

## SUPREME COURT OF OHIO

### State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas

126 Ohio St. 3d 198, 2010-Ohio-3299 (Ohio 2010) · No. 2009-1649 · Decided July 21, 2010

#### SUMMARY

The Supreme Court of Ohio affirmed a writ of procedendo requiring the Lucas County Court of Common Pleas and Judge Zmuda to vacate a stay and proceed with a medical-malpractice claim against a private employer under respondeat superior. The court held that R.C. 2743.02(F) did not require a prior Court of Claims immunity determination because neither the state nor the state-employed physician was the subject of the remaining action. It further held that the physician's potential personal immunity did not shield the private employer from vicarious liability.

#### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                      |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Ohio                                                                                                                                                                                                                                                                |
| WRITING FOR THE COURT | Lanzinger, J.; Brown, C.J.; Cupp, J.; Lundberg Stratton, J.; O'Connor, J.; O'Donnell, J.; Pfeifer, J.; Stratton, J.                                                                                                                                                                  |
| JURISDICTION          | Ohio                                                                                                                                                                                                                                                                                 |
| DECIDED               | July 21, 2010                                                                                                                                                                                                                                                                        |
| DOCKET                | 2009-1649                                                                                                                                                                                                                                                                            |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                             |
| PROCEDURAL POSTURE    | Appeal as of right from a judgment of the Sixth District Court of Appeals granting a writ of procedendo and ordering the Lucas County Court of Common Pleas and Judge Zmuda to vacate a stay and proceed with a medical-malpractice claim against Associated Physicians of MCO, Inc. |
| STANDARD OF REVIEW    | Whether the relator established a clear legal right to procedendo, a clear legal duty to proceed, and the lack of an adequate remedy in the ordinary course of law.                                                                                                                  |
| PRECEDENTIAL VALUE    | Published, precedential decision of the Supreme Court of Ohio                                                                                                                                                                                                                        |
| PARTIES               | Lucas County Court of Common Pleas, Judge Gene A. Zmuda v. Henry J. Sawicki Jr.                                                                                                                                                                                                      |

#### TOPICS

medical malpractice

remedies

appellate procedure

civil procedure

statutory interpretation

## PRACTICE AREAS

Ohio civil procedure

extraordinary writs

medical malpractice

vicarious liability

state sovereign immunity

## QUESTIONS PRESENTED

1. Whether R.C. 2743.02(F) required the common pleas court to stay a medical-negligence action brought solely against a private employer on a respondeat-superior theory because the allegedly negligent physician was also a state employee.
2. Whether a state-employed physician may simultaneously act as an agent of a private employer for the same conduct in a hospital setting.
3. Whether the physician's personal statutory immunity bars the private employer's vicarious liability.
4. Whether Sawicki had an adequate remedy in the ordinary course of law that precluded a writ of procedendo.

## HOLDINGS

1. R.C. 2743.02(F) did not apply because the action remaining before the common pleas court was against only the physician's private employer, not against the state or the state-employed physician, and none of the statutory conditions triggering the Court of Claims's exclusive initial jurisdiction was satisfied.
2. A person may simultaneously be the servant or agent of two separate employers as to the same act when the service to one does not involve abandonment of the service to the other; thus, the physician could have acted as an agent of both the state hospital and Associated.
3. An employee's personal immunity from civil liability does not shield a private employer from liability for the employee's conduct under respondeat superior.
4. Sawicki was entitled to a writ of procedendo because the common pleas court erroneously stayed the case, and a time-barred, inappropriate Court of Claims action would not provide an adequate remedy in the ordinary course of law.

## KEY QUOTATIONS

*"To be entitled to the requested writ of procedendo, Sawicki must establish (1) a clear legal right to have Judge Zmuda proceed to the merits and try the medical-malpractice case, (2) a clear legal duty on the part of the judge to try the case, and (3) the lack of an adequate remedy in the ordinary course of the law." (§ 11)*

*"An employee's immunity from liability is no shield to the employer's liability for acts under the doctrine of respondeat superior." (§ 28)*

*"Therefore, we affirm the judgment of the court of appeals granting the writ of procedendo to compel the common pleas court and Judge Zmuda to vacate their stay of the underlying medical-malpractice case and to proceed on Sawicki's vicarious-liability claim." (§ 32)*

## FACTUAL BACKGROUND

Sawicki alleged that Dr. Peter Temesy-Armos negligently treated him after he was diagnosed with atrial flutter, resulting in internal bleeding and a proximal femoral nerve lesion causing leg atrophy. At the time of treatment, Temesy-Armos was both a state employee of the former Medical College of Ohio Hospital and a private employee of Associated Physicians of MCO, Inc. Sawicki pursued a respondeat-superior claim against Associated after the claims against Temesy-Armos were dismissed, but the common pleas court stayed that claim pending a Court of Claims determination concerning the doctor's state-employee immunity.

## PROCEDURAL HISTORY

Sawicki filed a medical-malpractice action against Dr. Peter Temesy-Armos and his private employer, Associated Physicians of MCO, Inc. The common pleas court dismissed the claims against the doctor based on his alleged state-employee status and stayed the respondeat-superior claim against Associated pending a Court of Claims immunity determination. The Sixth District granted procedendo; the Supreme Court of Ohio initially reversed and remanded, and on remand the appellate court again granted the writ. The Supreme Court of Ohio affirmed that judgment.

## DISPOSITION

affirmed

## REMAND INSTRUCTIONS

The common pleas court and Judge Zmuda were ordered to vacate the stay and proceed on Sawicki's vicarious-liability claim against Associated.

## CASES CITED

- State ex rel. Weiss v. Hoover, 84 Ohio St. 3d 530, 705 N.E.2d 1227 (1999)
- State ex rel. CNG Fin. Corp. v. Nadel, 111 Ohio St. 3d 149, 2006-Ohio-5344, 855 N.E.2d 473
- State ex rel. Charvat v. Frye, 114 Ohio St. 3d 76, 2007-Ohio-2882, 868 N.E.2d 270
- State ex rel. Watkins v. Eighth Dist. Court of Appeals, 82 Ohio St. 3d 532, 696 N.E.2d 1079 (1998)
- Johns v. Univ. of Cincinnati Med. Assocs., Inc., 101 Ohio St. 3d 234, 2004-Ohio-824, 804 N.E.2d 19
- State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas, 60 Ohio St. 3d 78, 573 N.E.2d 606 (1991)
- Conley v. Shearer, 64 Ohio St. 3d 284, 595 N.E.2d 862 (1992)
- Adams v. Peoples, 18 Ohio St. 3d 140, 18 OBR 200, 480 N.E.2d 428 (1985)
- Comer v. Risko, 106 Ohio St. 3d 185, 2005-Ohio-4559, 833 N.E.2d 712
- State ex rel. Sevayega v. McMonagle, 122 Ohio St. 3d 54, 2009-Ohio-2367, 907 N.E.2d 1180
- State ex rel. Miley v. Parrott, 77 Ohio St. 3d 64, 671 N.E.2d 24 (1996)
- Vargo v. Sauer, 457 Mich. 49, 576 N.W.2d 656 (1998)
- Tonsic v. Wagner, 458 Pa. 246, 329 A.2d 497 (1974)
- Johnson v. LeBonheur Children's Med. Ctr., 74 S.W.3d 338 (Tenn. 2002)
- Davis v. Lambert-St. Louis Int'l Airport, 193 S.W.3d 760 (Mo. 2006)

- Hooper v. Clements Food Co., 694 P.2d 943 (Okla. 1985)
- Sears v. Cincinnati, 31 Ohio St. 2d 157, 60 O.O.2d 113, 285 N.E.2d 732 (1972)
- State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas, 121 Ohio St. 3d 507, 2009-Ohio-1523, 905 N.E.2d 1192

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