

# Court of Claims of Ohio

The Ohio Judicial Center  
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Columbus, OH 43215  
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BETTY CLEVINGER

Plaintiff

v.

UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE

Defendant

Case No. 2008-10323

Judge Clark B. Weaver Sr.

## DECISION

{¶ 1} This matter is before the court for non-oral hearing on two issues, the first being whether John Tew, M.D. is entitled to civil immunity pursuant to R.C.2743.02(F) and 9.86. The parties submitted simultaneous briefs on April 17, 2009, in addition to documentary evidence and the deposition transcript of Dr. Tew.

{¶ 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 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.”

{¶ 6} The Supreme Court of Ohio has held that “in an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02[F], the Court of Claims must initially determine whether the practitioner is a state employee. If there is no express contract of employment, the court may require other evidence to substantiate an employment relationship, such as financial and corporate documents, W-2 forms, invoices, and other billing practices. If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.

{¶ 7} “If the court determines that the practitioner is a state employee, the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting ‘manifestly outside the scope of employment’ for purposes of R.C. 9.86. *If there is evidence that the practitioner’s duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred.*” *Theobald v. University of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 30-31. (Emphasis added.)

{¶ 8} At all times relevant, Dr. Tew was a tenured professor of neurosurgery in the College of Medicine at the University of Cincinnati (UC). (Defendant’s Exhibit A.) He also provided clinical care to patients of the Department of Neurosurgery at Mayfield Clinic, which was located on the University Hospital (UH) grounds. Dr. Tew explained that he receives income from UC, UH, and Mayfield Clinic, with the largest portion coming from UC. He testified that he has been a full-time professor at UC since 1982, and that he also serves as UC’s medical director for the Neuroscience Institute.

{¶ 9} Plaintiff was referred to Dr. Tew by her family physician for treatment of a condition known as trigeminal neuralgia, which causes severe facial pain. Plaintiff met with Dr. Tew at Mayfield Clinic on April 4, 2007. (Deposition Exhibit 1.) According to the medical records, plaintiff had been experiencing intermittent, severe pain in the right side of her face for six or seven years and had recently been treated with multiple

neuroleptics and narcotics. The medications had made her very ill. After discussion with Dr. Tew, plaintiff opted to have a percutaneous stereotactic rhizotomy (PSR), a surgical procedure that involves destroying a portion of the facial nerve that carries the pain. The surgery can result in numbness of the affected area.

{¶ 10} Later in the day of April 4, 2007, plaintiff went to the emergency room at UH complaining of extreme facial pain. Nursing notes from that evening reflect that plaintiff complained of left-sided facial pain; however, the notes from the following morning, April 5, 2007, reflect right-sided pain. (Deposition Exhibit 2.) Dr. Tew performed the PSR in the afternoon of April 5, 2007. According to Dr. Tew, he met with plaintiff in the radiology department prior to the surgery and performed the procedure in that same room. He stated that patients normally are not admitted to the hospital for the procedure because most are not as ill as plaintiff was at the time of surgery. Dr. Tew testified that plaintiff described the area of her pain as being left-sided and that he performed the PSR on that side. He stated that plaintiff's daughter was also confused about which side of plaintiff's face was painful, but that he and two nurses spoke with plaintiff prior to the PSR and plaintiff confirmed that it was the left side. Afterward, plaintiff related to Dr. Tew that she was experiencing no pain on the right side and that "minimal numbness of the left lower face is causing no problem." (Deposition Exhibit 8.) Plaintiff was discharged with a plan of returning for a right-side PSR or an alternative surgery if her pain returned. (Deposition Exhibit 8.) In her complaint, plaintiff asserts that she has since undergone a Microvascular Decompression on the right side of her face, and that she has left-sided facial numbness that appears to be permanent in nature. She alleges that Dr. Tew was negligent in performing the PSR on the left side of her face and that his care and treatment of her fell below the standard of care.

{¶ 11} Initially, the court finds that Dr. Tew's position as a tenured professor at UC clearly qualifies as state employment. Thus, the issue before the court is whether Dr. Tew was acting on behalf of the state at the time when the alleged negligence occurred and, because there is evidence that Dr. Tew's duties included the education of residents, whether he was in fact educating a resident at the time of the alleged negligence.

{¶ 12} In the present case, there is no documentary evidence of a resident being present at plaintiff's April 4, 2007 visit to Mayfield Clinic; however, Dr. Tew testified that

a resident “always is.” He explained that it was normal procedure to have at least one resident present but that, in this instance, he did not recall who it was. However, he insisted that his primary role with UC was that of a professor; that he does not differentiate his duties among UC, UH, and Mayfield Clinic; that Mayfield Clinic is “responsible for running the department of neurosurgery”; and that UC is “where I work.” To the extent that plaintiff is alleging any negligence with regard to plaintiff’s visit to Mayfield Clinic, the court is persuaded by the evidence that a resident was present for the purpose of education and that Dr. Tew was furthering the interests of the state in his care and treatment of plaintiff at that facility.

{¶ 13} With respect to the surgery performed at UH, plaintiff argues that, even though it was documented that resident Nick Levine was present, the documentation does not specify when he arrived or how long he stayed. Dr. Tew testified that Dr. Levine did not assist him in performing the PSR because he had performed “5,000” of such procedures and did not require a resident’s assistance. He stated that he did not specifically recall Dr. Levine being present, but that it was documented in the “Invasive Procedures Record” and that it was customary for residents to observe the procedure. (Deposition Exhibit 6.) In addition, resident Andre Choutka was present during the preoperative phase of plaintiff’s care on April 4, 2007. Although the form does not document that Dr. Tew was also present at the same time, Dr. Choutka did sign the “Neurosurgery Admission and Consultation Form” in the area marked “Resident’s Signature.” (Deposition Exhibit 9.)

{¶ 14} As stated in *Theobald*, supra, “[i]n many instances, the line between [the physician’s] roles (practicing and teaching) is blurred because the practitioner may be teaching by simply providing the student or resident an opportunity to observe while the practitioner treats a patient.” Id. at ¶ 16 quoting *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶ 34. In affirming the holding of the Tenth District Court of Appeals, the Supreme Court agreed that “the question of scope of employment must turn on what the practitioner’s duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury.” Id. at ¶ 23. The Court of Appeals had explained that “anytime a clinical faculty member furthers a student or resident’s education, he promotes the state’s interest. Because the state’s interest is promoted no matter how the education of the student or resident occurs, a practitioner is acting within the scope of his employment if he educates a student or resident by

direct instruction, demonstration, supervision, or simple involvement of the student or resident in the patient's care." *Theobald*, supra, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶ 47.

{¶ 15} Based upon the totality of the evidence presented, the court concludes that Dr. Tew's duties as a state-employed professor of medicine included treating patients at both UH and Mayfield Clinic, and that he was engaged in those duties at the time of the alleged negligence. The *Theobald* decision does not restrict physician immunity to situations where a resident or student was physically present or assisting in a surgical procedure. It is clear that education of students and residents can be accomplished by either direct instruction or simple observation of medical procedures. *Id.* Therefore, the court concludes that Dr. Tew was acting within the scope of his state employment with UC at all times pertinent hereto.

{¶ 16} In her immunity brief, plaintiff has also asserted that Dr. Tew's conduct was wanton and reckless and, therefore, outside the scope of his state employment. It has been held that "[t]he 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, 104-105, quoting 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500. Inasmuch as the term "reckless" is often used interchangeably with "willful" and "wanton," it has also been held that the foregoing definition applies to conduct characterized as willful and wanton. *Id.* at fn. 1.

{¶ 17} Applying this definition to the misconduct alleged in this case, the court finds that the evidence is wholly insufficient to establish that Dr. Tew acted in a wanton or reckless manner toward plaintiff. Consequently, the court concludes that Dr. Tew is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, 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.

{¶ 18} Regarding the second issue, on November 18, 2008, defendant filed a motion to dismiss plaintiff's complaint pursuant to Civ.R. 12(B)(6), asserting that

plaintiff's action is barred by the statute of limitations. On December 2, 2008, plaintiff filed a response. On December 8, 2008, defendant filed a reply and, on December 22, 2008, plaintiff filed a surreply. By entry dated February 13, 2009, the court held the motion in abeyance pending its immunity determination. In light of the foregoing, the court now turns to defendant's motion.

{¶ 19} In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190. Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242. Additionally, dismissal under Civ.R. 12(B)(6) based upon a statute of limitations is proper only when the face of the complaint conclusively shows that the action is time-barred. *Leichliter v. Natl. City Bank of Columbus* (1999), 134 Ohio App.3d 26.

{¶ 20} R.C. 2743.16(A) provides:

{¶ 21} "Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action *or within any shorter period that is applicable to similar suits between private parties.*" (Emphasis added.)

{¶ 22} R.C. 2305.113(A) provides, in relevant part:

{¶ 23} "Except as otherwise provided in this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued."

{¶ 24} Plaintiff's cause of action accrued on April 5, 2007, when the PSR was performed on the left side of her face. The complaint was filed on October 15, 2008. Plaintiff has alleged no plausible theory or case law that would operate to save her claim from dismissal. Therefore, the court concludes that plaintiff's action is time-barred. Defendant's motion to dismiss shall therefore be granted and plaintiff's complaint shall be dismissed, pursuant to Civ.R. 12(B)(6).

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Judge Clark B. Weaver Sr.

## JUDGMENT ENTRY

The court held a non-oral evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon reviewing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that John Tew, 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 filed against him based upon the allegations in this case.

For the additional reasons set forth in the decision, defendant's motion to dismiss is GRANTED and plaintiff's complaint is DISMISSED, pursuant to Civ.R. 12(B)(6). Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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CLARK B. WEAVER SR.  
Judge

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