

IN THE SUPREME COURT OF OHIO

MATTHEW RIES, ADMR. et al., :

Appellants, :

vs. :

Case No. 12-0954

THE OHIO STATE UNIVERSITY :  
MEDICAL CENTER, :

Appellee. :

On Appeal From the  
Franklin County Court of Appeals  
Case No.: 11AP-1004

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS MATTHEW RIES, ADMR., et al.**

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**FILED**  
JUN 04 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents the question of whether a physician employed by a state university teaching hospital to perform specific teaching-related duties is entitled to civil immunity for medical negligence while treating a patient, even where no student is present and he is not engaged in any teaching activity but instead involved in making money for his private practice group, Ohio State University Physicians, Inc., which is not a state entity.

In many ways, this case presents the flipside of this Court's recent ruling in *Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St.3d 263, 2011-Ohio-3375, which held that a volunteer physician with no other connection to a state university teaching hospital is not entitled to the immunity protections contained in R.C. 9.86 and R.C. 2743.02(F) merely on the basis that a medical student was present at the time of the alleged negligence. In this case the physician had two contracts. One contract was with The Ohio State University to teach, serve on committees or research, for which he was paid \$50,000.00 per year. The other contract was with his private practice group, Ohio State University Physicians, Inc., for treating patients, for which he received \$140,000.00 per year, plus bonuses. At the time of his treatment of Appellant's decedent, Michael McNew, an attorney, the physician was neither teaching nor serving on a committee nor conducting research. However, the court of appeals found the physician was providing a "service" to OSU. This ruling virtually immunizes every physician with an employment connection to a state university hospital, thereby denying every plaintiff the right to a jury trial.

This Court's other recent pronouncement on this issue, *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, set forth guidelines that focused upon whether the physician is furthering the interests of the state by teaching or supervising medical students or residents. On several occasions since *Theobald*, the Tenth District Court of Appeals has recognized that whether a physician is in the scope of his employment hinges upon whether he is engaged in teaching or teaching-related activity.

When Dr. Syed Husain treated Plaintiff-Appellant's decedent Michael McNew, he was not teaching a student, he was not serving on a committee, nor was he conducting medical research. He was treating a patient to earn bonus money through the private corporation known as Ohio State University Physicians, Inc., a private, non-profit company that operates independently of The Ohio State University Medical Center, The Ohio State University College of Medicine and Public Health, and the State of Ohio.

However, the Tenth District reasoned that because the physician's contract with The Ohio State University indicated that he would have the responsibility of providing "service to the institution," and because "service" should be interpreted as providing clinical care to patients, the presence or absence of a student was irrelevant.

In so holding, the court of appeals has now proclaimed that the presence of a student is no longer essential or even relevant to a finding that the physician is entitled to immunity. Rather, the new test holds that so long as the physician is providing clinical care, he is performing a service pursuant to his OSU contract, and is therefore entitled to immunity.

This interpretation largely renders the immunity analysis to be pro forma, since all a state teaching hospital must now do to ensure civil immunity for its physicians is to

declare that any task assigned them, no matter how distant from or unrelated to the ostensible purpose of educating students, is a “service to the institution” that furthers the interests of the state.

The importance of this issue is that virtually every patient who sustains negligent injury through the acts and omissions of a physician with an employment connection to a state teaching hospital will be denied the right to trial by jury, since, by statute, there are no jury trials in the Court of Claims. “Section 5, Article I of the Ohio Constitution guarantees the right to trial by jury in medical malpractice cases and provides that the right “\*\*\* shall be inviolate \*\*\*.” *Morris v. Savoy*, 61 Ohio St.3d 684, 702, 576 N.E.2d 765, 778 (1991), Sweeney, J., concurring and dissenting in part. As the Tenth District previously recognized in *York v. Univ. of Cincinnati Medical Ctr.*, 10th Dist. Nos. 95API09-1117, 95API09-1127, 1996 Ohio App. LEXIS 1682 (Apr. 23, 1996), what is at stake in these cases is nothing less than the plaintiff’s “right to have his claim adjudicated by a jury.” *York* found that, when similar facts are viewed in the context of a plaintiff’s right to jury trial, the university’s interest in attracting top physicians, or the faculty physicians’ interest in being allowed to practice medicine for remuneration without violating state ethics laws, seemed “much less persuasive.” *Id.*

Case precedent may have evolved since *York*, but not so much as to defeat the basic premise that the elimination of a plaintiff’s right to jury trial must be based upon a compelling need to do so, and not simply upon an interpretation of a contract as placing virtually all of a physician’s professional duties under the umbrella of immunity, regardless of whether the state’s interests are being served, or how those “interests” are defined.

The Tenth District erred in ruling that a physician employed by a state university hospital was in the scope of his employment regardless of whether he was engaging in education-related activities.

In support of this position, Appellant presents the following argument.

#### STATEMENT OF THE CASE AND FACTS

Appellant initiated this case in both the Court of Claims and the Franklin County Common Pleas Court based upon his claim that medical treatment rendered to decedent Michael McNew, by agents and/or employees of the State of Ohio, The Ohio State University Medical Center and/or Ohio State University Physicians, and by Syed Husain, M.D. and Howard R. Rothbaum, M.D., deviated from the applicable standard of care and caused the wrongful death of attorney Michael McNew. On November 7, 2011, the Court of Claims issued its judgment entry ruling that, at the time he rendered care to decedent, Dr. Husain was acting within the scope of his state employment and was therefore entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F). Appellant then perfected an appeal to the Tenth District Court of Appeals, which, on April 19, 2012, affirmed the judgment finding immunity for Dr. Husain.

Appellant's medical negligence action arose in 2009, when Dr. Husain diagnosed and performed hemorrhoid surgery upon Michael McNew. After surgery, Mr. McNew experience excessive bleeding, began to experience shortness of breath and bruising, upon which Dr. Husain instructed decedent to take additional pain medicine. When the decedent lost consciousness later that evening, he was taken by ambulance to Dublin Methodist Hospital, then transferred to Riverside Methodist Hospital, where he died the

next day of an undiagnosed cerebral hemorrhage from thrombocytopenia, or low blood platelet count, that causes a failure to clot and excessive bleeding.

The defense argued below that Dr. Husain was an employee of the State of Ohio, and that his treatment of Michael McNew occurred in the scope of his employment. After the parties briefed this issue, the Court of Claims concluded that Dr. Husain was, in fact, entitled to immunity, finding that “Dr. Husain was a full-time faculty physician who was required by defendant to provide clinical care, that his clinical activities were controlled by defendant, that he was required to devote all of his professional time and effort to the service of defendant, that OSUP functioned as the business arm of defendant, and that Dr. Husain did not maintain a private practice.” Decision of the Court of Claims at page 3. In affirming, the court of appeals concluded that Dr. Husain was “wearing two hats” while treating patients because his job duties fulfilled requirements under both his state employment contract and his contract with Ohio State University Physicians, Inc., and, ostensibly, because Dr. Husain treated Michael McNew at an Ohio State University Medical Center facility.

In support of her position on this issue, the appellant presents the following argument.

#### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law: A physician whose state employment duties are education-related must be shown to be engaging in education-related activity at the time he allegedly renders negligent care in order to qualify for civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).**

In *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, this Court established the test for determining whether and when physicians

connected with state university hospitals and medical schools are state employees acting in the scope of their employment. In *Theobald*, ¶ 24, this Court stated:

“In this case, the court of appeals concluded that the practitioner’s duties included the education of students and residents. The court thus instructed the Court of Claims to ‘first identify the aspect of the course of treatment that the plaintiff alleges gave rise to damage or injury,’ then to ‘inquire whether the practitioner was educating a student or resident while rendering the allegedly negligent care to the patient.’ [*Theobald v. Univ. of Cincinnati* (2005), 160 Ohio App.3d 342, 2005-Ohio-1510,] at P 46, 48.

We believe that this approach follows the language and intent of R.C. 9.86 and correctly focuses upon the purpose of the employment relationship  
\*\*\*”

Thus, this Court has established that the presence of a student or resident at the time of care is a critical, even decisive, factor in these cases.

*Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St.3d 263, 2011-Ohio-3375, 957 N.E.2d 764, decided five years after *Theobald*, recognized that *Theobald*’s two-part test was applicable, but further observed that *Theobald* was of little help where the physician was not a paid employee of the university because *Theobald* involved whether the subject physicians were acting in the scope of their employment, rather than whether they were employees at all. *Engel* at ¶ 9.

In *Engel*, the question was whether a volunteer physician who was supervising medical students was, in fact, a state employee, when his only connection to the University of Toledo College of Medicine was as an appointed volunteer faculty member who would allow students to rotate through his private practice as a part of their training. This Court held such a connection was too tenuous a basis upon which to allow immunity.

Thus, under *Theobald* and *Engel*, to be afforded immunity, the physician, at the time of the care alleged to be negligent, must both be performing duties under his state contract and instructing a student.

In considering such cases, the Tenth District Court of Appeals, until now, has consistently found that without a student or resident present, there can be no immunity. See, e.g., *Balson v. The Ohio State Univ.*, 112 Ohio App.3d 33, 677 N.E.2d 1216 (10<sup>th</sup> Dist. 1996)(doctors were not entitled to immunity; separate practice plan corporation was the actual employer, no student present); *Katko v. Balcerzak*, 41 Ohio App.3d 375, 536 N.E.2d 10 (10<sup>th</sup> Dist. 1987)(physician was both a faculty member and private physician, billing through his private medical partnership with no payment to OSU, no student present, so no immunity); *York v. Univ. of Cinti. Med. Ctr.*, 10<sup>th</sup> Dist. Nos. 95API09-1117, 95API09-1127, 1996 Ohio App. LEXIS 1682 (physician was outside scope of employment when rendering care because compensation from private association far exceeded amount paid by state entity, no student present); *Johnson v. Univ. of Cincinnati*, 10<sup>th</sup> Dist. No. 04AP-926, 2005-Ohio-2203 (physicians were employed by medical school as faculty and conducted a clinical practice supervising residents; although plaintiff treated at the clinic, no students were present so no immunity); *Harrison v. Univ. of Cincinnati Hosp.*, 10<sup>th</sup> Dist. No. 96API01-81, 1996 Ohio App. LEXIS 2762 (June 28, 1996)(each faculty member had to be a member of practice plan, and defendant doctor was, but no student was present so he was outside of scope of employment); *Smith v. Ohio State Univ. Hosp.*, 110 Ohio App.3d 412, 674 N.E.2d 721 (10<sup>th</sup> Dist. 1996)(Department of Surgery Corp. was not a state institution and no student was present, so no immunity).

In fact, the overwhelming weight of case precedent in which a physician was found to be a state employee in the scope of his employment involved physicians who were instructing or supervising students or residents at the time of the injury. See, e.g., *Barkan v. The Ohio State Univ.*, 10<sup>th</sup> Dist. No. 02AP-436, 2003-Ohio-985, 2003 Ohio App. LEXIS 928; *Ferguson v. The Ohio State Univ. Med. Ctr.*, 10<sup>th</sup> Dist. No. 98AP-863, 1999 Ohio App. LEXIS 2828 (June 22, 1999); *Kaiser v. The Ohio State Univ.*, 10<sup>th</sup> Dist. No. 02AP-316, 2002-Ohio-6030, 2001 Ohio App. LEXIS 5848; *Scarberry v. The Ohio State Univ. Hosps.*, 10<sup>th</sup> Dist. No. 98AP-143, 1998 Ohio App. LEXIS 5649 (Dec. 3, 1998); *Schultz v. Univ. of Cincinnati College of Medicine*, 10<sup>th</sup> Dist. No. 09AP-900, 2010-Ohio-2071, 2010 Ohio App. LEXIS 1694; *Allen v. Univ. of Cincinnati Hosp.*, 122 Ohio App.3d 195, 701 N.E.2d 443 (10<sup>th</sup> Dist. 1997); *Chitwood v. Univ. Medical Ctr.*, 10<sup>th</sup> Dist. No. 97API09-1235, 1998 Ohio App. LEXIS 2106 (May 5, 1998).

In *Johnson*, supra, as recently as 2005, the Tenth District concisely summed up the history of this issue and its rubric for analyzing medical negligence/immunity cases as follows:

“The case law from this court establishes no bright-line rule for determining whether a physician employed by both a state university and a professional practice group has acted within the scope of the physician's university, or ‘state,’ employment. While this court has utilized a variety of factors in making the determination, it has concluded that the primary factor is the ‘education factor’: whether a medical student or resident was involved in the patient's care or treatment when the physician saw the patient, thus implicating the doctor's capacity as a faculty member supervising residents or teaching medical students. *Theobald v. Univ. of Cincinnati*, 160 Ohio App. 3d 342, 2005-Ohio-151, 827 N.E.2d 365 (10<sup>th</sup> Dist.); *Barkan* [*v. The Ohio State Univ.*, 10<sup>th</sup> Dist. No. 02AP-436, 2003-Ohio-985, 2003 Ohio App. LEXIS 928], \*\*\* at ¶ 12; *Ferguson v. The Ohio State Univ. Med. Ctr.*, 10<sup>th</sup> Dist. No. 98AP-863, 1999 Ohio App. LEXIS 2828 (June 22, 1999).”

Such precedent overwhelmingly indicates that where the physician is not engaged in teaching or teaching-related activity, and where the financial arrangement is such that the physician is practicing pursuant to and compensated primarily through a separate contract with a private practice plan, immunity is not warranted.

In affirming the Court of Claims, the Tenth District found that Dr. Husain's duties overlapped, and asserted that, in such an instance, *Theobald* requires a finding that the physician is acting in a governmental capacity and so is entitled to immunity. Although the Court of Claims concluded from the evidence that the state had not established that a student was present at the time Dr. Husain rendered care to Michael McNew, the court of appeals held this was of no importance, because Dr. Husain's contractual duties with OSU included providing service and maintaining a high level of clinical competence. The court of appeals concluded that because Dr. Husain was doing so at the time he treated Michael McNew, he was entitled to immunity.

By this reckoning, the presence of a student, the existence of a separate professional practice contract with a private corporation (such as Ohio State University Physicians, Inc.), and other factors (such as the location of the services rendered, the understanding of the patient as to what "hat" the physician is wearing, and the source some or all of the physician's compensation) become irrelevant. Instead, the question purely becomes what the contract with OSU states, and whether treating the patient was one of the "services" the physician must provide under the OSU contract as opposed to the Ohio State University Physicians, Inc., contract.

This conclusion directly contradicts both the reasoning in *Theobald* and in *Engel*. In *Theobald*, this Court emphasized the importance of scrutinizing the purpose of the

employment relationship, finding that the scope of employment turns on what the physician's duties are as a state employee, and whether he was engaged in those duties at the time of the alleged injury. Thus, under the *Theobald test*, a major factor in determining whether the physician is in the scope of employment is whether the physician was educating a student or resident at the time of the alleged injury.

In *Engel*, the question was whether a volunteer physician who was supervising medical students was, in fact, a state employee, when his only connection to the University of Toledo College of Medicine was as an appointed volunteer faculty member who would allow students to rotate through his private practice as a part of their training. *Engel* determined that the physician's only role was to allow students to rotate through his private practice, a connection that was too tenuous to find state employment status.

Read in conjunction, *Theobald* and *Engel* indicate that student presence, standing alone, is not enough to establish immunity, while if the state-employed physician's duties include the education of students, the lack of a student being present may defeat a finding that the physician was in the scope of his employment.

While *Theobald* stated that the "proof of the content of the practitioner's duties is crucial" and then required the state to present evidence of those duties, *Theobald* should not be interpreted (as the court of appeals here did) to allow The Ohio State University Medical Center simply to specify a duty that a physician treat clinical patients and then expect immunity to follow. Such a rule would seem to allow The Ohio State University Medical Center to include in its contract any activity, no matter how far removed from advancing its teaching hospital function, and then claim that, so long as the physician was performing that task, he is entitled to immunity.

Dr. Husain's duties as a state employee were to conduct research and teach. He was doing neither at the time he rendered care to Appellant's decedent, and therefore he is not entitled to immunity for his acts and omissions in treating decedent. *Theobald* cited *Wayman v. Univ. of Cincinnati Medical Ctr.*, 10<sup>th</sup> Dist. No. 99AP-1055, 2000 Ohio App. LEXIS 2690 (June 22, 2000), with favor. That case summarized Tenth District precedent, and concluded that a physician with a virtually identical contractual arrangement was not entitled to immunity because no student was present.

In *Wayman*, the physician saw the plaintiff at a component office of the private plan, while here Dr. Husain saw decedent at OSU East. However, this is a distinction without a difference, given the financial arrangement that primarily compensated Dr. Husain through a separate legal entity, a private contract that governed virtually all of the terms of his employment, and the fact that Dr. Husain was neither engaged in research nor teaching at the time he treated decedent. In fact, the location at which the doctor-patient contact occurred was not relevant to the immunity determination in several immunity cases, which instead focused on whether the patient was a private patient of the physician rather than a patient of the university, and the amount of financial gain, if any, benefiting the university versus the physician's private practice plan. See, e.g., *Norman v. The Ohio State Univ. Hosps.*, 116 Ohio App.3d 69, 686 N.E.2d 1146 (10<sup>th</sup> Dist. 1996).

Keeping in mind *Theobald's* enunciation of the test as being what the practitioner's duties are as a state employee and whether the practitioner was so engaged at the time of an injury, it is clear that in this instance Dr. Husain was not engaged in teaching, committee work, or research at the time he treated Appellant's decedent. Instead, he was solely acting as a private physician, and, in this capacity, was billing and

receiving payment for his services. Appellee has argued that application of *Theobald* means that a physician is a state actor any time he or she is furthering the interests of the state, yet *Theobald* did not embrace this broad definition. By that standard, any physician treating an Ohio resident is “furthering the interests of the state” in having healthy citizens, but this does not make that physician a state actor. In *York*, supra, the university had argued that offering immunity to top physicians and having them on staff furthers an important public policy, but the Tenth District rejected this claim. Clearly, there must be more to the analysis than simply whether the university claims the physician is furthering state interests at the time of rendering care.

In fact, a review of the cases on this topic dating from the early 1990s indicates that a physician is a state employee in the scope of his employment where he is acting in the capacity of a paid faculty member supervising or teaching students or residents at the time of the alleged injury. Without the presence of a student or resident, the physician is not acting in the scope of his employment.

As this Court stated in *Engel*, the factors to be applied are:

- Whether there is a contractual relationship between the state and the alleged employee.

Clearly, in the case at bar there is such a contractual relationship. But Appellant’s entire point is that the subject contract between Dr. Husain and The Ohio State University Medical Center only related to the duties of teaching, research, supervising students, serving on committees, and the like. As Appellant has argued extensively in his Brief, this contract did not apply to Dr. Husain’s clinical duties and his treatment of Appellant’s decedent, which, instead, was governed by the separate contract with the private corporation, Ohio State University Physicians, Inc.

- Whether the state controls actions of the purported employee.

“You are 100% our employee,” so the contract says. But that isn’t really true because during Dr. Husain’s clinical hours he was working under a separate contract with a private corporation. The evidence does not establish a student was present. The Ohio State University Medical Center had every right to control Dr. Husain’s actions as a faculty member supervising and teaching students, conducting research, and serving on committees, but not practicing medicine, which is controlled by Ohio State University Physicians, Inc., a separate corporation.

- Payment by the state for services of alleged employee.

Dr. Husain was paid by the state, but only for his services as a faculty member teaching, researching, and serving on committees. The rest of his remuneration came from Ohio State University Physicians, Inc., pursuant to his contract with that separate corporation. His clinical services were billed by Ohio State University Physicians, Inc.

In affirming the Court of Claims’ immunity determination, the Tenth District denied Appellant’s constitutional right to a trial by jury without precedential authority or factual basis. Further, the court of appeals erroneously analyzed this case because it did not apply its own case precedent emphasizing the importance of a student being present in order for immunity to attach.

### CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Shroyer', written over a horizontal line.

David I. Shroyer (0024099)

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**PROOF OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail on June 4, 2012, to the following:

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**APPENDIX**

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FILED  
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FRANKLIN CO. OHIO  
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 Defendant-Appellee. :

No. 11AP-1004  
(Ct. of Cl. No. 2010-10335)  
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 19, 2012, the assignment of error is overruled. Therefore, it is the judgment and order of this court that the decision of the Ohio Court of Claims is affirmed. Costs shall be assessed against appellant.

TYACK, FRENCH & DORRIAN, JJ.

By *Gary Tyack*  
Judge G. Gary Tyack

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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(REGULAR CALENDAR)

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D E C I S I O N

Rendered on April 19, 2012

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*Colley Shroyer & Abraham, LPA, and David I. Shroyer, for appellants.*

*Michael DeWine, Attorney General, Karl W. Schedler and Daniel R. Forsythe, for appellee.*

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APPEAL from the Ohio Court of Claims

TYACK, J.

{¶ 1} The estate of Michael McNew is appealing from the decision of the Ohio Court of Claims which granted immunity to Syed Husain, M.D. The estate assigns a single error for our consideration:

THE TRIAL COURT ERRED IN DETERMINING THAT SYED HUSAIN, M.D. WAS ACTING IN THE SCOPE OF HIS STATE EMPLOYMENT AND THEREFORE WAS ENTITLED TO CIVIL IMMUNITY FOR ACTS AND OMISSIONS THAT OCCURRED DURING HIS TREATMENT OF APPELLANT'S DECEDENT, MICHAEL MCNEW.

{¶ 2} Certain facts are not in dispute. Dr. Husain was, at all pertinent times, an employee of The Ohio State University College of Medicine. Dr. Husain treated Michael McNew initially at The Ohio State University Medical Center East in the colorectal surgery clinic. He consulted with McNew after McNew left the hospital.

{¶ 3} McNew later lost consciousness and was transported to a different hospital, where he died from a cerebral hemorrhage.

{¶ 4} Physicians who work at The Ohio State University Medical Center ("OSUMC") have two employers, The Ohio State University College of Medicine and a private practice entity. In the case of Dr. Husain, the private practice entity is The Ohio State University Physicians ("OSUP"). Physicians who work at OSUMC are required to be a member of such a private practice entity.

{¶ 5} As with other physicians who are both professors at The Ohio State College of Medicine and practicing physicians, the duties of Dr. Husain sometimes overlapped. For instance, if Dr. Husain were treating a patient while being observed by a medical student or resident physician, he would be serving both of his employers at the same time. In such circumstances, a physician is considered to be a governmental employee and entitled to governmental immunity. See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208.

{¶ 6} Dr. Husain could not recall if a resident was present while he was treating McNew. The evidence before the Court of Claims was conflicting on the issue of the presence of a resident. Other medical records for patients seen at about the same time showed handwriting from a resident, but a family member of McNew was sure no one else was present when Dr. Husain drained McNew's hemorrhoid. The judge of the Court of Claims who addressed the immunity issue found that the evidence did not demonstrate Dr. Husain was teaching residents when he saw and treated McNew.

{¶ 7} The judge, however, granted immunity on a different basis. In the judge's words:

Dr. Husain's duties as a state-employed faculty physician include teaching residents, and the evidence does not demonstrate that he was doing so when the alleged negligence occurred. However, the court finds that Dr. Husain was a full-

time faculty physician who was required by defendant to provide clinical care, that his clinical activities were controlled by defendant, that he was required to devote all of his professional time and effort to the service of defendant, that OSUP functioned as the business arm of defendant, and that Dr. Husain did not maintain a private practice. Accordingly, the court concludes that Dr. Husain's duties of employment included providing clinical care and that he was engaged in such duties at the time of the alleged negligence.

Therefore, the court finds that Dr. Husain was acting within the scope of his state employment at all times pertinent hereto. Consequently, Dr. Husain is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

{¶ 8} Counsel for the estate vigorously contests those findings, relying heavily upon counsel's interpretation of the employment contracts which were signed by Dr. Husain.

{¶ 9} The contracts set forth three major categories of duties for Dr. Husain, namely teaching, research and service. The evidence did not establish that Dr. Husain was teaching while treating McNew. The evidence also did not demonstrate that research was involved. The judge in the Court of Claims found that Dr. Husain's activity while treating McNew fit under the category of service.

{¶ 10} The letter regarding employment for Dr. Husain with the College of Medicine contained a section captioned "SERVICE." The section reads:

We anticipate an evidence of commitment to the provision of service to the institution, the community, and the profession as reflected by completion of specialty board certification and maintenance of re-certification. Service will also be measured by evidence of a high level of clinical competence. It is anticipated that you will be an active participant in divisional, department, and college committee functions. It is also anticipated that you will hold office in local, regional, or national professional organizations.

{¶ 11} The letter is from OSUMC, so the "provision of service to the institution" phrase is a reference to provision of service to or for OSUMC. The sentence regarding service being measured by evidence of a high level of clinical compliance can only be a reference to patient care at OSUMC, since Dr. Husain was specifically barred from serving patients anywhere but OSUMC facilities.

{¶ 12} Under the circumstances, the judge of the Court of Claims who granted immunity to Dr. Husain was correct to find that part of Dr. Husain's employment with OSUMC and the College of Medicine was the rendering of patient care at facilities operated by OSUMC. The fact that Dr. Husain had responsibilities to OSUP and received payment from OSUP did not remove his responsibilities to OSUMC and the College of Medicine.

{¶ 13} Stated in more conventional terms, physicians with the employment contracts such as those provided to Dr. Husain wear two hats while treating patients. One hat says "OSUMC" and the other says "OSUP." Dr. Husain was wearing both while treating NcNew. Since one of the hats involved employment duties with a governmental entity, he was entitled to governmental immunity under R.C. 9.86 and R.C. 2743.02(F).

{¶ 14} The sole assignment of error is overruled and the finding of the Ohio Court of Claims with respect to immunity for Dr. Husain is affirmed.

*Judgment affirmed.*

FRENCH and DORRIAN, JJ., concur.

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# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

MATTHEW RIES, Admr., et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY  
MEDICAL CENTER

Defendant

Case No. 2010-10335

Judge Joseph T. Clark

JUDGMENT ENTRY

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FILED  
COURT OF CLAIMS  
OF OHIO

This matter came before the court for an evidentiary hearing to determine whether Syed Husain, M.D. is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

R.C. 2743.02(F) states, 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 the officer’s or employee’s 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.”

R.C. 9.86 states, in part:

“[N]o officer or employee [of the state] 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.”

“[I]n an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02(A)(2), the

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Court of Claims must initially determine whether the practitioner is a state employee. \* \* \* 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 not, then the practitioner was acting 'manifestly outside the scope of employment' for purposes of R.C. 9.86." *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶¶30-31.

Plaintiffs' decedent, Michael McNew, was referred to Dr. Husain for treatment of a hemorrhoidal blood clot. On September 15, 2009, Dr. Husain removed the clot during an outpatient procedure at defendant's University Hospital East, and they later spoke via telephone to discuss McNew's condition. Plaintiffs allege that the care and treatment rendered by Dr. Husain fell below the standard of care, and that, as a result, McNew died on September 19, 2009, of "a cerebral hemorrhage from thrombotic thrombocytopenia, which went undiagnosed until after his death." (Complaint, ¶17.)

At the hearing, Dr. Husain testified that he has been employed by defendant since September 2008 as a clinical assistant professor in the department of surgery, specializing in colo-rectal surgery. According to Dr. Husain, his duties as an assistant professor include providing clinical care to patients, as well as teaching medical students and residents in a clinical setting. Dr. Husain stated that he could neither recall nor derive from the medical records whether students or residents were present when he rendered care to McNew, but that he considered his treatment of McNew at University Hospital East to be within his job duties nonetheless.

According to Dr. Husain, his practice is directed entirely by defendant, he is not permitted to practice outside of defendant's facilities, and he maintains no private practice of medicine inasmuch as his employment agreement requires that all of his professional activities be devoted to serving defendant. Indeed, Dr. Husain's employment agreement with defendant states, in part: "You should understand that this is a full-time offer with 100 percent of your professional efforts being devoted to the Department of Surgery." (Defendant's Exhibit A.)

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Dr. Husain acknowledged that as a condition of his employment with defendant, he is also required to maintain employment with Ohio State University Physicians (OSUP), but he described OSUP as an auxiliary entity that exists to administer billing and collections for all of the clinical care rendered by defendant's practitioners.

Dr. Robert Bornstein, defendant's Vice Dean of Academic Affairs, testified that he is familiar with the duties and responsibilities of defendant's faculty physicians, and he explained that plaintiff's position as a clinical assistant professor encompasses two main duties – patient care and education. Dr. Bornstein explained that Dr. Husain is required by defendant to provide clinical care regardless of whether residents or students are present, and that Dr. Husain's job performance is evaluated, in part, based upon his clinical competence. According to Dr. Bornstein, the chair of the department of surgery controls all aspects of Dr. Husain's practice, including the type of work that he performs and his work location. With regard to OSUP, Dr. Bornstein testified that it was created by defendant's board of trustees to administer the billing and collections associated with the clinical care rendered by defendant's practitioners, and that Dr. Husain must belong to OSUP as a condition of his employment with defendant.

"[T]he question of scope of employment must turn on what the practitioner's duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury." *Id.* at ¶23.

Dr. Husain's duties as a state-employed faculty physician include teaching residents, and the evidence does not demonstrate that he was doing so when the alleged negligence occurred. However, the court finds that Dr. Husain was a full-time faculty physician who was required by defendant to provide clinical care, that his clinical activities were controlled by defendant, that he was required to devote all of his professional time and effort to the service of defendant, that OSUP functioned as the business arm of defendant, and that Dr. Husain did not maintain a private practice. Accordingly, the court concludes that Dr. Husain's duties of employment included providing clinical care and that he was engaged in such duties at the time of the alleged negligence.

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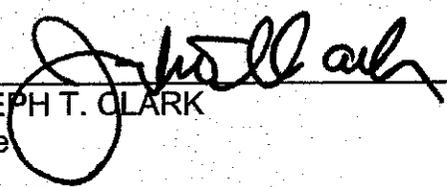
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Therefore, the court finds that Dr. Husain was acting within the scope of his state employment at all times pertinent hereto. Consequently, Dr. Husain is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

On a related matter, defendant's November 1, 2011 motion for a protective order, to prohibit plaintiffs from deposing Dr. Husain until such time as the court determines whether he is entitled to civil immunity, is DENIED as moot.

  
\_\_\_\_\_  
JOSEPH T. CLARK  
Judge

cc:

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RCV/dms

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