

OPINION NO. 81-046**Syllabus:**

1. Members of the Ohio State University Hospitals Board are entitled to immunity from civil liability, as provided by R.C. 9.86 and R.C. 2743.02(A).
2. The Ohio State University Hospital is authorized to purchase liability insurance for the Hospitals Board members pursuant to R.C. 2743.02(C).
3. Members of the Ohio State University Hospitals Board qualify for the indemnification provisions of R.C. 9.87 and R.C. 2743.02(C).

To: Chester Devenow, Chairman, Ohio State University Board of Trustees, Columbus, Ohio

By: William J. Brown, Attorney General, August 24, 1981

I have before me your request for an opinion concerning the civil liability of the members of the University Hospitals Board at Ohio State University. The Ohio State University Board of Trustees established the Hospitals Board and appointed members to the Board pursuant to its authority under R.C. 3335.04¹ and R.C. 3335.08.² The Board is composed of three members of the Board of Trustees and twelve citizens from the general public. According to the resolution establishing the Hospitals Board, the Board is "responsible to the board of trustees for the oversight of patient care services in university hospitals. The hospitals board shall

¹R.C. 3335.04 reads:

The board of trustees of the Ohio state university annually shall elect one of their number chairman, and in the absence of the chairman, elect one of their number temporary chairman. It also may appoint a secretary, treasurer, and librarian, and such other officers as the interests of the college require, who may be members of the board. Such appointees shall hold their offices for such term as the board fixes, subject to removal by it, and shall receive such compensation as the board prescribes. (Emphasis added.)

I note that it is not clear that the term "officers" is used in this section in its common law sense. See State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919 (1917), which is frequently quoted for its explanation of what constitutes a public office.

²R.C. 3335.08 reads: "The board of trustees of the Ohio state university may adopt bylaws, rules, and regulations for the government of the university."

be accountable through the vice president for health sciences, or other designee of the president, and the president to the university board of trustees." The Board of Trustees' Policy Statement on University Hospitals Governance and the University Hospitals Board bylaws set out in greater detail the duties and responsibilities of the Hospitals Board. Specifically, you wish to know whether the Hospitals Board members qualify for certain immunity protections set forth by statute, and whether the Board members qualify for insurance and indemnification provisions also set forth by statute.

I turn first to your question concerning the immunity of Board members. R.C. 9.86³ states in part that: "no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties. . . ." In determining whether Hospitals Board members qualify for the immunity from civil liability which R.C. 9.86 provides, it must first be ascertained whether the Board members are officers or employees, as those terms are used in R.C. 9.86 and related provisions.⁴ R.C. 9.85(A) provides that, as used in R.C. 9.86, "officer or employee," has the same meaning as in R.C. 109.36(A). R.C. 109.36(A) defines "officer or employee" as "any person who, at the time a cause of action against him arises, is serving in an elected or appointed office or position with the state or is employed by the state." (Emphasis added.) R.C. 109.36(A) further provides that, "[o]fficer or employee does not include any person elected, appointed, or employed by any political subdivision of the state." R.C. 109.36(B), which defines "state" and pursuant to R.C. 9.85 is applicable to R.C. 9.86, provides that "state" means "the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. 'State' does not include political subdivisions." (Emphasis added.) Both the Ohio State University and the Ohio State University Hospitals have been held to be instrumentalities of the state. Thacker v. Board of Trustees, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973); Wolf v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959). Thus, the Ohio State University and its Hospitals fall within the definition of "state" found at R.C. 109.36(B). It is unnecessary to specifically categorize the nature of a member of

³R.C. 9.86 reads in its entirety:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage 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.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

⁴In 1975 Op. Att'y Gen. No. 75-044, I concluded that a member of the Ohio State University Board of Trustees is a public officer. Thus, the three members of the Hospitals Board who are trustees are state officers for purposes of R.C. 9.86, R.C. 2743.02, and R.C. 109.361. The discussion which follows concerning the nature of the Hospitals Board members with regard to the above statutes applies only to the members who are not also trustees of the University.

the Hospitals Board to see that he falls within the broad definition of "officer or employee" found at R.C. 109.36(A).⁵ Clearly, because of the nature of services which the University Hospitals Board renders to the Ohio State University, its members are persons who either serve in an appointed office or position with the state or are employed by the state. Thus, I conclude that the Hospitals Board members fall within the scope of R.C. 9.86, and are immune from civil liability arising under the laws of Ohio for damage or injury caused in the performance of their duties, to the extent provided by that section.

There are, however, certain qualifications contained within R.C. 9.86 which limit the immunity to which an officer or employee is otherwise entitled. R.C. 9.86 does not provide immunity from civil actions which arise from the operation of a motor vehicle,⁶ nor from civil actions in which the state is the plaintiff. An officer or employee will not be immune under R.C. 9.86 if his actions were manifestly outside the scope of his employment or official responsibilities, nor if he acted with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 9.86 provides immunity only in actions arising under the law of this state. But see R.C. 9.87 (discussed in greater detail below). It should also be noted that R.C. 9.86, by its own terms, does not affect immunity from civil liability conferred upon an officer or employee by any other section of the Revised Code or by case law. R.C. 9.86 also does not affect the state's liability in an action filed against the state in the Court of Claims pursuant to R.C. Chapter 2743. In other words, the state cannot assert R.C. 9.86 as a defense in an action filed against it pursuant to R.C. 2743.02. See R.C. 2743.02(A)(2).

R.C. Chapter 2743, the Court of Claims Act, also provides protection from liability to state officers and employees. In R.C. 2743.02(A)(1) the state, including its instrumentalities, see R.C. 2743.01(A), has waived its immunity from liability, and has consented to be sued in the Court of Claims. However, in filing a civil action against the state in the Court of Claims, a claimant waives any cause of action he may have, based on the same act or omission, against a state officer or employee. R.C. 2743.02(A)(1). In language which is consistent with that of R.C. 9.86, R.C. 2743.02(A)(1) also provides that a claimant's waiver of his action against

⁵I am aware that, in your request, you have asked me to decide whether the Hospitals Board members are state officials (or officers) or whether they are state employees. Although your question was asked in the abstract, I find the need to address the issue in the context of your other questions concerning immunity, insurance, and indemnification, and the relevant statutes pertaining thereto. Because it is unnecessary within the context of your other questions to make a general determination as to whether the Board members are state officers or state employees, I draw no conclusion on that point at this time. I do note, as a general matter, that whether a particular person is viewed as an "officer" or an "employee" may depend upon the context in which those terms are used. See, e.g., 1980 Op. Att'y Gen. No. 80-065 ("[t]his category [of persons defined as employees for purposes of R.C. 124.01] may easily contain some individuals who are public officers for purposes of R.C. 121.161").

⁶Although R.C. 9.86 does not provide immunity to officers or employees from actions arising from the operation of a motor vehicle, R.C. 9.83 does authorize the state to insure its officers and employees against any such liability occurring while the vehicle is being used in the course of the business of the state. Under R.C. 9.83, the state may also pay judgments rendered against an officer or employee resulting from his operation of a motor vehicle while acting in the course of his employment, and the state may compromise claims for liability against an officer or employee resulting from the operation of a motor vehicle in the course of his employment. I note that there is no statutory definition of "officer" or "employee" as those terms are used in R.C. 9.83.

the state officer or employee "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." Under those circumstances, an officer or employee is not immune from suit under R.C. 9.86 nor protected by R.C. 2743.02(A)(1). R.C. 2743.02(A)(2) provides that where a claimant proves in the Court of Claims that an officer or employee (as defined in R.C. 109.36(A)) would be personally liable for his acts or omissions, except for the fact that he is immune from liability under R.C. 9.86, the state shall be held liable in the Court of Claims for such act or omission. Thus, one who has been wronged by the act or omission of a state officer or employee is not left without a remedy, despite the immunity provided in R.C. 9.86 and the waiver provisions found in R.C. 2743.02(A)(1).

Unfortunately, R.C. Chapter 2743 does not provide a definition of state officer or employee. However, I believe it is reasonable to conclude that the broad definition found in R.C. 109.36(A) and used in R.C. 9.86 should also be used for purposes of R.C. 2743.02(A)(1) concerning the waiver of a claimant's cause of action against a state officer or employee. The language of R.C. 2743.02(A)(1) was amended by Am. Sub. S.B. 76, 113th Gen. A. (1980) (eff. March 13, 1980) to conform with the language of R.C. 9.86, which was enacted by Am. Sub. S.B. 76. It was clearly the intent of the legislature to apply the immunity provisions under R.C. 9.86 and the waiver provisions under R.C. 2743.02(A)(1) to the same people under the same circumstances. R.C. 2743.02(A)(2), which was also enacted by Am. Sub. S.B. 76 and provides a remedy for persons with causes of action against those officers and employees who are immune from suit, supports this conclusion by specifically using R.C. 109.36(A) as the definitional reference. As discussed above, a Board member falls within the definition of state officer or employee provided by R.C. 109.36(A); thus, a Board member comes within the scope of R.C. 2743.02(A)(1).

I turn now to your question concerning the qualification of the Hospitals Board members for liability insurance purchased by the state. R.C. 2743.02(C) states in part as follows: "Any hospital, as defined under section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees. . . ." The definition of hospital found in R.C. 2305.11 covers hospitals owned by the state. Thus, the Ohio State University Hospital may purchase liability insurance for those persons listed above. The Hospitals Board members are not clearly agents of the hospital. An "agent," as that term is commonly used, has the authority to act on behalf of, and to legally bind, his principal. See *Ish v. Crane*, 8 Ohio St. 521 (1858). Although the Hospitals Board performs those duties prescribed by the Board of Trustees on behalf of the University and its Hospitals, the Board of Trustees has not delegated its ultimate duties and responsibilities for governing the Hospitals to the Board.⁷ Examining the duties of the Board as they are set out in the Policy Statement and the University Hospital bylaws, it is clear that the Board has not been granted the authority to affect the legal relationships of the Hospitals, and thus the Board cannot be considered an agent of the Hospitals. Nor are the Board members clearly "employees," of the Hospitals, as that term is commonly used. Board members hold their position for a specified term, they receive no compensation, and the Board is required to meet only once a month. Although the Hospitals Board cannot bind the Hospitals, the Board members act for the Trustees in many respects in administering the Hospitals, and are arguably state officers, rather than employees, under the reasoning of 1975 Op. Att'y Gen. No. 75-044. I also cannot conclude that the Hospitals Board is the governing board of the Hospitals, as the Board of

⁷Point 2 of the Trustees' Policy Statement on University Hospitals Governance reads in part: "The Hospitals Board will be delegated authority permissible under Ohio law. It is understood that the University Board of Trustees cannot delegate its ultimate duties and responsibilities for governing the Hospitals, including those for the fiscal health of the University Hospitals, its personnel policies, or the definition of the Hospitals mission."

Trustees, rather than the Hospitals Board has been granted the authority to govern the Hospitals. However, it does appear that the Hospitals Board may be considered a "committee" of the governing board, as that term is used in R.C. 2743.02(C). The members of the Hospitals Board were chosen by the Trustees to act for the Trustees in overseeing and reviewing the operations of the Hospitals, and to make recommendations concerning the Hospitals to the Trustees and other officers of the University. Thus, the Hospitals Board acts as a committee in relation to the governing board of the Hospitals. As a result, the Hospitals Board members may be covered by liability insurance purchased by the Hospital pursuant to R.C. 2743.02(C). Whether the Board members are actually covered by a particular policy of insurance is, of course, a factual determination beyond the scope of the opinions function of this office.

I turn now to your questions concerning the indemnification of the Hospitals Board members. R.C. 9.87(A) states in part: "The state shall, except as provided in division (B) of this section, indemnify an officer or employee from liability incurred in the performance of his duties by paying any judgment in, or amount negotiated in settlement of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction." While R.C. 9.86 provides immunity against civil liability in an action arising out of the laws of this state, R.C. 9.87 provides indemnification in actions arising out of federal law, or the laws of another state or foreign jurisdiction. As discussed above, pursuant to R.C. 9.85(A) and (B) and R.C. 109.36(A) and (B), the Hospital Board members are officers or employees for purposes of both R.C. 9.86 and R.C. 9.87, and thus may be entitled to indemnification under R.C. 9.87. The maximum aggregate amount of indemnification which may be paid to or on behalf of an officer or employee is one million dollars per occurrence, and the reasonableness of the amount of the settlement or of the consent judgment is subject to the review and approval of the Attorney General and the director, administrative chief or governing body of the employer of the officer or employee to be indemnified. Pursuant to R.C. 9.87(C), the Director of Administrative Services may purchase insurance to cover amounts in excess of one million dollars. R.C. 9.87(B) states the circumstances under which an officer or employee may not be indemnified (including acting with malicious purpose, in bad faith, in a wanton or reckless manner, or acting manifestly outside the scope of employment or official responsibilities), and divisions (E) and (F) set out the procedures which must be followed.

R.C. 2743.02(C) also provides for indemnification and states in part as follows:

to such extent as its governing board considers appropriate, [any hospital as defined in R.C. 2305.11 may] indemnify or agree to indemnify and hold harmless any such person [including committee members] against expense, including attorneys' fees, damage, loss or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of his or her duties or engaged in activities at the request or direction, or for the benefit, of the hospital.

As discussed above, hospitals owned by the state fall within this section, and the Hospitals Board members are members of a committee of the governing board of a hospital owned by the state. Thus, the Board members also may be entitled to indemnification pursuant to R.C. 2743.02(C).

In addition to the immunity, insurance, and indemnification protections outlined above, the Hospitals Board members may be entitled to representation and defense by the Attorney General pursuant to R.C. 109.361 in any civil action instituted against them, with all expense to be paid by the Board members' employer. As discussed above, the Board members fall within the definition of officer or employee set out in R.C. 109.36(A) and (B), and thus may be entitled to

such representation. Representation will not be provided, however, if the officer or employee acted "manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner," R.C. 109.362(A), or if the officer or employee is covered by an insurance policy purchased by the state requiring the insurer to provide counsel, R.C. 109.362(B). Further details and procedures concerning the Attorney General's representation are set forth in R.C. 109.363, R.C. 109.364, R.C. 109.365, and R.C. 109.366.

I note that section three (uncodified) of Am. Sub. S.B. 76 provides for the repeal of R.C. 9.85, R.C. 9.86 and R.C. 9.87, and for the repeal of R.C. 9.83, R.C. 2743.01, and R.C. 2743.02 as amended by Am. Sub. S.B. 76, effective December 31, 1985, unless such sections are reenacted by subsequent legislation. Section four (uncodified) of Am. Sub. S.B. 76 provides for new sections R.C. 9.83, R.C. 2743.01 and R.C. 2743.02, to be effective December 31, 1985.

In conclusion, it is my opinion, and you are advised, that:

1. Members of the Ohio State University Hospitals Board are entitled to immunity from civil liability, as provided by R.C. 9.86 and R.C. 2743.02(A).
2. The Ohio State University Hospital is authorized to purchase liability insurance for the Hospitals Board members pursuant to R.C. 2743.02(C).
3. Members of the Ohio State University Hospitals Board qualify for the indemnification provisions of R.C. 9.87 and R.C. 2743.02(C).