[Cite as *Boutros v. State Med. Bd. of Ohio*, 2009-Ohio-6070.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

GEORGE JAMIL ELIAS BOUTROS, M.D.

Plaintiff

v.

STATE MEDICAL BOARD OF OHIO

Defendant
Case No. 2008-05711

Judge Joseph T. Clark

DECISION

{¶ 1} An evidentiary hearing was conducted in this matter to determine whether Stephen G. Noffsinger, M.D., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Upon review of the testimony and evidence presented at the hearing, the court makes the following determination.

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

{¶ 3} "A civil action against an officer or employee, as defined in section 109.36[1]

---

[1]R.C. 109.36 states, in relevant part:

"As used in this section and sections 109.361 [109.36.1] to 109.366 [109.36.6] of the Revised Code:

"(A) (1) 'Officer or employee' means any of the following: "(a) A person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state. "(b) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, *psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.*

"* * * "(B) 'State' means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, *boards*, offices,

of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's 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."

{¶ 4} R.C. 9.86 states, in part:

{¶ 5} "[N]o 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} Plaintiff is a board-certified ophthalmologist. In 2004, plaintiff left his position at Trinity Hospital (Trinity) in Minot, North Dakota. In 2005, plaintiff moved to Ohio and accepted a position at Eye Specialists of Ohio in Circleville.

{¶ 7} Pursuant to R.C. Chapter 4731, defendant is charged with regulating the licenses of physicians in Ohio. In March 2005, defendant requested that plaintiff undergo a mental health examination based upon information that it had received regarding his employment at Trinity. Defendant chose Dr. Noffsinger to evaluate plaintiff and to prepare a report concerning his mental health.

{¶ 8} In his report, Dr. Noffsinger concluded that plaintiff suffered from Bipolar I Disorder and recommended that plaintiff be required to undergo outpatient psychiatric treatment and be prescribed mood-stabilizing medication. After reviewing Dr. Noffsinger's report, on August 9, 2006, defendant issued a Notice of Opportunity for Hearing pursuant to R.C. 119, informing plaintiff that it was considering whether to take formal action in accordance with Dr. Noffsinger's opinions and recommendations.

---

commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions. "* * *

"(D) 'Employer' means the general assembly, the supreme court, any office of an elected state officer, or any department, *board*, office, commission, agency, institution, or other instrumentality of the state of Ohio that employs or contracts with an officer or employee or to which an officer or employee is elected or appointed." (Emphasis added.)

Plaintiff disputed Dr. Noffsinger's opinion and report and requested an administrative hearing.[2]

{¶ 9} In this action, plaintiff asserts that Dr. Noffsinger was not an officer or employee of the state as those terms are used in R.C. 9.86. Moreover, plaintiff asserts that if the court finds that Dr. Noffsinger qualifies as an officer or employee of the state, he acted with malicious purpose, in bad faith, or in a wanton or reckless manner when he conducted his evaluation.

{¶ 10} The Supreme Court of Ohio has held that "in an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02[F], the Court of Claims must initially determine whether the practitioner is a state employee. If there is no express contract of employment, the court may require other evidence to substantiate an employment relationship, such as financial and corporate documents, W-2 forms, invoices, and other billing practices. If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply." *Theobald v. University of Cincinnati,* 111 Ohio St.3d 541, 2006-Ohio-6208, ¶30.

{¶ 11} The issue whether an employee is entitled to immunity is a question of law. *Nease v. Medical College Hosp*., 64 Ohio St.3d 396, 400, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether an employee acted outside the scope of his employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9.

I. OFFICER OR EMPLOYEE

{¶ 12} Mark Blackmer testified that he is employed by defendant as an Enforcement Attorney, and that his duties include coordinating investigations of physicians to determine whether they have violated R.C. Chapter 4731.22. He explained that pursuant to R.C. 4731.22(B)(19),3 he may send a physician for a medical

---

[2]As of the date of the evidentiary hearing, the report from the administrative hearing had not been issued.

[3]R.C. 4731.22(B)(19) states, in relevant part:

"(B) The board, by an affirmative vote of not fewer than six members, shall, to the extent

or psychiatric evaluation, and that defendant maintains a list of experts to consult when psychiatric or chemical dependency issues arise. Blackmer explained that his practice was to call an expert on the list, ask the expert if he is willing to do an evaluation, and, if so, then schedule an evaluation. Blackmer testified that he had retained Dr. Noffsinger for evaluations prior to his involvement with plaintiff's case and decided to contact him when plaintiff's case arose.

{¶ 13} Blackmer further testified that defendant typically used two types of contracts to obtain an expert evaluation. The first, a global or master contract, would authorize a physician to perform any number of evaluations for a two-year period. The second, a testifying contract, would allow the physician to be compensated for his testimony at a hearing. Blackmer stated that the contracts contained in Plaintiff's Exhibits 3A-3F and Defendant's Exhibit L pertained to Dr. Noffsinger from July 29, 2003 to June 30, 2007. Although Blackmer acknowledged that there was a "gap" for the period from June 30, 2004 to September 2, 2005, with regard to written contracts for Dr. Noffsinger, Blackmer testified that he was under the impression that Dr. Noffsinger had a written contract in place when he called him to evaluate plaintiff and then scheduled an evaluation for March 24, 2005, at Dr. Noffsinger's offices at University Hospitals of Cleveland. Otherwise, Blackmer stated that he would not have called Dr. Noffsinger.

{¶ 14} Dr. Noffsinger testified that he has been retained by defendant numerous times to perform evaluations of physicians whose licenses are under review. Dr. Noffsinger testified that he received his first referral from defendant in 1999 and that he has performed approximately 60 evaluations since that time. Dr. Noffsinger stated that when he receives a phone call from the board's attorney, he asks for the physician's name and the names of his or her previous treaters, if any, to determine whether a conflict exists. If there is no conflict, Dr. Noffsinger agrees to conduct an evaluation and an appointment is scheduled.

{¶ 15} Dr. Noffsinger explained that with each referral he received a letter from

---

permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

"* * * "(19) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely affects cognitive, motor, or perceptive skills."

an enforcement attorney, but that he did not receive a separate employment contract for each evaluation. Dr. Noffsinger stated that he evaluated plaintiff in response to a referral letter and that he assumed that a written contract was in effect when he examined plaintiff.

{¶ 16} Based upon the foregoing, the court finds that Dr. Noffsinger qualifies as an officer or employee as those terms are defined in R.C. 109.36. Although defendant could not produce a copy of a written contract that was in effect in March 2005, the court finds that both defendant and Dr. Noffsinger acted with the understanding that a written contract did exist. The court further finds that the existence of contracts between defendant and Dr. Noffsinger both before and after the date of the evaluation demonstrates that they acted with the understanding that a contract was in place. Therefore, plaintiff's argument that Dr. Noffsinger was not an officer or employee is without merit.

II. MALICIOUS PURPOSE, BAD FAITH, OR WANTON OR RECKLESS CONDUCT

{¶ 17} Plaintiff asserts that Dr. Noffsinger committed multiple negligent acts during his evaluation, and that the cumulative effect of those actions constitutes reckless or wanton conduct.

{¶ 18} In the context of immunity, an employee's wrongful conduct, even if it is unnecessary, unjustified, excessive or improper, does not automatically subject the employee to personal liability unless the conduct is so divergent that it severs the employer-employee relationship. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775, citing *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86, 89. In order to find wanton or reckless conduct there must be a showing that the employee perversely disregarded a known risk. See, e.g., *Jackson v. Butler Cty. Bd. of Cty. Commrs*. (1991), 76 Ohio App.3d 448, 454. Plaintiff bears the burden of proving that a state employee should be stripped of immunity. *Fisher v. University of Cincinnati Med. Ctr.* (Aug. 25, 1998), Franklin App. No. 98AP-142.

{¶ 19} Plaintiff offered the testimony of Edward L. Kelly, M.D., J.D., who is board-certified in both psychiatry and forensic psychiatry. Dr. Kelly critiqued Dr. Noffsinger's initial report in various respects. However, Dr. Kelly's strongest criticism of Dr.

Noffsinger was Dr. Noffsinger's failure to explain why he did not change his initial diagnosis after he reviewed an arbitration report generated in subsequent proceedings in plaintiff's employment dispute in North Dakota. In Dr. Kelly's opinion, Dr. Noffsinger's failure to do so shows that he acted recklessly and in bad faith.

{¶ 20} Dr. Kelly testified that Dr. Noffsinger violated the ethical standards of psychiatrists in that he did not attain the highest standards of forensic psychiatry; he was not thorough in his report; he was not objective; and he did not explain why the additional evidence should not be considered. Dr. Kelly also criticized Dr. Noffsinger's recommendation to prescribe mood-stabilizing medication to plaintiff because a common symptom of the medication is tremors, which would prevent plaintiff from performing eye surgery. Dr. Kelly also criticized Dr. Noffsinger for diagnosing plaintiff with Bipolar 1 Disorder because it is the most "severe" form of Bipolar disorder. However, Dr. Kelly's main criticism was that Dr. Noffsinger did not reconsider his diagnosis after the "bulk of the information was discredited" by the arbitration decision. In Dr. Kelly's opinion, Dr. Noffsinger had a "disregard for the truth" in this matter.

{¶ 21} On cross-examination, Dr. Kelly admitted that plaintiff has paid him at least $30,000 since 2005 to advocate on his behalf, including to testify at the arbitration hearing in North Dakota. In addition, Dr. Kelly agreed that reasonable psychiatrists can review the same documents and arrive at different conclusions.

{¶ 22} Defendant presented the testimony of Jeffrey S. Janofsky, M.D., who is board-certified in both general and forensic psychiatry, and who is employed as a clinical professor at both The University of Maryland School of Medicine and The Johns Hopkins University School of Medicine. Dr. Janofsky conducts forensic evaluations in his private practice and teaches forensic psychiatry, including how to conduct forensic evaluations.

{¶ 23} According to Dr. Janofsky, once a psychiatrist receives a telephone call from a state medical board with a referral, the psychiatrist must determine if there are any conflicts with the subject of the evaluation. If there are no conflicts, the psychiatrist may agree to conduct the evaluation. Dr. Janofsky also stated that the psychiatrist must explain to the subject of the evaluation what the scope of the evaluation will be, including that the results of the evaluation will be forwarded to the board. Dr. Janofsky

opined that Dr. Noffsinger appropriately followed those steps during his evaluation of plaintiff. Dr. Janofsky further opined that nothing in Dr. Noffsinger's report concerned him or caused him alarm.

{¶ 24} Dr. Janofsky stated that the "American Academy of Psychiatry and the Law Ethics Guidelines for the Practice of Forensic Psychiatry" require confidentiality, consent of the patient, honesty, and objectivity. (Joint Exhibit 1.) Dr. Janofsky opined that Dr. Noffsinger was sufficiently thorough and met the standard of care in both his original and supplemental report. In addition, Dr. Janofsky opined that Dr. Noffsinger did, in fact, consider the supplemental information that Dr. Kelly referred to in his testimony.

{¶ 25} Dr. Janofsky opined that Dr. Noffsinger met the standard of care even though he did not change his diagnosis after reviewing the arbitration decision. Dr. Janofsky concluded that Dr. Noffsinger complied with both the standards of care for the practice of psychiatry and the ethical standards of care pursuant to the American Academy of Psychiatry and the Law.

{¶ 26} Dr. Noffsinger testified that he had never met plaintiff before the evaluation; that he asked plaintiff to explain what happened at Trinity in his own words; that he took 14 pages of notes during the evaluation; that he received a letter from Dr. Kelly on March 30, 2005, before he submitted his report to defendant; that he considered Dr. Kelly's information along with the rest of the information that was provided to him when he rendered his opinion; and that he received additional materials in June 2006, which he considered before rendering his final opinion to the board.

{¶ 27} "The difference between negligence and willfulness is a difference in kind and not merely a difference in degree, and, accordingly, negligence cannot be of such degree as to become willfulness. Generally a willful act involves no negligence, but it has also been held that a willful act may include the element of negligence." *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96, quoting 65 Corpus Juris Secundum, 546, Section 9(1).

{¶ 28} The term "reckless" is often used interchangeably with the word "wanton" and has also been held to be a perverse disregard of a known risk. *Jackson*, supra, at

454. "The actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, at 104-105, citing Restatement of the Law 2d, Torts (1965), at 587, Section 500.

{¶ 29} In the continuum between negligence and intentional misconduct, wanton misconduct is a degree greater than negligence. *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515. "'[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.'" *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, quoting *Roszman v. Sammett*, supra, at 96-97.

{¶ 30} Notwithstanding plaintiff's arguments to the contrary, the court finds that plaintiff has not proven by a preponderance of the evidence a disposition to perversity on the part of Dr. Noffsinger. Moreover, even if this court were to conclude that Dr. Noffsinger was negligent,4 plaintiff's theory that multiple negligent acts considered together can rise to the level of willful or wanton conduct is not supported by case law. In addition, the court finds that plaintiff has failed to prove that Dr. Noffsinger acted with malicious purpose or in bad faith. Therefore, the court finds that Dr. Noffsinger is entitled to immunity.

{¶ 31} In light of this decision, defendant's April 6, 2009 motion in limine is DENIED as moot.

[4]The court notes that the issue of whether Dr. Noffsinger was negligent when he rendered his report is not before the court at this juncture. The sole issue at the evidentiary hearing is whether Dr. Noffsinger is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F).

65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

GEORGE JAMIL ELIAS BOUTROS, M.D.

Plaintiff

v.

STATE MEDICAL BOARD OF OHIO

Defendant
Case No. 2008-05711

Judge Joseph T. Clark

JUDGMENT ENTRY

The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Stephen G. Noffsinger, M.D., is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

_____
JOSEPH T. CLARK
Judge

cc:

Andrea L. Whitaker
Gordon S. Friedman
1370 Ontario Street, Suite 600
Cleveland, Ohio 44113-1752

Anne B. Strait
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Mark O'Neil
The Tower at Erieview, Suite 1900
1301 East 9th Street
Cleveland, Ohio 44114

Andrea L. Whitaker
Gordon S. Friedman
1370 Ontario Street, Suite 600
Cleveland, Ohio 44113-1752

Anne B. Strait
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Mark O'Neil
The Tower at Erieview, Suite 1900
1301 East 9th Street
Cleveland, Ohio 44114

HTS/cmd
Filed October 19, 2009
To S.C. reporter November 17, 2009