

ORIGINAL

IN THE SUPREME COURT OF OHIO

<p>Matthew Ries,  Plaintiff-Appellant,  v.  The Ohio State University Medical Center,  Defendant-Appellee.</p>	<p>Case No. 2012-0954  On Appeal from the Franklin County Court of Appeals, Tenth Appellate District</p>
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REPLY BRIEF OF *AMICUS CURIAE*  
THE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFF-APPELLANT MATTHEW RIES

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## ARGUMENT

### **I. This Court should decide this case.**

The State's argument for dismissal on the ground of jurisdiction having been improvidently granted is unpersuasive for two reasons.

*First:* The new fact upon which the State relies does not reduce the likelihood of the question presented in this case arising in future cases. The new fact upon which the State relies is that "[n]ow, no faculty physicians at the university's Medical Center will also have a contract with OSUP." (State's Brief 11.) But OSUP, Inc. apparently will continue to function as before, receiving all of the patient fees and insurance payments – the only difference being that OSUP, Inc. now will pay the physicians by passing the money through a Medical Center account instead of paying them directly. (See State's Brief 11-12.) This new fact may be relevant to future immunity analyses, but it does not seem significant, much less dispositive.

*Second:* The new fact upon which the State relies pertains only to OSUP, Inc. Even accepting the dubious proposition that the court of appeals decision in this case will never have any relevance in any future case against any OSUP, Inc. physician, the court of appeals decision remains a binding precedent applicable to all other physicians affiliated with State medical colleges.

### **II. Dr. Husain was manifestly outside the scope of his State responsibilities.**

OSUP, Inc. receives all the patient-fee and insurance-payment income arising from Dr. Husain's practice, and OSUP, Inc. pays most of Dr. Husain's compensation. Yet, the State argues, another entity (the State) is Dr. Husain's sole employer.

The State's argument is disproved by two simple facts:

- All else being equal, if the Ohio State University Medical Center did not exist, Dr. Husain's practice of medicine would be substantially the same.

- All else being equal, if OSUP, Inc. did not exist, Dr. Husain would choose to work elsewhere.

If the Ohio State University Medical Center did not exist, Dr. Husain's practice of medicine would be substantially the same. He would still be an employee of OSUP, Inc., which would still pay most of his compensation. His practice would still be administered by OSUP, Inc. His patients and their insurers would still be billed by, and remit payment to, OSUP, Inc. His clinical activities would still be controlled by the physician-manager of OSUP, Inc. (*See* Tr. 107:12-13 (May 5, 2011) [contained in the Dec. 15, 2011 Stipulation to Supplement Record on Appeal].)

In contrast: All else being equal, if OSUP, Inc. did not exist – leaving Dr. Husain to work for only the State (the Ohio State University Medical Center) – Dr. Husain would choose to work elsewhere. Not only would the majority of his compensation be gone, he would have no administrative functionality – no billing, no collections, no one paying the electric bill.

And the State fails to explain how, in the face of R.C. 2921.43, OSUP, Inc. can lawfully compensate Dr. Husain for performing medical services if Dr. Husain's performance of medical services is "100 percent" employment with the State.

The State's contention that Dr. Husain is 100 percent an employee of the State and zero percent an employee of OSUP, Inc. (*see* State's Brief 19-20) is closer to being backwards than to being accurate.

\* \* \*

This State/private-corporation set-up smacks of subterfuge. The executives and physicians of the Medical Center want it both ways. They want whatever benefits come with doing business as a private corporation. And they also want the benefits that come with being part of

the State – namely, civil immunity for the employees and non-jury civil trials. One of the perils of this duplicity is that it cannot be coherently described. The State’s brief contains these inconsistencies:

1. Regarding who controlled Dr. Husain’s practice:

- “Dr. Husain’s clinical activities were controlled by the Medical Center.” (State’s Brief 15 (quotation marks omitted).)
- “Dr. Husain’s direct supervisor controlled where and when he practiced” (State’s Brief 19), and that direct supervisor was the manager of OSUP, Inc. (Tr. 107:12-13 (May 5, 2011) [contained in the Dec. 15, 2011 Stipulation to Supplement Record on Appeal]).

2. Regarding which entity Dr. Husain served:

- “Dr. Husain was required to devote all of his professional time and effort to the service of the Medical Center.” (State’s Brief 15 (quotation marks omitted).)
- Dr. Husain had a contract with OSUP, Inc. “[T]he OSUP contract described Dr. Husain’s employment with OSUP as ‘concurrent employment’ with his work at the Medical Center.” (State’s Brief 22.) The State’s Brief elsewhere refers to “services Dr. Husain performed for OSUP ....” (State’s Brief 20.)

3. Regarding the importance of OSUP, Inc.:

- “[W]hat to make of the fact that Dr. Husain had a separate contract with OSUP? Not much ....” (State’s Brief 21.)
- “[T]he provision of patient care services by the regular and auxiliary faculty *through [OSUP]* is an essential and critical part of their employment *at OSU.*” (State’s Brief 17 (quotation marks omitted) (bold-faced emphasis added).)

4. Regarding physicians’ civil liability and concomitant need for insurance:

- Under R.C. 9.86, physicians are immune from liability for conduct within the scope of their State employment. Thus, they need liability insurance to cover only claims arising from conduct outside the scope of their State employment.
- “The university agreed to provide all employed physicians with professional liability insurance that covered claims arising when the fac-

ulty member [wa]s acting within the scope of his or her employment.”  
(State’s Brief 17 (quotation marks omitted).)

In every practical respect, Dr. Husain was acting as an employee of OSUP, Inc. at the time of the alleged negligence in this case.

### **CONCLUSION**

This Court should reverse the judgment of the Court of Appeals and remand to the Court of Claims for further proceedings.

Respectfully submitted,



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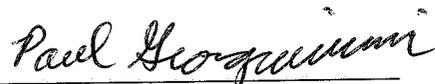
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### **CERTIFICATE OF SERVICE**

A PDF electronic image of this document was sent by e-mail on February 25, 2013 to:

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