and, for the first time, asserted the defense of immunity under Theobald II.

The Henry County Court granted a stay (which is still in effect), and Larry Engel filed an action in the Court of Claims approximately one month after the first assertion of the immunity defense, on March 24, 2008.

Not believing that the General Assembly ever intended for the taxpayers of Ohio to indemnify the thousands of private, volunteer clinical faculty members of Ohio's state medical schools now entitled to immunity under the new Theobald II test (which virtually guarantees that they will always be immune), UTCM has taken the position throughout this litigation that Dr. Skoskiewicz is not entitled to immunity under the facts of this case. The issue before the Court of Claims was whether as a private-practitioner, volunteer faculty member who merely permitted a third year medical student to observe his two surgeries on Larry Engel in a non-state owned or operated hospital, Dr. Skoskiewicz qualified as an "officer or employee" of the State of Ohio who was entitled to immunity under R.C. 9.86.

Based upon this Court's holding in Theobald II, the Court of Claims found that Dr. Skoskiewicz's status as an unpaid volunteer faculty member was irrelevant, and that since a medical student was observing both surgeries upon Larry Engel, that Dr. Skoskiewicz was entitled to immunity.

Believing that this ruling portended financial ruin for the treasury of the State of Ohio, and decimation of the process by which medical students are educated in Ohio, UTCM appealed the decision of the Court of Claims to the Tenth District Court of Appeals.

On August 11, 2009, the Tenth District upheld the immunity determination of the Court of Claims. Engel vs. UTCM, 2009-Ohio-3957 (Exhibit B to Appellant's Merit Brief). In doing so, the Tenth District applied a very literal interpretation of the language in R.C. 109.36(A)(1)(a) that defines who is an "officer or employee" for purposes of determining immunity under. R.C. 9.86.

On behalf of UTCM and the State of Ohio the Attorney General has now appealed this case to this Court.

I. BOTH THE COURT OF CLAIMS AND THE TENTH DISTRICT COURT OF APPEALS ERRED IN INTERPRETTING R.C. 109.36(A)(1)(a) LITERALLY WITHOUT CONSIDERING THE OVERRIDING PURPOSE OF THE COURT OF CLAIMS ACT, R.C. 2743 et seq., AND THE CONSEQUENCES OF AN OVERLY BROAD INTERPRETATION OF THAT STATUTE

Proposition of Law No. 1

Only those appointed to an office or position with the state by the Governor, with the advice and consent of the Senate, are deemed "officers or employees" under R.C. 109.36(A)(1) for purposes of immunity under R.C. 9.86.

The Ohio General Assembly enacted the Court of Claims Act in 1975. With this Act's passage, Ohio now permitted itself to be sued for damages as if it were a private citizen, albeit in a new, special court it established as part of that Act. R.C. 2743.02. As this Court explained:

> [I]n 1975, the "General Assembly enacted legislation [the Court of Claims Act, R.C. Chapter 2743] creating the Court of Claims and specifying the forum and manner in which actions may be brought against the state and its officers and employees." [citation omitted] Under the Court of Claims Act, the state "waives its immunity from liability" and "consents to be sued" in the Court of Claims. R.C. 2743.02(A)(1)

Johns vs. Univ. of Cincinnati Med. Assoc., 101 Ohio St. 3d 234, 237. 2004-Ohio-824 at ¶ 16.

R.C. 9.86, the code section that grants immunity to state "officers and employees" states in relevant part:

> § 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.

(emphasis added)

However, R.C. 9.86 fails to define what either an "officer" or an "employee" is for purposes of that statute. Therefore, this Court has held that for purposes of R.C. 9.86, the definition of "officer or employee" found in R.C. 109.36 is to be used. Theobald II, 2006-Ohio-6208, at ¶ 14. Relevant to the case at hand is R.C. 109.36(A)(1)(a), which states:

> §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.

(emphasis added)

The courts below have held that Dr. Skoskiewicz qualifies for immunity under R.C. 9.86 and 109.36(A)(1) as a result of his having been "appointed" to a "position" with the state as a volunteer clinical professor of surgery at UTCM. However, no definition of exactly what type of "position" the General Assembly contemplated in passing R.C. 109.36(A)(1) is provided in that code section. Larry

Engel has not been able to find any definition of "positions" with the state anywhere in the R.C. or in case law that pertain to entitlement to immunity. Thus, it would appear that the term "position" in this context must be construed by this Court.

In interpreting R.C. 109.36, or any statutory law for that matter, a court must keep in mind the overall context in which the statute, and the language of that statute, exist. See generally, State ex rel. Toledo vs. Bd. Of Comm'rs (1987), 32 Ohio St. 3d 352, 356. This Court has held in syllabus law that:

> Statutes relating to the same matter or subject, although passed at different times and making no reference to each other are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent.

State ex rel. Pratt vs. Weygandt (1956), 164 Ohio St. 436, at ¶ 2 of the syllabus.

Thus, when applying the definition or "officer or employee" from R.C. 109.36(A)(1), this court must read that *in pari materia* with the context and purpose of R.C. 9.86 – the statute to which that definition is to be applied.

Additionally, as was stated by this Court in Doe vs. Marlington Local School Bd., 122 Ohio St. 3d 12, 15, 2009-Ohio- 1360, at ¶ 10, a court must "bear this legislative purpose in mind as [it] consider[s] and appl[ies] the provisions of [any R.C. Chapter]." Id.

What then was the legislative intent of the General Assembly when passing the Court of Claims Act? This Court has already answered this question in Community Ins. Co. vs. ODOT, 92 Ohio St. 3d 376, 378, 2001-Ohio-208. In Community Ins. the plaintiff, Community Insurance, sued the Ohio Department of Transportation to recoup through subrogation medical expenses it had paid on behalf of its insured who had been seriously injured as a result of negligence by ODOT. In rejecting Community Insurance's subrogation claim this Court held that such a claim was barred by

Section 2743.02 (D) of the Court of Claims Act. This Court noted that, similar to Chapter 2744 of the R.C. (pertaining to political subdivisions), in waiving sovereign immunity and allowing itself to be sued, the State had two main purposes: 1) to compensate otherwise uninsured victims and, 2) to preserve the fiscal resources of the State. Id at 378-9. (Emphasis added) Thus, "preserve[ing] the fiscal resources of the state" must be kept in mind when construing R.C. 109.36(A)(1) and 9.86 in the context of this case.

The courts below found Dr. Skoskiewicz was entitled to immunity under R.C. 9.86 because they felt he met the requirements of R.C. 109.36(A)(1), i.e., they held that since Dr. Skoskiewicz was appointed by the board of UTCM as a volunteer member of its clinical faculty, that he held an "appointed ... position" with the state rather than an appointed office.

> 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 determination of "officer or employee."

Engel, 2009-Ohio-3957, at ¶ 10 (emphasis added).

The Court of Claims similarly wrote:

> 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 procedure 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.

Engel, 2008-Ohio-7058, at ¶ 23 (emphasis added)

In reaching this conclusion, however, neither court below addressed exactly what a "position with the state" means in the context of immunity. That a volunteer assistant clinical professor

constituted a "position" was apparently assumed by both courts. Such an assumption on such an important matter cannot stand without some basis in law. Cloaking a person's negligent acts with immunity is a step with Constitutional implications that cannot be taken lightly. Granting immunity to an actor deprives the injured party of his or her right to a jury trial, and burdens the state with the cost of the damages caused by the actor's negligence. Therefore, Larry Engel submits that some analysis/construing of what a "position with the state" means in this context is required.

In construing an ambiguous statute this Court has held that the consequences of a particular construction must also be considered.

> When a statute is subject to varying interpretations, it is ambiguous and we must construe it in a manner which carries out the intent of the General Assembly. *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26, 550 N.E.2d 461. We look to the language of the statute, the circumstances under which the statute was enacted, legislative history, and the consequences of a particular construction when determining the intention of the legislature. R.C. 1.49; *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007 Ohio 2203, 865 N.E.2d 1275, P 12.

Sheet Metal Workers vs. Gene's Refigeration, 122 Ohio St. 3d 248, 2009-Ohio-2747, at ¶ 29 (emphasis added)

A great deal of the State's Merit Brief addresses the adverse consequences it sees resulting from an affirmance of the case at bar, and therefore Larry Engel will not address those at length herein.

In order to be an "appointed officer" of the state subject to immunity under the Court of Claims Act, one would likely have to be appointed to an official office. In trying to construe what types of "positions" the General Assembly had in mind when enacting R.C. 109.36(A)(1), it is helpful to understand what types of "officers" would be considered eligible for immunity.

The Constitution of the State of Ohio is a good starting point for determining what types of

officeholders the state intends to cloak with immunity for actions taken in furtherance of those official duties. Article XV, Section 4 sets forth the following requirement of eligibility to hold a state office:

> §4. Who eligible to office
>
> No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.

Additionally, under the Constitution of Ohio, anyone "chosen or appointed" to an office must take an oath to support the Constitutions of both the USA and the State of Ohio:

> Article XV, Section 7 states that:
>
> §7. Oath of officers
>
> Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office.

The requirement that an office holder take an oath of office is also found in the R.C.

> § 3.22. All officers must take oath of office
>
> Each person chosen or appointed to an office under the constitution or laws of this state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties. . . .

R.C. 3.22

Although the evidence below was not developed to the point of determining whether Dr. Skoskiewicz or other appointed volunteer faculty members of UTCM were required to take oaths or affirmations to support and uphold the Constitutions of the U.S. and State of Ohio, as well as an oath of "Volunteer Clinical Assistant Professor", it seems unlikely that would be the case.

R.C. 3.03 addresses how when a state office is vacated and subject to appointment to fill, such appointment is to be performed by the governor with the advice and consent of the senate.

> § 3.03. Filling vacancy in appointive state office
>
> When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a regular session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. . . .

(emphasis added)

In the Related Statutes & Rules annotations to R.C. 3.03 is a laundry list of many (if not all) state boards, commissions, departments, etc. that all are headed by officers who are appointed by the governor with the advice and consent of the senate. None of these Related Statutes & Rules references professorships, whether paid or volunteer.

Additionally, R.C. 102.01 dealing with ethical requirements of public officers or employees, specifically exempts the type of appointed professorship held at the relevant time by Dr. Skoskiewicz from Ohio's ethical rules for public officers or employees:

> (B) "Public official or employee" means any person who is elected or appointed to an office or is an employee of any public agency. "Public official or employee" does not include a person elected or appointed to the office of precinct, ward, or district committee member under section 3517.03 of the Revised Code, any presidential elector, or any delegate to a national convention. "Public official or employee" does not include a person who is a teacher, instructor, professor, or other kind of educator whose position does not involve the performance of, or authority to perform, administrative or supervisory functions.

R.C. 102.01 (B) (emphasis added)[2]

Finally, professorships are specifically excluded from the definition of civil servants by

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2 "Supervisory functions" here must mean supervisor of other teachers or instructors because every teacher, professor, and educator "supervises" his or her students while in their charge.

R.C. 124.01:

> (K) "Service of the state" or "civil service of the state" includes all offices and positions of trust or employment with the government of the state. "Service of the state" and "civil service of the state" do not include offices and positions of trust or employment with state-supported colleges and universities, counties, cities, city health districts, city school districts, general health districts, and civil service townships of the state.

(emphasis added)

The point of all this is that when enacting R.C. 109.36, the types of positions and appointing processes that the General Assembly likely had in mind involved gubernatorial-level appointments to positions with Constitutional duties and obligations, rather than next-level down appointments. Allowing such second tier appointments (i.e., appointments by appointees) to confer immunity would effectively allow local appointments to vest state-immunity upon appointees without the involvement or even knowledge of the state.

Since the treasury of the State of Ohio is responsible for the damages caused by those who are found to be immune under R.C. 9.86, and recognizing that one of the purposes of the Court of Claims Act is to "preserve the fiscal resources of the state" Community Ins., supra, at 378-9, to read R.C. 109.36(A)(1) in conjunction with R.C. 9.86 so expansively as to include second-tier appointments, rather than Gubernatorial appointments with the advice and consent of the senate, violates the intent and spirit of the Court of Claims Act.

Wherefore, Larry Engel, Jr. now believes that R.C. 109.36(A)(1) is ambiguous as it relates to the types of "positions" it encompasses, and therefore must be construed. In construing that statute, and keeping in mind the legislative intent, and the consequences to the treasury of the State of Ohio if read too broadly, Larry Engel now believes that R.C. 109.36(A)(1) should not be read to apply to appointed clinical professors, and that therefore the decision of the Tenth district should be reversed.

II. THEOBALD IS UNWORKABLE WHEN APPLIED RETROSPECTIVELY

Proposition of Law No. 2

Theobald vs. Univ of Cincinatti (2006), Ohio St. 3d 541is to be applied prospectively only to cases that accrued after its release on December 13, 2006.

That Theobald I and II changed the legal landscape of immunity determinations in Ohio cannot be disputed. At the Court of Claims level, the medical practitioners in the Theobald case were all found not to be entitled to immunity. (See Exhibit "A")[3]

Theobald arose out of allegedly negligent treatment of Keith Theobald which took place in October, 1998. Theobald filed timely claims in October of 1999 in the Hamilton County Court of Common Pleas against four separate health-care providers; Dr. Jamal Taha, Dr. Frederick Luchette, Dr. Harsha Sharma, and a Certified Registered Nurse Anesthetist, Maureen Parrott. In 2001 Theobald was placed on stay by the Hamilton County court for a determination of immunity by the court of claims.

The Court of Claims found that at the relevant time Dr. Luchette was employed by the University of Cincinnati as an assistant professor of surgery, and also was an employee of a private practice group, the University Surgical Group of Cincinnati. (Exhibit "A", at p. 10) In the year that he treated Keith Theobald, the Court of Claims found that Dr. Luchette was paid in excess of $61,000.00 by the University of Cincinnati. However, the Court of Claims also found that Dr. Luchette's private practice group billed (and was paid) for the treatment rendered to Keith Theobald, and noted that all relevant treatment was delivered at a private hospital.

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3 Exhibit A is an unfiled-stamped copy of the April 23, 2002 Decision by Judge Shoemaker of the Court of Claims. This copy was obtained from the Court of Claims website which only displays this unsigned and unfile-stamped copy.

Based upon these facts, and applying the Tenth District's analysis from Wayman vs. Univ. of Cincinnati (June 22, 2000), Franklin App. No. 99-AP-1055, 2000 Ohio App. Lexis 2690 (copy attached as Exhibit "B"), the Court of Claims found that when treating Keith Theobald Dr. Luchette was acting outside of any employment duties he had with the University of Cincinnati, and therefore was not entitled to immunity.

Regarding Dr. Sharma, the Court of Claims found that he also was at all relevant times an assistant professor of medicine at the University of Cincinnati (for which he was paid $12,000.00 in the relevant year), as well as a member of a private practice group of anesthesiologists, which group billed for the anesthesiology services rendered to Keith Theobald.

Applying the Wayman analysis again, the Court of Claims found that Dr. Sharma was not entitled to immunity. (Exhibit "A" at p.10-11)

Regarding Dr. Taha, the Court of Claims found that he was employed solely by another private entity, the Mayfield Clinic. The court found that it was the Mayfield Clinic that billed for Dr. Taha's treatment of Keith Theobald. The court also noted that the Mayfield Clinic had a contract with the University of Cincinnati to supervise and teach residents. (Id, p. 11)

The Court of Claims found that Dr. Taha was not an employee of UC and, even if he was, under Wayman, he would not be entitled to immunity.

Finally, Maureen Parrott, CRNA. Nurse Parrott was found to be an employee of the same private anesthesiology group as was Dr. Sharma, and therefore was not entitled to immunity.

Thus, the Court of Claims initially held that none of the individual defendants in Theobald was entitled to immunity, and that those claims belonged back in the Hamilton County Court of Common Pleas.

On appeal to the Tenth District, however, the appellate court used an entirely different test to

analyze the individual medical care provides entitlement to immunity. In applying its new test (i.e., whether at the relevant time an actor was engaged in teaching a health care student - regardless of the degree of that student's involvement in the patient's care, Theobald I at ¶ 47, 49), the Tenth District took great pains to distance itself from its previous analysis of entitlement to immunity based primarily on financial and control factors. In what seemed a results-oriented approach, the Tenth District held that in most cases when the traditional financial/control tests were utilized, immunity was rarely found. The Tenth district explained:

> In each of the cases that focused upon financial factors in determining whether the practitioner was within the scope of employment with the state university at the time of the alleged wrongful act, the result was the same: the practitioner was not immune. Generally, we reached this result because the private practice plan typically had significantly greater financial involvement in the provided care. Most, if not all, Ohio state medical schools affiliate with separate corporations run and staffed by clinical faculty members to deal with the income generated from the clinical faculty members' practices. These corporations, or practice plans, employ the medical school clinical faculty and provide the majority of the clinical faculty members' salaries. Additionally, the practice plans are responsible for billing and collecting payments for the services the clinical faculty members provide as part of their practice of medicine. Often, the practice plans also provide the practitioner's malpractice insurance.
>
> * * *
>
> Although medical schools exercise a high degree of control over these practice plans and benefit from their profitability, the schools themselves have little direct involvement with the financial aspects of the practice of medicine. Therefore, the use of the financial factors to determine whether a practitioner is within the scope of his employment with the medical school will almost always result in a negative answer. Furthermore, the financial factors generally do not address the core scope of employment issue: whether the practitioner was acting to further the medical school's interests.

Theobald I, at ¶ 36, 38 (emphasis added)

Making what amounts to a policy decision that more physicians should be immune and that

the State should shoulder the liability for more state actors, the Tenth District formulated its new test that virtually guaranteed that any medical school professor would be entitled to immunity if a student had any involvement whatsoever in the patient's care.

Perhaps lost in Theobald I, however, was its analysis of nurse Parrott's entitlement to immunity. Similar to Dr. Skoskiewicz herein, nurse Parrott was a volunteer clinical instructor for UC who supervised nurse-anesthetist students through her private practice group employment. Theobald I, at ¶ 27.

In addressing whether as a volunteer clinical instructor nurse Parrott was entitled to immunity, the Tenth District fell back onto the more traditional financial/control factors. The Tenth District wrote:

> Neither Nurse Parrott's admission that she was not an UC employee nor her testimony that she was not compensated by UC is dispositive of her employment status.... Rather, in order to determine whether a volunteer clinical instructor at a state university is a state employee for purposes of immunity, this Court must analyze the relationship between the university and the instructor's private practice plan.
>
> * * *
>
> 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 I, at ¶ 28, 30[4]

The fact that the Court of Claims and the Tenth district disagreed so completely as to all four

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4 Larry Engel recognizes the distinction between the Tenth District's finding that Nurse Parrott was an "employee" of UC and its later determination that Dr. Skoskiewicz is entitled to immunity as an "appointee." Larry Engel mentions this however to point out the multiple results-oriented analyses the Tenth District is willing to entertain to reach the same result , i.e., immunity and its corresponding financial responsibility foisted upon the treasury of the State of Ohio.

individual defendants, indicates "strongly" the ambiguity inherent in the proper interpretation of, and interplay between, R.C. 109.36(A)(1) and 9.86. Meeks vs. Papadopulos (1980), 62 Ohio St. 2d 187, 190.

Just five months after Theobald I was released by the Tenth District, the Court of Claims released its decision in Hans vs. OSU Medical Center, 2005-Ohio-4457. This decision (which was authored by Judge Shoemaker who had just been reversed in Theobald) thrust immunity upon a physician who did not himself claim, nor apparently want, immunity, nor did the university he was affiliated with feel in that case that he was entitled to immunity. The Court of Claims decision notes that:

> Dr. Schirmer had not asserted that he is entitled to personal immunity. Rather, he maintains that at all times pertinent he was an attending physician rendering treatment to Hans in his capacity as an employee of DOSC, his private practice group. Defendant [OSU Medical Center] also contends that Dr. Schirmer is not entitled to immunity.

Id at ¶ 9

In spite of the physician himself and the university he was ostensibly acting within the course and scope of employment of not claiming nor wanting immunity to apply in that instance, the Court of Claims thrust that status onto them both. Citing Theobald I, the Court of Claims wrote:

> Further, even though Dr. Schirmer himself is not claiming immunity, the court in Theobald has held that even an individual who works for a university on a volunteer basis, not as an employee and not receiving compensation, can be deemed a state employee for purposes of immunity... Accordingly, for all the foregoing reasons, the court finds that Dr. Schirmer is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

Id at ¶ 31

Thus, following the result-oriented Theobald I analysis, the State was to be burdened with the liability for the alleged negligent acts of a physician who himself did not believe he was acting

within the scope of his affiliation with OSU, nor who OSU (which either appointed or employed him) felt was acting within the scope of that appointment/employment.

Next in line of the Theobald evolution was this Court's decision of December 13, 2006, Theobald II.

In Theobald II this Court affirmed the Tenth District's decision in Theobald I. This Court held that the determination of an actor's entitlement to immunity involved a two-part test. First, the Court of Claims must determine whether or not the actor was a state employee.[5] If yes, the next step is to determine whether at the relevant time the actor was within the scope of that employment.

In Theobald II this Court cited with approval the case of Ferguson vs. OSU Med. Ctr. (June 22, 1999), Franklin App. No. 98AP-836, 1999 Ohio App. Lexis 2828. (Copy attached as Exhibit "C"). Ferguson remains good law and has been cited by the Tenth District Court of Appeals as recently as May 10th of this year in Schultz vs. Univ. of Cincinnati, 2010-Ohio-2071, which will be discussed later herein.

As this Court noted in Theobald II, Ferguson held that financial/billing matters may not always be determinative of whether or not an actor was acting within the scope of employment with the state for purposes of immunity. Theobald II, at ¶ 19. However, Ferguson offered a different inquiry than Theobald I's results-oriented inquiry into whether or not a student had any involvement whatsoever in a physician's care of a patient. Rather, in Ferguson, the inquiry focused more on whether the physician's involvement in treating the patient was as his own patient (with a student's observation/participation being merely incidental), or primarily to supervise and/or teach a student or residents – in furtherance of his or her role as a medical school professor. As quoted by this Court:

5 In Theobald this first prong was agreed to by all parties. In the case at bar the issue revolves around this first prong but asks whether an "appointment" by a university board of trustees to a volunteer faculty position also qualifies under R.C. 109.36 as an "officer or employee" who is entitled to immunity.

> The key issue in determining whether Dr. Little is entitled to personal immunity is whether he saw the patient only in his capacity as an attending physician supervising residents at OSUMC or whether he saw the patient as a private patient.

Theobald II, at ¶ 19, quoting from Ferguson, supra, at p. 6 (emphasis added)

This "key issue" in Ferguson which this Court cited with approval somehow morphed in Theobald I into a rule that it did not matter why or how the physicians saw or treated a patient, so long as a student was nearby, that treatment was deemed to be within the scope of employment for purposes of immunity. ("Notably, the degree of the student or resident's involvement is not significant in this analysis as long as the practitioner was teaching at the time of the alleged wrongful act.") Theobald I, at ¶ 49.

In Theobald II this Court did not comment specifically on this proposition that the degree of a student's involvement of a patient was irrelevant to an attending physician's entitlement to immunity.

Thus, long standing case law creating a balanced, logical approach to whether or not a physician's actions were sufficiently in furtherance of the state's interest to warrant to cloak of immunity, such as Ferguson, supra, (if patient was seen only in capacity as an attending physician supervising students or residents), Norman vs. OSU Hosp. (1996), 116 Ohio App. 3d 69 ("... whether the practitioner only saw the patient in the course of supervising or instructing a resident..." (emphasis added)), and Kaiser vs. OSU, 2002-Ohio-6030 (wherein a resident actually treated the patient with minimal supervision by the attending physician), was eviscerated in favor of a results-oriented test that virtually insured that physicians would be entitled to immunity for which the treasury of the State of Ohio would bear the burden for their negligence no matter how minimal or incidental the student's involvement in the patient's care.

This Court cited to Theobald I in explaining the basis for its affirmance of the shift away from financial/control factors as follows:

> The court of appeals faulted that approach, stating that the financial factors "generally have little bearing upon whether a practitioner is acting within the scope of his employment." *Theobald,* 160 Ohio App. 3d 342, 2005 Ohio 1510, 827 N.E.2d 365, at P 46. This is because, as the court of appeals explained, "[m]ost, if not all, Ohio state medical schools affiliate with separate corporations run and staffed by clinical faculty members to deal with the income generated from the clinical faculty members' practices. These corporations, or practice plans, employ the medical school clinical faculty and provide the majority of the clinical faculty members' salaries. Additionally, the practice plans are responsible for billing and collecting payments for the services the clinical faculty members provide as part of their practice of medicine." Id. at P 36. This arrangement allows universities to attract and compensate highly qualified clinical instructors while the practice groups or corporations, in turn, financially contribute to maintain the medical departments within the university. Id. at P 37.
>
> We agree with the court of appeals. . .

Theobald II, at ¶ 22 – 23 (emphasis added)

In the situation described by the Court above, it appears that the Court felt that a university-affiliated private physician practice corporation was more of an alter ego of the university rather than a truly independent private corporation, and therefore the fact that billings for services came not from the university itself, but instead from its alter ego, should not stand in the way of a true university affiliated physician being found immune.

In the instant case however, Larry Engel was a private patient who had been referred directly to Dr. Skoskiewicz at his office at the Henry County Hospital by his family practice physician. Dr. Skoskiewicz was not employed by, or otherwise affiliated with UTCM's physician practice group. Instead, he was truly an independent sole practitioner of medicine who billed directly for his own services. Dr. Skoskiewicz was going to operate on Larry Engel regardless of whether the UTCM student was present or not. The fact that a student was present during Larry Engel's surgeries was

incidental, and irrelevant to the care Dr. Skoskiewicz rendered. Thus, he was not the type of university - affiliated physician this Court was concerned about in ¶ 22 of Theobald II quoted above.

In affirming the Tenth District's Theobald I decision this Court appears to have indirectly adopted that court's view that the degree of a student's involvement is irrelevant, so long as one could be said to have been "involved" at all. This Court wrote:

> R.C. 9.86 is inclusive and makes no exception for persons who may simultaneously have other employment interests. It provides immunity for all state employees as long as they are acting within the scope of their employment when the injury occurs.

Theobald II, at ¶ 25 (emphasis added)

It is this "exception-free" interpretation of R.C. 9.86, virtually ensuring that all appointed clinical faculty members will be found immune that fosters the financial armegaddon to the treasury of the State of Ohio which the state now fears, as it has aptly expressed in its Merit Brief.

Since Dr. Skoskiewicz was never employed by UTCM's alter-ego physician practice group, there is no reason to apply a Theobald analysis to this case. Instead, the earlier tests of Ferguson, supra, Norman, supra, and Kaiser, supra, should be used herein and, applying those tests, the Tenth district should be reversed, and Dr. Skoskiewicz should be found not entitled to immunity.

III. The Expansion of Theobald Has Led to Unfair And Unworkable Results

Proposition of Law No.3

When in a timely filed action in a court of common pleas, a plaintiff discovers that a health care provider is asserting an entitlement to immunity pursuant to R.C. 9.86, and the plaintiff thereafter initiates an action in the Court of Claims pursuant to R.C. 2743.02(F), the date of the filing of that action relates back to the filing of the initial action in the common pleas court. (Civil Rule 15(C) applied)

A very recent and troubling trend has come out of the Court of Claims and the Tenth District

Court of Appeals which, depending on this court's decision herein, likely will impact Larry Engel's case. For this reason Larry Engel feels he must address this matter now to insure that the Court is aware of the implications its decision in this appeal will have on his ultimate right to continue to pursue damages in any forum for the alleged negligence of Dr. Skoskiewicz.

For cases such as Larry Engel's , i.e., those arising prior to Theobald II, the State of Ohio has been moving for, and getting, Civ. R. 12(B)(6) dismissals of cases that were initially (and properly under then-existing law) filed in a Common Pleas Court. The basis for these Civ. R. 12(B)(6) dismissals is that because the original suits were brought in a Common Pleas Court, the argument goes, by the time the plaintiff's action was finally brought in the Court of Claims (in response to a recent assertion of immunity), and the physician was found to be immune, it was untimely. Thus, the Common Pleas Court no longer has jurisdiction over the now-immune physician, and the action against the State is dismissed from the Court of claims on a statute of limitations basis. The end result being that the injured plaintiff is without a forum in which to have his action heard.

In Theobald III, on remand from this Court, the Tenth District upheld the dismissal of Keith Theobald's case on such a 12(B)(6) basis. As was discussed above, Keith Theobald's allegedly negligent treatment occurred in 1998. At that time the test being utilized by both the Court of Claims and the Tenth District were those which relied upon financial and control issues. In reliance on the law as it existed up until that time, Keith Theobald's attorneys filed suit in Common Pleas Court. In filing their answers to the complaint in Common Pleas Court, each of the defendants apparently raised a boilerplate affirmative defense of immunity. However, it does not appear that any of those defendants took any action toward proving that defense (which would have failed under the then-existing law) until sometime in 2001. Even though the Court of Claims itself held that none of the

defendants in Theobald was entitled to immunity, due to the later reversal of that decision, the Court of Claims now found that the state was entitled to a dismissal of the entire cause of action because it was not initiated in that court until after the statute of limitations had expired.

In upholding this 12(B)(6) dismissal the Tenth District noted that the boilerplate affirmative defense of immunity had been pled more than a year before the plaintiff initiated his action in the Court of Claims. The Tenth District noted that:

> [A]ppellants were aware that the status [of immunity] was being claimed more than one year before the filing of their action in the Court of Claims.

Theobald III, at ¶ 12.

The clear implication of this statement is that if the plaintiffs had not been aware of the possibility of the defense of immunity the Tenth District would have viewed the matter differently, i.e., felt that a discovery rule might be appropriate in that circumstance.

Unless a patient specifically knows to ask a physician about his or her status with any state medical schools (and the import of that status – which interestingly, the Court of Claims apparently did not understand in its initial consideration of Theobald), they are unlikely to ever know that information. Without knowing of a physician's appointment (or employment) as a clinical professor of a state medical school (particularly when the care is being provided in a private office or hospital), there is no reason for a plaintiff to file an action in the Court of Claims.

In Theobald II this Court held that a physician has no duty to advise a patient of his or her position as an agent of the state as part of informed consent (Theobald II at ¶ 32) (See also Schultz, supra, at ¶ 46). One remedy suggested to this paradox was proposed by the Tenth District Court of Appeals in Schultz, supra, wherein it suggested that "[w]hile burdensome, [filing parallel suits in both a Common Pleas Court and the Court of Claims], may be the prudent course of action in every

medical malpractice case filed." Schultz, at ¶ 43 (emphasis added)

Later, on January 14th, 2010 the Tenth District released its decision in the case of Clevenger vs. Univ. of Cincinnati, 2010-Ohio-88. In this Clevenger II decision (upholding the Court of Claims Clevenger decision, supra), the Tenth District upheld the grant of a 12(B)(6) dismissal of the action in the Court of Claims, again on the basis that although an action had been timely commenced in a Common Pleas Court, by the time the defense of immunity had been asserted and made its way to the Court of Claims, the statute of limitations had expired.

In Clevenger II the plaintiff argued, as the Tenth District had suggested in Theobald III, that a discovery rule should be created for situations such as hers, in which a plaintiff has no way of knowing a physician's status as a member of a university's clinical staff. The Tenth District set forth this proposition as follows:

> The fact that litigation was not initiated in the Ohio Court of Claims within the one-year period set forth in R.C. 2305.113(A) and applied to the Court of Claims via R.C. 2743.16(A) is not open to debate. Counsel for Ms. Clevenger submits that a new theory of discovery regarding a tort claim should be developed and applied to her case. The theory is that a patient who knows she has received injuries as a result of a medical treatment which she knows or should have known was negligently performed does not have her claim accrue until she and her counsel are sure of which court is the appropriate court in which to pursue the claim. We find no case law to support this theory and will defer to the Supreme Court of Ohio to add or not to add this theory to the law of Ohio.

Clevenger, 2010-Ohio-88, at ¶ 16 (emphasis added)

By the highlighted portion above, the Tenth District did not reject the proposition that equity called for a discovery rule in situations such as faced Betty Clevenger, but rather simply recognized that no such rule had yet been announced by this Court, and that therefore it would leave that decision up to this Court.

Unfortunately this Court rejected jurisdiction of Clevenger on May 26th of this year, at 2010-Ohio-2212. In doing so this Court passed on the opportunity to address the Tenth District's invitation to determine whether to adopt an equitable discovery rule relative to an assertion of immunity after the running of the statute of limitations.

Thereafter, on May 11th, 2010 the Tenth District released its decision in Schultz, supra. Like Theobald, Schultz arose in the late 1990's – long before Theobald had modified the test utilized for immunity. Because there was no reason to even consider doing so in 1998 under the then-existing interpretations of the Court of Claims Act, James Schultz filed his action against a defendant physician in the Hamilton County Court of Common Pleas. Due to some procedural maneuvering that included dismissals and refilings, the issue of immunity was not raised by the defendant in earnest until after the release of Theobald II. Within one year of the defendant's motion asserting immunity the plaintiff filed an action in the Court of Claims seeking a determination of whether the defendant physician was entitled to immunity in the first place, and secondly whether Theobald could be retrospectively applied to that action which accrued some nine years earlier.

Upholding again a Rule 12(B)(6) dismissal on statute of limitations grounds, the Tenth District addressed the inequity of applying 2006 case law to a 1997 occurrence, but noted that this Court had the opportunity to make its Theobald II decision prospective only, but had not done so. Id at ¶ 25. In finding that it was constrained to apply Theobald retrospectively, the Tenth District wrote:

> The *Theobald* court had discretion to apply its decision only prospectively. *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008 Ohio 5327, 897 N.E.2d 132 (holding in paragraph two of the syllabus that an Ohio court has discretion to apply its decision only prospectively after weighing certain factors). Nothing in *Theobald* suggests that the court intended its decision to be applied prospectively only. *Cf. Medcorp, Inc. v. Ohio Dep't of Job & Family Servs.*, 124 Ohio St. 3d 1215, 921 N.E.2d 239, 2009 Ohio 6425, P4 ("[t]he holding in [*Medcorp, Inc. v. Ohio Dep't of Job & Family*

> *Servs.*, 121 Ohio St. 3d 622, 906 N.E.2d 1125, 2009 Ohio 2058] shall apply only to cases filed on and after June 15, 2009, the date on which the opinion in [*Medcorp*, 121 Ohio St. 3d 622, 2009 Ohio 2058, 906 N.E.2d 1125] was published in the Ohio Official Reports advance sheets"); *State ex rel. Adams v. Aluchem, Inc.*, 104 Ohio St.3d 640, 2004 Ohio 6891, P8, 821 N.E.2d 547 ("[w]e agree with claimant's contention that our decision in [*State ex rel.*] *Thomas* [*v. Indus. Comm.* (Dec. 19, 2000), 10th Dist. No. 00AP-289], must be applied retrospectively because we did not expressly state that the decision was to be applied only prospectively"). Although appellants' counsel strongly disagrees with the holding in *Theobald*, 111 Ohio St. 3d 541, 2006 Ohio 6208, 857 N.E.2d 573, we must apply the law as set forth by the Supreme Court of Ohio. See *State v. Horton*, 10th Dist. No. 06AP-311, 2007 Ohio 4309, P60 (noting a court of appeals is bound by and must follow decisions of the Supreme Court of Ohio unless and until they are reversed or overruled).

Schultz, at ¶ 25 (emphasis added)

The Tenth District again then suggested as it had held recently in Clevenger, supra, that:

> We also stated in *Clevenger* that, because the plaintiff was on notice that issues regarding immunity might well have been present in the case, "[t]he prudent course of action would have been to file suit in both the Ohio Court of Claims and the Court of Common Pleas for Hamilton County, Ohio and then submit the immunity issue to the Court of Claims in order to determine which court was the appropriate forum." Id. at P17. Although the facts of *Clevenger* differ from those in the instant case, i.e., Clevenger's surgery was performed in 2007, after *Theobald* was decided, we believe this court's assertion applies to the instant case.
>
> As noted, Dr. Dunsker's 1999 deposition demonstrates that he asserted a claim of immunity in his answer to appellants' 1998 complaint. Appellants and counsel were thus on notice that issues regarding immunity might well be present in this case. Thus, as this court averred in *Clevenger*, appellants' prudent course of action would have been to file suit in both the Ohio Court of Claims and the Court of Common Pleas for Hamilton County. While burdensome, this may be the prudent course of action in every medical malpractice case filed.

Id at ¶ 42-43 (emphasis added).

This final comment quoted above from the Tenth District screams out the unworkable consequences of the current law and the retroactive application of the Theobald II. For an appellate court to suggest that it is "prudent", i.e., necessary, for a plaintiff to have engaged in gratuitously burdensome machinations at any time, much less even before unforeseen case law changes are announced by this Court in order to avoid a statute of limitations defense that didn't exist at the time, should be viewed as a sign that a real problem exists that demands rectification by this court.

Larry Engel submits that a reasonable remedy for this problem is to apply Civ. R. 15 (C) in this situation so if during litigation in a common pleas court a defendant asserts personal immunity for the first time after the expiration of the statute of limitations, a subsequently filed action in the Court of Claims brought under R.C. 2743.02(F) relates back to the initial filing date in the common pleas court. Such a use of Civ. R. 15 (C) is appropriate since, if the physician is determined to be an "officer or employee" who is entitled to immunity, then he or she must then be "the responsible officer" of the university or other entity of the state on the matter at issue in the action.

> (C) Relation back of amendments.
>
> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of

> the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

Civ. R. 15 (emphasis added)

A. The Expansion of Theobald by the Lower Courts Has Led to Absurd Results

In applying this Court's "exception-free" view of a physician's entitlement to immunity if there is any student involvement whatsoever, the Court of Claims and the Tenth District Court of Appeals have extended Theobald to absurd results. The Hans, supra, case in which neither the physician at issue nor the university hospital claimed or wanted immunity had it thrust upon them has already been discussed. Other absurd extensions of Theobald include:

> Yurkowski vs. Univ. of Cincinnati, 2008-Ohio-6483 (Ct of Claims). (Physician acknowledged that when he saw patients at his private clinic there were never student/residents present. However, the physician also testified that he would use his outpatient treatments in lectures of students later.) Id at ¶ 15-16.

The Court of Claims held that this later incorporation of an interaction with a patient into a lecture was sufficient to cloak physician with immunity. Thus, under this interpretation, a physician can negligently treat a patient alone, without a student within miles of that encounter, but if that physician then discusses that case with students in a lecture or during rounds at some later day, he can retroactively cloak himself with immunity.

> Clevenger vs. Univ. of Cincinnati, 2009-Ohio-2829 (Ct of Claims) (Student or resident need not be present for immunity to attach. "The Theobald decision does not restrict physician immunity to situations where a resident or student was physically present or assisting in a surgical procedure." Id at ¶ 15).

Clevenger was then dismissed by the Court of Claims on a statute of limitations basis, as will be discussed, supra.

> Chappelear vs. OSU Medical Center, 2009-Ohio-7059 (Ct. of Claims) (citing Clevenger for the proposition that under this Court's decision in Theobald II it is not necessary for a student to be physically present when an attending physician treats a patient for immunity to attach. Id at ¶ 23)

Yurkowski , Clevenger, and Chappelear are all inconsistent with this Court's true holding in Theobald II that; "[i]f 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 II, at ¶ 31 (emphasis added). "Was in fact educating..." implies an active, present tense interaction between the physician as teacher and student, rather than some remote, later, reference in a lecture.

Clevenger was upheld by the Tenth District Court of Appeals on January 14, 2010 at 2010-Ohio-88. Thus, the current state of the law relating to immunity of university affiliated clinical professors is that, in spite of what this Court held in Theobald II (in order to be immune under the court of claims Act a physician needed to be "... in fact educating a student or resident when the alleged negligence occurred"), an attending physician need not be actually teaching, instructing, or supervising anyone at the time of his or her alleged negligence. Instead, so long as the alleged deviation from standard of care is later discussed with a student, the physician will be entitled to immunity. This expansion of Theobald II leaves little room for doubt that any clinical professor can at anytime immunize him or herself at will – even presumably during ongoing litigation in a court of common pleas, by making the subject case a topic of discussion with one or more students.

It seems unlikely that such an expansive reading of Theobald II was within the contemplation of the General Assembly when enacting the Court of Claims Act, nor within the contemplation of this Court in issuing Theobald II.

IV. Dr. Skoskiewicz Is No "Amicus" Of Larry Engel

Dr. Skoskiewicz has filed an amicus brief in which he claims to be filing it "on behalf of Plaintiff-Appellee Larry Engel, Jr." This amicus brief was filed by counsel who was appointed by Dr. Skoskiewicz's private professional liability carrier to represent Dr. Skoskiewicz in the action in the Henry County Court of Common Pleas.

Given the adverse effect of this Court's affirmance of the Tenth District's decision, coupled with the retroactive application of Theobald, and a statute of limitations defense in the Court of Claims could potentially have on Larry Engel's ultimate ability to ever be able to present his case on the merits to any tribunal, Dr. Skoskiewicz's position is friendly only to his private malpractice insurance carrier, and no one else.

Regardless of whether Larry Engel ever gets to have his case heard in the Henry County Court of Common Pleas, or in the Court of Claims, Dr. Skoskiewicz really has no personal interest what so ever. If a court, any court, ultimately hears Larry Engel's case and, if Dr. Skoskiewicz is found to have provided negligent care that caused the loss of Larry's testicle, the damages will be paid on his behalf either by his private malpractice carrier, or by the taxpayers of the State of Ohio. Regardless of which court may ever hear this case Dr. Skoskiewicz is a certain witness. Thus, while having no financial interest in this case, if it is able to proceed in any forum, Dr. Skoskiewicz's only interest is the inconvenience being a testifying witness may cause him.

The real winner in this action if this Court affirms the Tenth District is the malpractice carrier which collected premiums from Dr. Skoskiewicz, but then would have no obligation to indemnify him for damages caused by his negligence while a 3rd year medical student merely happened to be observing his negligent act.

The interests of professional liability insurance carriers in Ohio is clear - they see Theobald as a windfall to their bottom lines. What better risk to take than to collect full premiums for risks associated with a private physician's practice, only to hope (if not contractually require) that a medical student be in the building when the patient is being treated, or that the patient at issue be later made the subject of a lecture or comment to a single student, in order to side-step the liability it had contracted to bear. Despite its misleading caption, Dr. Skoskiewicz's brief herein is not friendly to Larry Engel, the taxpayers of Ohio, nor for that matter, is it particularly to Dr. Skoskiewicz since it really offers him no benefit to which he otherwise wouldn't be entitled.

V. CONCLUSION

Whether one is an "officer or employee" of the state under R.C. 9.86 and 109.36 (A)(1) by virtue of holding an "appointed position" with the state is ambiguous. Who must make the appointment is not specified in the R.C. To what office or "position" must one be appointed? What is a "position" with the state in this context? Because of these ambiguities this Court must construe R.C. 109.36(A)(1) in the context of R.C. 9.86, while keeping in mind the legislative intent in enacting the Court of Claims Act, R.C. 2743 et seq. In doing so, it is submitted that only gubernatorial appointments made with the advice and consent of the senate should qualify for immunity under those code sections.

Additionally, Theobald and its progeny have resulted in absurd (Hans, supra, immunity being thrust upon a physician when neither he nor the university he was ostensibly within the scope of employment for felt or wanted him to be found immune), unfair (Theobald III, supra, Clevenger II, and Schultz, supra, in which Theobald II was retroactively applied to deprive the plaintiffs of a forum to present their claims) and, unworkable results (Clevenger, supra, and Schultz , supra,

holding that plaintiffs should file dual complaints in all medical malpractice claims to avoid not being in the proper forum timely).

In order to provide even a modicum of equity and justice to those plaintiffs injured by physicians whom they had no idea might later qualify for immunity, Larry Engel submits that this Court must make Theobald II prospective only or, pursuant to Civil Rule 15 (C), hold that actions brought in the Court of Claims to adjudicate post statute of limitations claims of immunity asserted in otherwise timely filed action in a court of common pleas, be deemed to relate back to the filing of the initial action in the common pleas court.

In a dissenting opinion to Theobald II, Justice Pfeifer noted that after 7 years of litigation, including two trips to this very Court, Keith Theobald "still does not know which court he should be in." Id, at ¶ 36. If this Court could not be sure which court Keith Theobald's case belonged in, certainly he could not have been sure. However, when the correct court for Mr. Theobald was finally determined, to have his claim taken from him on statute of limitations grounds is an injustice that this Court must ensure does not befall any other plaintiff.

This Court is the body charged with ensuring that the Ohio judicial system fulfills its obligation to Ohio's citizens to provide a fair forum for legitimate grievances.

> Beginning with the adoption of Supreme Court Rule XXVI in February 1875, see 24 Ohio St. V, and culminating in the adoption of Section 2(B)(1)(g), Article IV of the Ohio Constitution in 1968, it has been methodically and firmly established that the power and responsibility ... to ... broadly regulate, control, and define the procedure and practice of law in Ohio rests inherently, originally, and exclusively in the Supreme Court of Ohio.

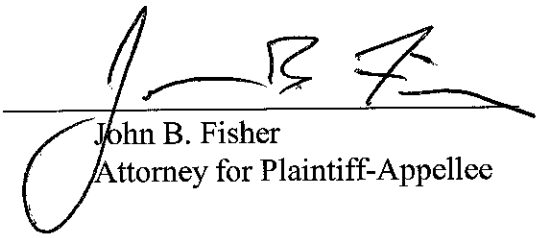
Shimko vs. Lobe 103 Ohio St. 3d 59, 2004-Ohio-4202, at ¶ 15.

Now, in 2010 Larry Engel finds himself in the exact same situation as did Keith Theobald and, potentially facing the same result as Keith Theobald, he asks this Court to adopt one or more of

his Propositions of Law to ensure that he will not lose his right to his day in court to retroactive application of case law that acts to deprive him of a forum for his claim.

Respectfully submitted,

LAW OFFICE OF JOHN B. FISHER, LLC



By: _____
John B. Fisher
Attorney for Plaintiff-Appellee

CERTIFICATION

This is to certify that a copy of the foregoing has been sent by ordinary U.S. Mail, postage pre-paid this 15th day of June, 2010, to:

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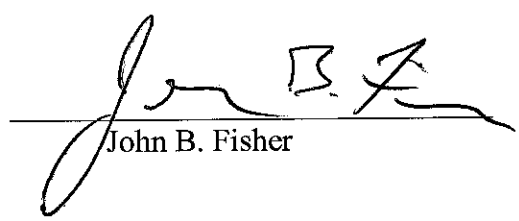

John B. Fisher

IN THE COURT OF CLAIMS OF OHIO

KEITH THEOBALD, et al.	:	
Plaintiffs	:	CASE NO. 2001-06461
v.	:	DECISION
UNIVERSITY OF CINCINNATI	:	Judge Fred J. Shoemaker
Defendant	:	

: : : : : : : : : : : : : : : : : :

On October 23, 1998, Plaintiff Keith Theobald[1] was involved in a motor vehicle collision. His injuries required that he be air-carried to University Hospital which is a private hospital.

On October 24, 1998, plaintiff underwent surgery that began at approximately 8:00 p.m. and concluded the following morning at approximately 8:00 a.m. The medical treatment of plaintiff was complex and required experienced doctors from different specialties. When plaintiff recovered consciousness he was found to be totally blind.

On October 25, 1999, plaintiff filed a medical malpractice complaint in the Hamilton County Court of Common Pleas. The court stayed the case pending an immunity determination by this court regarding Dr. Frederick Luchette, Dr. Harsha Sharma, Dr. Jamal Taha and Nurse Maureen Parrott.

In accordance with L.C.C.R. 4.1, the immunity hearing was scheduled for February 1, 2002. However, the hearing was waived by agreement of counsel and the issues were submitted on depositions, briefs and stipulations.

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[1] "Plaintiff" shall be used to refer to Keith Theobald throughout this decision.

Ex. A

Drs. Sharma, Taha, Luchette and Nurse Parrott have filed motions to strike the decision of this court naming them as parties in a special proceeding to determine whether each or all of them are entitled to civil immunity.

A review of the history of the enactment of R.C. 2743.02(F) and R.C. 9.86 makes clear that the General Assembly intended the Court of Claims to have the exclusive original jurisdiction over immunity determinations and to make binding its immunity decisions upon the employee. R.C. 2743.02(F) and 9.86 are also part of a comprehensive statutory scheme by which the state, subject to specific restrictions, gave state employees substantial rights which they should be allowed to assert at the trial and appellate levels.

When the Court of Claims Act was first passed (135 v. H.800 eff. 1/1/75), it did not preclude actions against individual state employees. A plaintiff injured by a state employee could sue either the employer (the state) or the individual employee just as a plaintiff could, without restriction, sue an employee of a private employer. The original Court of Claims Act provided that an action against the state had to be brought in the Court of Claims, but an action against the employee could be brought either in the Court of Claims by joinder or in a separate action in a common pleas court. Claims against an employee could be joined in the Court of Claims regardless of whether the claims involved actions "outside the scope or within the scope of employment." See *State ex rel. Moritz v. Troop* (1975), 44 Ohio St.2d 90 (outside the scope); *Torpey v. State* (1978), 54 Ohio St.2d 398 (within the scope). See, also, *Boggess v. Tarrent* (Ct. Cl. 1975), 73 O.O.2d 345. Other than creating a special court for actions against the state, the original Court of Claims Act

did not change the rules for actions against state employees; claims against state employees mirrored similar claims against employees of private companies.

However, in 1978, a major change in procedure occurred. By amendment to the Court of Claims Act (137 v. H.149, eff. 2/7/78), the General Assembly provided, in what is now R.C. 2743.02(E), that the only defendant in the Court of Claims could be the state. This amendment eliminated joinder of claims against state employees in the Court of Claims.

In addition, the legislature amended R.C. 2743.02(A) as follows:

> Sec. 2743.02(A) The state hereby waives, IN EXCHANGE FOR THE COMPLAINANT'S WAIVER OF HIS CAUSE OF ACTION AGAINST STATE OFFICERS OR EMPLOYEES, its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.
>
> EXCEPT IN THE CASE OF A CIVIL ACTION FILED BY THE STATE, FILING A CIVIL ACTION IN THE COURT OF CLAIMS RESULTS IN A COMPLETE WAIVER OF ANY CAUSE OF ACTION, BASED ON THE SAME ACT OR OMISSION, WHICH THE FILING PARTY HAS AGAINST ANY STATE OFFICER OR EMPLOYEE. THE WAIVER SHALL BE VOID IF THE COURT DETERMINES THAT THE ACT OR OMISSION WAS NOT WITHIN THE SCOPE OF THE OFFICER'S OR EMPLOYEE'S OFFICE OR EMPLOYMENT. [Amended language appears in capital letters.]

The 1978 amendments to the Court of Claims Act imposed a requirement that persons wishing to assert claims against state employees had to elect a remedy. *Smith v. Stempel* (10th Dist.,

1979), 65 Ohio App.2d 36. A plaintiff could still sue a state employee for acts within the scope of employment if a suit was filed in common pleas court. If, however, plaintiff sued the state in the Court of Claims, plaintiff necessarily agreed to waive any claims against the state employee in the common pleas court for actions taken within the scope of employment. Once an action against the state was initiated in the Court of Claims, the only way a plaintiff could thereafter sue a state employee in a common pleas court was if, and only if, the Court of Claims had first determined the employee was acting outside the scope of employment.

In 1980, another significant change was made when the Ohio General Assembly further narrowed the remedies available to a plaintiff who elected to proceed against a state employee in a common pleas court. The legislature enacted R.C. 9.86, which provided immunity to state employees for acts committed by that employee, subject to the limited exceptions of acting outside the scope of employment or acting with malice, in bad faith, or in a wanton or reckless manner. (138 v. S.76, eff 3/13/80.) In addition, the legislature amended R.C. 2743.02 to clarify that the state would be responsible for its employees' acts "in any circumstance in which a claimant proves in the court of claims that an officer or employee *** would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the revised code."

The 1980 amendments accomplished two purposes. First, they permitted a plaintiff to sue a state employee in common pleas court only if plaintiff alleged that the employee did not have immunity under R.C. 9.86. Second, they provided that the state

would be responsible for those acts done by its employees for which the employees were granted immunity under R.C. 9.86. The courts recognized that the scope of actions against state employees had been limited by the 1980 amendments to the Court of Claims Act. See *Scot Lad Foods, Inc. v. Secretary of State* (1981), 66 Ohio St.2d 1; *Van Hoene v. State* (1st Dist., 1985), 20 Ohio App.3d 363; *McIntosh v. University of Cincinnati* (1st Dist., 1985), 24 Ohio App.3d 116; *Walker v. Steinbacher* (9th Dist., 1987), 37 Ohio App.3d 1. In essence, the courts recognized that a claim against state employees that was based on actions taken within the scope of employment was an action against the state. *Moss v. Coleman* (10th Dist., 1982), 5 Ohio App.3d 177. A claim could thereafter be made against a state employee in the common pleas court only if the narrow exceptions of R.C. 9.86 applied. *James H v. Dept. of Mental Health & Mental Retardation* (10th Dist., 1980), 1 Ohio App.3d 60.

However, following the 1980 amendments, a dispute arose in various courts as to whether the common pleas courts could determine whether they had jurisdiction of claims against state employees or whether only the Court of Claims could determine whether the common pleas courts had jurisdiction. The courts' differing conclusions on this issue arose from their differing interpretations of R.C. 2743.02(A)(1), which specifies only that "the Court" must determine whether the employee's act was within or outside the scope of employment.

This confusion was temporarily resolved by the Ohio Supreme Court's decision in *Cooperman v. University Surgical Assoc.* (1987), 32 Ohio St.3d 191, which held that the Court of Claims had concurrent jurisdiction with the common pleas courts to

decide whether a state employee's acts were within the scope of employment and whether the employee was therefore entitled to claim immunity in a suit involving those acts. However, that interpretation was short-lived.

Less than two months after the *Cooperman* decision, R.C. 2743.02(F) took effect (142 v. H.267, eff. 10/20/87) and vested *exclusive original jurisdiction* in the Court of Claims to determine whether a state employee is entitled to personal immunity or whether, instead, a common pleas court has jurisdiction to hear a claim against the state employee. The eighty-eight county courts of common pleas *could no longer determine their own jurisdiction over claims against state employees* and the risk of inconsistent decisions was lessened. Notwithstanding the statutory change, the Ohio Supreme Court in *Nease v. Medical College Hospital* (1992), 64 Ohio St.3d 396, also clarified that *Cooperman* was limited only to situations where a plaintiff had failed to file an action against the state in the Court of Claims, and therefore had not waived the right to bring suit in the common pleas court pursuant to R.C. 2743.03(A)(1). (See the 1978 amendment regarding waiver discussed *supra*.) The Supreme Court in *Nease, supra,* at 399, accomplished this by restating a prior holding that "[T]he court as referred to in R.C. 2743.02(A)(1) means the Court of Claims." *Id.*; citing *McIntosh v. Univ. of Cincinnati, supra,* at 119.

In addition to statutorily vesting exclusive jurisdiction in the Court of Claims to determine the issue of jurisdiction of a court of common pleas, the 1987 enactment of R.C. 2743.02(F), in effect, also narrowed a plaintiff's ability to proceed against state employees one step further. In order to proceed against a

state employee in the common pleas court, a plaintiff needs to first: 1) allege that the employee falls within the exceptions set forth under R.C. 9.86; and, 2) bring his claim in the Court of Claims against the state for a determination of the employee's immunity. In the interim, since plaintiff is suing the state in the Court of Claims, the limited waiver provided by the Court of Claims Act prevents litigation of any claim against a state employee in the common pleas court. Only when a plaintiff alleges and proves before the Court of Claims that immunity does not exist, thus undoing the statutorily-imposed waiver, can plaintiff proceed with an action against the state employee in the common pleas court. However, if acts outside the scope of employment cannot be shown, then the state, and only the state, can be held responsible for the employee's acts. After all, as discussed above, only the state can be a defendant in the Court of Claims.

As seen from the above discussion, special proceedings under R.C. 2743.02(F) determine which claims can proceed against individual state employees and which cannot. The Court of Claims has exclusive jurisdiction to determine an employee's immunity and the issue of jurisdiction of the common pleas courts. If the Court of Claims determines that the state may be responsible for its employee's acts (the employee is immune), the common pleas courts do not gain jurisdiction to hear claims against the employee. Thereafter, only the state is subject to suit and the case can then continue forward in the Court of Claims. If the Court of Claims determines that the state is not responsible for the employee's acts (the employee is not immune), then the common pleas courts have jurisdiction over claims against the employee, and the employee is subject to suit.

However, in order to effectuate the full meaning of this comprehensive statutory plan, which has been developed and refined by the General Assembly over the past twenty-five years, the Court of Claims' determination of a state employee's immunity (and whether the common pleas court has jurisdiction) *must be binding* upon the state employee. In *Nease, supra*, the Ohio Supreme Court refuted the argument that R.C. 2743.02(E) prevents the Court of Claims from making employees parties to immunity proceedings. Quoting *McIntosh, supra*, at 117, the Ohio Supreme Court said that:

> Although the only proper defendant in an original action in the Court of Claims is the state, R.C. 2743.02(E), the Court of Claims will nevertheless consider the alleged acts or omissions of any state officer or employee in determining *their civil immunity from suit*, in accordance with R.C. 2743.02(A)(1) and R.C. 9.86. (Emphasis added.)

L.C.C.R. 4.1 states:

> Any party shall file a motion requesting that the Court of Claims make a determination, as required by R.C. 2743.02(F), as to whether the officer or employee is entitled to personal immunity under R.C. 9.86 and whether the courts of common pleas have jurisdiction over the civil action. If no motion for this determination is made, the Court of Claims may *sua sponte* set this matter down for the R.C. 2743.02(F) hearing.

The applicable statutes regarding civil immunity are R.C. 2743.02(F) and 9.86. R.C. 2743.02(F) provides in pertinent part:

> A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the

> scope of his employment or official responsibilities, or that the officer, or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***

R.C. 9.86 provides:

> *** [N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages 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. ***

R.C. 2505.02 refers to special proceedings and states, in pertinent part:

> (A) As used in this section:
> (1) 'substantial right' means a right that *** a statute *** entitles a person to enforce or protect.
> (2) 'Special proceeding' means an action or proceeding that is specially created by statute ***
> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
> (2) An order that affects a substantial right made in a special proceeding ***.

For the reasons set forth in *Janice L. Johns v. University of Cincinnati* (March 19, 2002), Court of Claims Case No. 99-09161, unreported, the motions to dismiss filed by Drs. Luchette, Sharma, Taha and Nurse Parrott are hereby OVERRULED.

There is no allegation that either Drs. Luchette, Sharma, Taha, or Nurse Parrott acted with malice, in bad faith, or in a wanton or reckless manner in the treatment of plaintiff.

In 1998, Dr. Luchette was employed by the University of Cincinnati as an associate professor of surgery and an employee of the University Surgical Group of Cincinnati, Inc. (USGC, Inc.). He was plaintiff's admitting doctor at University Hospital and was a co-surgeon with Dr. Taha, a neurosurgeon, during plaintiff's surgery. He opened and closed plaintiff's chest and was assisted by Dr. Giss. Also, he supervised plaintiff's care while plaintiff was in the hospital. His 1998 income from the university was $61,130.68, and his income from USGC, Inc. was $180,000 plus benefits. USGC, Inc. billed for Dr. Luchette's services.

Applying the factors set forth in *Wayman v. Univ. of Cincinnati* (June 22, 2000), Franklin App. No. 99 AP-1055, unreported, the court finds that Dr. Luchette was acting outside of the scope of his employment in treating plaintiff. The practice group billed and received the money arising out of the services rendered by Dr. Luchette. Furthermore, plaintiff was treated at a private hospital. See *Homer C. Smith and Laura Smith v. University of Cincinnati* (Nov. 29, 2001), Franklin App. No. 01 AP-404, unreported.

Dr. Harsha Sharma was an assistant professor at the University of Cincinnati and also a member of the practice group University of Anesthesia Associates, Inc. (UAA, Inc.). He was

the responsible anesthesiologist during plaintiff's operation. His 1998 income from the practice group was $118,000 plus benefits and the university paid him $12,000 as an assistant professor. His practice group billed for the services that he provided to plaintiff. Again, applying the factors noted in *Wayman, supra*, the court finds that Dr. Sharma is not entitled to civil immunity.

Dr. Taha is employed only by Mayfield Clinic, Inc. (a private, for-profit corporation) and is compensated solely by Mayfield Clinic, Inc. Mayfield Clinic has a contract with the University of Cincinnati to supervise and teach residents. Dr. Taha performed the neurological surgery on plaintiff and Mayfield Clinic, Inc. billed for his services. The court finds that he was not an employee of the University of Cincinnati, and that even if he were an employee of the University of Cincinnati, he would nonetheless not be entitled to civil immunity according to the factors set forth in *Wayman, supra*.

Maureen Parrott (CRNA) worked exclusively for University of Anesthesia Associates, Inc. (UAA, Inc.). She was a certified nurse anesthetist. She was not an employee of the University of Cincinnati and never received any pay from the university. Accordingly, Maureen Parrott is not entitled to civil immunity.

Therefore, the court finds that Drs. Luchette, Sharma, Taha and Nurse Parrott are not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Consequently, the courts of common

pleas have jurisdiction over this matter. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay.

FRED J. SHOEMAKER
Judge

IN THE COURT OF CLAIMS OF OHIO

KEITH THEOBALD, et al.	:	
Plaintiffs	:	CASE NO. 2001-06461
v.	:	JUDGMENT ENTRY
UNIVERSITY OF CINCINNATI	:	Judge Fred J. Shoemaker
Defendant	:	

: : : : : : : : : : : : : : : : : :

The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence, and for the reasons sets forth in the decision filed concurrently herewith, the court finds that Drs. Luchette, Sharma, Taha and Nurse Maureen Parrott are not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas have jurisdiction over civil actions against Drs. Luchette, Sharma, Taha and Nurse Maureen Parrott based upon their alleged actions and inactions in this case. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay.

FRED J. SHOEMAKER
Judge

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*2000 Ohio App. LEXIS 2690, **

Gloria **Wayman,** Plaintiff-Appellee, v. University of Cincinnati Medical Center, Defendant-Appellant.

No. 99AP-1055

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2000 Ohio App. LEXIS 2690

June 22, 2000, Rendered

PRIOR HISTORY: [*1] APPEAL from the Ohio Court of Claims.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant challenged the judgment of the Ohio Court of Claims (Ohio) finding appellant's employee was acting outside the scope of his employment when he negligently treated appellee at an outside location. Ohio Rev. Code Ann. § 9.86.

OVERVIEW: Appellee was a patient of a medical doctor who works for appellant university medical center. Plaintiff filed an action alleging that the doctor negligently treated appellee by failing to adequately assess, diagnose, evaluate, and treat her. The doctor argued that he was entitled to immunity. The court determined that the doctor's care and treatment of plaintiff occurred primarily at his private practice location that was not located on the campus of the university. The trial court found that he was acting outside the scope of his employment with appellant and was not entitled to statutory immunity under Ohio Rev. Code Ann. § 9.86. The appellate court affirmed, determining that appellee was not a patient of appellant considering appellant's financial gain from the services rendered. It held that the doctor was not acting within the scope of his employment and was, therefore, without immunity.

OUTCOME: The judgment was affirmed because the employee treated appellee at a location outside appellant's center and appellant had little financial gain from the services rendered.

CORE TERMS: patient, immunity, doctor, services rendered, university hospital, medical services, treating, billed, faculty member, retirement, entitled to immunity, privately owned, malpractice insurance, malpractice, clinical, assigned, chairman, employment contracts, separate contract, private practice, salary, clinic

COUNSEL: The Lawrence Firm, L.P.A., Roger N. Braden and Jennifer L. Lawrence, for appellee.

Ex. B

Betty D. Montgomery, Attorney General, and Susan M. Sullivan; Lindhorst & Dreidame, Michael F. Lyon and Brian M. Kneafsey, Jr., for appellant.

JUDGES: BRYANT, J., KENNEDY and LAZARUS, JJ., concur.

OPINION BY: BRYANT

OPINION

(ACCELERATED CALENDAR)

BRYANT, J.

Appellant, Clarence R. McLain, Jr., M.D., through defendant-appellant, University of Cincinnati Medical Center ("UCMC"), appeals from a judgment of the Ohio Court of Claims finding he was acting outside the scope of his employment with UCMC in rendering medical services to plaintiff-appellee, Gloria Wayman. Because the trial court properly determined Dr. McLain was acting outside the scope of his employment with UCMC, we affirm.

On September 25, 1997, plaintiff and her husband, Rel Wayman, filed a complaint in the Ohio Court of Claims against UCMC, contending Dr. McLain negligently treated plaintiff by failing to adequately assess, diagnose, evaluate, and treat her.

The trial court ultimately held a hearing pursuant to R.C. 2743.02(F) to determine whether Dr. McLain **[*2]** was acting within the scope of his employment with UCMC at the time he rendered care to plaintiff. To facilitate that determination, the parties stipulated that plaintiff's claims arise out of clinical care and treatment Dr. McLain provided during 1996, that the deposition of Dr. McLain properly could be considered by the trial court in determining the issue, that Dr. McLain's care and treatment of plaintiff occurred primarily at his office at his practice plan's Kenwood location, and that his Kenwood office is not located on the campus of the University of Cincinnati.

Following consideration of the submitted materials, the trial court issued a decision finding Dr. McLain was acting outside the scope of his employment with UCMC in treating plaintiff. Accordingly, the Court of Claims found Dr. McLain is not entitled to immunity under R.C. 9.86. Dr. McLain appeals, assigning the following errors:

I. THE COURT OF CLAIMS ERRED IN FAILING TO FOLLOW THE EXISTING CASE LAW WHICH HOLDS THAT A PHYSICIAN EMPLOYED AS A FACULTY MEMBER AS [*sic*] A STATE UNIVERSITY COLLEGE OF MEDICINE IS ENTITLED TO IMMUNITY FROM PERSONAL LIABILITY IN A MEDICAL NEGLIGENCE ACTION **[*3]** WHEN THE PHYSICIAN'S INVOLVEMENT IN THE PATIENT'S CARE AND TREATMENT IS AS A FACULTY MEMBER TEACHING OR SUPERVISING RESIDENT PHYSICIANS.

II. THE COURT OF CLAIMS ERRED IN HOLDING THAT THE UNIVERSITY OF CINCINNATI DOES NOT HAVE THE LEGAL AUTHORITY TO DEFINE THE EMPLOYMENT DUTIES OF ITS MEDICAL SCHOOL FACULTY TO INCLUDE THE PROVISION OF PATIENT CARE SERVICES WITHIN A MEDICAL SCHOOL PRACTICE PLAN.

III. THE COURT OF CLAIMS ERRED IN HOLDING THAT DR. MCLAIN WAS NOT ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH THE UNIVERSITY OF CINCINNATI IN PERFORMING MEDICAL SERVICES WITH RESPECT TO PLAINTIFF/APPELLEE GLORIA WAYMAN BECAUSE A PROPER LEGAL INTERPRETATION OF THE DOCUMENTS DEFINING THE EMPLOYMENT CONTRACT ESTABLISHES OTHERWISE.

IV. THE COURT OF CLAIMS ERRED IN NOT LIMITING ITS DETERMINATION ON THE IMMUNITY OF DR. CLARENCE R. MCLAIN, JR. TO A REVIEW OF WHETHER THE CONDUCT ALLEGED IN THE COMPLAINT WAS MANIFESTLY OUTSIDE THE SCOPE OF DR. MCLAIN'S EMPLOYMENT DUTIES AS DEFINED BY THE UNIVERSITY OF CINCINNATI.

Preliminarily, although Dr. McLain was not a party to the proceedings in the Court of Claims, the court nonetheless permitted Dr. McLain to present evidence, to **[*4]** argue the issue of immunity, and to participate as a party. Having participated in the proceedings from which this appeal is taken, Dr. McLain is entitled to participate in the appeal. *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App. 3d 69, 686 N.E.2d 1146.

Dr. McLain's four assigned errors are interrelated, and thus we address them jointly. Initially, Dr. McLain contends that because UCMC agreed he was acting within the scope of his employment at the time he rendered services to plaintiff, that determination resolves the immunity issue. While UCMC, through its representative, may have expressed an opinion concerning the scope of employment, that opinion is not determinative of the immunity issue, nor binding on the court. *Harrison v. Univ. of Cincinnati Hosp.*, 1996 Ohio App. LEXIS 2762 (June 28, 1996), Franklin App. No. 96API01-81, unreported. Accordingly, we review the facts to determine whether Dr. McLain was acting within the scope of his employment with UCMC in rendering services to plaintiff.

A state employee may be entitled to statutory immunity pursuant to R.C. 9.86 and 2743.02. Pursuant to R.C. 2743.02(F), the Court of Claims has exclusive **[*5]** original jurisdiction to determine, initially, "whether the officer or employee is entitled to personal immunity under Section 9.86 of the Revised Code." Thus, the question before the Court of Claims was not whether Dr. McLain was an employee of the state at the pertinent time, but rather whether he was acting outside the scope of his employment when he treated plaintiff.

Beginning with *Katko v. Balcerzak* (1987), 41 Ohio App. 3d 375, 536 N.E.2d 10, this court has set significant precedent for assessing when a medical employee is acting outside the scope of his or her employment with the state. Thus, in *York v. Univ. of Cincinnati Med. Ctr.*, 1996 Ohio App. LEXIS 1682 (Apr. 23, 1996), Franklin App. No. 95API09-1117, this court determined that a physician who was chairman of the Department of Neurosurgery at the University of Cincinnati and also the Director of the Academic Division of Mayfield Neurological Institute, Inc., a privately owned professional association, was acting outside the scope of his employment when he rendered services to the plaintiff in that action. Factually, defendant there received compensation from the University of Cincinnati, but considerably **[*6]** more from his privately owned professional association. Moreover, that association paid his malpractice insurance, billed for the medical services rendered to the plaintiff at issue and received the compensation for those services. In particular, this court noted the University of Cincinnati received nothing for the medical services rendered to the plaintiff, evidencing the lack of an employment relationship with respect to those medical services.

Similarly, in *Balson v. The Ohio State Univ.*, 112 Ohio App. 3d 33, 677 N.E.2d 1216 (1996), the defendant doctor was employed as an associate professor at The Ohio State University, but also had a contract with the Department of Surgery Corporation as a physician in a division of that practice plan. The practice plan billed for the services rendered to plaintiff's decedent, the patient's insurance carrier made payment directly to the practice plan, and the practice plan provided the malpractice insurance for the defendant doctor. In *Balson*, the court concluded that the defendant doctor was acting outside the scope of his employment with The Ohio State University.

Finally, in *Harrison,* each department within the **[*7]** College of Medicine at the University of Cincinnati was required to have a practice plan filed and approved by the Dean of the College

of Medicine. Each faculty member at the College of Medicine was required to be a member of a practice plan. The practice plans, however, were separate legal entities from the University of Cincinnati: the University of Cincinnati exercised no physical control over the plans, nor did the University of Cincinnati's operating budget include the private practice plans, even though the practice plans provided contributions to the University of Cincinnati. The physician in *Harrison* received a salary both from the university and from his practice plan, had two separate employment contracts, received two separate W-2's, and two sets of employee and retirement benefits. Applying the rationale of *Katko, York,* and *Balson,* the court in *Harrison* determined the doctor there was acting outside the scope of his employment with the University of Cincinnati.

From those cases, two major factors arise in determining whether a physician is acting outside the scope of his or her employment for a state university hospital: (1) whether the patient was the **[*8]** physician's private patient or a patient of the university, and (2) the university's financial gain from the treatment rendered compared to the physician's gain from it. *Norman, supra.*

Here, the Department of Obstetrics & Gynecology, to which Dr. McLain belonged, is part of UCMC, which in turn is part of the University of Cincinnati. Virtually all members of the Department of Obstetrics & Gynecology are also members of the practice plan, once called University OB/GYN Associates, Inc. and later called Foundation for Obstetrics and Gynecology.

While the Chairman of the Department of Obstetrics & Gynecology at UCMC reviews and determines the salary for the doctors in the practice plan, most of the monies generated from the physicians engaged in the clinical practice, as members of the practice plan, remain with the practice plan for distribution; only a small percentage of funds derived from the practice plan are directed to the Dean of the College of Medicine. The practice plan pays medical malpractice insurance premiums for its members, as well as telephone, rent, and electricity. As a member of the practice plan, Dr. McLain signed a separate contract with the practice **[*9]** plan, received a W-2 from the practice plan separate from UCMC, and had a retirement fund with the practice plan separate from that provided by UCMC.

Dr. McLain's private patients were seen pursuant to the practice plan frequently at the separate offices of the practice plan. By contrast, clinic patients usually came to the University Hospital Outpatient Department; they were not seen at the offices of the practice plan. Dr. McLain first saw plaintiff in 1983 at the practice plan's Madeira office; he later treated her pregnancy, briefly treated her for infertility thereafter, and generally saw her for gynecological care. Indeed, all care at issue in this lawsuit occurred in the practice plan component offices, not at the university hospitals. Dr. McLain admits plaintiff was a private patient of the practice plan; she was never a patient in the clinic. Moreover, the hospital did not bill for the services he provided in the practice plan, but instead the practice plan was responsible for both billing plaintiff and receiving the funds she paid.

Application of the two major factors from *Norman* indicates Dr. McLain was acting outside the scope of his employment in treating plaintiff. **[*10]** Here, the separate practice plan both billed and received monies arising out of services rendered by members of the practice plan. In addition, plaintiff was never seen at UCMC, but was treated at the component offices of the private plan as a private patient. Moreover, other facts closely parallel those of *Harrison* and *York.* Dr. McLain's private practice through the practice plan required a separate contract and separate W-2, and it provided him separate malpractice insurance and retirement. Given the close factual similarity of this case with *York* and *Harrison*, the trial court did not err in finding Dr. McLain was acting outside the scope of his employment with UCMC in treating plaintiff as a private patient at the practice plan's offices.

Accordingly, the four assigned errors are overruled, and the judgment of the Ohio Court of

Claims is affirmed.

Judgment affirmed.

KENNEDY and LAZARUS, JJ., concur.

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*1999 Ohio App. LEXIS 2828, **

Peter **Ferguson,** Plaintiff-Appellee, v. The **Ohio State** University Medical Center, Defendant-Appellant.

No. 98AP-863

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1999 Ohio App. LEXIS 2828

June 22, 1999, Rendered

PRIOR HISTORY: [*1] APPEAL from the Court of Claims of Ohio.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant, a state medical center, appealed from decision of the Court of Claims of Ohio, concluding that the attending physician on duty at defendant's emergency room, when plaintiff individual was examined, was entitled to civil immunity from medical malpractice pursuant to Ohio Rev. Code Ann. §§ 9.86 and 2743.02(F).

OVERVIEW: Plaintiff individual sued defendant, a state medical center, alleging medical malpractice arising from plaintiff's treatment in defendant's emergency room. The trial court determined that the attending physician at defendant's emergency room, on the date that plaintiff was examined by a resident, was entitled to civil immunity pursuant to Ohio Rev. Code Ann. §§ 9.86 and 2743.02(F). The court affirmed. The attending physician was entitled to immunity under these statutes if he saw plaintiff in his capacity as a state employee. While plaintiff received a bill for emergency room services performed by the attending physician from a company owned by that physician, this fact was not determinative of whether the attending physician was acting within the scope of his state employment. The evidence showed that that this doctor's only involvement with plaintiff was to supervise the care of plaintiff in his capacity as the attending physician supervising residents in defendant's emergency room. Accordingly, the trial court was correct in finding that the attending physician was acting within the scope of his employment with defendant and was, therefore entitled to immunity.

OUTCOME: The court affirmed the trial court's finding that the attending physician had personal immunity because he was acting within the scope of his state employment. The physician's only involvement with plaintiff was to supervise plaintiff's care in his capacity as the attending physician supervising residents in defendant's emergency room.

CORE TERMS: patient, emergency room, immunity, attending physician, resident, billed, entity's, private practice, assignments of error, civil action, supervising, emergency, salary, emergency department, testicle, question of law, state employee, entitled to immunity, cause of action, resident physicians, malpractice, manifestly, malicious, reckless, treating, naming, wanton, epididymitis, testicular, ultrasound

Ex. C

COUNSEL: Butler, Cincione, DiCuccio, Dritz & Barnhart, N. Gerald DiCuccio and Gail M. Zalimeni, for appellee.

Betty D. Montgomery, Attorney General; Kegler, Brown, Hill & Ritter, William J. Brown, Anthony C. White, Timothy T. Tullis, Special Counsel, for appellant.

JUDGES: LAZARUS, P.J. DESHLER and BROWN, JJ., concur.

OPINION BY: LAZARUS

OPINION

(REGULAR CALENDAR)

OPINION

LAZARUS, P.J.

Defendant-appellant, The Ohio State University Medical Center ("OSUMC"), appeals from the decision and entry of the Court of Claims of Ohio concluding that Dr. Charles Little, M.D. ("Dr. Little") is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). For the reasons that follow, we affirm.

The Court of Claims' determination arose out of a medical malpractice action filed in the Court of Claims on October 29, 1997, naming OSUMC as a defendant. On the same day, plaintiff-appellee, Peter Ferguson, filed a companion case in the Franklin County Court of Common Pleas naming Charles M. Little, M.D., Emergency Care Association, Inc., and Eric D. Drobny, M.D., as defendants. The Court **[*2]** of Claims conducted an evidentiary hearing to determine whether Dr. Little was entitled to immunity pursuant to R.C. 2743.01(F) and 9.86. On June 3, 1998, the trial court issued its decision and entry finding that Dr. Little was immune.

OSUMC appealed the June 3, 1998 decision and entry, assigning as error the following two assignments of error:

1. The Court of Claims erred when it held that Dr. Charles Little was entitled to personal immunity.

2. The Court of Claims erred when it held that this Court's decision in *Chitwood v. University of Cincinnati* required the conclusion that Dr. Charles Little was entitled to personal immunity.

The assignments of error are related and will be addressed together. The determination as to whether or not a state employee is entitled to personal immunity is governed by R.C. 2743.02(F) and 9.86. R.C. 2743.02(F) provides, in pertinent part:

A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, **[*3]** that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine,

initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

R.C. 9.86 provides:

*** 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.

In order to be entitled to personal immunity under these statutes, one must be an officer or employee. **[*4]** R.C. 109.36(A)(1)(a) and (b) define officer or employee as:

(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.

Whether a state employee is entitled to personal immunity is a question of law. *Nease v. Medical College Hosp.* (1992), 64 Ohio St. 3d 396, 400, 596 N.E.2d 432, citing *Conley v. Shearer* (1992), 64 Ohio St. 3d 284, 595 N.E.2d 862. While the issue of immunity is a question of law, consideration of the specific facts is necessary. See *Lowry v. Ohio State Highway Patrol*, 1997 Ohio App. LEXIS 679 (Feb. 27, 1997), Franklin App. No. 96API07-835, unreported (1997 Opinions 524, 533). In this case, the facts are largely undisputed.

Dr. Little was an attending **[*5]** physician at the OSUMC emergency room in December of 1996. He was also a member and equity owner of a private practice corporation called Emergency Care Associates, Inc. ("ECAI"). On December 4, 1996, at approximately 6 p.m., plaintiff, Peter Ferguson, arrived at the emergency room at OSUMC reporting pain to his right testicle, swelling, nausea, and vomiting. A third-year resident, Dr. Drobny, conducted a physical examination, and ordered a testicular ultrasound, which was read as showing epididymal inflammation. Dr. Drobny diagnosed plaintiff with epididymitis, an infection of the epididis, which sits at the back of the testicle. The plaintiff alleges that the diagnosis of epididymitis was incorrect and that he actually suffered testicular torsion resulting in the loss of the testicle.

As the on-call attending physician, Dr. Little does not recall seeing plaintiff personally but testified by way of deposition that he would have discussed the case with the resident and reviewed the chart prior to the plaintiff's discharge from the emergency room. The plaintiff remembered being treated by only one physician, Dr. Drobny, and that he never met Dr. Little while he was in the emergency **[*6]** room. The plaintiff was given antibiotics and discharged with instructions to follow up with the Rardin Family Practice Center. Dr. Little signed off on the emergency department record with the note: "I provided or directly supervised the Emergency Department care of this patient."

Every person who is discharged from the emergency room at OSUMC receives a bill from ECAI. Plaintiff was billed $ 96 by ECAI for Dr. Little's services rendered on December 4, 1996. Plaintiff was also billed $ 327.40 by OSUMC for emergency room services and the ultrasound test.

OSUMC urges this court to adopt the position that when an attending physician, through his

private practice corporation, bills for his or her services to a private patient, the physician is acting outside the scope of his or her employment with the state of Ohio. We find this analysis does not always answer the question of whether the physician is treating a private patient, particularly in situations such as this where Dr. Little does not otherwise see patients outside the emergency department. While billing may be a relevant factor in determining whether the physician is acting within the scope of his state employment, **[*7]** it may not always be the determinative factor.

The key issue in determining whether Dr. Little is entitled to personal immunity is whether he saw the patient only in his capacity as an attending physician supervising residents at OSUMC or whether he saw the patient as a private patient. In making these determinations, this court has considered many factors, including:

1. whether the physician held a faculty position and also was a member of a professional corporation;

2. whether the patient was previously a private patient of the physician;

3. whether the patient was referred to the physician;

4. whether the patient was billed through the professional corporation;

5. whether any of the physician's fee was paid to the state entity;

6. whether the professional corporation provided medical malpractice insurance;

7. whether the physician was paid by the state entity for the services provided to the patient;

8. how much the physician was paid by the state entity and how much by the professional corporation;

9. whether the physician was required to be part of a private practice group in order to work at the state entity;

10. whether **[*8]** the physician treated the patient independently of the resident or only in a supervisory capacity;

11. whether the physician actually performed any of the procedures in issue;

12. whether the private practice group determined the fees to be charged the patient;

13. whether the private practice plans are controlled by the state entity;

14. whether the patient was seen through the state entity's clinic; and

15. whether a resident was involved in the treatment of the patient.

In this regard, the situation in this case is analogous to the facts in *Scarberry v. The Ohio State University Hospitals*, 1998 Ohio App. LEXIS 5649 (Dec. 3, 1998), Franklin App. No. 98AP-143, unreported (1998 Opinions 5389). In *Scarberry*, this court held that the attending emergency room physician was entitled to personal immunity because he was not treating a private patient, but a patient of the hospital through the emergency room as part of his duties of supervising resident physicians.

The similarities between this case and the *Scarberry* case are striking. In the *Scarberry* case, the attending physician when the patient was admitted was Dr. Jonathan Brooks. Dr. Brooks

testified that practically **[*9]** all the patients in the emergency room were his patients because, unless another attending physician saw the patient in the emergency room, he was responsible for the patients and saw every patient who came through the emergency room. He also stated that every patient at the hospital had to have an attending physician and that the resident physicians could not be considered attending physicians. Dr. Brooks belonged to the same practice group as Dr. Little, and his practice group billed the patient $ 151 for his services while OSU Hospitals billed the patient $ 151,358.78, including $ 375.12 for the emergency room. Dr. Brooks received a $ 90,000 salary from ECAI and a $ 25,000 salary from OSU Hospitals. Dr. Little received an $ 86,000 salary from ECAI and $ 34,000 from OSU.

The facts in this case indicate that although ECAI billed plaintiff for his services, Dr. Little's only involvement with plaintiff was to supervise the care of plaintiff in his capacity as the attending physician supervising residents. Thus, we conclude the trial court was correct in finding that Dr. Little was acting within the scope of his employment with OSUMC and was, therefore, entitled to immunity. Both assignments **[*10]** of error are not well-taken.

Based on the foregoing, both assignments of error are overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

DESHLER and BROWN, JJ., concur.

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