

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mario Marotto, a Minor, by and through his mother Deborah Marotto et al.,	:	
	:	
Plaintiffs-Appellees,	:	No. 12AP-27
	:	(Ct. of Cl. No. 2011-02590)
v.	:	
	:	(REGULAR CALENDAR)
The Ohio State University Medical Center,	:	
	:	
Defendant-Appellee,	:	
	:	
[David Bell, M.D.,	:	
	:	
Appellant.]	:	

D E C I S I O N

Rendered on December 27, 2012

Leeseberg & Valentine, Gerald S. Leeseberg and Susie L. Hahn, for appellees Mario Marotto, Deborah Marotto and Howie Marotto.

Michael DeWine, Attorney General, and *Karl W. Schedler*, for appellee The Ohio State University Medical Center.

The Triona Firm, James P. Triona and Paul J. Vollman, for appellant David Bell, M.D.

APPEAL from the Court of Claims of Ohio

BRYANT, J.

{¶1} David Bell, M.D., appeals from a judgment of the Court of Claims of Ohio denying him immunity pursuant to R.C. 9.86 and 2743.02(F). Because the Court of Claims failed to allow Dr. Bell to participate as the relevant statute provides, we reverse.

I. Facts and Procedural History

{¶2} In February 2011, Deborah Marotto, Howie Marotto and Mario Marotto filed a complaint against appellee, The Ohio State University Medical Center ("OSUMC"), in the Court of Claims seeking damages related to injuries suffered as a result of Mario's birth at OSUMC in January 2007. The Marottos also filed an action in the Franklin County Court of Common Pleas against Dr. Bell, Kingsdale Gynecological Associates, Inc., MaternOhio Clinical Associates, Inc., and two residents. Dr. Bell responded that R.C. 9.86 and 2743.02 provided him immunity since he was a state employee, an OSUMC faculty member instructing the OSUMC residents who assisted him with the delivery of Mario.

{¶3} Pursuant to R.C. 2743.02(F), the Court of Claims conducted a hearing on December 9, 2011 to determine whether Dr. Bell was entitled to immunity, during which the deposition of Dr. Bell was admitted into evidence. The Marottos and OSUMC filed a stipulation in which they agreed for purposes of the action that Dr. Bell was not an officer or employee of OSUMC. The Court of Claims determined the stipulation "concludes evidentiary matters involved in this matter," and it filed an entry journalizing its decision to deny Dr. Bell immunity. (Tr. 9.)

{¶4} Dr. Bell filed an appeal from the Court of Claims' entry denying him immunity. OSUMC responded with a motion to dismiss, arguing Dr. Bell is not a party to the action and does not have standing to file an appeal. This court denied the motion to dismiss, noting Dr. Bell's ability to appeal was consistent with legislative revisions of R.C. 2743.02(F) and due process of law, leading to the conclusion that this court must offer an avenue of appellate review to state of Ohio officers and employees from immunity determinations under R.C. 2743.02(F). *See Marotto v. The Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-27, 2012-Ohio-1078.

II. Assignments of Error

{¶5} On appeal, Dr. Bell assigns two errors:

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY MISINTERPRETING THE REQUIREMENTS OF R.C. §2743.02(F) THEREBY DENYING APPELLANT DAVID BELL MD THE RIGHT TO "FULLY PARTICIPATE" IN HIS IMMUNITY DETERMINATION.

II. THE TRIAL COURT ERRED WHEN IT RULED THAT APPELLANT DAVID BELL MD WAS NOT ENTITLED TO IMMUNITY UNDER R.C. §9.86 AND R.C. §2743.02(F).

III. First Assignment of Error – Right to Participate Under R.C. 2743.02(F)

{¶6} Dr. Bell's first assignment of error contends the Court of Claims erred as a matter of law by misinterpreting the requirements of R.C. 2743.02(F) and denying him the opportunity to participate in his immunity determination.

A. R.C. 9.86, R.C. 2743.02(F) and Immunity

{¶7} R.C. 9.86, referred to in R.C. 2743.02(F), provides that "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 the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." A "state employee" for purposes of R.C. 9.86 is defined in R.C. 109.36(A)(1) as a " 'person who, at the time a cause of action against the person arises, is * * * employed by the state.' " *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14.

{¶8} R.C. 2743.02(F) establishes the procedure for determining the immunity R.C. 9.86 grants, stating "[a] civil action against an officer or employee" alleging "the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities" or alleging "the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner" first must "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" pursuant to R.C. 9.86 "and whether the courts of common pleas have jurisdiction over the civil action." R.C. 2743.02(F). Significant to this appeal, the section further provides that "[t]he officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity." R.C. 2743.02(F).

{¶9} Accordingly, whether a doctor is entitled to personal immunity from liability under R.C. 9.86 involves a question of law, an issue over which the Court of Claims has exclusive, original jurisdiction. *Nease v. Med. College Hosps.*, 64 Ohio St.3d

396, 400 (1992); *Johns v. Univ. of Cincinnati Med. Assocs., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824. If the Court of Claims determines the employee is immune from liability, the plaintiff in the underlying action must assert his or her claims against the state, not the employee. R.C. 2743.02(A)(2).

{¶10} The Court of Claims' analysis of immunity is divided into two parts. *Theobald* at ¶ 14. The court initially must determine whether the individual was a state employee. *Id.* If so, the court secondly must determine whether the individual was acting within the scope of employment when the cause of action arose. Whether the individual was acting within the scope of employment requires consideration of the specific facts. *Scarberry v. The Ohio State Univ. Hosps.*, 10th Dist. No. 98AP-143 (Dec. 3, 1998), citing *Lowry v. Ohio State Highway Patrol*, 10th Dist. No. 96API07-835 (Feb. 27, 1997), and *Brooks v. The Ohio State Univ.*, 111 Ohio App.3d 342, 350 (10th Dist.1996).

B. Dr. Bell's Ability to Participate

{¶11} Given the language of R.C. 2743.02, Dr. Bell contends the Court of Claims erroneously deprived him of the opportunity to participate in the hearing to determine his immunity from suit when it: (1) failed to grant his request for a reasonable continuance; (2) denied his request to submit evidence in the form of depositions; and (3) approved, despite his objection, the stipulation between the Marottos and OSUMC, concluding the stipulation eliminated the need for further evidence.

{¶12} The Marottos respond to Dr. Bell's contentions concerning the stipulation by noting Dr. Bell had the opportunity to present evidence and to otherwise participate but voluntarily limited his own participation when he failed to appear for the hearing or submit his direct testimony through transcript or video. As an indication of the latitude afforded Dr. Bell, they further note Dr. Bell, through counsel, was able to proffer Dr. Bell's affidavit at the hearing. They lastly point out that since the court's judgment entry states the court relied on the evidence presented at the hearing and the case of *Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St.3d 263, 2011-Ohio-3375, Dr. Bell cannot demonstrate prejudicial error in the court's relying on the stipulation.

{¶13} The stipulation at issue resolves Dr. Bell's first assignment of error. The stipulation states that "[t]he parties, plaintiffs Mario Marotto (through his mother,

Deborah Marotto), Deborah Marotto, and Howie Marotto, and the defendant, The Ohio State University Medical Center, do hereby stipulate and agree for purposes of this action only that Dr. David Bell is NOT an 'officer or employee' of the defendant, The Ohio State University Medical Center, under R.C. 9.86, 109.36, or 2743.02." (Emphasis sic.) Accordingly, the stipulation concludes, "since Dr. Bell is not an 'officer or employee' under those statutes he is not entitled to immunity under R.C. 9.86." At the hearing, the court asked Dr. Bell's counsel if he wanted to join in the stipulation; counsel responded that he did not.

{¶14} Prior to the amendment, a state employee had no right to participate in immunity determination proceedings before the Court of Claims or to appeal that determination. *Theobald v. Univ. of Cincinnati*, 101 Ohio St.3d 370, 2004-Ohio-1527. In amending the statute, the legislature did not state the employee is a party to immunity decision; nor did it require the employee to be named or joined as a party to the proceeding. The language the legislature used in amending the statute nonetheless reflects its intent that employees subject to immunity proceedings under R.C. 2743.02(F) participate in the hearing (stating "[t]he officer or employee may participate in the immunity determination proceeding before the court of claims"). Such participation was lacking in the proceedings involving Dr. Bell. R.C. 2743.02(F).

{¶15} After the Marottos and OSUMC presented the stipulation to the court, counsel for OSUMC noted that "if there's going to be any proffer of evidence made, * * * we would also proffer the deposition of Dr. Bell, in addition to the stipulation. But the stipulation * * * kind of closes the door on the factual issue of whether or not he's an officer or employee." (Tr. 6.) The court responded, "[t]hat was the basis of my deciding that there's no reason to go forward with any more hearing, unless [Dr. Bell's counsel] had specific evidence that he was ready to present at the hearing, which apparently he does not." (Tr. 6-7.) When Dr. Bell's counsel suggested he would proffer Dr. Bell's deposition, the court stated, "[w]ell, we have Dr. Bell. We will receive that into evidence, for whatever purpose it is. I have that." (Tr. 7.) The court did not allow Dr. Bell's affidavit to be admitted; nor did the court give Dr. Bell's counsel the opportunity to submit an argument. At the end of the hearing, Dr. Bell's counsel proffered Dr. Bell's affidavit and OSUMC's counsel proffered rebuttal evidence.

{¶16} The same day, the court filed an entry that denied Dr. Bell immunity. The entry stated that, "[i]n light of the parties' stipulation, the evidence presented at the hearing, and the recent decision of the Supreme Court in *Engel v. Univ. of Toledo College of Medicine*, Slip Opinion No. 2011-Ohio-3375," the court concluded "David Bell, M.D. is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F)," so "the courts of common pleas have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case."

{¶17} Although the Marottos point out that the Court of Claims' judgment entry cites evidence in the hearing to support its determination, the hearing transcript indicates the court deemed the evidence significant until it received the stipulation. Once the Marottos and OSUMC submitted the stipulation, the court indicated the stipulation resolved the immunity issue. Although the court, in a seeming contradiction, asked Dr. Bell's counsel if he had further evidence, the court's judgment entry was filed the same day as the hearing, a factor suggesting the court likely did not rely on the deposition transcript or any other evidence admitted at the hearing. Because a determination based heavily on the stipulation deprives Dr. Bell of his statutory opportunity to participate in the proceedings that determine his own immunity from liability, the Court of Claims erred in deciding the immunity issue primarily on the stipulation.

{¶18} In response to Dr. Bell's first assignment of error, OSUMC contends the language of amended R.C. 2743.02 allows an employee to participate in the immunity determination but does not permit the employee to become a party to the proceedings. Because Dr. Bell is not a party, OSUMC asserts, he has no right to appeal from the Court of Claims' judgment. This court, however, determined Dr. Bell has the right to appeal from the Court of Claims' determination, even if he is not a party to the action, and we decline to revisit OSUMC's argument to the contrary. *See Marotto* at ¶ 5-8. Indeed, the amended statute's provisions granting Dr. Bell participation in the hearing would be nearly meaningless if Dr. Bell had no avenue of appellate review of the Court of Claims' immunity decision, especially here where the Court of Claims so heavily premised its decision on a stipulation in which Dr. Bell did not join.

{¶19} In the final analysis, the hearing transcript makes clear the court considered only the stipulation and declined to take further evidence. In light of amended R.C. 2743.02, the Court of Claims erred in relying on the stipulation, a procedure that in itself deprives the employee of the opportunity to participate and invites collusion between the parties who have aligned interests, the injured party and the state. Accordingly, we remand this matter so the court may hold a hearing, admit evidence, and consider the evidence to determine Dr. Bell's immunity.

{¶20} Dr. Bell's first assignment of error is sustained.

IV. Second Assignment of Error

{¶21} Dr. Bell's second assignment of error contends the Court of Claims erred when it ruled that he was not entitled to immunity under R.C. 9.86 and 2743.02(F). Because this matter must be returned to the Court of Claims to determine Dr. Bell's immunity after affording him the opportunity to participate in the hearing, Dr. Bell's second assignment of error is premature and not ready for resolution.

V. Disposition

{¶22} Having sustained Dr. Bell's first assignment of error, rendering his second assignment of error premature, we reverse and remand this matter to the Court of Claims for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed and
cause remanded.*

TYACK and SADLER, JJ., concur.
