

[Cite as *Rhoades v. Univ. of Toledo Med. Ctr.*, 2018-Ohio-1804.]

SUSAN J. RHOADES

Plaintiff

v.

UNIVERSITY OF TOLEDO MEDICAL  
CENTER

Defendant

Case No. 2018-00030JD

Judge Patrick M. McGrath

DECISION

{¶1} Before the court are (1) a motion for an immunity determination filed by plaintiff Susan J. Rhoades that asks the court to determine whether Bernardo Martinez, M.D. should be entitled to personal immunity, and (2) a stipulation of facts regarding immunity entered into by Rhoades, defendant University of Toledo Medical Center (UTMC), and Dr. Martinez. For reasons set forth below, the court determines that Dr. Martinez is not entitled to personal immunity under R.C. 9.86.

### **I. Relevant Background and Procedural History**

{¶2} On January 8, 2018, Rhoades sued UTMC, alleging that UTMC, through its agents and employees, departed from accepted standards of medical care by failing to remove a clamp, or surgical item, from Rhoades's right leg when UTMC's agents performed a surgical procedure on December 18, 2016. UTMC answered Rhoades's complaint, generally denying Rhoades's claim of medical negligence. Rhoades has filed a statement that indicates a connected case has been filed in the Lucas County Court of Common Pleas.

{¶3} On February 9, 2018, Rhoades moved this court to determine whether Dr. Martinez, the physician whom Rhoades claims performed surgery on her on December 18, 2016, is entitled to personal immunity under R.C. 9.86. In her motion, Rhoades represented that in the connected case before the common pleas court

Dr. Martinez asserted, as an affirmative defense, that he is entitled to personal or qualified immunity. And in a memorandum attendant to her motion, Rhoades requested a determination from this court that Dr. Martinez should not be entitled to personal or qualified immunity. UTMC did not file a timely memorandum in opposition to Rhoades's motion for an immunity determination.

{¶4} The court initially held Rhoades's motion in abeyance. Later, in a conference with the parties' counsel the court discussed whether an immunity-determination proceeding relative to the civil immunity of Dr. Martinez should be held with a trial of the merits of the case, whether an immunity-determination hearing should be conducted apart from a trial of this matter, or whether the parties wanted the court to issue an immunity determination based on stipulated facts. Based on the court's discussion, the court ordered the parties to submit on or before May 2, 2018, necessary written materials for the court to decide the issue of Dr. Martinez's personal immunity. The court also directed defense counsel to notify Dr. Martinez of the submission date for materials relative to Rhoades's motion for an immunity determination.

{¶5} On April 4, 2018, Rhoades, UTMC, and Dr. Martinez, by and through their counsel, filed a stipulation of facts regarding immunity. With their stipulation Rhoades, UTMC, and Dr. Martinez attached a copy of a letter dated March 22, 2011, addressed to Bernardo D. Martinez, M.D. from (1) Jeffrey P. Gold, M.D., Chancellor and Executive VP for Biosciences & Health Affairs, Dean, College of Medicine, University of Toledo College of Medicine, and (2) Gerald B. Zelenock, M.D., Professor and Chairman, Department of Surgery, University of Toledo College of Medicine. In this letter, Drs. Gold and Zelenock informed Dr. Martinez that the Board of Trustees of the University of Toledo (UT) at a meeting on January 24, 2011 approved his community-based volunteer faculty appointment. And Drs. Gold and Zelenock further informed Dr. Martinez that community-based volunteer faculty members "are not considered to be officers or employees of UT with respect to claims of professional liability."

{¶6} In the parties' and Dr. Martinez's stipulation filed with the court, Rhoades, UTMC, and Dr. Martinez agree:

1. Bernardo Martinez, M.D., is a vascular surgeon who performs surgeries at several hospitals in Toledo, Ohio, including the University of Toledo Medical Center.
2. Dr. Martinez holds an appointment as a community-based volunteer Clinical Professor in the Department of Surgery of the University of Toledo. \* \* \*.
3. Dr. Martinez's community-based volunteer faculty appointment has been renewed annually for each succeeding academic year, and was in full force and effect in December, 2016 and at other all times relevant to this suit.
4. Under the express terms of Dr. Martinez's appointment, as a community-based volunteer faculty member he is not an officer or employee of the University of Toledo. \* \* \*.

\* \* \*

6. On December 18, 2016, Dr. Martinez performed an aorto-bi-iliac stent graft, open exposure of bilateral femoral arteries, left iliofemoral endarterectomy, Bovine patch angioplasty, right iliofemoral endarterectomy, bilateral balloon angioplasty, Bovine patch profundoplasty, right superficial femoral artery endarterectomy, right femoral tibioperoneal bypass using reverse saphenous vein graft on Ms. Rhoades.

\* \* \*

8. Dr. Martinez, Ms. Rhoades and the University of Toledo stipulate and agree that Dr. Martinez was not an officer or employee of the University of Toledo as those are defined in Ohio Rev. Code § 109.36 at any time that is relevant to his care and treatment of Ms. Rhoades.
9. Dr. Martinez, Ms. Rhoades and the University of Toledo further stipulate and agree that Dr. Martinez is not entitled to personal immunity under Ohio Rev. Code 9.86.

Upon review of Rhoades's, UTMC's, and Dr. Martinez's stipulation of facts and the attachment to the stipulation of facts, the court accepts the stipulation of facts and the attachment to the stipulation of facts, as filed.

## **II. Law and Analysis**

{¶7} The issue of personal immunity presents a question of law. See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, ¶ 14. The Ohio Supreme Court has established that R.C. 2743.02(F) “vests the Court of Claims with exclusive jurisdiction to determine whether a state employee is immune from personal liability in a civil action allowed by R.C. 9.86.” *Ries v. Ohio State Univ. Med. Ctr.*, 137 Ohio St.3d 151, 2013-Ohio-4545, 998 N.E.2d 461, ¶ 20. Pursuant to R.C. 9.86:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee 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.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

In *Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St.3d 263, 2011-Ohio-3375, 957 N.E.2d 764, the Ohio Supreme Court discussed a two-part analysis that this court is required to apply when determining whether a person is entitled to immunity under R.C. 9.86. *Engel* states:

In *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, ¶ 14, this court stated that determining whether a

person is entitled to R.C. 9.86 immunity requires a two-part analysis, the first part of which is to determine whether the person claiming immunity is a state officer or employee. If the person claiming immunity is a state officer or employee, the second part of the analysis is to determine whether that person was acting within the scope of employment when the cause of action arose. *Id.*

*Engel* at ¶ 6.

{¶8} Here, the parties and Dr. Martinez have stipulated that Dr. Martinez was not an officer or employee of the University of Toledo, as those terms are defined in R.C. 109.36, at any time that is relevant to Dr. Martinez’s care and treatment of Rhoades. And the court has accepted this stipulation. Based on the evidence before the court, the court finds that Dr. Martinez was not an officer or employee when he performed surgery on Rhoades on December 18, 2016, and when he rendered attendant medical care to Rhoades.

{¶9} Additionally, because the court has found that Dr. Martinez was not an officer or employee when he performed surgery on Rhoades on December 18, 2016, and when he rendered medical care attendant to the surgery of December 18, 2016, the court determines that in this instance the first-prong of the personal-immunity analysis, as discussed in *Engle* at ¶ 6, is not satisfied. Because the first-prong of the personal-immunity analysis set forth by the Ohio Supreme Court is not satisfied in this instance, judicial restraint counsels against deciding whether the second-prong of the personal-immunity analysis—whether the person claiming immunity was acting within the scope of employment when the cause of action arose—applies in this instance. See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, ¶ 30 (“If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply”); see also *State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 135 Ohio St.3d 416, 2013-Ohio-1532, 988 N.E.2d 546, ¶ 25 (“The “cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more”—counsels against deciding issues rendered moot by

our determination that the redacted information constitutes trade secrets. *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment”).

### **III. Conclusion**

{¶10} Accordingly, for reasons set forth above, and in accordance with R.C. 2743.02(F), which provides that this court “has exclusive, original jurisdiction to determine, initially, whether [an] 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,” the court holds that Dr. Martinez was not an officer or employee when he performed surgery on Rhoades on December 18, 2016, and when rendered medical care attendant to the surgery of December 18, 2016. The court further holds that Ohio courts of common pleas have jurisdiction over civil matters arising from Dr. Martinez’s surgery upon Rhoades and the attendant medical care he rendered to Rhoades. The court GRANTS Rhoades’s motion for an immunity determination filed on February 9, 2018.

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PATRICK M. MCGRATH  
Judge

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JUDGMENT ENTRY

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{¶11} Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Bernardo Martinez, M.D., is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case. The clerk shall serve upon all parties and attorney Michael P. Murphy notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

Filed April 18, 2018  
Sent to S.C. Reporter 5/8/18