

# 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

DEBORAH MAROTTO, et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY MEDICAL CENTER

Defendant

Case No. 2011-02590

Judge Patrick M. McGrath  
Magistrate Holly True Shaver

## JUDGMENT ENTRY

{¶1} On January 9, 2014, the magistrate issued a decision recommending that the court find that David Bell, M.D., is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F), and that the courts of common pleas have jurisdiction over civil actions that may be filed against him based upon the allegations in this case.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” Dr. Bell filed his objections on January 23, 2014. Defendant filed a response on January 31, 2014. Plaintiffs did not file a response. A transcript of the proceedings was filed on October 1, 2013.

{¶3} This case for obstetrical malpractice arises out of the alleged negligent delivery of Mario Marotto at the Ohio State University Medical Center (OSUMC). Dr. Bell, an unpaid auxiliary faculty member at The Ohio State University College of Medicine (OSUCOM), asserted that he was an OSUCOM employee operating in the course and scope of his employment at the time of the alleged negligence and is thus

entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). The case proceeded to an immunity hearing before the magistrate.

{¶4} The magistrate determined that “there was no employment contract between Dr. Bell and defendant, that Dr. Bell received no financial compensation from defendant as a result of the medical care he rendered to plaintiffs, and that defendant did not control the care and treatment that Dr. Bell rendered to plaintiffs. Furthermore, Dr. Bell has failed to prove that he served in an elected or appointed position with the state, or that he was rendering medical services pursuant to a personal services contract or purchased service contract with the state.” Magistrate’s Decision, pg. 8. Accordingly, the magistrate found that “Dr. Bell was not an officer or employee of the state of Ohio as defined in R.C. 109.36.” *Id.* Therefore, the magistrate recommended that the court find that “David Bell, M.D., is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F), and that the courts of common pleas have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.” *Id.*

{¶5} In reviewing a party’s objections, the “court must conduct an independent analysis of the underlying issues, undertaking the equivalent of a de novo determination and independently assessing the facts and conclusions contained in the magistrate’s decision.” *Shihab & Assoc. Co. LPA v. Ohio Dept. of Transp.*, 168 Ohio App.3d 405, 2006-Ohio-4456, ¶ 13 (10th Dist.); *Dayton v. Whiting*, 110 Ohio App.3d 115, 118 (2nd Dist.1996).

{¶6} Dr. Bell’s objections challenge the magistrate’s conclusion that he is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Dr. Bell argues that he does have an employment contract with OSUCOM as set forth in the OSUMC bylaws, his reappointment letter, and credentialing documents; that he receives compensation in the form of free Continuing Medical Education and unlimited access to the Health Sciences Library; and that OSUCOM controlled Dr. Bell’s actions in the form of a “crushing regulatory scheme, to which Dr. Bell was required to accept, all as a

precondition for gaining privileges to treat patients at OSUMC.” Dr. Bell’s objections, pg. 10. The Ohio Supreme Court and the Tenth District Court of Appeals have previously concluded that unpaid auxiliary faculty members are not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). *Engel v. Univ. of Toledo College of Med.*, 130 Ohio St.3d 263, 2011-Ohio-3375, 957 N.E.2d 764; *Phillips v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 12AP-414, 2013-Ohio-464; *Poe v. Univ. of Cincinnati*, 10th Dist. Franklin Nos. 12AP-929 and 13AP-210, 2013-Ohio-5451. Dr. Bell has not pointed to any evidence that would compel the court to reach a different result. Dr. Bell’s objections are OVERRULED.

{¶7} Next, Dr. Bell argues that he was serving in an appointed position with the state. However, there is no evidence that Dr. Bell possessed “some sovereign functions of government to be exercised by him for the benefit of the public either of an executive, legislative or judicial character.” *Engel* at ¶ 19. Furthermore, Dr. Bell’s duties “were not of a level consonant with those of a public office.” *Id.* Dr. Bell’s objection is OVERRULED.

{¶8} Finally, Dr. Bell argues that he was performing pursuant to a personal services contract or purchased service contract with the state. However, the court has already concluded that Dr. Bell was not performing services pursuant to an employment contract with the state. Moreover, the court has concluded that Dr. Bell did not receive any monetary compensation for such services rendered. Dr. Bell was acting as an unpaid voluntary faculty member at the time of the alleged negligence. Dr. Bell’s objection is OVERRULED.

{¶9} Upon review of the record, Dr. Bell’s objections, and the magistrate’s decision, the court determines that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED, and the court adopts the magistrate’s decision and recommendation as its own, including the findings of fact and conclusions of law contained therein. The court

determines that David Bell, M.D., is not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case. A status conference is set for *April 9, 2014, at 10:00 a.m.*, to discuss the status of the case. The court shall initiate the conference via telephone.

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PATRICK M. MCGRATH  
Judge

cc:

Gerald S. Leeseberg  
175 South Third Street  
Penthouse One  
Columbus, Ohio 43215-5134

Gregory B. Foliano  
Special Counsel to Attorney General  
2075 Marble Cliff Office Park  
Columbus, Ohio 43215

Karl W. Schedler  
Assistant Attorney General  
150 East Gay Street, 18th Floor  
Columbus, Ohio 43215-3130

James P. Triona  
Paul Vollman  
2021 Auburn Avenue  
Cincinnati, Ohio 45219

**Filed March 19, 2014**  
**Sent to S.C. Reporter 10/15/15**