[Cite as *Schultz v. Univ. of Cincinnati College of Medicine* , 2010-Ohio-2071.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James W. Schultz et al.,	:	
Plaintiffs-Appellants,	:	No. 09AP-900 (C.C. No. 2008-06431)
v.	:	(REGULAR CALENDAR)
University of Cincinnati College of Medicine et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 11, 2010

John H. Metz, for appellants.

Richard Cordray, Attorney General, and *Brian M. Kneafsey*, *Jr*., for appellee University of Cincinnati College of Medicine.

APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} Plaintiffs-appellants, James W. Schultz and his wife, Julie Ann, appeal from a judgment of the Ohio Court of Claims finding that Stewart Dunsker, M.D., is entitled to personal immunity, pursuant to R.C. 9.86 and 2743.02(F), and that appellants' medical malpractice action against defendant-appellee, University of Cincinnati ("UC"), is barred by the applicable statute of limitations. For the following reasons, we affirm the Court of Claims' judgment.

{¶2} In 1984, Dr. Dunsker was appointed as full professor of clinical neurosurgery at UC College of Medicine, a position he retained until his retirement in 2002. As a member of the UC faculty, Dr. Dunsker's responsibilities included the supervision and instruction of neurosurgery residents who rotated through both UC Hospital and The Christ Hospital ("Christ Hospital"), a private hospital in Cincinnati. Dr. Dunsker also provided clinical care to patients at Christ Hospital through his private practice group, the Mayfield Clinic ("Mayfield").

{¶3} On January 13, 1997, Dr. Dunsker, through his private practice group, performed surgery on Schultz at Christ Hospital. Dr. Dunsker operated on Schultz's cervical spine to relieve pain and pressure originating from a vertebrae in Schultz's neck. Schultz alleges that he suffered injury to his laryngeal nerve during the operation and that such injury has permanently affected his ability to speak in a normal tone of voice.

{¶4} On July 7, 1998, appellants filed a medical malpractice action in the Hamilton County Court of Common Pleas against Dr. Dunsker and Mayfield. The case was dismissed and refiled twice, the last refiling occurring December 20, 2005. Trial was scheduled for June 4, 2007. On May 23, 2007, Dr. Dunsker filed a motion asserting personal immunity pursuant to R.C. 9.86 and 2743.02. The common pleas court stayed the proceedings pending an immunity determination in the Court of Claims.

{¶5} Thereafter, on May 22, 2008, appellants filed a medical malpractice action in the Court of Claims against UC, Dr. Dunsker, and Mayfield, alleging that Schultz was permanently injured by Dr. Dunsker's medical negligence. Appellants also asserted that Dr. Dunsker failed to provide Schultz with sufficient, accurate information regarding the risk of injury to the laryngeal nerve so that he could give informed consent for the surgery.

In addition, Schultz's wife asserted a loss of consortium claim. By entry filed May 23, 2008, the Court of Claims, noting its jurisdiction over only state agencies and instrumentalities, sua sponte dismissed Dr. Dunsker and Mayfield from the action.

{¶6} On June 17, 2008, UC filed a motion to dismiss appellants' complaint, pursuant to Civ.R. 12(B)(6), asserting, as relevant here, that appellants' action was time-barred by the four-year statute of limitations set forth in R.C. 2305.113(C)(2). Appellants responded, arguing that their complaint was timely as it was filed within one year of Dr. Dunsker's assertion of immunity. By entry dated October 2, 2008, the Court of Claims held the motion in abeyance pending its immunity determination.

{¶7} On August 13, 2009, the Court of Claims conducted an immunity hearing at which Dr. Dunsker testified. Following the hearing, the Court of Claims issued a decision concluding that Dr. Dunsker's position as a full professor at UC qualified as state employment and that he was acting within the scope of his employment while treating Schultz, principally because he was furthering the education of a neurosurgical resident during the treatment of and surgery performed on Schultz. Accordingly, the Court of Claims determined that Dr. Dunsker 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 civil actions against him based upon his alleged action or inaction in this case. In addition, the Court of Claims granted UC's motion to dismiss, concluding that appellants' action is time-barred by the one-year statute of limitations applicable to medical malpractice claims asserted against the state. The Court of Claims entered judgment on September 1, 2009.

{¶8} On appeal, appellants assert the following errors:

> [1]. The trial court erred to the prejudice of plaintiffs-appellants in granting immunity to the [sic] Dr. Dunsker.
>
> [2]. The trial court erred to the prejudice of plaintiffs-appellants in not finding defendant had waived the issue of immunity.
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> [3]. The trial court erred to the prejudice of plaintiffs-appellants in dismissing plaintiffs' case and not applying the "loaned servant doctrine" to the facts.
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> [4]. The trial court erred to the prejudice of plaintiffs-appellants in applying the Ohio Court of Claims Act and ***Theobald*** to create an unconstitutional denial of Due Process and Equal Protection of the laws.
>
> [5]. The trial court erred to the prejudice of plaintiffs-appellants by dismissing plaintiffs' case on the basis of the statute of limitations.
>
> [6]. The trial court erred to the prejudice of plaintiffs-appellants in failing to find that defendant's breach of contract and violation of informed consent did not entitled [sic] him to personal immunity.
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> [7]. The trial court erred to the prejudice of plaintiffs-appellants by failing to apply fundamental agency law to the case which would not result in immunity.
>
> [8]. The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint since such application of the law violates the [sic] Equal Protection of the laws guaranteed under the Ohio and Federal Constitutions.
>
> [9]. The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint by applying the law retroactively.
>
> [10]. The trial court erred to the prejudice of plaintiffs-appellants in dismissing plaintiffs' complaint by considering factual matters outside the pleadings while applying Civil Rule 12(B)(6).

{¶9} As appellants' first and ninth assignments of error are interrelated, we will address them jointly. By these assignments of error, appellants contend that the Court of Claims erred in concluding that Dr. Dunsker is entitled to personal immunity. We disagree.

{¶10} A personal immunity determination is governed by the application of R.C. 9.86 and 2743.02(F). R.C. 9.86 provides:

> 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.

{¶11} The Court of Claims has exclusive, original jurisdiction to determine whether a state employee is personally immune from liability in a civil action under R.C. 9.86 or whether the employee's conduct was manifestly outside the scope of his employment at the time the cause of action arose. R.C. 2743.02(F); *Johns v. Univ. of Cincinnati Med. Assoc., Inc.,* 101 Ohio St.3d 234, 2004-Ohio-824, ¶1, 30. If the Court of Claims determines that the state employee is immune from personal liability, pursuant to R.C. 9.86, the claimant must assert his claims against the state and the state shall be liable for the employee's acts or omissions if a claim is timely filed in the Court of Claims pursuant to R.C. 2743.16. R.C. 2743.02(A)(2).

{¶12} Thus, in determining that a person is entitled to personal immunity under R.C. 9.86 and 2743.02(F), the Court of Claims must make two findings: (1) that the person is a state officer or employee, and (2) that the officer or employee was acting

within his scope of employment and without malicious purpose, in bad faith, or in a wanton or reckless manner. *Theobald v. Univ. of Cincinnati,* 111 Ohio St.3d 541, 2006-Ohio-6208, ¶14. Findings supported by some competent, credible evidence will not be disturbed on appeal as being against the manifest weight of the evidence. *Theobald v. Univ. of Cincinnati,* 160 Ohio App.3d 342, 2005-Ohio-1510, ¶22, citing *Smith v. Univ. of Cincinnati*, 10th Dist. No. 01AP-404, 2001-Ohio-3990.

{¶13} The determination as to whether or not a person is entitled to immunity under R.C. 9.86 and 2743.02(F) is a question of law. *Barkan v. Ohio State Univ.,* 10th Dist. No. 02AP-436, 2003-Ohio-985, ¶11. However, the question of whether a person acted manifestly outside the scope of his or her employment is a question of fact. Id.

{¶14} As noted, the first step in an immunity analysis is to determine whether the person is a state employee. R.C. 109.36(A)(1)(a) defines a state employee as "[a] person who, at the time a cause of action against the person arises, * * * is employed by the state." The Court of Claims found that Dr. Dunsker's position as a full-time professor at UC qualified him as a state employee. The evidence presented at the immunity hearing supports this conclusion. Dr. Dunsker testified that, in 1984, he was appointed a full professor of clinical neurosurgery at UC's College of Medicine and that he retained that position until his retirement in 2002. Dr. Dunsker produced a letter, dated June 1, 1996, from the Dean of the College of Medicine approving his reappointment as "Professor of Clinical Neurosurgery" effective September 1, 1996 through August 31, 1999. Dr. Dunsker also produced a form entitled "Annual Report of Outside Activity For Full-time Faculty," in which he reported that, from September 1, 1996 through August 31, 1997, he performed clinical medical services on behalf of Mayfield in addition to his full-time faculty

employment. In addition, Dr. Dunsker testified that he received an annual salary from UC; he produced a W-2 form showing that he earned $40,478.73 during 1997 from his employment with UC.

{¶15} Despite this evidence, appellants argue that Dr. Dunsker was not a state employee when he performed the surgery because he was simultaneously employed by Mayfield. Dr. Dunsker's employment with a private practice group does not negate his status as a state employee. In *Theobald*, 2005-Ohio-1510, this court found that a physician was a state employee for purposes of R.C. 109.36(A)(1)(a), despite the fact that he was also employed by a private practice group. Id. at ¶23-24. The evidence upon which we relied in so finding is strikingly similar to that presented by Dr. Dunsker in the instant case. Accordingly, we find that competent, credible evidence supports the Court of Claims' conclusion that Dr. Dunsker was a state employee at the time he operated on Schultz.

{¶16} As there is no assertion on appeal that Dr. Dunsker acted with malice, in bad faith, or in a wanton or reckless manner in his care and treatment of Schultz, the issue resolves to whether he was acting within the scope of his state employment at the time the alleged negligence occurred. In *Theobald*, 2006-Ohio-6208, the Supreme Court of Ohio noted that, "[f]or purposes of personal immunity under R.C. 9.86, a state employee acts within the scope of employment if the employee's actions are 'in furtherance of the interests of the state.' " Id. at ¶15, quoting *Conley v. Shearer*, 64 Ohio St.3d 284, 287, 1992-Ohio-133. The court stated that "a state employee's duties should define the scope of employment." Id.

{¶17} The court acknowledged that the dual nature of a physician's employment as both private practitioner and employee of a state medical institution has posed problems for courts in identifying an appropriate analysis for resolving the scope of employment issue. " 'In many instances, the line between these two roles 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,* 2005-Ohio-1510, ¶34.

{¶18} The court conducted an exhaustive analysis of this court's previous jurisprudence on the scope of employment issue. The court noted that, in early cases, this court analyzed billing procedures and other financial factors, including the comparison of a practitioner's financial gain with the university's financial gain from the medical treatment. Id. at ¶17, citing *Katko v. Balcerzak* (1987), 41 Ohio App.3d 375; *York v. Univ. of Cincinnati Med. Ctr.* (Apr. 23, 1996), 10th Dist. No. 95API09-1117; and *Kaiser v. Flege* (Sept. 22, 1998), 10th Dist. No. 98AP-146. In cases focusing on financial factors, the physician was inevitably found not to be immune.

{¶19} The court observed that, in *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App.3d 69, we expanded our analysis to examine the physician's relationship with the patient in addition to the university's financial benefit. *Theobald,* 2006-Ohio-6208, ¶18. Continuing its review, the Supreme Court of Ohio noted that, in *Ferguson v. Ohio State Univ. Med. Ctr.* (June 22, 1999), 10th Dist. No. 98AP-863, this court explained that billing practices, although relevant, do not necessarily establish when a physician is acting within his or her scope of employment with the state. We determined that the key issue is whether the physician " 'saw the patient only in his capacity as an attending physician

supervising residents * * * or whether he saw the patient as a private patient.' " *Theobald,* 2006-Ohio-6208, ¶19, quoting *Ferguson*. The court next observed that, after *Ferguson,* we began to emphasize the physician's role at the time of treatment over the financial factors. *Theobald,* 2006-Ohio-6208, ¶20, citing *Hopper v. Univ. of Cincinnati* (Aug. 3, 2000), 10th Dist. No. 99AP-787, and *Kaiser v. Ohio State Univ.,* 10th Dist. No. 02AP-316, 2002-Ohio-6030.

{¶20} The court then examined our decision in *Theobald*, 2005-Ohio-1510. The court noted that we found the financial factors generally had little bearing on whether a physician is acting within the scope of employment. *Theobald,* 2006-Ohio-6208, ¶22, citing *Theobald,* 2005-Ohio-1510, ¶46. The court agreed, stating that "[t]he financial factors may be relevant to the practitioner's status as a state employee; however, they do not necessarily establish whether he or she was within the scope of that employment at the time a cause of action arose. Instead, 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." *Theobald,* 2006-Ohio-6208, ¶23.

{¶21} The court noted both our conclusion that the physician's duties included the education of students and residents and our instructions to the Court of Claims to " 'first identify the aspect of the course of treatment that the plaintiff alleges gave rise to damage or injury,' then to 'inquire whether the practitioner was educating a student or resident while rendering the allegedly negligent care to the patient.' " *Theobald,* 2006-Ohio-6208, ¶24, quoting *Theobald*, 2005-Ohio-1510, ¶46, 48. The court approved this approach, finding that it "follows the language and intent of R.C. 9.86 and correctly focuses upon the purpose of the employment relationship, not on the business or financial arrangements

between the practitioner and the state." *Theobald,* 2006-Ohio-6208, ¶25. The court further stated that "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." Id. The court observed that application of this approach inevitably results in a determination that the physician is entitled to immunity. Id.

{¶22} The Supreme Court of Ohio distinguished the above cases from those where the "employee's actions are self-serving or have no relationship to the employer's business." *Theobald*, 2006-Ohio-6208, ¶28. In such cases, the conduct is " 'manifestly outside the scope of employment,' and R.C. 9.86 does not apply." Id., citing *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 59; *Hidey v. Ohio State Hwy. Patrol* (Sept. 22, 1998), 10th Dist. No. 97API12-1587. As examples, the court cited *Johnson v. Univ. of Cincinnati,* 10th Dist. No. 04AP-926, 2005-Ohio-2203, a case where the physician treated the plaintiff at the clinic without a student or resident in attendance, and *Wayman v. Univ. of Cincinnati Med. Ctr.* (June 22, 2000), 10th Dist. No. 99AP-1055, a case where the physician treated the plaintiff as a private patient at his own office, not while he was teaching at the hospital, and his practice plan had billed for and received the proceeds from his services.

{¶23} Following its examination of this court's jurisprudence on the scope of employment issues, the court concluded that, once a court determines that a health-care 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*, 2006-Ohio-6208, ¶31.

{¶24} In the instant case, the Court of Claims, applying *Theobald*, 2006-Ohio-6208, concluded that Dr. Dunsker is entitled to personal immunity because his duties as a professor of clinical neurosurgery at UC included the education of residents and a resident was present for the purpose of education at the time the alleged negligence occurred. Appellants claim that the Court of Claims erred in retrospectively applying *Theobald*, a 2006 decision, to the instant case, the facts of which occurred in 1997. Appellants argue that the Court of Claims should have applied the case law as it existed in 1997, and determined Dr. Dunsker's personal immunity by examining billing procedures to determine whether Mayfield or UC had the most significant financial involvement in the provided treatment, rather than considering whether Dr. Dunsker was engaged in the education of a resident while treating Schultz.

{¶25} 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 (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 Dept. of Job & Family Servs.*, 124 Ohio St.3d 1215, 2009-Ohio-6425, ¶4 ("[t]he holding in [*Medcorp, Inc. v. Ohio Dept. of Job & Family Servs*., 121 Ohio St.3d 622, 2009-Ohio-2058] shall apply only to cases filed on and after June 15, 2009, the date on which the

opinion in [*Medcorp*, 2009-Ohio-2058] was published in the Ohio Official Reports advance sheets"); *State ex rel. Adams v. Aluchem, Inc.,* 104 Ohio St.3d 640, 2004-Ohio-6891, ¶8 ("[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*, 2006-Ohio-6208, 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, ¶60 (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).

{¶26} As noted, *Theobald*, 2006-Ohio-6208, instructs that a physician acts within the scope of his state employment when the physician's duties include the education of students and residents and the physician was in fact educating a student or resident when the alleged negligence occurred. Here, the Court of Claims found that Dr. Dunsker's duties as a professor of clinical neurosurgery at UC included the education of residents and that a resident was present for the purpose of education at the time the alleged negligence occurred. The evidence presented at the immunity hearing supports this conclusion. Dr. Dunsker testified that his faculty responsibilities at UC included the supervision and instruction of neurosurgery residents who rotated through Christ Hospital. He further testified that, although he did not expressly recall Schultz's surgery, the "Record of Operation" completed by the circulating nurse during surgery indicated that one of his neurosurgery residents, Dr. Kokkino, was present. Dr. Dunsker produced the "Record of Operation," which confirms his testimony. Dr. Dunsker further testified that his

usual practice was to instruct neurosurgical residents in performing various procedures during surgery and, since Dr. Kokkino was listed on the "Record of Operation" as the attending neurosurgical resident, he would have provided this same type of instruction to Dr. Kokkino during Schultz's surgery. Indeed, Dr. Dunsker testified that, pursuant to his usual teaching methods, he would have had Dr. Kokkino assist him during surgery, either by performing opening or closing procedures or assisting in retraction. Accordingly, based upon the evidence in the record, we find that competent, credible evidence supports the Court of Claims' conclusion that Dr. Dunsker acted within his scope of employment while treating Schultz.

{¶27} In short, the evidence provided by Dr. Dunsker at the immunity hearing supports the Court of Claims' conclusion that he is entitled to personal immunity under R.C. 9.86 and 2743.02, as he was a state employee acting within the scope of his employment when the alleged negligence occurred. Accordingly, we overrule appellants' first and ninth assignments of error.

{¶28} Appellants' second assignment of error contends that the Court of Claims erred in failing to find that Dr. Dunsker waived the issue of immunity. At the immunity hearing, appellants introduced the September 1, 1999 deposition of Dr. Dunsker taken in the Hamilton County case. During the deposition, Schultz's counsel noted that Dr. Dunsker had asserted the defense of immunity in his answer. When counsel asked Dr. Dunsker what the term "immunity" referred to, Dr. Dunsker's counsel interjected, stating "I threw that in as I always do in these cases. I doubt very much immunity applies in this case." Sept. 1, 1999 Depo., at 99. Schultz's counsel then averred, "Then we won't have to get into that." Sept. 1, 1999 Depo., at 99. Dr. Dunsker's counsel replied, "We can talk

about that separately, but I would assume that it does not apply in this case." Sept. 1, 1999 Depo., at 100. Schultz's counsel then stated: "Okay. I didn't know if we needed to go down that whole route." Sept. 1, 1999 Depo., at 100. Appellants argue the statements made by Dr. Dunsker's counsel during the foregoing exchange constituted an express waiver of immunity.

{¶29} "Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory or constitutional." *Glidden Co. v. Lumbermens Mut. Cas. Co*., 112 Ohio St.3d 470, 2006-Ohio-6553, ¶49. A party asserting waiver must prove it by establishing a clear, unequivocal, decisive act by the other party demonstrating the intent to waive. *N. Olmsted v. Eliza Jennings, Inc*. (1993), 91 Ohio App.3d 173, 180, citing *White Co. v. Canton Transp. Co*. (1936), 131 Ohio St. 190, 198-99. The Court of Claims found the colloquy between counsel insufficient to support a finding that Dr. Dunsker communicated his intent to waive the defense of immunity. However, while the Court of Claims has exclusive jurisdiction to determine the issue of immunity, the issue of waiver should have been determined by the court of common pleas.

{¶30} In *Cooperman v. Univ. Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191, the Supreme Court of Ohio held that courts of common pleas have jurisdiction to make R.C. 9.86 immunity determinations. In response to that decision, the General Assembly amended R.C. 2743.02 and added subsection (F), which provides that the Court of Claims has exclusive, original jurisdiction to determine, initially, whether a state officer or employee is entitled to personal immunity under R.C. 9.86, and whether the courts of common pleas have jurisdiction over the action. In making the personal immunity

determination, the Court of Claims must specifically address (1) whether the person is a state officer or employee, and (2) whether the officer or employee was acting within his or her scope of employment and without malicious purpose, in bad faith, or in a wanton or reckless manner. In *Johns*, 2004-Ohio-824, the Supreme Court of Ohio held that the General Assembly's addition of R.C. 2743.02(F) reflected the legislative intent to supersede its ruling in *Cooperman*.

{¶31} In amending R.C. 2743.02(F), the General Assembly did not state that the Court of Claims has exclusive, original jurisdiction to determine whether a state officer or employee has waived the right to assert personal immunity under R.C. 9.86. The Court of Claims has only the jurisdiction that is conferred upon it by the General Assembly. *Wirick v. Transport America,* 10th Dist. No. 01AP-1268, 2002-Ohio-3619, ¶11, citing *Steward v. State* (1983), 8 Ohio App.3d 297, 299. Because the General Assembly did not specifically make the issue of waiver a matter under the exclusive, original jurisdiction of the Court of Claims, pursuant to R.C. 2743.02(F), we believe this issue remains within the jurisdiction of the court of common pleas. Thus, the Court of Claims was not the proper forum to determine the issue of waiver and, therefore, this court will not address that issue. Accordingly, appellants' second assignment of error is hereby rendered moot.

{¶32} Appellants' third assignment of error contends the Court of Claims erred in failing to address the issue of "loaned servant." Appellants maintain that Dr. Dunsker, as a "loaned servant" of Christ Hospital, had no immunity despite his state employment with UC. The Supreme Court of Ohio rejected an identical argument in *State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas* (1991), 60 Ohio St.3d 78, 79 (stating that "[i]rrespective of whether Sanquily was a 'loaned servant,' he was employed by the state

when the cause of action arose. He was therefore an 'officer or employee' of the state for purposes of R.C. 2743.02(F)." We thus overrule the third assignment of error.

{¶33} Appellants' fourth and eighth assignments of error allege that the Court of Claims' application of R.C. 2743.02 in deciding Schultz's case deprived him of his constitutional right to jury trial and equal protection. This court has consistently held to the contrary. See *Lippert v. Med. College of Ohio* (Dec. 1, 1992), 10th Dist. No. 92AP-741; *Ashcraft v. Univ. of Cincinnati Hosp.,* 10th Dist. No. 02AP-1353, 2003-Ohio-6349; *Fisher v. Univ. of Cincinnati Med. Ctr.* (Aug. 25, 1998), 10th Dist. No. 98AP-142. We therefore overrule appellants' fourth and eighth assignments of error.

{¶34} Appellants contend in their fifth assignment of error that the Court of Claims erred by dismissing their complaint against UC on statute of limitations grounds. We disagree.

{¶35} In deciding whether to dismiss a complaint, pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in a light most favorable to the appellants, drawing all reasonable inferences in their favor. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that appellants can prove no set of facts entitling them to recovery. *O'Brien v. Univ. of Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

{¶36} The Court of Claims determined that the applicable statute of limitations bars the medical negligence allegations of appellants' complaint. A complaint may be dismissed under Civ.R. 12(B)(6) as time-barred under the statute of limitations if the face

of the complaint makes clear that the action is time-barred. *Steiner v. Steiner* (1993), 85 Ohio App.3d 513, 518-19. Only where the complaint demonstrates conclusively on its face that the action is time-barred should a Civ.R. 12(B)(6) motion to dismiss based upon the statute of limitations be granted. *Swanson v. Boy Scouts of Am.,* 4th Dist. No. 07CA663, 2008-Ohio-1692, ¶6.

{¶37} Appellants' complaint plainly presents allegations of medical negligence. The complaint likewise plainly sets forth the date when appellants contend the medical negligence occurred. Accordingly, the applicable statute of limitations may be applied to the dates presented in appellants' complaint to determine whether the appropriate statute of limitations time-bars appellants' complaint.

{¶38} Under R.C. 2743.02(A)(1), the state "waives its immunity from liability * * * and consents to be sued, * * * subject to the limitations set forth in this chapter." With exceptions not relevant here, R.C. 2743.16(A) states the applicable statute of limitations for civil actions against the state. According to R.C. 2743.16(A), such actions "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." Insofar as appellants assert a claim for medical negligence, the applicable statute of limitations is R.C. 2305.113(A), as it governs such actions between private parties and is shorter than the two-year statute of limitations in R.C. 2743.16(A). R.C. 2305.113(A) states that "an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued." Appellants' medical negligence allegations arise out of Dr. Dunsker's alleged surgical error. Appellants' complaint specifies that Dr. Dunsker's medical negligence occurred during surgery on January 13, 1997. Because their

complaint was not filed until May 22, 2008, the Court of Claims determined that it is untimely under R.C. 2305.113(A) and is therefore time-barred.

{¶39} Appellants contend that it is unfair and unreasonable to expect a medical malpractice plaintiff to bring suit in the Court of Claims before the plaintiff knows of the existence of a resident or has reason to believe that there is any other issue making the Court of Claims the appropriate forum in which to file suit. More specifically, appellants contend they did not discover the existence of Dr. Kokkino, the neurosurgery resident, or had any other reason to believe there was any issue making the Court of Claims the appropriate forum in which to file suit until Dr. Dunsker filed his motion asserting personal immunity on May 23, 2007. Appellants thus contend their claim was not time-barred because they filed it within one year of Dr. Dunsker's assertion of immunity.

{¶40} Appellants' argument is without merit. The discussion between counsel during Dr. Dunsker's September 1999 deposition clearly establishes that he asserted a claim of immunity in his answer to appellants' 1998 complaint. Further, Schultz's medical chart includes a "Record of Operation" completed by the circulating nurse during Schultz's surgery indicating that a neurosurgery resident, Dr. Kokkino, was present during the surgery. Medical malpractice appellants have a duty to examine medical records to ascertain the identity of medical personnel who may have rendered negligent care. *Hans v. Ohio State Univ. Med. Ctr.,* 10th Dist. No. 07AP-10, 2007-Ohio-3294. Dr. Dunsker's assertion of immunity in his answer to appellants' 1998 complaint, along with the "Record of Operation" listing Dr. Kokkino as a resident, provided ample reason for appellants to believe there might be an issue making the Court of Claims an appropriate forum in which to file suit.

{¶41} This court recently addressed a similar argument in *Clevenger v. Univ. of Cincinnati College of Medicine,* 10th Dist. No. 09AP-585, 2010-Ohio-88. There, the plaintiff failed to initiate litigation in the Court of Claims within one year of the alleged medical malpractice. The plaintiff argued that a new theory of discovery regarding a tort claim should be developed and applied to her case - a claim for medical malpractice does not accrue until the patient or her counsel are certain which court is the appropriate court in which to pursue the claim. This court declined to adopt this proposition of law, stating, "[w]e 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." Id. at ¶16.

{¶42} 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 ¶17. 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.

{¶43} 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.

{¶44} Appellants further contend they were not provided an opportunity to address UC's motion to dismiss prior to the Court of Claims rendering its decision granting the motion. We construe appellants' argument to contend that the Court of Claims abused its discretion in failing to conduct an evidentiary hearing on the motion. As UC points out, appellants filed a response to the motion, but never requested a hearing. Further, appellants did not mention the pending motion at Dr. Dunsker's August 13, 2009 immunity hearing. Because a trial court is confined to the allegations in the pleadings, a trial court does not abuse its discretion in failing to conduct an evidentiary hearing as factual findings are not required to determine the merits of a Civ.R. 12(B)(6) motion. *Savage v. Godfrey* (Sept. 28, 2001), 10th Dist. No. 01AP-388 (holding that a trial court did not err in denying a motion for oral hearing on a Civ.R. 12(B)(6) motion to dismiss, as "motions may be decided wholly on papers, and the dismissal of a complaint without an oral hearing does not violate due process").

{¶45} Accordingly, the Court of Claims did not err in concluding that the one-year statute of limitations applicable to medical malpractice actions against the state barred the allegations in appellants' complaint. We thus overrule appellants' fifth assignment of error.

{¶46} Appellants' sixth and seventh assignments of error contend the Court of Claims erred in failing to address the issues of "fundamental agency law" and "informed consent." We note initially that the arguments presented in these two assignments of error are essentially the same, that is, that Schultz was never informed of Dr. Dunsker's state employment and, therefore, could not have consented to be treated by a state

employee. In *Fisher*, this court rejected the same argument, averring that "whether appellant was informed and/or consented to Dr. Mullen treating her as a 'loaned servant,' [is] irrelevant to the determination of whether Dr. Mullen was employed by the state pursuant to R.C. 2743.02(F)." Accordingly, we overrule appellants' sixth and seventh assignments of error.

{¶47} Appellants' tenth and final assignment of error contends the Court of Claims erred in granting UC's Civ.R. 12(B)(6) motion to dismiss appellants' complaint by considering factual matters outside the pleadings. Appellants have taken out of context portions of the court's decision and judgment entry pertaining to the determination of Dr. Dunsker's immunity in arguing that the Court of Claims looked outside the pleading when applying Civ.R. 12(B)(6). A thorough reading of the decision and judgment entry demonstrates that the Court of Claims applied the proper standard in granting UC's motion to dismiss. Accordingly, we overrule appellants' tenth assignment of error.

{¶48} Based upon the foregoing, appellants' first, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error are overruled, the second assignment of error is rendered moot, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

TYACK, P.J., and FRENCH, J., concur.

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