

**IN THE COURT OF CLAIMS OF OHIO**

KEITH THEOBALD, et al.	:	
Plaintiffs	:	CASE NO. 2001-06461
v.	:	<u>DECISION</u>
UNIVERSITY OF CINCINNATI	:	Judge Fred J. Shoemaker
Defendant	:	
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{¶1} On October 23, 1998, Plaintiff Keith Theobald<sup>1</sup> was involved in a motor vehicle collision. His injuries required that he be air-carried to University Hospital which is a private hospital.

{¶2} On October 24, 1998, plaintiff underwent surgery that began at approximately 8:00 p.m. and concluded the following morning at approximately 8:00 a.m. The medical treatment of plaintiff was complex and required experienced doctors from different specialties. When plaintiff recovered consciousness he was found to be totally blind.

{¶3} On October 25, 1999, plaintiff filed a medical malpractice complaint in the Hamilton County Court of Common Pleas. The court stayed the case pending an immunity determination by this court regarding Dr. Frederick Luchette, Dr. Harsha Sharma, Dr. Jamal Taha and Nurse Maureen Parrott.

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<sup>1</sup>"Plaintiff" shall be used to refer to Keith Theobald throughout this decision.

{¶4} In accordance with L.C.C.R. 4.1, the immunity hearing was scheduled for February 1, 2002. However, the hearing was waived by agreement of counsel and the issues were submitted on depositions, briefs and stipulations.

{¶5} Drs. Sharma, Taha, Luchette and Nurse Parrott have filed motions to strike the decision of this court naming them as parties in a special proceeding to determine whether each or all of them are entitled to civil immunity.

{¶6} A review of the history of the enactment of R.C. 2743.02(F) and R.C. 9.86 makes clear that the General Assembly intended the Court of Claims to have the exclusive original jurisdiction over immunity determinations and to make binding its immunity decisions upon the employee. R.C. 2743.02(F) and 9.86 are also part of a comprehensive statutory scheme by which the state, subject to specific restrictions, gave state employees substantial rights which they should be allowed to assert at the trial and appellate levels.

{¶7} When the Court of Claims Act was first passed (135 v. H.800 eff. 1/1/75), it did not preclude actions against individual state employees. A plaintiff injured by a state employee could sue either the employer (the state) or the individual employee just as a plaintiff could, without restriction, sue an employee of a private employer. The original Court of Claims Act provided that an action against the state had to be brought in the Court of Claims, but an action against the employee could be brought either in the Court of Claims by joinder or in a separate action in a common pleas court. Claims against an employee could be joined in the Court of Claims regardless of whether the claims involved actions “outside the scope or within the scope of employment.” See *State ex rel. Moritz v.*

*Troop* (1975), 44 Ohio St.2d 90 (outside the scope); *Torpey v. State* (1978), 54 Ohio St.2d 398 (within the scope). See, also, *Boggess v. Tarrent* (Ct. Cl. 1975), 73 O.O.2d 345. Other than creating a special court for actions against the state, the original Court of Claims Act did not change the rules for actions against state employees; claims against state employees mirrored similar claims against employees of private companies.

{¶8} However, in 1978, a major change in procedure occurred. By amendment to the Court of Claims Act (137 v. H.149, eff. 2/7/78), the General Assembly provided, in what is now R.C. 2743.02(E), that the only defendant in the Court of Claims could be the state. This amendment eliminated joinder of claims against state employees in the Court of Claims.

{¶9} In addition, the legislature amended R.C. 2743.02(A) as follows:

{¶10} “Sec. 2743.02(A) The state hereby waives, IN EXCHANGE FOR THE COMPLAINANT’S WAIVER OF HIS CAUSE OF ACTION AGAINST STATE OFFICERS OR EMPLOYEES, its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

{¶11} “EXCEPT IN THE CASE OF A CIVIL ACTION FILED BY THE STATE, FILING A CIVIL ACTION IN THE COURT OF CLAIMS RESULTS IN A COMPLETE WAIVER OF ANY CAUSE OF ACTION, BASED ON THE SAME ACT OR OMISSION,

WHICH THE FILING PARTY HAS AGAINST ANY STATE OFFICER OR EMPLOYEE. THE WAIVER SHALL BE VOID IF THE COURT DETERMINES THAT THE ACT OR OMISSION WAS NOT WITHIN THE SCOPE OF THE OFFICER'S OR EMPLOYEE'S OFFICE OR EMPLOYMENT." [Amended language appears in capital letters.]

{¶12} The 1978 amendments to the Court of Claims Act imposed a requirement that persons wishing to assert claims against state employees had to elect a remedy. *Smith v. Stempel* (10<sup>th</sup> Dist., 1979), 65 Ohio App.2d 36. A plaintiff could still sue a state employee for acts within the scope of employment if a suit was filed in common pleas court. If, however, plaintiff sued the state in the Court of Claims, plaintiff necessarily agreed to waive any claims against the state employee in the common pleas court for actions taken within the scope of employment. Once an action against the state was initiated in the Court of Claims, the only way a plaintiff could thereafter sue a state employee in a common pleas court was if, and only if, the Court of Claims had first determined the employee was acting outside the scope of employment.

{¶13} In 1980, another significant change was made when the Ohio General Assembly further narrowed the remedies available to a plaintiff who elected to proceed against a state employee in a common pleas court. The legislature enacted R.C. 9.86, which provided immunity to state employees for acts committed by that employee, subject to the limited exceptions of acting outside the scope of employment or acting with malice, in bad faith, or in a wanton or reckless manner. (138 v. S.76, eff 3/13/80.) In addition, the legislature amended R.C. 2743.02 to clarify that the state would be responsible for its

employees' acts "in any circumstance in which a claimant proves in the court of claims that an officer or employee \*\*\* would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the revised code."

{¶14} The 1980 amendments accomplished two purposes. First, they permitted a plaintiff to sue a state employee in common pleas court only if plaintiff alleged that the employee did not have immunity under R.C. 9.86. Second, they provided that the state would be responsible for those acts done by its employees for which the employees were granted immunity under R.C. 9.86. The courts recognized that the scope of actions against state employees had been limited by the 1980 amendments to the Court of Claims Act. See *Scot Lad Foods, Inc. v. Secretary of State* (1981), 66 Ohio St.2d 1; *Van Hoene v. State* (1<sup>st</sup> Dist., 1985), 20 Ohio App.3d 363; *McIntosh v. University of Cincinnati* (1<sup>st</sup> Dist., 1985), 24 Ohio App.3d 116; *Walker v. Steinbacher* (9<sup>th</sup> Dist., 1987), 37 Ohio App.3d 1. In essence, the courts recognized that a claim against state employees that was based on actions taken within the scope of employment was an action against the state. *Moss v. Coleman* (10<sup>th</sup> Dist., 1982), 5 Ohio App.3d 177. A claim could thereafter be made against a state employee in the common pleas court only if the narrow exceptions of R.C. 9.86 applied. *James H v. Dept. of Mental Health & Mental Retardation* (10<sup>th</sup> Dist., 1980), 1 Ohio App.3d 60.

{¶15} However, following the 1980 amendments, a dispute arose in various courts as to whether the common pleas courts could determine whether they had jurisdiction of claims against state employees or whether only the Court of Claims could determine whether the common pleas courts had jurisdiction. The courts' differing conclusions on this issue arose from their differing interpretations of R.C. 2743.02(A)(1), which specifies only that "the Court" must determine whether the employee's act was within or outside the scope of employment.

{¶16} This confusion was temporarily resolved by the Ohio Supreme Court's decision in *Cooperman v. University Surgical Assoc.* (1987), 32 Ohio St.3d 191, which held that the Court of Claims had concurrent jurisdiction with the common pleas courts to decide whether a state employee's acts were within the scope of employment and whether the employee was therefore entitled to claim immunity in a suit involving those acts. However, that interpretation was short-lived.

{¶17} Less than two months after the *Cooperman* decision, R.C. 2743.02(F) took effect (142 v. H.267, eff. 10/20/87) and vested *exclusive original jurisdiction* in the Court of Claims to determine whether a state employee is entitled to personal immunity or whether, instead, a common pleas court has jurisdiction to hear a claim against the state employee. The eighty-eight county courts of common pleas *could no longer determine their own jurisdiction over claims against state employees* and the risk of inconsistent decisions was lessened. Notwithstanding the statutory change, the Ohio Supreme Court in *Nease v. Medical College Hospital* (1992), 64 Ohio St.3d 396, also clarified that *Cooperman* was

limited only to situations where a plaintiff had failed to file an action against the state in the Court of Claims, and therefore had not waived the right to bring suit in the common pleas court pursuant to R.C. 2743.03(A)(1). (See the 1978 amendment regarding waiver discussed *supra*.) The Supreme Court in *Nease, supra*, at 399, accomplished this by restating a prior holding that “[T]he court as referred to in R.C. 2743.02(A)(1) means the Court of Claims.” *Id.*; citing *McIntosh v. Univ. of Cincinnati, supra*, at 119.

{¶18} In addition to statutorily vesting exclusive jurisdiction in the Court of Claims to determine the issue of jurisdiction of a court of common pleas, the 1987 enactment of R.C. 2743.02(F), in effect, also narrowed a plaintiff’s ability to proceed against state employees one step further. In order to proceed against a state employee in the common pleas court, a plaintiff needs to first: 1) allege that the employee falls within the exceptions set forth under R.C. 9.86; and, 2) bring his claim in the Court of Claims against the state for a determination of the employee’s immunity. In the interim, since plaintiff is suing the state in the Court of Claims, the limited waiver provided by the Court of Claims Act prevents litigation of any claim against a state employee in the common pleas court. Only when a plaintiff alleges and proves before the Court of Claims that immunity does not exist, thus undoing the statutorily-imposed waiver, can plaintiff proceed with an action against the state employee in the common pleas court. However, if acts outside the scope of employment cannot be shown, then the state, and only the state, can be held responsible for the employee’s acts. After all, as discussed above, only the state can be a defendant in the Court of Claims.

{¶19} As seen from the above discussion, special proceedings under R.C. 2743.02(F) determine which claims can proceed against individual state employees and which cannot. The Court of Claims has exclusive jurisdiction to determine an employee's immunity and the issue of jurisdiction of the common pleas courts. If the Court of Claims determines that the state may be responsible for its employee's acts (the employee is immune), the common pleas courts do not gain jurisdiction to hear claims against the employee. Thereafter, only the state is subject to suit and the case can then continue forward in the Court of Claims. If the Court of Claims determines that the state is not responsible for the employee's acts (the employee is not immune), then the common pleas courts have jurisdiction over claims against the employee, and the employee is subject to suit.

{¶20} However, in order to effectuate the full meaning of this comprehensive statutory plan, which has been developed and refined by the General Assembly over the past twenty-five years, the Court of Claims' determination of a state employee's immunity (and whether the common pleas court has jurisdiction) *must be binding* upon the state employee. In *Nease, supra*, the Ohio Supreme Court refuted the argument that R.C. 2743.02(E) prevents the Court of Claims from making employees parties to immunity proceedings. Quoting *McIntosh, supra*, at 117, the Ohio Supreme Court said that:

{¶21} "Although the only proper defendant in an original action in the Court of Claims is the state, R.C. 2743.02(E), the Court of Claims will nevertheless consider the alleged acts or omissions of any state officer or employee in determining *their civil*



*immunity from suit*, in accordance with R.C. 2743.02(A)(1) and R.C. 9.86.” (Emphasis added.)

{¶22} L.C.C.R. 4.1 states:

{¶23} “Any party shall file a motion requesting that the Court of Claims make a determination, as required by R.C. 2743.02(F), as to whether the officer or employee is entitled to personal immunity under R.C. 9.86 and whether the courts of common pleas have jurisdiction over the civil action. If no motion for this determination is made, the Court of Claims may *sua sponte* set this matter down for the R.C. 2743.02(F) hearing.”

{¶24} The applicable statutes regarding civil immunity are R.C. 2743.02(F) and 9.86. R.C. 2743.02(F) provides in pertinent part:

{¶25} “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 his 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. \*\*\*”

{¶26} R.C. 9.86 provides:

{¶27} “\*\*\* [N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages 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. \*\*\*"

{¶28} R.C. 2505.02 refers to special proceedings and states, in pertinent part:

{¶29} "(A) As used in this section:

{¶30} "(1) 'substantial right' means a right that \*\*\* a statute \*\*\* entitles a person to enforce or protect.

{¶31} "(2) 'Special proceeding' means an action or proceeding that is specially created by statute \*\*\*

{¶32} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶33} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶34} "(2) An order that affects a substantial right made in a special proceeding \*\*\*."

{¶35} For the reasons set forth in *Janice L. Johns v. University of Cincinnati* (March 19, 2002), Court of Claims Case No. 99-09161, unreported, the motions to dismiss filed by Drs. Luchette, Sharma, Taha and Nurse Parrott are hereby OVERRULED.

{¶36} There is no allegation that either Drs. Luchette, Sharma, Taha, or Nurse Parrott acted with malice, in bad faith, or in a wanton or reckless manner in the treatment of plaintiff.

{¶37} In 1998, Dr. Luchette was employed by the University of Cincinnati as an associate professor of surgery and an employee of the University Surgical Group of Cincinnati, Inc. (USGC, Inc.). He was plaintiff's admitting doctor at University Hospital and was a co-surgeon with Dr. Taha, a neurosurgeon, during plaintiff's surgery. He opened and closed plaintiff's chest and was assisted by Dr. Giss. Also, he supervised plaintiff's care while plaintiff was in the hospital. His 1998 income from the university was \$61,130.68, and his income from USGC, Inc. was \$180,000 plus benefits. USGC, Inc. billed for Dr. Luchette's services.

{¶38} Applying the factors set forth in *Wayman v. Univ. of Cincinnati* (June 22, 2000), Franklin App. No.

{¶39} 99 AP-1055, unreported, the court finds that Dr. Luchette was acting outside of the scope of his employment in treating plaintiff. The practice group billed and received the money arising out of the services rendered by Dr. Luchette. Furthermore, plaintiff was treated at a private hospital. See *Homer C. Smith and Laura Smith v. University of Cincinnati* (Nov. 29, 2001), Franklin App. No. 01 AP-404, unreported.

{¶40} Dr. Harsha Sharma was an assistant professor at the University of Cincinnati and also a member of the practice group University of Anesthesia Associates, Inc. (UAA, Inc.). He was the responsible anesthesiologist during plaintiff's operation. His 1998 income from the practice group was \$118,000 plus benefits and the university paid him \$12,000 as an assistant professor. His practice group billed for the services that he

provided to plaintiff. Again, applying the factors noted in *Wayman, supra*, the court finds that Dr. Sharma is not entitled to civil immunity.

{¶41} Dr. Taha is employed only by Mayfield Clinic, Inc. (a private, for-profit corporation) and is compensated solely by Mayfield Clinic, Inc. Mayfield Clinic has a contract with the University of Cincinnati to supervise and teach residents. Dr. Taha performed the neurological surgery on plaintiff and Mayfield Clinic, Inc. billed for his services. The court finds that he was not an employee of the University of Cincinnati, and that even if he were an employee of the University of Cincinnati, he would nonetheless not be entitled to civil immunity according to the factors set forth in *Wayman, supra*.

{¶42} Maureen Parrott (CRNA) worked exclusively for University of Anesthesia Associates, Inc. (UAA, Inc.). She was a certified nurse anesthetist. She was not an employee of the University of Cincinnati and never received any pay from the university. Accordingly, Maureen Parrott is not entitled to civil immunity.

{¶43} Therefore, the court finds that Drs. Luchette, Sharma, Taha and Nurse Parrott are not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Consequently, the courts of common pleas have jurisdiction over this matter. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay.

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FRED J. SHOEMAKER

Judge

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