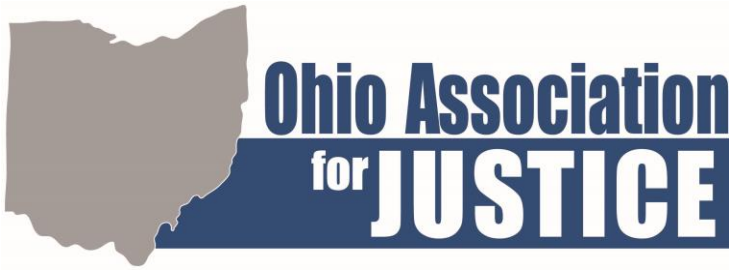

2014 Navigating Through Statutes, Insurance Policies, and Regulations

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Immunity: The New Front of Tort Reform

John Holschuh, Esq., Cincinnati, OH

PHYSICIAN IMMUNITY IN OHIO

I. Background.

A. Court of Claims Act – OR Chapter 2743. All civil actions against the State or any of its institutions must be filed in the Court of Claims. Further, any case involving the conduct of an officer or employee of the State must also be filed in the Court of Claims. In such a case, only the State is named as a defendant, not the individual officer or employee. Revised Code 9.86 states in part:

> Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the State is a plaintiff, no officer or employee shall be liable in any civil action that arise under the law of this State for damage or injury caused in the performance of his duties, unless the officers or employees 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.

B. WARNING: What about borrowed servant where an employee of a State institution is working at an outside institution? Example: What about a medical resident from the University of Cincinnati rotating through a private outside hospital? You would want to file in <u>both</u> Court of Claims against the University of Cincinnati as well as in the Common Pleas Court naming the doctor individually.

II. Immunity.

A. Revised Code Section 2743.02(F) reads in part:

> 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.

A. The Court of Claims will schedule what is deemed an "O2F hearing" wherein a judge in the Court of Claims will hear evidence to determine whether an individual should be entitled to immunity. The Lynd case sets forth the factors the Court of Claims often examines.

B. In practice, the parties may present "stipulated facts" to the court for determination. The parties may also subpoena witnesses to testify and often this is done by way of a telephone conference with the court.

C. If you are able to establish that the health-care provider acted with malicious purpose, in bad faith, or in a wanton or reckless manner, then there is no immunity. See Habeeb v. The Ohio House of Representatives, 2007-Ohio-5426.

III. Factors in Deciding Immunity.

A. Pre-Theobald.

The two major determining factors to be used in finding whether a physician was acting outside the scope of his or her employment for a state university hospital are: (1) whether the patient was a private patient of the physician, rather than a patient of the university; and (2) the university's financial gain from the medical treatment at issue relative to the physician's financial gain therefrom. Kaiser v. Flege, 98-LW-5261 (10th), citing Norman v. Ohio State (1996), 116 O. App. 3d 69, et 77.

In making this determination, the courts would consider various factors including where the physician saw the patient; whether a medical student was present; who billed for the physician service; whether the physician carried private malpractice insurance; how much the physician was paid by the State v. his/her private corporation; and so on. Id.; See also Lynd v. University of Cincinnati, 99-LW-5059 (10th).

B. Theobald v. University of Cincinnati (2006), 111 Ohio St. 3d 541, 857 N.E. 2d 573.

The Ohio Supreme Court in Theobald adopted a "bright-line test" as to when a health-care practitioner is entitled to personal immunity pursuant to R.C. 9.86 and 2743.02(A)(2) and held:

"The Court of Claims must initially determine whether the practitioner is a state employee. If there is no express contract of employment, the court may require other evidence to substantiate an employment relationship, such as financial and

corporate documents, W-2 forms, invoices, and other billing practices. If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.

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 no, 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." Id., 111 Ohio St. 3d at 547-8. (emphasis added)

Thus the Supreme Court has replaced the financial interest determination with the teaching/education determination. Now once a health-care practitioner establishes he/she had an employment agreement with the state, then the only other issue is whether he/she was teaching or educating a student or resident.

C. Ramifications of Theobald.

Generally, the courts since Theobald have been granting immunity so long as the physician can establish that they were "teaching". See Meredith v. Ohio State, 2007-Ohio-3867; Engel v. University of Toledo, 2008-Ohio-7058; McLeod v. MCO, 2008-Ohio-3398; Yurkowski v. University of Cincinnati, 2008-Ohio-6483.

In Clevenger v. University of Cincinnati, 2009-Ohio-2829, the Court of Claims went one step further. In Clevenger the record did not show any resident was present on one office visit, but the doctor testified that a resident "always is". Further, when surgery was performed the next day, the doctor could not recall when or how long a resident was involved. Despite this, the court held the physician was entitled to immunity. Even though plaintiff had also alleged wanton and reckless conduct, the court, without any hearing or trial, went ahead and granted immunity. This case is on appeal.

Accordingly, anytime you have a case where a health-care provider may have a dual employment with the state, and the physician may have been "teaching" medical students or residents, you must also file in the Court of Claims.

D. Today. Ries v. Ohio State University Medical Center, 137 Ohio St.3d (2013).

In Ries, the Supreme Court went even further expanding physician immunity. No longer is teaching a resident required, but only that the physician seeking immunity was a state employee and "acts within the scope of employment if the employee's actions advance the interests of the state as defined by the duties of the state employee." In short, as long as the physician's duties include "providing clinical services" to patients, and the physician is treating patients, then immunity attaches.

Of course, you still must determine if the physician was acting within the scope of employment and if you can prove that the physician acted "with malicious purpose, in bad faith, or in a wanton or reckless manner," then there is no immunity.

Accordingly, today, the best and safest practice is to always file in both Common Pleas Court and the Court of Claims and send out discovery to determine if immunity is an issue.

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2013-2014 (130th General Assembly)

HB 247 – Immunity for premises that deploy defibrillators – PASSED

HB 290 – Immunity for school districts and employees that make school available for use by outside organization – PASSED

SB 276 – Immunity for facilities and persons providing safe cribs – PASSED

HB 320 – Extends free clinic immunity to Medicaid eligible population when using free clinic – PASSED

HB 170 - Immunity for health care professionals who provide naloxone to persons who experiences a drug overdose - PASSED

HB 296 – Immunity for schools and school personnel who use epinephrine autoinjectors – PASSED

HB 264 – Immunity for schools and school personnel who provide diabetes injections – PASSED

HB 379 – Immunity for architects, engineers providing services during a declared emergency – DIED

SB 334 – Immunity for agritourism – DIED

SB 296 – Immunity for gas stations for sale of incompatible fuel – DIED

HB 464 – Immunity for ski patrols when providing emergency care – DIED

HB 215 – Immunity for police, current or retired, who volunteer to patrol schools – DIED

HB 271 – Immunity for physicians and other health care professionals to provide care for indigent and uninsured persons – DIED

2011-2012 (129th General Assembly)

HB 143 – Immunity for volunteer coaches who follow protocol in treating head injuries and concussions – PASSED

SB 129 –Immunity (qualified – reckless standard) for physicians and other health care professionals providing care in emergency rooms – DIED

SB 375 – Immunity for restaurants and employees who perform Heimlich maneuver – DIED

HB 421 – Immunity for physicians who violate patient's confidentiality and report a patient's drug abuse to police – DIED

HB 487 – Immunity, blanket immunity greater than sovereign immunity, for Ohio Department of Transportation - DIED