

IN THE COURT OF CLAIMS OF OHIO

DARLENE LANE FERRARO

Plaintiff

v.

THE OHIO STATE UNIVERSITY  
MEDICAL CENTER

Defendant

CASE NO. 2011-10371

JUDGE ALAN C. TRAVIS

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO  
2012 JUN 25 PM 3:03

**DEFENDANT'S BRIEF REGARDING  
AUTHORITY TO ISSUE IMMUNITY DETERMINATION**

On May 16 2012, this Court ordered the parties to submit briefs “on the issue of whether this court has authority to issue an immunity determination in this matter.” Defendant submits that because this matter arises from the operation of a motor vehicle, immunity under R.C. 9.86 cannot apply. Accordingly this Court has no basis on which to make a determination of “immunity,” although the related question of whether the plaintiff may seek relief in another court is one which this Court may entertain.

While immunity cannot apply in this case, this Court may still address the issue of whether or not the state employee in this case, Dr. Rolf Barth, was acting in the course and scope of his employment at the time of the accident. The Court of Claims Act provides that a claim in these circumstances must be filed in the Court of Claims. It also provides that the filing of a claim in this Court waives any claim against the individual employee unless this Court determines that the individual was acting manifestly outside the scope of employment. As Dr. Barth was unquestionably acting within the scope of his employment at the time of this accident, the filing of this action waives plaintiff's right to seek relief in any other court.

**ON COMPUTER**

**I. Immunity under R.C. 9.86 does not apply to motor vehicle liability.**

Officers and employees of the state are not immune from suit for liability arising from the operation of a motor vehicle. R.C. 9.86.

Immunity for officers and employees of the state is governed by R.C. 9.86. The statute provides for immunity for state employees under certain circumstances, but not in relation to liability arising from the operation of a motor vehicle. It provides that officers and employees of the state are not liable in civil actions that arise under the law of the state, “Except for civil actions that arise out of the operation of a motor vehicle.” And while R.C. 2743.02(F) provides for hearings regarding immunity under R.C. 9.86, that section has no application to motor vehicle liability case because of the exception in R.C. 9.86.

In creating this Court and establishing immunity for state employees, the General Assembly quite explicitly distinguished motor vehicle claims from other types of liability claims. One reason for this clear distinction between how claims are addressed is that motor vehicle claims have been addressed separately for risk management purposes both within the State and in private litigation. For instance, R.C. 9.83(A) specifically addresses motor vehicle liability insurance for the State and its subdivisions separately from any other insurance. And in the case of state employees operating their own vehicles (as in this case) the private insurance coverage that is available to indemnify the State for its liability might be made unavailable should the employee be granted immunity.

The General Assembly has made it clear that the benefits of privately paid insurance, if available, should be applied to claims against the State before taxpayer funds are so applied. Thus the Court of Claims Act reduces a plaintiff's award by the amounts already received through private insurance. R.C. 2743.02(D). A separate provision applies the same reduction

for awards against State universities or colleges. R.C. 3345.40(B)(2). That statute provides, in pertinent part:

If a **plaintiff receives or is entitled to receive benefits** for injuries or loss allegedly incurred **from a policy or policies of insurance** or any other source, the benefits shall be disclosed to the court, and **the amount of the benefits shall be deducted from any award** against the state university or college recovered by the plaintiff. **No insurer or other person is entitled to bring a civil action under a subrogation provision in an insurance or other contract against a state university or college with respect to such benefits.**

(Emphasis added.) These provisions establish a clear public policy that taxpayer funds should not be applied to a claim where a private insurer has already agreed to accept that risk and has been paid pursuant to its own actuarial calculation that have accounted for that risk. Otherwise, a private insurer who has calculated that risk and has been paid for that risk would receive a windfall at taxpayer expense.

When a State employee is driving his or her own vehicle in the course and scope of employment, that employee's private coverage may be available to indemnify the State for any vicarious liability in this Court. The language of insurance policies can vary greatly between different insurers, and in many case a policy may provide coverage for an employer only for vicarious liability for the driver. Without underlying liability of an employee, there can be no vicarious liability. *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 217; *Nat'l Union Fire Ins. Co. v. Wuerth* 122 Ohio St.3d 594, 2009-Ohio-3601. Thus in some cases the State's access to private, paid insurance may be denied if the employee is immune from liability. That would frustrate the policy that prefers private insurance to bear the burden.

For those reasons and others, the Revised Code takes a different approach with motor vehicle liability and does not grant the employee the same immunity as in cases that do not involve motor vehicle liability. As a result, R.C. 9.86 only grants immunity in cases other than motor vehicle cases. Immunity for employees and officers of the State is very explicitly limited

under R.C. 9.86 and this Court's authority to hear the question of immunity pursuant to R.C. 2743.02(F) is likewise limited. The statute does not provide immunity for motor vehicle accidents.

This case arises from the operation of a motor vehicle. The Complaint alleges that the claim arises from a motor vehicle accident on Interstate 71 on September 10, 2009. The Complaint alleges that the accident was caused by Dr. Barth's negligent operation of a motor vehicle. And while the Defendant has denied negligence, it has not denied that a motor vehicle collision did occur that night. Thus there is no dispute that this case arises out of the operation of a motor vehicle.

Because immunity does not apply in cases arising from the operation of a motor vehicle, this Court has no authority to make a determination of immunity in this case.

**II. Even though immunity does not apply, the waiver of claims in R.C. 2743.02 still applies.**

Although officers and employees of the state are not immune from liability arising from the operation of a motor vehicle under R.C. 9.86, the Court of Claims Act still requires that any action alleging such liability must first be filed against the state in this Court and also that such a filing waives any claim against the officer or employee unless this Court finds otherwise.

Under R.C. 2743.16(B), anyone claiming damages from the operation of an automobile by an officer or employee of the state must first seek to compromise that claim. (The plaintiff in this case has not shown any effort to comply with that portion of the statute, and thus there may still be a question of whether this action may proceed.) If a person claiming damages from a motor vehicle accident attempts to compromise such a claim and the state does not agree to that compromise, the plaintiff may then file a claim in this Court. The statute provides explicitly that "Neither the person nor his or his estate's representative shall commence an action against the officer or employee to recover damages for the injury, death, or loss until after he commences

the action in the court of claims against the state and the action in that court is terminated.” Thus a court of common pleas cannot assume jurisdiction over an action against a state officer or employee until after any action in this Court has been terminated.

But because of the waiver provision of R.C. 2743.02(A), an action against the state employee or officer cannot be pursued in another court unless and until this Court has determined that the officer or employee acted “manifestly” outside the scope of employment or with malicious purpose, in bad faith, or in a wanton or reckless manner. *Ratliff v. Industrial Comm.*, 85 Ohio Misc.2d 79, 684 N.E.2d 388 (Ct. of Cl. 1997). That portion of the statute states, in pertinent part:

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 officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer’s or employee’s office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This waiver provision has been held to apply to all causes of action relating to the act or omission that is the subject of an action in this Court, even if those claims are pled under a different theory of recovery. *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), cert. denied, 517 U.S. 1105.

Accordingly, plaintiff may not pursue an action against Dr. Barth unless and until this Court finds that he acted manifestly outside the scope of his employment or with malicious purpose, in bad faith, or in a wanton or reckless manner. But the provisions of R.C. 2743.02(F) for immunity do not apply to such a determination.

**III. Dr. Barth was acting within the course and scope of his employment at the time of the accident in this case.**

Because Dr. Barth was acting in the course and scope of his duties as a state employee at the time of the accident, plaintiff may not proceed against him in another court.

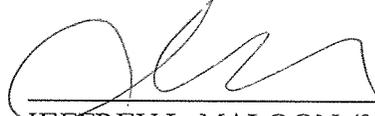
Dr. Barth is employed by The Ohio State University as a professor of pathology. Deposition of Rolf Barth, portions of which are attached as Exhibit A, at 7. He was travelling from Columbus to Cleveland to attend a conference when the accident occurred. Barth depo. at 71-73. The conference was hosted by the Cleveland Clinic to address the delivery of drugs to the brain. Barth depo at 16-17. That subject is within Dr. Barth's specialty as a professor of pathology. Barth depo. at 17. The meeting was scheduled to begin the next morning. Barth depo. at 7. His attendance at the conference was in furtherance of his duties as an OSU professor. Barth depo. at 71. He filled out a travel authorization for the trip and it was approved by his division chair. Barth depo at 71-73. (Dr. Barth submitted an affidavit regarding those facts to the Cuyahoga County Court of Common Pleas in the connected action, a copy of which is attached as Exhibit B.)

There can be no reasonable dispute that Dr. Barth was acting in the course and scope of his employment as he drove up to Cleveland the night of the accident. And there is no allegation in this case that Dr. Barth acted with malicious purpose, in bad faith, or in a wanton or reckless manner when this accident occurred. There is no basis for a finding that Dr. Barth was acting manifestly outside the course and scope of his employment or with any state of mind that would remove him from the waiver provision of R.C. 2743.02(A).

Accordingly, plaintiff's filing of this action waives any claim plaintiff has against Dr. Barth in any other court.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



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COUNSEL FOR DEFENDANT

### CERTIFICATE OF SERVICE

On June 25, 2012, a copy of this document was served via regular mail on the following:

Thomas J. Sheehan  
W. Craig Bashein  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113

Counsel for Plaintiff



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CHRISTOPHER P. CONOMY (0072094)  
Assistant Attorney General

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THE OHIO COURT OF CLAIMS

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Darlene Lane Ferraro,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No.
	:	2011-10371
The Ohio State University	:	
Medical Center,	:	
	:	
Defendant.	:	

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VIDEOTAPED DEPOSITION OF ROLF F. BARTH, M.D.

- - -

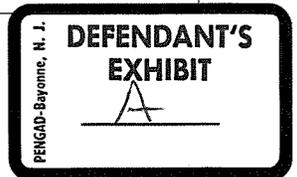
Tuesday, December 6, 2011  
 2:20 o'clock p.m.  
 370 West Ninth Avenue  
 Meiling Hall, Room 221  
 Columbus, Ohio 43210

- - -

MARILYN K. MARTIN,  
 REGISTERED PROFESSIONAL REPORTER

- - -

ANDERSON REPORTING SERVICES, INC.  
 3242 West Henderson Road, Suite A  
 Columbus, Ohio 43220  
 (614) 326-0177  
 FAX (614) 326-0214



1 Q. And if you answer the question, I'm going  
2 to assume you understood the question and gave the  
3 most complete and accurate response you were capable  
4 of giving today. Is that a fair assumption on my  
5 part?

6 A. Yes, it is.

7 Q. Okay. Give me your full name.

8 A. Rolf, R-O-L-F, Frederick, Barth,  
9 B-A-R-T-H.

10 Q. Okay. What is your residential address?

11 A. 2670 Crafton, C-R-A-F-T-O-N, Park,  
12 Columbus, Ohio, 43221.

13 Q. And how old are you?

14 A. 74 years old.

15 Q. And your date of birth?

16 A. April 4, 1937.

17 Q. And your current employer?

18 A. The Ohio State University.

19 Q. And what is your title here?

20 A. Professor of pathology.

21 Q. And how long have you been with The Ohio  
22 State University?

23 A. 32 years.

24 Q. And has it remained in the capacity as a

1 expenses in traveling to Cleveland by The Ohio State  
2 University for the trip that you were involved in  
3 when the accident occurred?

4 A. No, I was not.

5 Q. No expense reimbursement?

6 A. None.

7 Q. And are there measures here in place at  
8 The Ohio State University if the trip is taken for  
9 business purposes that would allow you to be  
10 reimbursed?

11 A. Yes, it would.

12 Q. And that includes mileage, lodging if it's  
13 incurred and meals?

14 A. Yes.

15 Q. And what you're saying is your lodging was  
16 picked up by another organization?

17 A. Correct. Yes. And the meals as well.

18 Q. All right. And your mileage, you chose  
19 not to be reimbursed?

20 A. Yes.

21 Q. And what organization hosted you in  
22 Cleveland?

23 A. It was the Cleveland Clinic.

24 Q. And what type of function was going on

1 that you attended?

2 A. It was a meeting on direct delivery of  
3 drugs to the brain.

4 Q. And was this a -- some type of -- Well,  
5 describe what type of event it was, if you could.

6 A. It was an international meeting.

7 Q. Okay.

8 A. And there were approximately 50  
9 participants.

10 Q. So 50 attendees?

11 A. There may have been more attendees, but --

12 Q. Okay. And these would be physicians  
13 throughout the world?

14 A. Yes.

15 Q. Okay. And was this in your -- within your  
16 specialty or --

17 A. Yes.

18 Q. -- within various subspecialties?

19 A. In my special research interest.

20 Q. Okay. And then was the meeting scheduled  
21 to take place the next day following the accident  
22 that --

23 A. Yes, it was.

24 Q. Did you attend the meeting?

1 A. Yes. Although I thought it was more in  
2 front of me than --

3 Q. Okay.

4 A. -- than here. It looks like it's behind.

5 Q. But with that understanding, it may be in  
6 a different location that you recall, that is, the  
7 trailer --

8 A. Yes.

9 Q. -- that your vehicle impacted with?

10 A. Yes.

11 Q. Okay. At the time of this accident, were  
12 you of the belief that you were acting in the scope  
13 of your duties with The Ohio State University?

14 A. Yes.

15 Q. And your basis for saying that is -- Just  
16 describe for me why you believe that.

17 A. That I filled out a travel request form  
18 prior to my departure --

19 Q. And is that seeking --

20 A. -- with the appropriate authoriz --  
21 authorizing signature.

22 Q. Okay. So you -- you asked to attend the  
23 conference?

24 A. I was invited to attend the conference.

1 Q. But did you then ask somebody here at --

2 A. I filled out a form, yes.

3 Q. Okay. At Ohio State?

4 A. Yes.

5 Q. And what did that -- To your department  
6 chair, or how does that go?

7 A. To a division chair, to the division that  
8 I was in.

9 Q. Okay. In pathology?

10 A. In pathology.

11 Q. Okay. And then that's approved?

12 A. Yes.

13 Q. And then you made arrangements to go?

14 A. Yes.

15 Q. All right. And Cleveland was not a  
16 location that was your normal dest -- normal location  
17 of your employment?

18 A. No.

19 Q. In other words, you normally come to work  
20 here at The Ohio State --

21 A. Yes.

22 Q. -- in Columbus?

23 A. Yes.

24 Q. Okay. And that conference, then, would

1 have been scheduled to, what, start at 8:00 or 8:30  
2 the next morning?

3 A. Yes.

4 Q. Okay. You said you filled out some type  
5 of a requisition or a -- or request to go?

6 A. Yes.

7 Q. Have -- Since this accident, did you have  
8 to locate that as part of this case at all?

9 A. I knew exactly where it was.

10 Q. Okay. Have you seen it since?

11 A. Yes.

12 Q. All right. And have you made that  
13 available to counsel? That's something that I could  
14 get a copy of if I needed it?

15 A. Yes.

16 MR. BASHEIN: All right. Okay. I think  
17 that's all I have.

18 MR. CONOMY: All right. Dr. Barth, should  
19 this deposition be transcribed, you have a right to  
20 review it to check for errors, and I recommend you  
21 reserve that right.

22 THE WITNESS: I would like to review it.

23 MR. BASHEIN: Okay.

24 THE VIDEOGRAPHER: Here marks the end of

IN THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO

Darlene Lane Ferraro  
Individually and as Fiduciary of the Estate of  
Junior Lee Lane, Deceased.

Plaintiff.

v.

Rolf Barth, et al.

Defendants.

Case No CV: 10 733430  
Judge Kathleen Sutula

**AFFIDAVIT OF ROLF F. BARTH, M.D.**

STATE OF OHIO )  
 ) ss:  
COUNTY OF FRANKLIN )

Now comes affiant, Rolf F. Barth, M.D., and after being duly cautioned and sworn, states as follows:

1. I have personal knowledge of the facts stated herein;
2. On September 10, 2009 I was employed as a faculty member in the Department of Pathology at The Ohio State University Medical Center, holding the title of Professor in the Department of Pathology.
3. As of the date of executing this affidavit, I continue to be employed as a Professor in the Department of Pathology at The Ohio State University Medical Center.
4. On September 10, 2009, at the time of the accident which is the subject of plaintiff's complaint, I was operating my motor vehicle while engaged in the course and scope of my employment and official responsibilities as Professor and employee of The Ohio State University Medical Center.

Further, affiant sayeth naught.

*Rolf F. Barth*  
\_\_\_\_\_  
Rolf F. Barth, M.D.

Sworn to before me and subscribed in my presence this 22<sup>nd</sup> day of October, 2010.

*Sue Ramsey*  
\_\_\_\_\_  
Notary Public  
SUE RAMSEY  
Notary Public, State of Ohio  
My Commission Expires December 4, 2011

