

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Betty Clevenger,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-585
University of Cincinnati College of Medicine,	:	(C.C. No. 2008-10323)
Defendant-Appellee.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on January 14, 2010

Santen & Hughes, John D. Holschuh, Jr., and Sarah Tankersley, for appellant.

Richard Cordray, Attorney General, and *Brian M. Kneafsey, Jr.*, for appellee.

APPEAL from the Ohio Court of Claims

TYACK, P.J.

{¶1} Betty Clevenger is appealing from the judgments rendered to her detriment by the Ohio Court of Claims. She assigns three errors for our consideration:

FIRST ASSIGNMENT OF ERROR: THE COURT OF CLAIMS ERRED IN THE STANDARD IT APPLIED WHEN DETERMINING WHETHER DR. TEW WAS ACTING WITHIN THE SCOPE OF HIS STATE EMPLOYMENT.

SECOND ASSIGNMENT OF ERROR: THE COURT OF CLAIMS DETERMINATION THAT DR. TEW IS ENTITLED TO IMMUNITY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

THIRD ASSIGNMENT OF ERROR: THE COURT OF CLAIMS ERRED IN DISMISSING CLEVINGER'S COMPLAINT AGAINST THE STATE AS BARRED BY THE STATUTE OF LIMITATIONS.

{¶2} Following surgery performed on her face by John Tew, M.D, Betty Clevenger filed suit in the Court of Common Pleas for Hamilton County, Ohio. She did not immediately file suit in the Ohio Court of Claims.

{¶3} Counsel for Dr. Tew eventually asserted a defense that Dr. Tew was a state employee at the time he treated Ms. Clevenger and that, as such, Dr. Tew was entitled to immunity from any claim asserted by Ms. Clevenger.

{¶4} As required by statute, the issue of Dr. Tew's immunity was submitted to the Ohio Court of Claims for resolution. A judge for the Ohio Court of Claims found that Dr. Tew was an employee of the University of Cincinnati College of Medicine and that Dr. Tew was acting within the scope of his employment while treating Ms. Clevenger, principally because he was furthering the education of one or more medical interns during his treatment of and surgery performed on Ms. Clevenger. As a result, the judge of the Ohio Court of Claims found that Dr. Tew was entitled to immunity from a claim for medical negligence in state court.

{¶5} Having found that Dr. Tew was entitled to immunity, the judge next addressed the issue of whether or not Ms. Clevenger had filed suit in the appropriate court, the Ohio Court of Claims, within the one-year period allowed for medical claims.

The judge found that the claim had not been filed in the time allowed and entered judgment adverse to Ms. Clevenger. This appeal ensued.

{¶6} In the first assignment of error, counsel for Ms. Clevenger asserts that the trial court was mistaken in finding that Dr. Tew was entitled to immunity. Resolution of this issue turns upon the analysis of the case of *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208 and its potential applicability to the facts of Ms. Clevenger's case.

{¶7} In the *Theobald* case, the Ohio Court of Claims initially decided that the doctors who treated Keith Theobald were not immune from suit in the Court of Common Pleas because the doctors received the majority of their income from private corporations. The Tenth District Court of Appeals vacated that finding and directed the Ohio Court of Claims to decide the immunity issue based upon an analysis of what duties the doctors were performing when rendering treatment, not based upon how the doctors were paid. The Tenth District Court of Appeals found that the doctor who treated Theobald had duties which included supervising medical students and interns. We directed the Court of Claims to address whether or not the doctors were at least partially supervising or educating interns and medical students while treating Theobald.

{¶8} The Supreme Court of Ohio accepted the case for review and agreed with this court's analysis and resolution of the pertinent issues. Although counsel for Ms. Clevenger strongly disagrees with the language of the majority for the Supreme Court of Ohio, we are bound by the Supreme Court's opinion.

{¶9} The Ohio Court of Claims applied the opinion in *Theobald* and found that Dr. Tew was supervising and educating two separate interns during his treatment of Ms. Clevenger, especially one specific intern who observed the surgery. The Ohio Court of Claims applied the correct standard.

{¶10} The first assignment of error is overruled.

{¶11} In the second assignment of error, counsel for Ms. Clevenger asserts that the finding that Dr. Tew was entitled to immunity was against the manifest weight of the evidence. Judgments which are supported by some competent, credible evidence will not be overturned by an appellate court as being against the manifest weight of the evidence. See *C. E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, and the lengthy list of cases which have followed it.

{¶12} The evidence before the Court of Claims includes a neurosurgery admission and consultation form signed by a resident. The evidence also includes a department of radiology invasive procedure record which indicated the presence of an intern during the surgery performed on Ms. Clevenger. The documents support the finding of the Ohio Court of Claims that Dr. Tew was involved in educating interns while he treated Ms. Clevenger. The deposition testimony of Dr. Tew is also consistent with the finding of the lower court.

{¶13} The trial court's finding of immunity was supported by competent, credible evidence.

{¶14} The second assignment of error is overruled.

{¶15} In the third assignment of error, counsel for Ms. Clevenger asserts that the Ohio Court of Claims was in error in rendering judgment against her as a result of a finding that the statute of limitations barred her lawsuit in the Court of Claims.

{¶16} 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.

{¶17} Further, the *Theobald* case was decided in 2006. Ms. Clevenger received her treatment from Dr. Tew in 2007 and had her surgery performed in 2007. Counsel was on notice that issues regarding immunity might well be present in this case. The 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.

{¶18} The trial court did not err in granting judgment based upon a finding that the time permitted by the one-year statute of limitations for medical claims had elapsed. The third assignment of error is overruled.

{¶19} All three assignments of error having been overruled, the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
