

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Deborah Marotto et al.,	:	
Plaintiffs-Appellees,	:	
(David Bell,	:	
Plaintiff-Appellant),	:	
v.	:	No. 12AP-27
The Ohio State University	:	(C.C. No. 2011-02590)
Medical Center,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 15, 2012

Leesberg & Valentine, Gerald S. Leesberg and Susie L. Hahn,
for appellees Deborah Marotto et al.

The Triona Firm, and James Triona, for appellant.

Michael DeWine, Attorney General, and Karl S. Schedler, for
appellee The Ohio State University Medical Center.

ON MOTION TO DISMISS

TYACK, J.

{¶ 1} Counsel for the Ohio State University Medical Center has filed a motion seeking dismissal of an appeal filed on behalf of David Bell, M.D. Counsel for the other appellees have joined in the motion.

{¶ 2} As acknowledged by all, the only two literal, full parties or sets of parties in the Court of Claims of Ohio are the plaintiffs and the state of Ohio. However, the Court of

Claims is routinely requested to resolve the question about whether a specific person is entitled to immunity because the person is or was arguably a state employee acting within the scope of his or her employment. The issue has frequently been addressed in recent history in the context of physicians who are faculty members of state universities or medical colleges while still engaging in the treatment of patients. The rulings on the immunity issue can center on issues such as whether the physician was supervising interns while rendering the care or was demonstrating treatment to a medical student or intern.

{¶ 3} The present case did not name David Bell, M.D. as a party in the Court of Claims. A companion lawsuit in the court of common pleas did name him as a party.

{¶ 4} R.C. 2743.02(F) reads:

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. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

{¶ 5} The statute is somewhat inartfully drafted because the civil action is, and must always be, against the state of Ohio, not an individual officer or employee. However, the statute clearly contemplates that persons whose immunity is being addressed in the Ohio Court of Claims shall have right to participate in the proceedings in which the

immunity is being determined. The statute was amended in 2005. The amendment was apparently a legislative attempt to overturn *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824 and *Theobald v. Univ. of Cincinnati*, 101 Ohio St.3d 370, 2004-Ohio-1527.

{¶ 6} In the present case, the Court of Claims accepted a stipulation from the Ohio State University Medical Center and the plaintiffs that Dr. Bell was not a state employee acting within the scope of his state employment. The Court of Claims also had before it a deposition taken of Dr. Bell. Dr. Bell's counsel was present and attempted to provide additional evidentiary material, but the Court of Claims judge refused to consider the material because "the stipulation concludes evidentiary matters involved in this matter." (Tr. 9.)

{¶ 7} Due process of law in Ohio includes the right to pursue an appeal of some sorts. Sometimes the "appeal" is through the use of an action in mandamus to determine if a state agency has acted correctly. Most commonly, the appeal is a direct appeal to a higher court.

{¶ 8} The Ohio legislature has enacted a statute which makes officers and employees of Ohio somewhat of a party in the Court of Claims when their immunity is being determined. Such officers and employees must have an appellate remedy if they are deprived of or refused immunity by the Court of Claims. To be consistent with legislative enactment of a revised R.C. 2743.02(F) and due process of law, we must offer an avenue of appellate relief. We, therefore, will allow this appeal to proceed.

{¶ 9} The motion to dismiss the appeal is denied.

Motion to dismiss denied.

BROWN, P.J., and DORRIAN, J., concur.
