

[Cite as *Nelson v. Univ. of Cincinnati Med. Ctr.*, 2004-Ohio-311.]

**IN THE COURT OF CLAIMS OF OHIO**

CONNIE NELSON

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Plaintiff :

CASE NO. 2003-07502

Judge Fred J. Shoemaker

V.

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## DECISION

UNIVERSITY OF CINCINNATI  
MEDICAL CENTER

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Defendant

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{¶1} This case was scheduled for an evidentiary hearing to determine whether Henry W. Neale, M.D. is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. In lieu of an oral hearing, the parties agreed to submit the issue to the court upon stipulated exhibits and briefs. On December 18, 2003, the parties submitted the following stipulated exhibits:

- {¶2} “1) Plastic Department record for surgery for plaintiff;
- {¶3} “2) University Hospital record for surgery for plaintiff;
- {¶4} “3) Deposition of Dr. Neale;
- {¶5} “4) Deposition of Connie Nelson;
- {¶6} “5) University of Cincinnati (UC) answers to request for documents;
- {¶7} “6) UC supplement to answers to request for documents;
- {¶8} “7) UC response to interrogatories.”

{¶¶} Additionally, on December 18, 2003, plaintiff filed a motion to submit an additional record showing a prior surgery by Dr. Henry Neale. The parties have not stipulated to this exhibit. The court hereby GRANTS the motion.

{¶10} R.C. 2743.02(F) provides, in part:

{¶11} “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. \*\*\*”

{¶12} R.C. 9.86 provides, in part:

{¶13} “\*\*\* no 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.* \*\*\*” (Emphasis added.)

{¶14} Plaintiff developed breast cancer in the mid-1990s and underwent a lumpectomy and radiation for that condition.

{¶15} Prior to the surgery that is the subject of this litigation, plaintiff had received treatment through the University Plastics Clinic for a facelift. Plaintiff understood the surgery would be performed by a resident along with Dr. Neale. She also understood she was paying a reduced rate because her case would be handled by residents. Plaintiff was satisfied with the results of the facelift performed by the resident under the supervision of Dr. Neale.

{¶16} Prior to the date of the breast surgery on October 23, 2000, plaintiff again went to the University Plastic Clinic to discuss breast surgery with Dr. Butterfield. Plaintiff admitted that she knew Dr. Butterfield was a resident on the several occasions they met. Dr. Butterfield took plaintiff to meet with Dr. Neale and discuss the surgical procedure that

Dr. Butterfield had recommended. Dr. Neale viewed plaintiff's breast and approved the recommended surgery. Dr. Neale advised plaintiff that he was not her private doctor but would assist in the surgery. This was the only occasion the plaintiff met with Dr. Neale prior to the surgery. Dr. Neale assisted in the surgery on October 23, 2000. He did not charge plaintiff through his private practice for his participation in the surgery. The University Surgical Group of Cincinnati, Inc. (USGC) billed plaintiff for Dr. Neale's participation in the surgery; however, of the approximately \$900 collected, he received approximately \$152 after USGC took its portion and he paid taxes and fees.

{¶17} In determining whether a physician employed by both a state university and a practice group acted manifestly outside the scope of his or her employment with the state, this court has primarily utilized a two-prong test, examining:

{¶18} 1) Whether the patient was a "private" patient of the physician or a patient of the university; and

{¶19} 2) The university's financial gain in relation to the physician's financial gain from the care rendered to the patient. *Norman v. The Ohio State Univ. Hosp.* (1996), 116 Ohio App.3d 69.

{¶20} In *Ferguson v. Ohio State Univ. Med. Ctr.*, (June 22, 1999), Franklin App. No. 98AP-863, the court stated, "[t]he key issue in determining whether [a physician] is entitled to immunity is whether he saw the patient only in his capacity as an attending physician supervising residents at OSUMC or whether he saw the patient as a private patient."

{¶21} Whether a state employee is 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. While the issue of immunity is a question of law, consideration of the specific facts is necessary. *Nease, supra*; *Conley, supra*.

{¶22} The court finds, based upon the specific facts and the law, that Dr. Neale is entitled to personal immunity because he was acting as a teaching supervisor during plaintiff's surgery in accordance with his university responsibilities. The court further finds

that Dr. Neale did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff.

{¶23} The courts of common pleas do not have jurisdiction over civil actions against Dr. Henry W. Neale based on the allegations of this case.

{¶24} This case was submitted to the court upon stipulated exhibits and briefs to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon reviewing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Henry W. Neale, M.D. is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over any civil action against Dr. Neale arising from the allegations in the complaint. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay.

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FRED J. SHOEMAKER  
Judge

Entry cc:

David E. Davidson  
213 East Fourth Street  
P.O. Box 1078  
Covington, Kentucky 41012-1078

Attorney for Plaintiff

Larry Y. Chan  
Assistant Attorney General  
150 East Gay Street, 23rd Floor  
Columbus, Ohio 43215-3130

Attorney for Defendant

Information Copy:

Stephen O'Keefe  
7 West 7th Street, Suite 1990  
Cincinnati, Ohio 45202

Attorney for Henry W. Neale,  
M.D.

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JUDGMENT ENTRY

**FJS/cmd**

Filed January 21, 2004

To S.C. reporter January 26, 2004