

# Court of Claims of Ohio

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NINA STARKEY

Plaintiff

v.

UNIVERSITY OF CINCINNATI

Defendant

Case No. 2012-06165

Magistrate Anderson M. Renick

## DECISION OF THE MAGISTRATE

{¶1} On June 2, 2014, the court conducted an evidentiary hearing to determine whether Rajesh Gutta, D.D.S., M.S., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Upon review of the 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 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.”

{¶6} 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 the court determines that the practitioner is a state employee, the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting ‘manifestly outside the scope of employment’ for purposes of R.C. 9.86. *If there is evidence that the practitioner’s duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred.*” *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 547-548, 2006-Ohio-6208. (Emphasis added.)

{¶7} At all times relevant, Dr. Gutta was an assistant professor in the Department of Surgery, Division of Oral and Maxillofacial Surgery, at the University of Cincinnati (UC). (Defendant’s Exhibit A.) Dr. Gutta also provided clinical care to patients who were billed through his practice group, the University Surgical-Dental Associates, Inc. (USDA). Dr. Gutta testified that he received income from both UC and USDA. According to the offer letter for the position as an assistant professor at UC, Dr. Gutta was required to provide patient care “in accordance with the terms of the Department’s Practice Plan”. (Defendant’s Exhibit B.) On July 19, 2011, Dr. Gutta conducted an initial office visit with plaintiff and on August 10, 2011, he performed oral surgery on plaintiff. Dr. Gutta testified that, at the time of plaintiff’s surgery, he worked exclusively for UC in a teaching and research capacity and did not have his own private practice. Dr. Gutta related that UC received payment for plaintiff’s procedure.

{¶8} Initially, the court finds that Dr. Gutta's position as an assistant professor at UC qualifies as state employment. Thus, the issue before the court is whether Dr. Gutta was acting on behalf of the state at the time when the alleged negligence occurred and, inasmuch as there is evidence that Dr. Gutta's duties included the education of residents, whether he was in fact educating a resident at the time of the alleged negligence.

{¶9} Dr. Gutta testified that Christopher Koehn, D.D.S., a resident, participated in the initial consultation with plaintiff, during which he noted her medical history, ordered an x-ray and developed a treatment plan that was subsequently approved by Dr. Gutta. (Defendant's Exhibit D.) Although the surgical report did not list the name of an attending resident, Dr. Gutta explained that the surgical report form does not include a field for recording the names of residents who participated in the procedure. Dr. Gutta testified that it was his practice to teach residents during such procedures and that more likely than not, a resident was present during plaintiff's procedure. Dr. Gutta explained that his customary practice was to allow experienced residents to assist in performing the surgery.

{¶10} As stated in *Theobald, supra*, "[i]n many instances, the line between [the health-care practitioner's] roles (practicing and teaching) is blurred because the practitioner may be teaching by simply providing the student or resident an opportunity to observe while the practitioner treats a patient." *Id.* at ¶ 16, quoting *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶ 34. In affirming the holding of the Tenth District Court of Appeals, the Supreme Court agreed that "the question of scope of employment must turn on what the practitioner's duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury." *Id.* at ¶ 23. The Court of Appeals had explained that "anytime a clinical faculty member furthers a student or resident's education, he promotes the state's interest. Because the state's interest is promoted no matter how the education of the

student or resident occurs, a practitioner is acting within the scope of his employment if he educates a student or resident by direct instruction, demonstration, supervision, or simple involvement of the student or resident in the patient's care." *Theobald, supra*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶ 47.

{¶11} The Supreme Court of Ohio has held that even if no resident observed the clinical services rendered by the state health care provider, and even though the university organized its medical-practice plan as a private corporation, the provider's clinical practice advanced the interests of the state because he staffed a faculty clinic and treated patients on behalf of a state university. *Ries v. Ohio State Univ. Med. Ctr.*, 137 Ohio St. 3d 151, 157, 2013-Ohio-4545.

{¶12} The *Theobald* and *Ries* decisions support a finding of immunity in situations where a state-employed attending physician is furthering the state's interest by educating a resident who assists in a surgical procedure under the direct supervision of the surgeon. *Id.* Dr. Gutta testified that he would have been teaching surgical techniques to residents during the procedure. Based upon Dr. Gutta's testimony and the surgical records, the court finds that a resident was involved with plaintiff's treatment for the purpose of education and that Dr. Gutta was furthering the interests of the state in his care and treatment of plaintiff when the alleged negligence occurred.

{¶13} Plaintiff also contends that Dr. Gutta's hand-written notes on the prescription from the dentist who referred plaintiff to Dr. Gutta constitute an intended alteration of the records such that Dr. Gutta acted with malicious purpose, in bad faith, and in a wanton or reckless manner.

{¶14} In the context of determining whether a state employee is entitled to 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.*, 92 Ohio App.3d 772, 775 (1994), citing *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86, 89 (1988).

{¶15} The Tenth District Court of Appeals has stated:

{¶16} “Malicious purpose encompasses exercising ‘malice,’ which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified.

{¶17} “\* \* \*

{¶18} “‘Bad faith’ has been defined as the opposite of good faith, generally implying or involving actual or constructive fraud or a design to mislead or deceive another. \* \* \* Bad faith is not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive. \* \* \*

{¶19} “Finally, ‘reckless conduct’ refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that such risk is greater than that necessary to make the conduct negligent. \* \* \* 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. \* \* \* As to all of the above terms, their definitions connote a mental state of greater culpability than simple carelessness or negligence. \* \* \*”. (Internal citations omitted.) *Wrinn v. Ohio State Highway Patrol*, 10th Dist. No. 11AP-1006, 2013-Ohio-1141, ¶ 12, quoting *Caruso v. State*, 136 Ohio App.3d 616, 620-622 (10th Dist.2000).

{¶20} Dr. Gutta testified that he obtained plaintiff’s original prescription via fax and that his hand-written notations were made on the day of the consultation. According to Dr. Gutta, the notations were written after he discussed the treatment plan with plaintiff while both the resident and an assistant were present. Dr. Gutta described the document as a “day sheet,” a record which his staff uses to schedule an appointment based upon “what the treatment plan was written on this day.”

{¶21} The court finds that Dr. Gutta was credible in describing the development of plaintiff's treatment plan and his approval of that plan. Based upon Dr. Gutta's testimony and the documentary evidence presented, the court finds that plaintiff has failed to prove that Dr. Gutta acted with malicious purpose, in bad faith, or in a wanton or reckless manner with regard to his treatment and care of plaintiff.

{¶22} For the reasons stated above, the magistrate finds that Dr. Gutta was a state employee, that he was acting on behalf of the state, and that he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner during his treatment and care of plaintiff. Therefore, the magistrate recommends that Rajesh Gutta, D.D.S., M.S., 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.

*{¶23} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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ANDERSON M. RENICK  
Magistrate

Case No. 2012-06165

- 7 -

DECISION

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