[Cite as *Schulte v. Univ. of Cincinnati*, 2003-Ohio-1985.]

IN THE COURT OF CLAIMS OF OHIO

STEVE SCHULTE	:	
Plaintiff	:	CASE NO. 2002-04135
v.	:	DECISION
THE UNIVERSITY OF CINCINNATI	:	Judge J. Warren Bettis
Defendant	:	

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{¶1} This matter is before the court for determination as to whether Trevor C. Axford, M.D. and Daniel Snavely, M.D., are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Upon agreement of the court and counsel, an evidentiary hearing was waived and the issue was submitted upon stipulated facts and briefs.

{¶2} At all times relevant to this action, Drs. Axford and Snavely were faculty members of defendant, University of Cincinnati (UC), in the College of Medicine. Dr. Axford was an Associate Professor of Clinical Surgery and Dr. Snavely was an Associate Professor of Clinical Medicine. In addition to their faculty appointments, Drs. Axford and Snavely were also employed by approved private practice corporations for members of their respective departments within the College of Medicine. Dr. Axford was employed with the Cardiac Surgery Institute and Dr. Snavely was employed by University Internal Medicine Associates.

{¶3} There is no assertion that either Dr. Axford or Dr. Snavely acted with malice, in bad faith, or in a wanton or reckless manner in their care and treatment of plaintiff. Therefore, the issue before the court is whether these physicians were acting within the scope of their state employment with UC, or whether they were working within the scope of their private employment when the alleged injury to plaintiff occurred.

{¶4} R.C. 2743.02(F) states, in part:

{¶5} "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 his 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. ***"

{¶6} R.C. 9.86 states, in part:

{¶7} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages 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. ***"

{¶8} The determination of whether the physicians are entitled to personal immunity is a question of law. *Nease v. Medical College Hosp.* (1992), 64 Ohio St.3d 396 citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284. However, the question of whether they acted manifestly outside the scope of their state employment is one of fact. *Lowery v. Ohio State Highway Patrol* (February 27, 1997), Franklin App. No. 96API07-835, unreported.

{¶9} In *Ferguson v. The Ohio State University Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863, the Tenth District Court of Appeals set forth 15 factors it routinely considered in determining whether a physician acted outside the scope of his state employment. Subsequently, in *Wayman v. University of Cincinnati Med. Ctr.* (June 22, 2000), Franklin App. No. 99AP-1055, the court emphasized that the *Ferguson* factors could be viewed in terms of two essential considerations: 1) whether the patient was the physician's private patient or a patient of the university medical facility; and 2) the relative financial gain for the university as compared to that of the physician. Applying these criteria to the facts of the instant case, the court is persuaded for the following reasons that both physicians were acting within the scope of their university employment when rendering the care and treatment in question.

{¶10} On July 14, 2001, plaintiff went to the emergency department of the university hospital after experiencing a mild stroke. He was taken to the cardiology services unit. At the time, Dr. Snavely was the faculty physician on rotation in that unit. He therefore became plaintiff's attending physician. Upon

examination, he determined that plaintiff required surgery to replace both his aortic and mitral valves. Dr. Axford was then called because he was the only faculty physician who performed cardiac surgery. Neither Dr. Axford nor Dr. Snavely had previously met with or treated plaintiff. Nevertheless, because of the complexity of plaintiff's condition and his lengthy history of cardiac irregularities, they became involved in the case and continued as his attending physicians.

{¶11} Plaintiff was hospitalized from July 14 to 21, 2001. He was then discharged to continue recovering from the stroke and to await the valve replacement surgery that had been scheduled for September 5, 2001. At the direction of Dr. Axford, plaintiff was ordered to discontinue his anticoagulation drug therapy for one week prior to the surgery. According to Dr. Axford, this was recommended because plaintiff would benefit from normal blood clotting during the lengthy surgical procedures that would be performed. After plaintiff discontinued the drug therapy, his surgery had to be rescheduled to September 7, 2001. On September 5, he suffered a massive second stroke.

{¶12} There are a number of factual issues surrounding the discontinuation of the anticoagulation therapy and whether the stoppage was the proximate cause of the second stroke; however, those issues are not germane to the determination of immunity. Rather, the court finds that, despite the protracted involvement of both Drs. Axford and Snavely, the totality of the evidence demonstrates that plaintiff did not at any time become a private patient of either physician. Both physicians instructed or supervised students, residents, and fellows while rendering

treatment to plaintiff. There was no financial gain to either physician inasmuch as plaintiff did not have health insurance and received treatment through a special Hamilton County tax-levy program. Therefore, even though each physician could have received bonuses through private practice plans based upon total payments collected, neither had any expectation of recovery under the circumstances. To the contrary, the evidence shows that both had a duty as faculty physicians to provide free medical care to individuals who are unable to pay. It has repeatedly been held that physicians are entitled to statutory immunity when their only contact with a patient is in their capacity as faculty physicians supervising and/or teaching residents. See, e.g., *Allen v. University of Cincinnati Hosp.* (1997), 122 Ohio App.3d 195; *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App.3d 69; *Chitwood v. Univ. Medical Ctr.* (May 5, 1998), Franklin App. No. 97API09-1235.

{¶13} Having found that both Dr. Axford and Dr. Snavely treated plaintiff only in their capacities as faculty physicians and that plaintiff was at all times a patient of the university, the court concludes that both are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

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J. WARREN BETTIS
Judge

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LH/cmd
Filed 4-7-2003
To S.C. reporter 4-18-2035