[Cite as *McLeod v. Med. College of Ohio* , 2008-Ohio-3398.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

Plaintiffs

v.

MEDICAL COLLEGE OF OHIO

Defendant
Case No. 2007-01967

Judge Joseph T. Clark

DECISION

MARK A. MCLEOD, Guardian, et al.

{¶ 1} An evidentiary hearing was conducted in this matter to determine whether Michael P. Marcotte, M.D., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. The parties have stipulated that at all times relevant to this action, Dr. Marcotte held a full-time appointment to the faculty of the Medical College of Ohio (MCO) at the faculty rank of Assistant Professor in the Department of Obstetrics and Gynecology, and that, as such, he was an "employee" of MCO as that term is used in R.C. 9.86 and 109.36. The parties further stipulated that at all times throughout his treatment of plaintiff Jacqlyn Davis (f.k.a. Courtney),[1] beginning with her first office visit on May 24, 2002, and continuing through her inpatient admission and the delivery of baby Brandon Davis on June 14, 2002, Dr. Marcotte was actively engaged in the supervising and teaching of medical residents and students in his capacity as a faculty member of MCO.

{¶ 2} R.C. 2743.02(F) states, in part:

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

[1]For purposes of simplicity, plaintiff Jacqlyn Davis (f.k.a. Courtney), shall be referred to as "Jacqlyn" throughout this decision.

entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action."

{¶ 4} R.C. 9.86 states, in part:

{¶ 5} "[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities *or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.*" (Emphasis added.)

{¶ 6} The issue whether an employee is entitled to immunity is a question of law. *Nease v. Medical College Hosp*., 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether an employee acted outside the scope of his employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9.

{¶ 7} In *Theobald v. University of Cincinnati,* 111 Ohio St.3d 541, 548, 2006-Ohio-6208, the Supreme Court of Ohio held that:

{¶ 8} "[I]n an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02[F], the Court of Claims must initially determine whether the practitioner is a state employee. * * * If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.

{¶ 9} "If the court determines that the practitioner is a state employee, the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting 'manifestly outside the scope of employment' for purposes of R.C. 9.86. If there is evidence that the practitioner's duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred."

{¶ 10} In light of the parties' stipulation, the court finds that Dr. Marcotte was acting on behalf of the state when he rendered medical care to plaintiffs. However, plaintiffs assert that Dr. Marcotte committed multiple negligent acts during his treatment and care of plaintiffs, and that the cumulative effect of his actions constitutes reckless or wanton conduct. Therefore, the sole issue to be decided at this juncture is whether Dr. Marcotte acted in a reckless or wanton manner, in which case he would not be entitled to immunity.

{¶ 11} In the context of immunity, an employee's wrongful conduct, even if it is unnecessary, unjustified, excessive or improper, does not automatically subject the employee to personal liability unless the conduct is so divergent that it severs the employer-employee relationship. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775, citing *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86, 89. In order to find wanton or reckless conduct there must be a showing that the employee perversely disregarded a known risk. See, e.g., *Jackson v. Butler Cty. Bd. of Cty. Commrs*. (1991), 76 Ohio App.3d 448, 453-454. Plaintiffs bear the burden of proving that a state employee should be stripped of immunity. *Fisher v. University of Cincinnati Med. Ctr.* (Aug. 25, 1998), Franklin App. No. 98AP-142.

{¶ 12} At the evidentiary hearing, the following facts were established. On May 24,[2] Jacqlyn was referred to defendant's maternal-fetal medicine service located at St. Vincent Mercy Medical Center.[3] Jacqlyn was at 32 weeks gestation with her first pregnancy and was suffering from a relative increase in blood pressure that required medication. Dr. Marcotte diagnosed Jacqlyn with pregnancy-induced hypertension with possible early preeclampsia, a serious complication of pregnancy. Dr. Marcotte

[2]All references to the months of May and June refer to the year 2002.

[3]Dr. Marcotte testified that in 2002, faculty and residents from MCO practiced obstetrics either at St. Vincent Mercy Medical Center or at Toledo Hospital.

recommended that Jacqlyn be examined twice per week to monitor symptoms of progressive preeclampsia and to assess fetal well-being.

{¶ 13} On May 31, Dr. Marcotte saw Jacqlyn for a follow-up visit secondary to increased blood pressure. Dr. Marcotte sent her to labor and delivery for continued observation and she was discharged home with instructions for close followup.

{¶ 14} On June 11, Jacqlyn presented to St. Vincent Mercy Medical Center and was held for observation. On the morning of June 12, Dr. Marcotte examined Jacqlyn and determined that her preeclampsia was worsening. Dr. Marcotte decided that induction of labor was warranted because the potential risks to Jacqlyn and her baby from the preeclampsia outweighed the risks of delivering a premature baby. Dr. Marcotte began an induction of labor with the administration of Pitocin and the use of a Foley bulb to ripen the cervix. Dr. Marcotte's objective was a vaginal delivery. Fetal heart monitoring was conducted continuously beginning with the Foley bulb insertion. Throughout the induction phase, the baby's heart rate and tracings were normal, and Jacqlyn began having frequent but weak contractions. Jacqlyn's progress was monitored by Dr. Marcotte and one or more of the residents.

{¶ 15} The administration of Pitocin was stopped overnight so that Jacqlyn could sleep. On June 13, the Foley bulb was removed at 7:30 a.m. A pelvic exam conducted at 10:30 a.m. showed that Jacqlyn's cervix had been mechanically dilated to 4 to 5 centimeters and that the baby was at station "– 3," meaning that the baby's head was still located above the pelvic inlet. Jacqlyn's membranes were artificially ruptured to begin the process of labor. An epidural was also placed at that time and seizure prophylaxis with magnesium sulfate was started. Labetalol, a medication to treat Jacqlyn's hypertension, was also continued.

{¶ 16} On June 13 at approximately 10:30 p.m., Jacqlyn began to have stronger contractions. By 11:30 p.m., Jacqlyn's cervix was dilated 7 centimeters with 90 percent effacement and the baby's head was at "+ 1" station. By 1:00 a.m. on June 14, Jacqlyn was 8 centimeters dilated and the baby's head was at "+ 2" station. From 1:00

a.m to 3:00 a.m. no progress was made. At 3:00 a.m., the Pitocin was stopped and Jacqlyn rested. By 6:30 a.m., Jacqlyn was completely dilated to 10 centimeters. At 8:49 a.m., the baby was delivered vaginally without the use of forceps or a vacuum. However, the baby was diagnosed with birth asphyxia, encephalopathy with seizures, a possible temporal bone fracture and respiratory distress.

{¶ 17} Plaintiffs allege that the use of Pitocin caused hyper-stimulation of uterine contractions which in turn caused changes in the fetal heart rate and fetal distress. Plaintiffs also allege that during labor there were indications of cephalopelvic disproportion, failure to progress, and that there was the formation of caput, or swelling of the skull. Plaintiffs also assert that Dr. Marcotte was aware prior to the induction of her labor that Jacqlyn had a history of a pelvic injury which resulted in a "prominent" tail bone. Plaintiffs assert that Dr. Marcotte acted recklessly when he failed to consider all of these possible complications of a vaginal delivery and that he should have delivered the baby by Cesarean section (C-section) earlier in the labor.

{¶ 18} Plaintiffs' expert, Zane Brown, M.D., testified that he was board-certified in maternal- fetal medicine and that his practice involved high-risk obstetrics at the University of Washington. Dr. Brown testified that Dr. Marcotte should have known of the following risks when he decided to induce labor: 1) that the baby's head was large for his gestational age as shown in the ultrasound taken on May 24; 2) that Jacqlyn had a history of trauma to the pelvis, resulting in a prominent tailbone; 3) that Jacqlyn suffered from severe hypertension, and; 4) that the baby was premature with a gestational age of 34 or 35 weeks. Dr. Brown also testified that the baby's head was in a deflexed position on June 13, which is not an optimal position for vaginal delivery.

{¶ 19} Dr. Brown opined that on June 12, at 10:30 a.m. Jacqlyn was in active labor, but that by 5:50 p.m., she was dilated at only 5 centimeters. Dr. Brown opined that Jacqlyn had been having regular contractions too frequently without progress and that Dr. Marcotte should have performed a C-section at 5:50 p.m. on June 12. Dr. Brown opined that allowing Jacqlyn to continue with a vaginal delivery after that time

was "severe negligence" and by 3:00 a.m. on June 14, Dr. Marcotte's conduct of allowing the labor to continue became wilful and wanton. Dr. Brown stated that when Jacqlyn remained dilated at 8 centimeters from 1:00 a.m. to 3:00 a.m., she suffered from an arrest of dilatation for two hours, at which point a C-section should have been performed. Dr. Brown opined to a reasonable degree of medical probability that the baby suffered head trauma and hypoxic ischemia as a result of Dr. Marcotte's failure to perform a C-section.

{¶ 20} Defendant's expert, Frank Manning, M.D., testified that he was board-certified in both obstetrics and gynecology and in maternal-fetal medicine; that he was a clinical professor and a practicing perinatologist at New York University Downtown Hospital; and that he spent 100 percent of his time in the active clinical practice of medicine.

{¶ 21} After reviewing the medical records including the prenatal care and neonatal records, nurses' depositions and Dr. Marcotte's deposition, Dr. Manning opined to a reasonable degree of medical probability that Dr. Marcotte's overall management of Jacqlyn's labor and delivery was "absolutely" within the standard of care and was consistent with national guidelines.

{¶ 22} "The difference between negligence and willfulness is a difference in kind and not merely a difference in degree, and, accordingly, negligence cannot be of such degree as to become willfulness. Generally a willful act involves no negligence, but it has also been held that a willful act may include the element of negligence." *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96, quoting 65 Corpus Juris Secundum, 546, Section 9(1).

{¶ 23} The term "reckless" is often used interchangeably with the word "wanton" and has also been held to be a perverse disregard of a known risk. *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454. "The actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts

which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, at 104-105, citing Restatement of the Law 2d, Torts (1965), at 587, Section 500.

{¶ 24} In the continuum between negligence and intentional misconduct, wanton misconduct is a degree greater than negligence. *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515, 605 N.E.2d 445. "'[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.'" *Fabrey v. McDonald Village Police Dept*., 70 Ohio St. 3d 351, 356, 1994-Ohio-368, quoting *Roszman v. Sammett*, supra, at 96-97.

{¶ 25} Notwithstanding plaintiffs' arguments to the contrary, the court finds that although Dr. Marcotte's conduct may or may not have been negligent,[4] plaintiffs have not proven by a preponderance of the evidence a disposition to perversity on the part of Dr. Marcotte. Moreover, plaintiffs' theory that multiple negligent acts considered together can rise to the level of willful or wanton conduct is not supported by case law. Therefore, the court finds that Dr. Marcotte is entitled to immunity.

[4]The court notes that at this juncture, the issue of whether Dr. Marcotte was negligent in his treatment and care of plaintiffs is not before the court. The issue of negligence shall be decided at the trial on the merits.

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JUDGMENT ENTRY

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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 set forth in the decision filed concurrently herewith, the court finds that Michael P. Marcotte, M.D., is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay.

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JOSEPH T. CLARK
Judge

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HTS/cmd
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