

[Cite as *Botkin v. Univ. of Cincinnati, College of Medicine*, 2004-Ohio-646.]

IN THE COURT OF CLAIMS OF OHIO

RHONDA BOTKIN, Admx., etc. :  
Plaintiff : CASE NO. 98-02112  
v. : Judge Fred J. Shoemaker  
UNIVERSITY OF CINCINNATI : DECISION  
COLLEGE OF MEDICINE :  
Defendant :  
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{¶1} The court held an evidentiary hearing in this case to determine whether Helen W. Hsu,<sup>1</sup> M.D., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

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

{¶3} "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. \*\*\*"

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<sup>1</sup>On December 4, 2003, counsel for Helen W. Hsu, M.D., filed a suggestion of death pursuant to Civ.R. 25(E) with regard to Dr. Hsu.

{¶4} R.C. 9.86 provides, in part:

{¶5} "\*\*\* 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.)

{¶6} From July 1996 to February 5, 1997, plaintiff was a patient at defendant's OB-GYN Clinic where she received prenatal care and treatment from resident physicians who were under the supervision of faculty members. In January 1997, the treating physicians suspected that plaintiff's fetus was suffering from intrauterine growth restriction (IGR), a condition where the ratio of head circumference to abdominal circumference is asymmetric.

{¶7} During the course of her treatment, plaintiff expressed interest in a procedure known as tubal ligation, a form of permanent sterilization. On January 7, 1997, plaintiff signed a consent form for a tubal ligation to occur after the birth of her baby.

{¶8} On February 4, 1997, defendant's staff confirmed that plaintiff's fetus was suffering from IGR and plaintiff was scheduled for a Caesarian section (C-section) the following day. The C-section and the tubal ligation were scheduled to occur during the same surgery. According to Dr. Jill Zurawski, a fourth-year resident, and Dr. Helen Hsu, the attending physician, they discussed with plaintiff on numerous occasions the risks and benefits of a tubal ligation for a patient whose fetus was suffering from IGR. Although plaintiff concedes that she was told

that the fetus suffered from IGR, plaintiff claims that she was never informed of the risk of death associated with that condition and that she never would have consented to the tubal ligation if she had been so informed.

{¶9} Although Dr. Hsu was the attending physician on-call in the clinic on February 5, 1997, Dr. Zurawski and first-year resident Nathan Wenger performed the C-section and the tubal ligation. Dr. Hsu was present during the procedures but could not recall whether she had "scrubbed in" for the procedures. Both procedures were completed successfully, but plaintiff's baby was born with problems and was sent to the neonatal intensive care unit.

{¶10} Dr. Wenger, the junior resident, dictated an operative report on the day of the surgery, as is customary practice at defendant's hospital. The operative report was transcribed on February 7, 1997, and Dr. Hsu subsequently signed the report as the attending physician. After the report had been distributed for review, Dr. Zurawski contacted Dr. Wenger and asked him to amend the report to include a paragraph about plaintiff's desire to have a tubal ligation in spite of knowing that her fetus had IGR.

{¶11} On March 2, 1997, plaintiff's baby died. On March 19, 1997, a second dictation by Dr. Wenger was completed and it was subsequently signed by Dr. Hsu. Plaintiff asserts that Dr. Hsu was acting in a wanton or willful manner when she signed the second operative report because the additional paragraph regarding plaintiff's informed consent to the tubal ligation constitutes a falsification of medical records. Plaintiff agrees that Dr. Hsu was an employee of defendant and plaintiff is not asserting medical negligence with regard to the procedures that were performed.

{¶12} In July 1995, Dr. Hsu was appointed to the faculty for a two-year term as an Assistant Professor of Clinical Obstetrics and Gynecology at defendant's college of medicine. She received an annual starting salary of \$15,000 from the University of Cincinnati. In 1997, she earned \$129,032.88 from the Foundation for Obstetrics and Gynecology (FOG), the Departmental Practice Plan that was established to compensate faculty and instructors for their clinical efforts.

{¶13} Plaintiff and her infant were patients of the clinic at defendant's university. Clinic patients are cared for by a number of residents and attending physicians, depending on who is on duty. Plaintiff was not a private patient of Dr. Hsu. Plaintiff was billed by the university for her care and treatment in the clinic; she was not billed by FOG. Dr. Hsu's only interactions with plaintiff and her baby occurred in the clinic, where Dr. Hsu's duties included supervising resident physicians.

{¶14} The key factor in determining whether a physician, who is employed simultaneously by the state and a private employer, is entitled to immunity, is whether the patient was essentially the doctor's private patient or whether the doctor treated the patient in his or her capacity as an attending physician supervising residents. *Barkan v. The Ohio State Univ. Med. Ctr.*, Franklin App. No. 02AP-436, 2003-Ohio-985.

{¶15} Based upon the totality of the evidence presented, the court finds that Dr. Hsu acted within the scope of her employment with defendant at all times relevant hereto.

{¶16} Plaintiff argues that Dr. Hsu should not be entitled to immunity because her conduct in attempting to avoid liability by falsifying the second operative report was committed with malicious

purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. However, both operative reports were drafted by Dr. Wenger at the request of Dr. Zurawski. Dr. Hsu testified that as a matter of course, she signs the operative reports as they are given to her. Dr. Hsu's only involvement with the reports in this case was signing her name as a part of her responsibilities as a faculty member supervising residents.

{¶17} Based upon the evidence in this case, the court finds that plaintiff has failed to prove that Dr. Hsu acted with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, Dr. Hsu is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over civil actions against her based upon the allegations in this case.

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FRED J. SHOEMAKER  
Judge

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DECISION

HTS/cmd

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