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IN THE SUPREME COURT OF OHIO

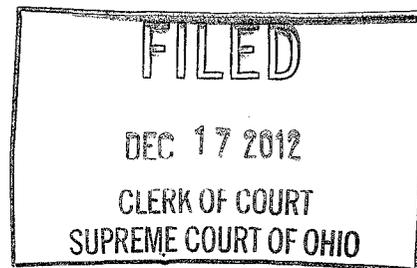
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| MATTHEW RIES, ADMR. et al., | : | |
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| Appellants, | : | |
| | : | |
| vs. | : | Case No. 2012-0954 |
| | : | |
| THE OHIO STATE UNIVERSITY | : | |
| MEDICAL CENTER, | : | |
| | : | On Appeal From the |
| Appellee. | : | Franklin County Court |
| | : | of Appeals, Tenth |
| | : | Appellate District |

MERIT BRIEF OF APPELLANTS MATTHEW RIES, ADMR., et al.

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TABLE OF CONTENTS

| | <u>Page</u> |
|---------------------------|-------------|
| TABLE OF AUTHORITIES..... | 3 |
| INTRODUCTION..... | 6 |
| STATEMENT OF FACTS..... | 9 |
| ARGUMENT | 15 |

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).

| | |
|--|----|
| 1. <i>Established Case Precedent Deemed State University Physicians to be in the Scope of Their Employment When They Were Performing Education-Related Duties.....</i> | 15 |
| 2. <i>The Court of Appeals Ruling Impermissibly Expands the Function of a State University Teaching Hospital, Disconnecting it From Any Educational Purpose.....</i> | 19 |
| 3. <i>OSU Physicians, Inc. is a Private Corporation Operating Independently of OSUMC, thus its Relationship with OSUMC does not Automatically Qualify its Employees for State Immunity.....</i> | 22 |
| 4. <i>A Finding of Immunity Infringes an Injured Party’s Right to a Jury Trial; Therefore, Statutory Immunity Should Not Rest Upon Contractual Language Imposing Job Duties That Are Not Intrinsically Related to a Recognized State Function.....</i> | 25 |
| CONCLUSION..... | 27 |
| PROOF OF SERVICE..... | 29 |
| APPENDIX..... | 30 |

Notice of Appeal to the Ohio Supreme Court (June 4, 2012)

Opinion of the Franklin County Court of Appeals (April 19, 2012)

Judgment Entry of the Franklin County Court of Appeals (April 19, 2012)

Immunity Decision of the Ohio Court of Claims (November 7, 2011)

TABLE OF AUTHORITIES

| <u>CONSTITUTIONAL PROVISIONS; STATUTES:</u> | <u>Page</u> |
|---|---------------|
| Ohio Constitution, Article I, Section 5..... | 25 |
| R.C. 9.86..... | <i>passim</i> |
| R.C. 2743.02(F)..... | <i>passim</i> |
| R.C. 3345.40(B)(3), (2)..... | 6 |
| R.C. 2323.43..... | 6 |
| R.C. 149.43..... | 23 |
| R.C. 2744.01(G)(1)(a)..... | 23 |
| R.C. 2743.11..... | 25 |
| <u>CASES</u> | |
| <i>Allen v. Univ. of Cincinnati Hosp.</i> , 122 Ohio App.3d 195, 701 N.E.2d 443 (10 th Dist. 1997)..... | 17 |
| <i>Arbino v. Johnson</i> , 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420..... | 25 |
| <i>Ashcraft v. Univ. of Cincinnati Hosp.</i> , 10 th Dist. No. 02AP-1353, 2003-Ohio-6349..... | 25 |
| <i>Balson v. The Ohio State Univ.</i> , 112 Ohio App.3d 33, 677 N.E.2d 1216 (10 th Dist. 1996)..... | 16 |
| <i>Barkan v. The Ohio State Univ.</i> , 10 th Dist. No. 02AP-436, 2003-Ohio-985..... | 17 |
| <i>Chitwood v. Univ. Medical Ctr.</i> , 10 th Dist. No. 97API09-1235, 1998 Ohio App. LEXIS 2106 (May 5, 1998)..... | 17 |
| <i>Conley v. Shearer</i> , 64 Ohio St.3d 284, 288, 1992-Ohio-133, 595 N.E.2d 862 (1992)..... | 25 |

| | |
|---|----|
| <i>Engel v. Univ. of Toledo College of Medicine,</i> 130 Ohio St.3d 263, 2011-Ohio-3375, 957 N.E.2d 764..... | 16 |
| <i>Ferguson v. The Ohio State Univ. Med. Ctr.</i> 10 th Dist. No. 98AP-863, 1999 Ohio App. LEXIS 2828 (June 22, 1999)..... | 17 |
| <i>Fisher v. Univ. of Cincinnati Med. Center,</i> 10 th Dist. No. 98AP-142, 1998 Ohio App. LEXIS 3900 (Aug. 25, 1998)..... | 25 |
| <i>Harrison v. Univ. of Cincinnati Hosp.,</i> 10 th Dist. No. 96API01-81, 1996 Ohio App. LEXIS 2762 (June 28, 1996)..... | 16 |
| <i>Hopper v. Univ. of Cincinnati,</i> 10 th Dist. No. 99AP-787, 2000 Ohio App. LEXIS 3456 (Aug. 3, 2000)..... | 15 |
| <i>Johnson v. Univ. of Cincinnati,</i> 10 th Dist. No. 04AP-926, 2005-Ohio-2203..... | 16 |
| <i>Kaiser v. The Ohio State Univ.,</i> 10 th Dist. No. 02AP-316, 2002-Ohio-6030..... | 17 |
| <i>Katko v. Balcerzak,</i> 41 Ohio App.3d 375, 536 N.E.2d 10 (10 th Dist. 1987)..... | 16 |
| <i>Koons v. The Ohio State Univ. Hosp.,</i> 10 th Dist. No. 82AP-909, 1983 Ohio App. LEXIS 15411 (Feb. 24, 1983)..... | 21 |
| <i>Long v. Bd. of Trustees of Ohio State Univ.,</i> 24 Ohio App. 261, 157 N.E. 395 (10 th Dist. 1926)..... | 20 |
| <i>Norman v. The Ohio State Univ. Hosps.,</i> 116 Ohio App.3d 69, 686 N.E.2d 1146 (10 th Dist. 1996)..... | 18 |
| <i>Scarberry v. The Ohio State Univ. Hosps.,</i> 10 th Dist. No. 98AP-143, 1998 Ohio App. LEXIS 5649 (Dec. 3, 1998)..... | 17 |
| <i>Schultz v. Univ. of Cincinnati College of Medicine,</i> 10 th Dist. No. 09AP-900, 2010-Ohio-2071..... | 17 |

| | |
|---|--------|
| <i>Smith v. Ohio State Univ. Hosp.</i> , 110 Ohio App.3d 412, 674 N.E.2d 721 (10 th Dist. 1996)..... | 17 |
| <i>State ex rel. Bell v. Brooks</i> , 130 Ohio St.3d 87, 2011-Ohio-4897, 955 N.E.2d 987..... | 22 |
| <i>State ex rel. Oriana House, Inc. v. Montgomery</i> , 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193..... | 22 |
| <i>State ex rel. Repository v. Nova Behavioral Health, Inc.</i> , 112 Ohio St.3d 338, 2006-Ohio-6713, 859 N.E.2d 936..... | 23 |
| <i>Theobald v. Univ. of Cincinnati</i> , 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573..... | 14, 15 |
| <i>Theobald v. Univ. of Cincinnati</i> , 160 Ohio App.3d 342, 2005-Ohio-1510, 827 N.E.2d 365 (10 th Dist. 2005)..... | 16 |
| <i>Wayman v. Univ. of Cincinnati Medical Ctr.</i> , 10 th Dist. No. 99AP-1055, 2000 Ohio App. LEXIS 2690 (June 22, 2000)..... | 17 |
| <i>Wolf v. Ohio State Univ. Hosp.</i> , 158 N.E.2d 909, 1958 Ohio App. LEXIS 883 (10 th Dist. 1958)..... | 20 |
| <i>York v. Univ. of Cinti. Med. Ctr.</i> , 10 th Dist. Nos. 95API09-1117, 95API09-1127, 1996 Ohio App. LEXIS 1682 (Apr. 23, 1996)..... | 16 |

INTRODUCTION

The Ohio State University Medical Center allows its faculty physicians to participate in a separate private practice corporation, Ohio State University Physicians, Inc., that bills for medical services and retains virtually all of its physician-generated revenue for compensation to practice corporation physicians. At the time Syed Husain, M.D. became a faculty member, he became an employee of Ohio State University Physicians, Inc., which controls the terms of his clinical employment, provides his benefits, bills his patients, provides the bulk of his income, provides payments for medical malpractice insurance, and allows him to accrue bonuses far in excess of the minimal compensation he earns through state employment.

In all respects, Ohio State University Physicians, Inc., or “OSU Physicians, Inc.,” does not function as a state entity or agency, and the physicians who practice under its authority and direction perform job duties and derive benefits as if they were private employees. The OSU Physicians, Inc. contract is 27 pages long, including addenda, and covers all aspects of employment duties, including vacation leave, disability pay, malpractice insurance, and termination. The lower court has ruled that physicians like Dr. Husain, even though they are not teaching, are considered to be dual-employees. This requires law suits against them to be brought in the Court of Claims, where plaintiffs are denied the right to jury trial otherwise guaranteed them by the Ohio Constitution, and where their cases are decided by an unelected judicial officer. Plaintiffs are disadvantaged in other ways in the Court of Claims: noneconomic damage awards are subject to a cap of \$250,000.00 (R.C. 3345.40(B)(3)), as opposed to the common pleas cap of up to \$500,000.00 (R.C. 2323.43). The state also has claimed that the Court of Claims can subtract from the plaintiff’s damage award any life insurance proceeds (R.C. 3345.40(B)(2)). A Court of Claims award does not include medical bills or lost wages that have

been paid by insurance. In fact, in some instances, the state has even taken the position that governmental benefits, such as Medicare or Medicaid, should be subtracted from a damage award. In the case at bar, the state has asserted that the proceeds from the decedent's life insurance policy of \$1,000,000.00 can be deducted from any damage award. Patients who present to OSUMC at one of its many facilities are not told that, by submitting to OSUMC's medical care, they are also submitting to Court of Claims jurisdiction, with its attendant disadvantages to the medical negligence victim. In fact, the facilities, the physicians, the treatments, and the billing, all resemble their private sector counterparts. And, like private hospital systems, OSUMC spends a great deal of money on advertising to convince the public that its services are superior to those of other hospitals.

Until now, the Tenth District Court of Appeals, when reviewing immunity determinations by the Court of Claims, has taken the view that, for the physicians employed by OSU Physicians, Inc. to be in the scope of state employment, they must be teaching or supervising medical students or residents. That has now changed.

In this case, the court held that these physicians wear "two hats" when they treat patients, and that the presence of a student for establishing immunity is thus irrelevant. The decision, for the first time, abandons the concept that, to be personally immune, a physician must be furthering the interests of the state of Ohio, and the recognized public function and purpose of a state university, by educating students. Instead, the Tenth District has adopted a standard that, in effect, allows a state university teaching hospital to decide and declare by contract that all of a state physician's duties, no matter how far removed from traditional notions of a "state-related function," or education, qualify him for statutory immunity.

A state university teaching hospital has authority to hire physicians to teach students, and to determine the circumstances under which those physicians are furthering the purpose of educating its students. In the case at bar, Dr. Husain was not engaged in teaching or another education-related function at the time of treatment. Dr. Husain was not serving on a committee at the medical school nor engaging in research. Instead, he merely was earning money for his private corporation, OSU Physicians, Inc., which could translate into a larger bonus for himself.

The Ohio State University Medical Center is a vast, profitable health care system possessing the brand recognition and financial success that private hospitals envy—and with which they strive to compete. Under the Tenth District’s recent pronouncement, The Ohio State University Medical Center, and, by extension, all of Ohio’s state university teaching hospitals, may provide state-employed physicians the cloak of state immunity for *all* of their professional activity, regardless of whether they are engaged in a recognized state function, such as educating the next generation of medical professionals. At the same time, the decision ignores the fact that these state-employed physicians are simultaneously working for and primarily being compensated by a private corporation.

This decision affirms an employment arrangement that essentially awards state immunity to physicians whose primary income and terms of employment are dictated by a private corporation. The appellate decision also empowers The Ohio State University Medical Center to bestow by contract a benefit so sweeping that it exceeds the boundaries of a state entity’s authority and usurps the role of the General Assembly to determine the purpose and function of Ohio’s state entities. Moreover, the General Assembly does not control the funds generated by OSU Physicians, Inc., and neither does OSUMC, for that matter. Most troubling is that the ruling sacrifices the constitutional rights of medical negligence victims, who are treated by

physicians acting on behalf of a private corporation, and who have no idea that, if something goes wrong, they will have to pursue justice in a different court without a right to a jury trial and at significant disadvantage based upon the laws that apply in the Court of Claims.

For these reasons, this Court should reverse the Tenth District's decision and reconfirm the historic connection between the state university physician's education-related duties and his or her entitlement to statutory immunity. Statutory law, case precedent, and substantial justice all support a holding that a dually-employed state university physician, when rendering clinical care under his contract with a private corporation, must be shown to be engaging in education-related activity at the time he allegedly renders negligent care which is intertwined with an educational event in order to qualify for civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).

STATEMENT OF FACTS

In 2009, Appellant's decedent Michael McNew, an attorney, presented to internist Howard R. Rothbaum, M.D., complaining of nausea, diarrhea, and rectal bleeding. Dr. Rothbaum referred McNew to Syed Husain, M.D., whose specialty is proctology and colon and rectal surgery. After Dr. Husain diagnosed and drained McNew's hemorrhoid, McNew experienced a large amount of bleeding, and began to experience shortness of breath and bruising, all signs of a potentially dangerous bleeding disorder. This excessive bleeding and unusual bruising was represented to Dr. Husain in two separate phone calls. Upon being called, Dr. Husain instructed McNew to take additional pain medicine and gave no consideration to the bleeding symptoms or a bleeding disorder. Later that evening, McNew lost consciousness and was transported by ambulance to Dublin Methodist Hospital, then transferred to Riverside Methodist Hospital, where he died the next day from thrombocytopenia, a blood disorder that

caused him to suffer bleeding in his brain. This disorder was treatable and the brain bleed could have been prevented by the administration of platelets if Dr. Husain had entertained a bleeding disorder in his differential diagnosis.

Appellant Matthew Ries, acting on behalf of the Estate of Michael McNew, and on behalf of McNew's surviving wife, Cyrelle McNew, who is also an attorney, and their 3 young sons, initiated this case in both the Court of Claims and the Franklin County Common Pleas Court. Ries, an Ohio attorney, was appointed as administrator of the Estate because Cyrelle McNew had to move to Massachusetts, where her parents live, so they could assist her with the children, and out-of-state residents cannot serve as administrators. These complaints alleged that medical treatment rendered to McNew by agents and/or employees of the State of Ohio, The Ohio State University Medical Center ("OSUMC") and/or Ohio State University Physicians, Inc., and by Dr. Husain and Dr. Rothbaum deviated from the applicable standard of care and caused the wrongful death of Michael McNew.

On May 5, 2011, the Court of Claims held an immunity hearing to determine whether Dr. Husain was a state employee in the scope of his employment at the time he treated Michael McNew. At the hearing, OSUMC presented testimony by Dr. Husain, who testified that his OSUMC contract specified that the scope of his clinical practice is limited to OSUMC and its affiliated offices, and it is in that setting that most of the teaching occurs, rather than exclusively in the classroom. *Id.* at page 29. When Michael McNew saw Dr Husain on September 15, 2009, there were no students present. *Id.* at pages 34, 37-38. With regard to the two follow-up telephone calls between Dr. Husain and Michael McNew (or his wife), Dr. Husain testified that students and residents do not normally participate or listen in on those calls, but that when they do their presence is identified to the patient. *Id.* at page 43. The Court of Claims and the Court

of Appeals found that the evidence did not establish that a student or resident participated in Michael McNew's care at the time he was treated by Dr. Husain. Dr. Husain also said that he does not contribute to state retirement from his OSU Physicians paycheck. *Id.* at pages 54-55. He testified that his salary through OSUMC is \$50,000, while his base salary through OSU Physicians is \$140,000, with a bonus depending upon whether OSU Physicians has a surplus. *Id.* at pages 51-52, 56-57.

When it hired Dr. Husain, OSUMC provided a five-page College of Medicine contract that outlined his employment duties and indicated an annual compensation of \$50,000.00. The College of Medicine contract sets forth expectations in the areas of teaching, research and service, stating, at pages 2-3:

"Each faculty member is expected to perform over the full range of responsibilities in the areas of teaching, research, and service.

TEACHING

As a member of the Department of Surgery you will be expected to be an active teaching member of the full time faculty ***."

RESEARCH

It is expected that you will embark on a program of research in your area of expertise.

SERVICE

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."

Dr. Husain also received a separate 27-page contract from OSU Physicians, Inc., an independent, non-profit corporation that is not a state entity. OSU Physicians employs OSUMC

physicians and is a private company that functions as a practice group: it collects fees for services rendered by the physicians it employs, it sets salaries that are subject to change based on billing and expenses, and it provides employee benefits such as health insurance, *malpractice insurance*, life insurance, vacation pay, and sick pay. The OSU Physicians contract supplies employment practice guidelines for physicians to follow, and further outlines disciplinary actions that may be imposed against noncompliant physicians, up to and including termination of employment. Significantly, if OSU Physicians terminates a physician, the College of Medicine may retain the physician as a classroom instructor.

The significant terms of both of these contracts are compared in the following chart:

| OHIO STATE UNIVERSITY MEDICAL CENTER/COLLEGE OF MEDICINE CONTRACT | OHIO STATE UNIVERSITY PHYSICIANS, INC. CONTRACT |
|--|--|
| Title | |
| "Assistant Professor" | "Employee" of Ohio State University Physicians, Inc. |
| Responsibilities | |
| <p>"TEACHING" –be an active teaching member of the full time faculty.</p> <p>"RESEARCH" –embark on program of research in your area of expertise.</p> <p>"SERVICE" –show commitment to serving the institution, complete board certification, maintain recertification, maintain high level clinical competence, participate in committees, hold office in professional organizations.</p> | <p>"To work at the times and places as deemed necessary by the LLC Manager."</p> <p>Surgery LLC "will set reasonable working hours."</p> <p>Etc.</p> |
| Compensation | |
| \$50,000.00 with \$25,000.00 base "expected to generate funding for salary." | \$140,000.00, with bonuses. |
| Benefits | |
| None listed. | <p>Short term disability benefits</p> <p>Vacation pay at 22 days per year</p> <p>Sick leave at 2 weeks per year</p> <p>Retirement plans</p> <p>Family medical leave plan</p> <p>Group accident, Group health plans</p> |

As indicated in the contract, and based upon the testimony of Dr. Husain, bonuses paid to physicians are at the discretion of OSU Physicians, Inc. and not controlled by the College of Medicine, with some physicians making many times more than Dr. Husain's admitted income of \$140,000.00. These extra sums are for valuable services the physicians render *on behalf of OSU Physicians, Inc.*, rather than on behalf of the College of Medicine, or the State of Ohio.

Dr. Husain's compensation pursuant to the College of Medicine contract, by comparison, is a modest \$50,000.00. Obviously, this compensation is not paid to physicians for caring for patients--*that* money comes from the patients and their medical insurance, *not* from the College of Medicine. The College of Medicine is not subsidizing the revenue derived from billing patients.

Dr. Husain testified that he spends about thirty percent of his time performing duties outlined in his medical college contract. Deposition of Syed Husain, M.D. at page 20. Dr. Husain explained that his teaching slows him down, either resulting in his seeing fewer patients or in his working more hours. *Id.* at pages 13-14. According to Dr. Husain, the \$50,000.00 compensation he receives pursuant to the College of Medicine contract corresponds to this additional time spent teaching, doing research, and serving on committees. *Id.* at pages 15-18.

No physician would agree to see and treat the number of patients that Dr. Husain does and put in the number of hours that he does for \$50,000.00 per year. Dr. Husain testified that he works 80 hours a week. *Id.* at page 20.

Also at the hearing, OSUMC Vice Dean Robert Bornstein, Ph.D. testified that the College of Medicine contract requires faculty to demonstrate a high level of clinical competence, which he defined as "having a national level of reputation and recognition based on your clinical service." *Id.* at page 79. He stated that faculty are expected to provide clinical service as a way

of contributing to OSUMC's "central mission of being one of the best medical centers in the United States." *Id.* at page 81. (Emphasis added.)

On November 7, 2011, the Court of Claims ruled that, at the time he rendered care to decedent, Dr. Husain was acting within the scope of his state employment and therefore was entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F). The court found that "Dr. Husain was a full-time faculty physician who was required by [OSUMC] 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 OSU Physicians 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." Judgment Entry of the Court of Claims, November 7, 2011.

McNew's estate then perfected an appeal to the Tenth District Court of Appeals, which, on April 19, 2012, affirmed immunity for Dr. Husain. The Court of Appeals rejected the Estate's argument that *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, and other pertinent case precedent required Dr. Husain to have been engaged in supervising or teaching a student or resident at the time he rendered the subject care. Instead, the court determined that because Dr. Husain's OSUMC contract expressly required him to provide service, and stated that service would be measured by "evidence of a high level of clinical competence," the contract could only be referring to providing service in the form of clinical care to OSUMC patients. Appellate Decision at paragraph 12. The court concluded it was irrelevant that Dr. Husain had two contracts, one with OSUMC and one with OSU Physicians, and further, that it was irrelevant whether a student was present or absent. Instead, "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 ‘OSU Physicians.’ Dr. Husain was wearing both while treating McNew.” *Id.* at paragraph 13. Finding that one of the hats involved government employment duties, the court found Dr. Husain was entitled to immunity under R.C. 9.86 and R.C. 2743.02(F).

The Estate filed a notice of appeal to the Supreme Court of Ohio, which accepted this case for review on September 26, 2012.

ARGUMENT

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).

1. *Established Case Precedent Deemed State University Physicians to be in the Scope of Their Employment When They Were Performing Education-Related Duties.*

Pursuant to R.C. 9.86, no state employee is liable in any civil action for injury caused in the performance of his duties unless his actions were manifestly outside the scope of his employment or unless he acted with malicious purpose, in bad faith, or in a wanton or reckless manner. The Court of Claims has exclusive original jurisdiction to determine, initially, whether such employee is entitled to immunity. R.C. 2743.02(F). The determination of immunity by the Court of Claims is a question of law that appellate courts review de novo. *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, *supra.*, at paragraph 14. Whether an individual acted manifestly outside the scope of employment is a question of fact. *Id.*, citing *Hopper v. Univ. of Cincinnati*, 10th Dist. No. 99AP-787, 2000 Ohio App. LEXIS 3456 (Aug. 3, 2000).

In *Theobald, supra*, this Court affirmed that an immunity determination involves first identifying the aspect of the course of treatment that allegedly injured the plaintiff, then asking

whether the physician was educating a student or resident while rendering the care. *Theobald*, ¶ 24, citing *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, 827 N.E.2d 365 (10th Dist. 2005), at paragraphs 46, 48. In so holding, this Court recognized that the focus of the analysis must be upon the purpose of the employment relationship. *Id.*

In *Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St.3d 263, 2011-Ohio-3375, 957 N.E.2d 764, this Court found too tenuous a state relationship in which a volunteer physician's only connection to the university was as an appointed volunteer faculty member who would allow students to rotate through his private practice as a part of their training.

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 (10th 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 (10th 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 Cincinnati Med. Ctr.*, 10th 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*, 10th 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.*, 10th 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 (10th 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.*, 10th Dist. No. 02AP-436, 2003-Ohio-985, 2003 Ohio App. LEXIS 928; *Ferguson v. The Ohio State Univ. Med. Ctr.*, 10th Dist. No. 98AP-863, 1999 Ohio App. LEXIS 2828 (June 22, 1999); *Kaiser v. The Ohio State Univ.*, 10th Dist. No. 02AP-316, 2002-Ohio-6030, 2001 Ohio App. LEXIS 5848; *Scarberry v. The Ohio State Univ. Hosps.*, 10th Dist. No. 98AP-143, 1998 Ohio App. LEXIS 5649 (Dec. 3, 1998); *Schultz v. Univ. of Cincinnati College of Medicine*, 10th 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 (10th Dist. 1997); *Chitwood v. Univ. Medical Ctr.*, 10th Dist. No. 97API09-1235, 1998 Ohio App. LEXIS 2106 (May 5, 1998).

A prime example of the prevailing view is found in *Wayman v. Univ. of Cincinnati Medical Ctr.*, 10th Dist. No. 99AP-1055, 2000 Ohio App. LEXIS 2690 (June 22, 2000), which this Court cited with favor in *Theobald, supra*. *Wayman* found that a physician having a virtually identical contractual arrangement to that held by Dr. Husain in this case 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 (10th Dist. 1996).

In *Johnson, supra*, as recently as 2005, the Tenth District recognized it had no bright-line rule for determining whether a physician employed by both a state university and a private corporation was acting within the scope of the physician's state university employment. But the court recognized that the primary factor is what it called the "education factor," defined as focusing upon whether a medical student or resident was involved in the patient's care or treatment when the physician saw the patient.

This case 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 providing clinical service at the time he treated Michael McNew, he was entitled to immunity.

The Tenth District's decision took Ohio law in a new direction. Under this new standard, 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, immunity now solely involves the content of the state university employment contract, and whether the contract indicates that treating patients is one of the services the physician must provide.

2. *The Court of Appeals Ruling Impermissibly Expands the Function of a State University Teaching Hospital, Disconnecting it From Any Educational Purpose.*

In finding immunity, the Court of Appeals both focused upon the "SERVICE" section of the College of Medicine contract, which stated an expectation that Dr. Husain would demonstrate his "commitment to the provision of service to the institution, the community, and the profession," which would "be measured by evidence of a high level of clinical competence." College of Medicine Contract at Page 3.

The contract does not define "clinical competence," nor does the contract indicate what would constitute a "high level" of that competence. The Court of Appeals, however, interpreted the contract's "service" provision as requiring Dr. Husain to demonstrate clinical competence by providing clinical care to OSUMC patients. Thus, under the courts' view, all patient care provided by Dr. Husain was rendered pursuant to his College of Medicine contract, regardless of

his other contract with OSU Physicians, Inc., and regardless of whether he was engaged in any teaching, research, or committee function at the time.

The Court of Appeals decision, for the first time, hinges immunity for state university teaching hospital faculty solely upon providing clinical care, rather than upon teaching or performing another education-related job duty. As a result, state university teaching hospitals may now provide medical care as an independent state function, rather than in connection with their role as research or teaching institutions, with their physicians enjoying the benefits of immunity. As admitted by Dr. Bornstein, OSUMC's "central mission" is to be "one of the best medical centers in the United States." Tp. of Immunity Hearing, at page 81. Under this ruling, OSUMC gets the best of both worlds: state immunity in the Court of Claims--with lower damage caps, no jury trial, and all the other attendant benefits--together with the ability to operate, in every other way, as the equivalent of a private hospital system. For all intents and purposes, the state of Ohio, through OSUMC, now is engaged in a profitable business enterprise that operates in direct competition with and virtually indistinguishable from a private hospital system.

Historically, The Ohio State University, like other state universities, derives its authority to operate a hospital as part of its teaching program. *See, e.g., Wolf v. Ohio State Univ. Hosp.*, 158 N.E.2d 909, 1958 Ohio App. LEXIS 883 (10th Dist. 1958)("The Ohio State University Board of Trustees clearly has the authority under the statutes of Ohio to operate the Ohio State University Hospital *as a part of its teaching program*," emphasis added). Addressing whether OSU was empowered to operate a campus bookstore, an older Tenth District case held that such an enterprise was incidental to a legitimate function of the state. *Long v. Bd. of Trustees of Ohio State Univ.*, 24 Ohio App. 261, 157 N.E. 395 (1926). According to *Long*, the university is, by statute, a body corporate with broad general powers, leading to the conclusion that "all the

enterprises undertaken by the University should be reasonably incidental to the main purpose, to wit, the maintenance of a University.” *Id.* at page 264. Rejecting an argument that a state university may be categorized as a political subdivision, rather than as an instrumentality of the state, the Tenth District also has observed that “a university’s primary mission is education.” *Koons v. The Ohio State Univ. Hosp.*, 10th Dist. No. 82AP-909, 1983 Ohio App. LEXIS 15411 (Feb. 24, 1983).

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, nor has OSUMC claimed that he was. OSUMC has argued that application of *Theobald* means that a physician is a state actor any time he or she is providing care to a patient, 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. For example, in *York, supra*, the University of Cincinnati Medical Center had argued that offering immunity to top physicians furthered an important public policy, but the Tenth District rejected this claim, stating that the goal of attracting top physicians was not sufficient to deny a plaintiff the right to have his claim adjudicated by a jury.

The focus of the state university teaching hospital’s provision of medical care had been to further its educational purpose. The Tenth District’s holding now shifts that purpose to one of advancing the hospital’s competitive business interests. Dr. Husain’s contractual agreement to “maintain clinical competence,” may be an important professional goal for him and a worthy business goal for his employer OSU Physicians, Inc., but its requirement in a state contract does

not transform the traditional function and purpose of a state university teaching hospital from providing education to operating a profitable and competitive business enterprise. Under *Theobald* and all other relevant case precedent, Dr. Husain's state immunity must hinge upon state employment job duties that bear a direct relationship to the educational purpose of a state university. The Tenth District erred in concluding that this relationship was not required or even relevant.

3. *OSU Physicians, Inc. is a Private Corporation Operating Independently of OSUMC, thus its Relationship with OSUMC does not Automatically Qualify its Employees for State Immunity.*

In holding that Dr. Husain was entitled to statutory immunity, the Court of Claims stated that OSU Physicians, Inc. "functioned as the business arm" of OSUMC. Decision of the Court of Claims at page 12. The manifest weight of the evidence established that OSU Physicians, Inc. is a separate, private corporation, rather than being an extension of a state entity.

Precedential authority interpreting public records law has established that separate private corporations may be so integrally connected to a public agency that they are considered to be the functional equivalent of a governmental entity. In such cases, this Court has applied a test that focuses upon whether the entity performs a governmental function, the level of government funding, the extent of government involvement, and whether the government created the entity. *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193, at the syllabus.

For example, applying this functional-equivalency test, this Court has determined that county risk-sharing pools do not qualify as public institutions because the only prong of the functional-equivalency test that was met was that the pools received government funding, which, standing alone, did not convert them to a public entity. *State ex rel. Bell v. Brooks*, 130 Ohio

St.3d 87, 2011-Ohio-4897, 955 N.E.2d 987, at paragraph 27. The Court specifically rejected the argument that the pools performed a public purpose, since performing a uniquely governmental function is not enough to meet the functional-equivalency test. *Id.* at paragraph 28, citing *Oriana House, supra*, and *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713, 859 N.E.2d 936.

Because these “functional-equivalency” cases analyze facts in relation to R.C. 149.43, and do not involve state university teaching hospitals, it is questionable whether a functional-equivalency test could or should be applied to the circumstances in this case. However, even applying that test, it is clear that OSU Physicians, Inc. is not the functional equivalent of a state entity.

First, neither operating a hospital nor staffing it through a private practice corporation is considered to be a governmental function, as established by 2744.01(G)(1)(a), which states that a hospital is a proprietary, rather than a governmental, function. Therefore, OSU Physicians, Inc. does not meet that prong of the test for determining whether it is the functional equivalent of a governmental entity.

The test also asks whether there is government funding for the private corporation, and what the level of that funding is. Testimony in this case established that, rather than OSUMC funding OSU Physicians, Inc., it was OSU Physicians, Inc. that funneled some of its profits back to the dean of the Medical College. OSU Physicians, Inc. does not meet that prong of the test.

Evidence also did not establish that OSUMC controls the day-to-day operations of OSU Physicians, Inc., but rather that OSU Physicians, Inc. has its own governing body, called a “Board of Managers,” a Fiscal Committee, and its own legal counsel. See OSU Surgery, LLC

Conflict of Interest Policy, January 1, 2004, attached as an addendum to Dr. Husain's Physician Employment Agreement with OSU Physicians, Inc.

The test also asks whether the government entity created or established the private corporation, which thus may be considered to be its alter ego. OSUMC is separate from OSU Physicians, Inc. As this Court observed, in *Repository, supra*, when addressing whether a private, non-profit mental health care provider qualified as a functional-equivalent of a public agency, an incorporator's anticipation of a close connection or contract between the private corporation and the public entity does not establish that the governmental entity created the private corporation. Instead, this Court found it significant that no law required the corporation's creation, and no statute required it to be funded. *Id.* at paragraph 37. These obvious indicators that the governmental agency created the corporation were not present in *Repository, Oriana House*, or *Bell*, and they are not present in this case.

Considering these factors, and notwithstanding the Court of Claims' belief that OSU Physicians, Inc. is an "arm" of OSUMC, OSU Physicians, Inc. is not the functional equivalent or the alter ego of a governmental entity. Rather, OSU Physicians, Inc. is a private corporation that operates independently. While it has a connection with OSUMC, having a connection is not the same thing as being the functional equivalent of a state entity. As a result, while physicians for OSU Physicians, Inc. may perform duties for OSUMC while they are supervising students and residents, without that teaching function they are OSU Physicians, Inc. employees engaged in clinical duties in the same fashion as any other private practitioner would be. Whatever the connection between the state entity and the private corporation, it does not support the conclusion that wearing one "hat" is exactly the same as wearing the other. When Dr. Husain

was talking to Michael McNew, assuring McNew that only pain medication was required, he was only wearing one hat, and it belonged to OSU Physicians, Inc.

4. *A Finding of Immunity Infringes an Injured Party's Right to a Jury Trial; Therefore, Statutory Immunity Should Not Rest Upon Contractual Language Imposing Job Duties That Are Not Inherently Related to a Recognized State Function.*

Article I, Section 5 of the Ohio Constitution provides that “[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.” Despite recognizing that the right to a jury trial is “one of the most fundamental and long-standing rights in our legal system,” and that its purpose is to prevent government oppression and promote the fair resolution of factual issues, this Court, in *Arbino v. Johnson*, 116 Ohio St.3d 468, 475, 2007-Ohio-6948, 880 N.E.2d 420, determined that the right is not absolute, and is only guaranteed in cases in which the right existed at common law. Because the Court of Claims Act abrogated sovereign immunity, and gave litigants a right to redress they previously lacked, it has been recognized that claimants legally may be denied a jury trial when suing the state.

R.C. 2743.11 provides that “[n]o claimant in the court of claims shall be entitled to have his civil action against the state determined by a trial by jury.” The constitutionality of this provision has been upheld on previous occasions. See, e.g., *Schultz, supra* at paragraph 33. See also *Ashcraft v. Univ. of Cincinnati Hosp.*, 10th Dist. No. 02AP-1353, 2003-Ohio-6349, 2003 Ohio App. LEXIS 5682, at paragraph 22; *Fisher v. Univ. of Cincinnati Med. Center*, 10th Dist. No. 98AP-142, 1998 Ohio App. LEXIS 3900, both citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288, 1992-Ohio-133, 595 N.E.2d 862.

However, because a finding of individual immunity eliminates the plaintiff's constitutional right to a jury trial, an immunity determination should focus upon facts proving

that a state employee was furthering the interests of the state at the time of the injury. *Theobald*, 111 Ohio St.3d at page 546; *Theobald*, 160 Ohio App.3d 342, at paragraph 33, citing *Conley*, *supra*, at 287. Here, witnesses for OSUMC asserted that providing clinical care was an interest of the state because it furthered OSUMC's "central mission" of being an outstanding health care provider. Yet, as already discussed, a state university hospital's primary function and state interest is—or at least should be—providing education, rather than maximizing its business edge over other hospital systems. This is the traditional, legally-recognized role of a public university that remains unchanged regardless of what OSUMC has stated in its contract.

OSUMC's view that state immunity is a perquisite offered to employees in order to promote the hospital's business goals, and that a physician need only provide clinical care to obtain that benefit, is an insufficient basis for eliminating the medical negligence victim's right to jury trial. Providing clinical care, standing alone, is not a recognized function of a state university teaching hospital. Education is. Case precedent has ruled that the presence of a student or resident connects a state university physician's clinical duties with his state employment, and renders him in the scope of that employment in order to qualify for state immunity. Clinical competence is not intrinsically related to a recognized state university teaching hospital function, and a contract requiring it is not a compelling basis for eliminating an injured plaintiff's constitutional right to jury trial, as well as many other rights.

However, even accepting that OSUMC was within its authority to decide what specific job duties rendered Dr. Husain in the scope of his state employment, and to declare by contract that those duties did not necessarily involve a teaching function, the fact of Dr. Husain's dual employment with a private corporation changes the analysis of whether he was in the scope because, his job duties, his compensation, and the other terms of his employment, were

controlled by a private corporation. As recognized by the courts, Dr. Husain had dual status as both a state employee and an employee of a private corporation. But, as this Court has held in *Theobald*, he was only entitled to state immunity when he was performing duties for the state.

In affirming the Court of Claims' immunity determination, the Tenth District denied the Estate's constitutional right to a trial by jury without precedential authority or factual basis. Further, the court erroneously analyzed this case because it did not apply its own case precedent emphasizing the importance of a student being present. Dr. Husain's duties as a state employee were to conduct research and teach. He was doing neither at the time he treated Michael McNew, and therefore he is not entitled to immunity.

CONCLUSION

For these reasons, this Court should reverse the Tenth District's decision and reconfirm the historic connection between the state physician's education-related duties and his entitlement to statutory immunity. Statutory law, case precedent, and substantial justice all advocate a holding that a dually-employed state physician, when rendering clinical care under his contract with a private corporation, 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).

Respectfully submitted,



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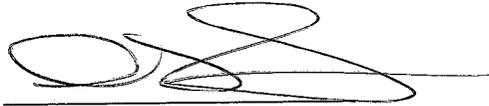
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Certificate of Service

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel of record for Appellee, Karl W. Schedler, Assistant Attorney General, Court of Claims Defense, 150 East Gay Street, 18th Floor, Columbus, Ohio 43215, on December 17, 2012.



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APPENDIX

| | <u>Appx. Page</u> |
|---|-------------------|
| Notice of Appeal to the Ohio Supreme Court (June 4, 2012) | 1 |
| Opinion of the Franklin County Court of Appeals (April 19, 2012)..... | 4 |
| Judgment Entry of the Franklin County Court of Appeals (April 19, 2012)..... | 8 |
| Immunity Decision of the Ohio Court of Claims (November 7, 2011)..... | 9 |
| Relevant Constitutional Provision, Statutes | 13 |

IN THE SUPREME COURT OF OHIO

MATTHEW RIES, ADMR. et al., :

Appellants, :

vs. :

THE OHIO STATE UNIVERSITY :

MEDICAL CENTER, :

Appellee. :

Case No. 12-0954

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

NOTICE OF APPEAL OF APPELLANT MATTHEW RIES, ADMR., et al.

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FILED
JUN 04 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellants Matthew Ries, Administrator, et al.

Appellants Matthew Ries, Administrator of the Estate of Michael McNew, et al., hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in the Court of Appeals Case No. 11AP-1004 on April 19, 2012.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail on

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|-----------------------------|
| Matthew Ries, Admr. et al., | : | |
| Plaintiffs-Appellants, | : | |
| v. | : | No. 11AP-1004 |
| The Ohio State University Medical Center, | : | (Ct. of Cl. No. 2010-10335) |
| Defendant-Appellee. | : | (REGULAR CALENDAR) |

D E C I S I O N

Rendered on April 19, 2012

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

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

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.

FILED
COURT OF APPEALS
FRANLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Matthew Ries, Admr. et al., :
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 Plaintiffs-Appellants, :
 :
 v. :
 :
 The Ohio State University Medical Center, :
 :
 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 *Mary Tyack*
Judge G. Gary Tyack



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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Case No. 2010-10335

- 2 -

ENTRY

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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Case No. 2010-10335

- 3 -

ENTRY

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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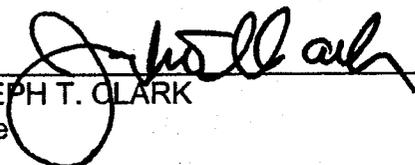
Case No. 2010-10335

- 4 -

ENTRY

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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RELEVANT CONSTITUTIONAL PROVISION
AND STATUTES

Ohio Constitution, Article I, Section 5

R.C. 9.86

R.C. 2743.02(F)

R.C. 3345.40(B)(3), (2)

R.C. 2323.43

R.C. 149.43

R.C. 2744.01(G)(1)(a)

R.C. 2743.11

PREAMBLE

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

ARTICLE I: BILL OF RIGHTS

INALIENABLE RIGHTS.

§1 All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

(1851)

RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.

§2 All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

(1851)

RIGHT TO ASSEMBLE.

§3 The people have the right to assemble together, in a peaceable manner, to consult for the common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances.

(1851)

BEARING ARMS; STANDING ARMIES; MILITARY POWER.

§4 The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

(1851)

TRIAL BY JURY.

§5 The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

(1851, am. 1912)

SLAVERY AND INVOLUNTARY SERVITUDE.

§6 There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime.

(1851)

RIGHTS OF CONSCIENCE; EDUCATION; THE NECESSITY OF RELIGION AND KNOWLEDGE.

§7 All men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein

9.86 Immunity of public officers and employees.

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.

Effective Date: 03-13-1980

2743.02 State waives immunity from liability.

(A)(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

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, that 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.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(3)(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party. A special relationship under this division is demonstrated if all of the following elements exist:

- (i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;
- (ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;
- (iii) Some form of direct contact between the state's agents and the injured party;
- (iv) The injured party's justifiable reliance on the state's affirmative undertaking.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions that have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined in section 2305.113 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, and, whether or not such insurance is purchased, may, to the extent that its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's 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 the indemnified person's duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify those persons, or to agree to so indemnify, shall reserve any funds that are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if the hospital requests the superintendent to do so, the superintendent shall recommend, a specific amount for any period that, in the superintendent's opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for ten thousand dollars or less, that is filed in the court of claims.

(F) 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 that 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. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

(G) If a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671, et seq., the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

(H) If an inmate of a state correctional institution has a claim against the state for the loss of or damage to property and the amount claimed does not exceed three hundred dollars, before commencing an action against the state in the court of claims, the inmate shall file a claim for the loss or damage under the rules adopted by the director of rehabilitation and correction pursuant to this division. The inmate shall file the claim within the time allowed for commencement of a civil action under section 2743.16 of the Revised Code. If the state admits or compromises the claim, the director

shall make payment from a fund designated by the director for that purpose. If the state denies the claim or does not compromise the claim at least sixty days prior to expiration of the time allowed for commencement of a civil action based upon the loss or damage under section 2743.16 of the Revised Code, the inmate may commence an action in the court of claims under this chapter to recover damages for the loss or damage.

The director of rehabilitation and correction shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this division.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 9/10/2012.

Effective Date: 09-26-2003; 03-31-2005; 01-13-2005

3345.40 Limits on damages for wrongful death or injury to person or property.

(A) As used in this section:

(1) "State university or college" has the same meaning as in division (A)(1) of section 3345.12 of the Revised Code.

(2)(a) "The actual loss of the person who is awarded the damages" includes all of the following:

(i) All wages, salaries, or other compensation lost by an injured person as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of the injured person;

(ii) All expenditures of an injured person or of another person on behalf of an injured person for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(iii) All expenditures to be incurred in the future, as determined by the court, by an injured person or by another person on behalf of an injured person for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(iv) All expenditures of a person whose property was injured or destroyed, or of another person on behalf of such a person, in order to repair or replace the property that was injured or destroyed;

(v) All expenditures of an injured person, of a person whose property was injured or destroyed, or of another person on behalf of an injured person or a person whose property was injured or destroyed, in relation to the actual preparation or presentation of the claim of the person;

(vi) Any other expenditures of an injured person, of a person whose property was injured or destroyed, or of another person on behalf of an injured person or a person whose property was injured or destroyed, that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

(b) "The actual loss of the person who is awarded the damages" does not include either of the following:

(i) Any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss;

(ii) Any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of an injured person, for mental anguish, or for any other intangible loss.

(B) Notwithstanding any other provision of the Revised Code or rules of a court to the contrary, in an action against a state university or college to recover damages for injury, death, or loss to persons or property caused by an act or omission of the state university or college itself, by an act or omission of any trustee, officer, or employee of the state university or college while acting within the scope of his employment or official responsibilities, or by an act or omission of any other person authorized to act on behalf of the state university or college that occurred while he was engaged in activities at

at the request or direction, or for the benefit, of the state university or college, the following rules shall apply:

(1) Punitive or exemplary damages shall not be awarded;

(2) 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. Nothing in this division affects or shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds.

(3) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a state university or college.

Effective Date: 10-20-1987

2323.43 Limitation on compensatory damages that represent economic loss.

(A) In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, all of the following apply:

(1) There shall not be any limitation on compensatory damages that represent the economic loss of the person who is awarded the damages in the civil action.

(2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a civil action under this section to recover damages for injury, death, or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of three hundred fifty thousand dollars for each plaintiff or a maximum of five hundred thousand dollars for each occurrence.

(3) The amount recoverable for noneconomic loss in a civil action under this section may exceed the amount described in division (A)(2) of this section but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:

(a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

(b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.

(B) If a trial is conducted in a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property and a plaintiff prevails with respect to that claim, the court in a nonjury trial shall make findings of fact, and the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:

(1) The total compensatory damages recoverable by the plaintiff;

(2) The portion of the total compensatory damages that represents damages for economic loss;

(3) The portion of the total compensatory damages that represents damages for noneconomic loss.

(C)(1) After the trier of fact in a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property complies with division (B) of this section, the court shall enter a judgment in favor of the plaintiff for compensatory damages for economic loss in the amount determined pursuant to division (B)(2) of this section, and, subject to division (D)(1) of this section, the court shall enter a judgment in favor of the plaintiff for compensatory damages for noneconomic loss. In no event shall a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in divisions (A)(2) and (3) of this section. Division (A) of this section shall be applied in a jury trial only after the jury has made its factual findings and determination as to the damages.

(2) Prior to the trial in the civil action, any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages as described in division (A)(2) or (3) of this section.

(D)(1) A court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in this section.

(2) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limit on compensatory damages for noneconomic loss described in divisions (A)(2) and (3) of this section, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that limit.

(E) Any excess amount of compensatory damages for noneconomic loss that is greater than the applicable amount specified in division (A)(2) or (3) of this section shall not be reallocated to any other tortfeasor beyond the amount of compensatory damages that that tortfeasor would otherwise be responsible for under the laws of this state.

(F)(1) If pursuant to a contingency fee agreement between an attorney and a plaintiff in a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim, the amount of the attorney's fees exceed the applicable amount of the limits on compensatory damages for noneconomic loss as provided in division (A)(2) or (3) of this section, the attorney shall make an application in the probate court of the county in which the civil action was commenced or in which the settlement was entered. The application shall contain a statement of facts, including the amount to be allocated to the settlement of the claim, the amount of the settlement or judgment that represents the compensatory damages for economic loss and noneconomic loss, the relevant provision in the contingency fee agreement, and the dollar amount of the attorney's fees under the contingency fee agreement. The application shall include the proposed distribution of the amount of the judgment or settlement.

(2) The attorney shall give written notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing. Notwithstanding the waivers and consents of the interested persons, the probate court shall retain jurisdiction over the settlement, allocation, and distribution of the claim.

(3) The application shall state the arrangements, if any, that have been made with respect to the attorney's fees. The attorney's fees shall be subject to the approval of the probate court.

(G) This section does not apply to any of the following:

(1) Civil actions upon a medical, dental, optometric, or chiropractic claim that are brought against the state in the court of claims, including, but not limited to, those actions in which a state university or college is a defendant and to which division (B)(3) of section 3345.40 of the Revised Code applies;

(2) Civil actions upon a medical, dental, optometric, or chiropractic claim that are brought against political subdivisions of this state and that are commenced under or are subject to Chapter 2744. of the Revised Code. Division (C) of section 2744.05 of the Revised Code applies to recoverable damages in those actions;

(3) Wrongful death actions brought pursuant to Chapter 2125. of the Revised Code.

(H) As used in this section:

(1) "Economic loss" means any of the following types of pecuniary harm:

(a) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim;

(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim;

(c) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim, other than attorney's fees incurred in connection with that action.

(2) "Medical claim, dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in section 2305.113 of the Revised Code.

(3) "Noneconomic loss" means nonpecuniary harm that results from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

(4) "Trier of fact" means the jury or, in a nonjury action, the court.

Effective Date: 04-11-2003

149.43 Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Records listed in section 5101.29 of the Revised Code;

(aa) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(bb) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility.

(cc) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent

that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the

person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes

a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional

facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public. (C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court

determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would

serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

Amended by 129th General Assembly File No. 129, SB 314, § 1, eff. 9/28/2012.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 43, HB 64, § 1, eff. 10/17/2011.

Amended by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

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See 129th General Assembly File No. 131, SB 337, §4.

2744.01 Political subdivision tort liability definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that

are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any

school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

- (i) A park, playground, or playfield;
 - (ii) An indoor recreational facility;
 - (iii) A zoo or zoological park;
 - (iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;
 - (v) A golf course;
 - (vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;
 - (vii) A rope course or climbing walls;
 - (viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;
- (ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.
- (x) A function that the general assembly mandates a political subdivision to perform.
- (D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.
- (E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional

planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "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, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

2743.11 Trial by jury.

No claimant in the court of claims shall be entitled to have his civil action against the state determined by a trial by jury. Parties retain their right to trial by jury in the court of claims of any civil actions not against the state.

Jury trials shall be conducted at the court of claims, the court of common pleas of Franklin county, or the court of common pleas of the county in which a removed case is tried. Juries shall be drawn from the common pleas list of qualified jurors, and empaneled in the same manner as in cases that originate in the court of common pleas. The state shall pay all expenses incidental to a jury trial, except that juror costs shall be taxed to the losing party.

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