

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio, ex rel. Henry J. Sawicki, Jr.

Court of Appeals No. L-07-1386

Relator

v.

The Court of Common Pleas and
The Honorable Gene A. Zmuda, Judge

DECISION AND JUDGMENT

Respondents

Decided: August 5, 2009

* * * * *

James M. Tuschman and R. Ethan Davis, for relator.

Julia R. Bates, Lucas County Prosecuting Attorney, and
John A. Borell, Assistant Prosecuting Attorney, for respondents.

* * * * *

SINGER, J.

{¶ 1} This case is here on remand, after a decision issued by the Supreme Court of Ohio. See *State ex rel. Sawicki v. Court of Common Pleas of Lucas County*, 121 Ohio St.3d 507, 2009-Ohio-1523. In accordance with that decision, we have re-examined the motions for summary judgment filed by the parties.

{¶ 2} Relator, Henry Sawicki, Jr., filed a medical malpractice suit in the Lucas County Court of Common Pleas. During that proceeding, the trial court stayed relator's claims against a private employer, Associated Physicians of MCO, Inc. ("Associated Physicians"), "pending a ruling from the Ohio Court of Claims as to whether Dr. Temesy-Armos was acting within the scope of employment with [the Medical College of Ohio] at the time he rendered treatment to [Sawicki] and subject to personal immunity as a state employee."¹

{¶ 3} Relator then filed a complaint for writ of procedendo with this court, seeking to compel respondents, the Lucas County Court of Common Pleas and Judge Gene A. Zmuda, to vacate the order of stay. Relator seeks summary judgment, arguing that a determination as to whether Dr. Temesy-Armos was a state employee was not relevant or necessary in order to determine whether he was acting within the scope of employment as a private employee of Associated Physicians during Sawicki's medical treatment.

{¶ 4} Respondents also move for summary judgment. Respondents counter that, in order to determine the liability of Associated Physicians, the Court of Claims must first make the determination of whether Dr. Temesy-Armos' acts were manifestly outside the scope of his employment with his state employer, MUO.

¹Dr. Temesy-Armos was simultaneously employed by Associated Physicians and University of Toledo Medical Center ("MUO"), formerly known as Medical College of Ohio Hospital.

{¶ 5} "A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." *State ex rel. Weiss v. Hoover* (1999), 84 Ohio St.3d 530, 532. Procedendo is a proper remedy in any case in which a court has jurisdiction but refuses to exercise it. *State ex rel. Timson v. Latshutka* (Feb. 11, 1997), 10th Dist. No. 96APD11-1568. See, also, *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna* (1995), 73 Ohio St.3d 180, 184 (writ of procedendo will issue requiring a judge to proceed to final judgment if the judge erroneously stayed the proceeding based on a pending case that has no effect on the court's jurisdiction to proceed). It is an order from a court of superior jurisdiction to a court of inferior jurisdiction to compel the inferior tribunal to proceed to judgment. *Id.*, citing to *State ex rel. Utley v. Abruzzo* (1985), 17 Ohio St.3d 203, 204.

{¶ 6} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of facts, if any, * * * show that there is no genuine issue as to any material fact" and, "construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶ 7} In all civil actions *against the state*, R.C. 2743.02 confers exclusive, original jurisdiction upon the Court of Claims "to determine whether a state employee is personally immune from liability in a civil action under R.C. 9.86 or whether the conduct was manifestly outside the scope of employment at the time the cause of action arose."

Theobald v. Univ. of Cincinnati, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 13, citing to *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio. In other words, the purpose of R.C. 2743.02 is to determine, in an action *against the state*, the *immunity of a state employee*, acting on behalf of the state, and *liability of the state* for that employee's acts. See *Theobald*, supra. We can find no authority that requires a claimant to file suit against the state when his or her claims against a dual status employee are not based upon claims against the state, but are, rather, based upon allegations that the employee's negligent acts were within the scope of his private employment.

{¶ 8} In this case, as clearly noted by the Supreme Court of Ohio, "Sawicki seeks monetary damages. In addition, as the underlying case is now limited to his claim against Associated, *he does not seek relief against the state.*" (Emphasis added.) See *State ex rel. Sawicki*, supra, 2009-Ohio-1523, ¶ 15. Since it is undisputed that relators do not seek relief against the state, a stay was improper and the trial court unnecessarily delayed proceeding to judgment.

{¶ 9} Therefore, we conclude that there are no genuine issues of material fact in dispute and relator is entitled to judgment as a matter of law. Likewise, we conclude that respondents have failed to meet their burden entitling them to summary judgment, and the stay must be vacated.

{¶ 10} Accordingly, the writ in procedendo is granted. Costs assessed to respondents. All further pending motions are rendered moot and denied.

{¶ 11} The clerk of court, who the court hereby specially authorizes to perfect service in this case, shall immediately serve, upon the respondents by personal service, a copy of this writ, and the clerk shall verify, by affidavit, the time, place, and manner of service and file such verification upon completion of the service.

{¶ 12} The clerk is further directed to immediately serve **upon all the parties** a copy of this writ in a manner prescribed by Civ.R. 5(B).

{¶ 13} It is so ordered.

PETITION GRANTED.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.