

[Cite as *Covington v. Univ. of Cincinnati College of Medicine*, 2019-Ohio-3456.]

JASON COVINGTON, Admr., et al.

Plaintiffs

v.

UNIVERSITY OF CINCINNATI
COLLEGE OF MEDICINE

Defendant

Case No. 2016-00628JD

Judge Patrick M. McGrath

DECISION

{¶1} This matter came before the court for an evidentiary hearing to determine whether Norberto Andaluz, M.D., is entitled to civil immunity pursuant to R.C. 2743.02(F) and R.C. 9.86. For the reasons set forth below, the court finds that Dr. Andaluz is entitled to civil immunity.

FACTUAL BACKGROUND

{¶2} This immunity determination is related to a medical malpractice claim that arose due to the death of Joshua Stewart, a minor. On May 19, 2015, Stewart was admitted to The University of Cincinnati Medical Center (UCMC) after he was involved in a bicycle/vehicle collision. Dr. Andaluz was the attending physician assigned to care for Stewart. A resident named Mohamed Saleh, M.D. was present when Dr. Andaluz treated Stewart. Testing conducted at UCMC revealed that Stewart had a head injury. Dr. Andaluz treated Stewart with anticoagulants. On May 23, 2015, Stewart was discharged under parental supervision and was instructed to self-administer anticoagulants daily. On May 27, 2015, Stewart collapsed at his home. Stewart was taken to UCMC where an emergency craniotomy was performed by Dr. Andaluz. Stewart never regained consciousness and later died on May 30, 2015. Plaintiffs allege that defendant breached the standard of care by discharging Stewart before his

condition stabilized, and by overprescribing anticoagulants which ultimately lead to his death. Dr. Andaluz asserts that he was acting on behalf of the state during his care and treatment of Stewart, and consequently, he is entitled to civil immunity pursuant to R.C. 2743.02(F) and R.C. 9.86.

R.C. 2743.02(F) states, in 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 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 that 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 states, in part:

[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.

The Supreme Court of Ohio has stated,

[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(A)(2), 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.

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. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 30-31.

{¶3} Dr. Andaluz testified that he began his employment as the Director of Neurotrauma for The Department of Neurosurgery for the University of Cincinnati (UC), a public university, on July 1, 2011, as reflected in his letter of appointment dated May 26, 2011. (Exhibit A-2). The letter of appointment states, in part:

{¶4} “Effective July 1, 2011 your employment status will change from Strict Full-Time Affiliated (STFA) to Geographic Full Time Affiliated (GFTA) which means you will receive an annual UC salary of [redacted in original]. Your job duties, expectations and benefits will remain the same as outlined in your initial letter of offer dated March 6, 2009.” Dr. Andaluz’s Academic and Research Goals are attached to the letter of appointment. (Exhibit A-2). Among the goals listed is to “participate in the recruitment and education of residents.”

{¶5} Dr. Andaluz testified that in order to hold the position of Director of Neurotrauma he was required to be hired through the Mayfield Clinic, a privately held corporation that operates at UCMC and jointly employs UC faculty members. Dr. Andaluz testified that at the time he treated Stewart he also maintained his role as an associate professor of neurosurgery at UC. Dr. Andaluz's employment agreement with Mayfield lists duties related to his employment with the UC Department of Neurosurgery. (Exhibit A-5). The Mayfield employment agreement states, in part:

2.1 Employee will report to the Chairman, University of Cincinnati, Department of Neurosurgery (UC DNS), who also serves as Vice Chairman of the Association. As an Association physician, Employee shall abide by the Association Basic Expectations of Physicians * * *

2.2 In addition, Employee will participate in academic and research goals and objectives, as determined annually by the Association and approved by the Chairman of UC DNS. See Attachment A for introductory goals.

Attachment B to Dr. Andaluz's Mayfield employment agreement lists the following Academic and Research Goals and Objectives:

- I. Establish national leadership presence in neurosurgical organizations.
- II. Publish peer-reviewed journals
- III. *Participate in the recruitment and education of residents.*
- IV. Mentor medical students
- V. Fulfill department part-time faculty criteria." (Emphasis added.)

{¶6} Dr. Andaluz testified that per the terms of his Mayfield employment agreement he reported to Mario Zuccarello, M.D. Dr. Zuccarello was also the chairman of the Department of Neurosurgery at UC during the time of Dr. Andaluz's employment

with UC and Mayfield. Dr. Zuccarello's signature appears on Dr. Andaluz's UC letter of appointment and his Mayfield employment agreement. (Exhibit A-2 and Exhibit A-5).

{¶7} Dr. Andaluz's employment agreement with Mayfield lists his duties. (Exhibit A-5 Attachment A). These duties include: the development and expansion of a neurotrauma program and fellowship in conjunction with the UC DNS and Association; neurotrauma call coverage; and general neurosurgical care for Association patients. *Id.*

{¶8} Dr. Andaluz received a combined base salary from Mayfield and UC. (Exhibit A-5). Mayfield compensates Dr. Andaluz at an annual rate paid in equal bi-weekly installments. UC compensates Dr. Andaluz at an annual rate paid in equal monthly installments. Mayfield provides Dr. Andaluz with malpractice insurance. *Id.* Dr. Andaluz's primary benefits were provided through the Veterans Administration. *Id.*

{¶9} The evidence reveals that a UC resident named Mohamed Saleh was present when Dr. Andaluz made the decision to discharge Stewart at UCMC. The parties stipulated that Dr. Saleh is a resident in UC's Neurosurgery Residency Program. It should be noted that UCMC is a privately held corporation, where residents in the UC Neurosurgery Residency Program practiced and fulfilled their residency requirements. Dr. Saleh was a neurosurgery resident in UC's residency program beginning in June of 2014. (Exhibit E, p. 4). He was also employed as a resident with UCMC during the time Stewart was treated at UCMC. *Id.* Dr. Saleh was the intern on service when Stewart was treated by Dr. Andaluz. *Id.* at p. 6. He explained that, as an intern of service, he was assigned to perform several tasks related to Stewart's care. *Id.* at p. 7. Dr. Saleh stated that he was ordered to transcribe the discharge summary and place orders for medications and tests. *Id.* at p. 8. Dr. Saleh confirmed this would have been done at the direction of Dr. Andaluz. *Id.*

{¶10} According to Dr. Andaluz, he interacted with residents during surgery and rounding daily. Dr. Andaluz explained that during rounds he would gather with the

residents and go room by room attending to patients and discussing their care. Rounding with the residents is an important part of Dr. Andaluz's educational duties as a professor at UC because it allows the residents to observe and learn pre and post-operative care of patients. Dr. Andaluz confirmed that discharging a patient is something that is often discussed during rounding. Dr. Andaluz takes part in the discussions of whether to discharge a patient and formulates a discharge plan with the resident. The administrative paperwork related to a patient's discharge is usually completed by a resident or nurse practitioner. Dr. Andaluz testified that discharge summaries are completed by the resident or nurse practitioner and the attending physicians sign off last.

{¶11} Dr. Zuccarello testified that he is a member of the Department of Neurosurgery and a professor of neurosurgery at UC. Dr. Zuccarello stated that UCMC is one of the primary locations where residents from UC practice and learn from professors. He confirmed that The UC Department of Neurosurgery is the primary place for the residency program. Dr. Zuccarello explained that residents from the neurosurgery program are involved in patient care from the initial evaluation to the post-operative evaluation. He stated that rounding is an important aspect of the education of residents. Dr. Zuccarello also confirmed that discussions between the physician and resident regarding a patient's discharge are a part of the resident's education. He stated that residents frequently carry out the actual direction of discharge by drafting a discharge summary.

{¶12} Dr. Saleh testified that he was involved in the discussions to discharge Stewart. (Exhibit E, p. 17). Dr. Saleh witnessed multiple conversations, on rounds and with the team, regarding Stewart's discharge. *Id.* Dr. Saleh stated that Dr. Andaluz was speaking on behalf of the team regarding the discharge instructions for Stewart. *Id.* at p. 18. Dr. Saleh stated that the decision to discharge Stewart was made by

Dr. Andaluz. *Id.* p. 17. Dr. Saleh observed Dr. Andaluz, on rounds, speaking with Stewart's family regarding the discharge plan. *Id.* at p. 19. Dr. Saleh was directly involved with Stewart's discharge and spoke to Stewart's father on the day of the discharge. *Id.* at p. 17. Dr. Saleh typed the discharge summary and described the document under Dr. Andaluz's instructions. *Id.* at p. 26.

{¶13} Dr. Andaluz confirmed that he made the decision to discharge Stewart with instructions to take anticoagulants and follow-up with a primary care physician. The orders that Dr. Saleh gave in the discharge summary were at Dr. Andaluz's direction. Dr. Andaluz admitted that he was not present when Dr. Saleh typed the discharge summary on May 23, 2015. However, Dr. Andaluz made the decision to discharge Stewart, and Dr. Saleh was present when the decision was made.

LAW

{¶14} Based upon the evidence and the testimony presented at the hearing, the court finds that Dr. Andaluz was an employee of both UC and Mayfield. The dispositive issue in this matter is whether Dr. Andaluz was acting on behalf of the state when he treated Stewart. The court finds that he was.

{¶15} As stated in *Theobald*:

[T]he question of scope of employment must turn on what the practitioner's duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury. Thus, proof of the content of the practitioner's duties is crucial. The Court of Claims must have evidence of those duties before it can be determined whether the actions allegedly causing a patient's injury were "in furtherance of the interests of the state" or, in other words, within the scope of employment. *Id.* at ¶ 23.

The Supreme Court of Ohio has also stated:

Theobald did not establish a categorical rule that a physician who is a member of the faculty of a state medical college is immune for providing clinical care only while teaching a medical student or resident. Rather, the scope of employment is a fact-based inquiry that turns on proof of the employee's specific job description with the state and focuses on whether the employee's conduct is related to and promotes the state's interests. *Ries v. Ohio State Univ. Med. Ctr.*, 137 Ohio St.3d 151, 2013-Ohio-4545, ¶ 23.

{¶16} As stated above, the duties that Dr. Andaluz had pursuant to his employment with UC included participating in the recruitment and education of residents. Dr. Andaluz's duties pursuant to his employment with Mayfield included the clinical practice of medicine. Even though there is no categorical rule that immunity applies only if a medical student or resident is being taught in a clinical setting, the duties as set forth in Dr. Andaluz's letter of appointment with UC specifically include the recruitment and education of residents. Therefore, if Dr. Andaluz was not teaching when he treated Stewart, he was not performing his duties as set forth in his letter of appointment with UC.

{¶17} Based upon the totality of the evidence presented, the court concludes that Dr. Andaluz was acting within the course and scope of his employment as a professor of neurosurgery with UC when he made the decision to discharge Stewart on the date in question. UC argues that the facts of this case are nearly identical to those in *Zidron v. Metts*, 10th Dist. Franklin No. 15AP-1049, 2017-Ohio-1118.¹ The *Zidron* case similarly involved a physician who held clinical duties with a private hospital and clinical teaching

¹It should be noted that the Tenth District Court of Appeals captioned this case "*Zidron v. Metts*" while the Court of Claims captioned this case "*Metts v. Zidron*."

duties with the state. In that case, the court found that, because the physician treated the patient without the assistance of a resident, the physician was not engaged in her clinical teaching duties on behalf of the state. *Zidron*, at ¶ 9.

{¶18} However, the facts of this case differ from the facts in *Zidron*. Here, Dr. Andaluz and Dr. Saleh both testified that Dr. Andaluz made the decision to discharge Stewart. Dr. Andaluz and Dr. Saleh both testified that Dr. Saleh was present when the decision to discharge Stewart was made. Further, the discharge summary was drafted by Dr. Saleh at the direction of Dr. Andaluz. In *Zidron*, the attending physician treated the patient without a resident present at all. However, in this case, the evidence shows that a resident was present when the alleged negligence occurred and was involved in completing the discharge paperwork and describing it to the patient's family at the physician's direction.

{¶19} Although Dr. Andaluz was not present when Dr. Saleh typed the discharge summary and reviewed it with Stewart's family, *Theobald*, does not require the physical presence of the physician instructor in order for immunity to apply. As the Tenth District Court of Appeals has explained in *Theobald, supra*, "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*, 160 Ohio App.3d 342, 2005-Ohio 1510, ¶ 47 *aff'd*, 111 Ohio St.3d 541. For the reasons stated above, the court finds that Dr. Andaluz was educating a resident at the time he treated Stewart, including deciding to discharge Stewart; discussing the decision with the resident during rounds; and ordering the resident to prepare the discharge summary and advise the patient and family of the details of the follow-up plan. Therefore, the court finds that Norberto Andaluz, M.D., shall be entitled to civil immunity pursuant to

R.C. 9.86 and R.C. 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.

PATRICK M. MCGRATH
Judge

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JUDGMENT ENTRY

{¶20} 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 Norberto Andaluz, M.D., is entitled to civil immunity pursuant to R.C. 9.86 and R.C. 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.

PATRICK M. MCGRATH
Judge

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