

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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

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I. INTRODUCTION

State immunity for state university hospital physicians has always been tied to their role as educators. But in this case the Tenth District Court of Appeals found that a state university hospital may provide patient care without that connection. Here, Dr. Syed Husain provided patient care under a contract with a private corporation, Ohio State University Physicians, Inc. (“OSUP, Inc.”) He provided teaching services under a contract with The Ohio State University. The Court of Claims and the Court of Appeals found that he was entitled to state immunity while treating Appellants’ decedent Michael McNew, even though there was no evidence supporting that he was teaching or supervising a student or resident. The ruling deferred entirely to The Ohio State University Medical Center’s (“OSUMC”) assertion that Dr. Husain was a state employee in the scope of his employment at the time of the negligent treatment.

OSUMC’s Merit Brief maintains that its decision about whether a physician should be afforded immunity must be upheld, and that its authority to operate a hospital without any connection to an educational function is beyond question. In other words, OSUMC argues that it retains the decision-making authority on who does or doesn’t have immunity.

Appellants’ position is that patient care must be tied to education; otherwise OSUMC is running a business just like any private hospital system, and the individual physician should not enjoy state immunity. For this reason, and based upon all of the arguments set forth in their Merit Brief and below, Appellants ask this Court to overturn the Court of Appeals’ ruling, and to re-establish that state university hospital physicians, to be entitled to immunity, must be engaged in a direct educational role of instructing or supervising students and residents at the time of the subject care.

II. REBUTTAL ARGUMENT

A. **This Case is Not Strictly Fact Bound and Appellants' Proposition of Law is Unaffected by Alleged Modifications to OSUMC's Employment Practices.**

1. *OSUMC Advocates for Expansion of Immunity to Every Single Medical Occurrence On and Off Campus.*

OSUMC, at page 11 of its brief, states that this case does not present an opportunity to establish broader principles of state immunity. The Court of Appeals' holding, however, would expand immunity to every doctor on campus.

If this Court follows OSUMC's position that *Theobald* does not require a student or resident to be involved in the negligent care, the Court will have to make new law by rejecting *Theobald*. The result would be that OSUMC would be permitted, by contract, to disconnect any educational purpose or function, or any other governmental purpose or function, from a state university physician's job duties, and still expect him to be afforded immunity.

If this Court follows that rationale, it will recognize an entirely new basis for immunity, and create an entirely new governmental purpose for a state entity: providing patient care as a business enterprise.

In fact, this case already did make new law when the Court of Appeals ignored its own precedent and determined the presence of a student or resident was irrelevant to the immunity determination. This is why Appellants sought this Court's review, and why this Court's decision to take jurisdiction, even if only for the purpose of reversing the Court of Appeals, is necessary and important for the future of state immunity jurisprudence.

2. *OSUMC's New Attempt to Impose Immunity on All Medical Treatment on Campus.*

OSUMC cites to a recent resolution by the OSU Board of Trustees that creates the "Faculty Group Practice" that, OSUMC urges, has removed the requirement that physicians sign

a contract with OSUP, Inc. The only point of interest is: why did OSUMC feel the need to redraft the contracts that are the subject matter of this action?

This coincidental development does not affect:

- The fact that, at all relevant times, Dr. Husain was a dual employee, as OSUMC admitted and the lower courts found;
- The fact that OSUP, Inc., a private corporation, is still in existence, and is still what is being referred to as the “business arm” of OSUMC;
- The fact that OSUP, Inc., controlled the terms of Dr. Husain’s employment and paid most of his salary, as fully discussed in Appellants’ Merit Brief;
- The fact that nothing OSUMC says in its brief establishes that OSUP, Inc. now plays a lesser role in the physicians’ terms of employment, only that OSUMC alleges that there is no contract between OSUP, Inc. and the physicians at this time; and
- The fact that Appellants’ argument is not just based on the exact contents of the OSUMC and OSUP, Inc., contracts at the time but upon application of *Theobald* and related cases, and upon the underlying premise that the purpose of a state university hospital is to educate.

OSUMC’s contention that this new organizational structure eliminates a basis for the Supreme Court’s acceptance of this appeal is obviously motivated by a desire to keep the Court of Appeals ruling in place. The Tenth District is the only appellate court with jurisdiction over Court of Claims rulings, and Tenth District decisions govern all immunity cases.

B. This Appeal is Grounded in Precedent from This Court and the Tenth District Court of Appeals Holding that, to Qualify for State Immunity, State University Hospital Physicians Whose Job Duties Include Teaching Must Be Engaged in Teaching at the Time of the Alleged Negligence.

In *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, at paragraph 31, this Court emphasized the critical educational component of a state university hospital physician's employment by stating that "if there is evidence that the practitioner's duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred."

OSUMC's position, that if a physician's duties include teaching, the absence of students is relevant but not decisive, rejects *Theobald*, as well as long-established appellate court precedent. Instead, OSUMC advocates a rule that would elevate providing clinical care above any other job duty, and would completely divorce any educational motive from the role of a state university hospital physician.

Yet *Theobald* cannot so easily be cast off, and its underlying premise—that the purpose and function of state university hospitals is education—does not render the case distinguishable simply because OSUMC claims to have redefined the physician's job duties to require the provision of patient care for its own sake.

OSUMC claims that the hospital's patient care function, without any educational connection, is sufficient to invoke state immunity protection for the physician whose job duties allegedly include providing clinical care. In taking this position, OSUMC shrugs off Appellants' arguments that *Theobald* and other precedent require an education connection, and that the purpose and function of a state university hospital should revolve around teaching.

Here, the parties submitted evidence that Dr. Husain signed two contracts, one with the medical college and one with a private corporation. The duties required in each are distinct. The duties to the medical college included 1) research; 2) teaching students and residents; and 3)

serving on committees, all of this in exchange for compensation of \$50,000.00 per year. OSUMC emphasizes that Dr. Husain's job duties under the medical college contract "included" clinical care. Appellee's Merit Brief at page 16. That is not what the contract states.

Instead, the contract indicates only that the "service" component of the contract would be "measured by evidence of a high level of clinical competence." College of Medicine Contract at page 3. This does not require clinical care, and, certainly, the \$50,000.00 salary does not compensate for clinical care. The only other reference to patient care is the contract's statement that "Any patient care related revenue will revert to OSU Surgery, LLC." *Id.* That statement supports the view that OSUP, Inc., and not the medical college, controls the provision of patient care and the income derived therefrom. There is no language in the medical college contract that *requires* that he provide clinical care in fulfillment of the contract, only a suggestion that if he does the income would go to the private corporation. The contract indicates that there may be times in the process of teaching that he is providing clinical care, but there is nothing in the contract that requires clinical care.

The OSUP, Inc. contract, on the other hand, does require clinical treatment, for which Dr. Husain would be handsomely compensated with a \$140,000.00 base salary and bonuses. For example, the OSUP, Inc. contract states that the employee will "conduct medical service activities as an employee of OSUP at the hospitals and other facilities of The Ohio State University and other practice sites approved by OSUP for clinical medical services." OSUP, Inc. Contract at page 1. The contract forbids physicians such as Dr. Husain from engaging in the practice of medicine "except as an employee of OSUP." *Id.* The contract states that the employee "shall become an active medical staff member" and "shall maintain clinical privileges." *Id.* at page 4.

To be in the scope of his employment for state immunity purposes, *Theobald* requires Dr. Husain to have been engaging in and using his time and talent in educating a student or resident at the time the negligence occurred. OSUMC illogically argues that the absence of a student is irrelevant if the job duties included clinical care. But both this case and *Theobald* involve physicians whose job duties included both teaching and providing clinical care. OSUMC's attempt to distinguish this Court's own decision in *Theobald* fails.

C. A Contractual Reference to a Physician's Provision of Clinical Care Does Not Change the Rule of Law in *Theobald*.

Appellants' Proposition of Law posits that fulfillment of a state university hospital's educational function must be the foundation for determining that an individual physician is entitled to state immunity. The purpose of a state university hospital is to provide educational opportunities.

OSUMC, in essence, argues that it will control the immunity determination by defining the "scope of employment" of the physician, a position illustrated by the recent redraft of the contracts. However, OSUMC does not control immunity. Nor does the determination of immunity require the trier-of-fact to defer entirely to OSUMC's decision whether immunity should be granted to a particular employee.

1. OSUMC's Argument for a Clinical Practice Test is Misplaced.

Appellants' position is that control is not the test; however, even if it was, OSUP, Inc., and not OSUMC, exercised day-to-day control over all aspects of Dr. Husain's clinical practice. For example, OSUP, Inc. controlled all aspects of where and when the physician would work. It stated that the private corporation would control which work sites would be approved for clinical practice. OSUP, Inc. Contract at page 1. In the First Addendum to the contract, it is stated that OSUP, Inc., acting through Surgery LLC, would "set reasonable working hours" for Dr. Husain.

First Addendum at page 1. The OSUP, Inc. contract also dictated the terms under which Dr. Husain could be terminated (OSUP Contract at pages 4-5, Addendum page 3), provided the terms of vacation leave (Addendum page 5), set forth the compensation terms, including bonuses (Addendum page 2), restricted Dr. Husain from taking patients with him if he left the practice (Addendum page 3), provided disability and death benefits (Addendum page 4), and provided other details of his employment. There was nothing in the medical college contract that provided any of these specific terms of employment. The only reasonable conclusion that may be reached in comparing the two contracts is that OSUP, Inc., and not OSUMC, controlled every aspect of Dr. Husain's clinical practice.

OSUMC asserts that OSUP, Inc. is merely a billing or collections agency. This private corporation is far from that. The OSUP, Inc. contract, a 21-page document, controls virtually every aspect of the physician's employment, including hours, assignments, rate of pay, bonuses, health insurance, vacation and sick leave, death and disability benefits, and termination. On the other hand, the medical college contract controls none of these aspects of Dr. Husain's employment, but only gives him the title "Assistant Professor," who would "be an active teaching member of the full time faculty." College of Medicine Contract at pages 2-3.

Control might be the test in an *Engel*-style immunity case, in which the question is whether the physician, like Dr. Skoskiewicz in *Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St.3d 263, 2011-Ohio-3375, 957 N.E.2d 764 (10th Dist.), is a state employee at all, but here control is not the central focus because there is no question that the private corporation OSUP, Inc. employed Dr. Husain and controlled virtually all of the aspects of his employment. Dr. Husain did not serve only the university, as OSUMC wishfully asserts on page 20 of its brief.

Rather, he served OSUP, Inc., a private corporation that provided the lion's share of his compensation and controlled the terms of his employment.

OSUMC also emphasizes the characterization of OSUP, Inc. as the "business arm" of OSUMC, but the significance of this label remains unclear. Undoubtedly, OSUP, Inc. was a private entity that Appellants argue was not sufficiently connected with OSUMC to qualify it as a functional arm of the state. See Appellants' Merit Brief at pages 22-24. The state of Ohio does not provide immunity for private physicians. See *Engel, supra; accord, Phillips v. The Ohio State Univ. Medical Ctr.*, 10th Dist. No. 12AP-414, 2013-Ohio-464. Nor should it provide immunity when state employee physicians are not in the scope of their employment, such as when seeing patients without being engaged in a teaching function pursuant to the terms of a private contract with OSUP, Inc.

2. A State University Hospital Provides Patient Care in Connection with its Educational Function.

OSUMC misstates Appellants' argument in asserting that the state of Ohio can and does provide patient care in other settings. Other state or federal entities do provide patient care, but as an auxiliary to their primary, governmental function. For example, the function of the Department of Rehabilitation and Correction is not to provide patient care, but to operate corrections facilities. It provides patient care to inmates in relation to that function. Similarly, other state and federal entities that provide health care do so in the course of their primary function of assisting the populations whose needs they serve in ways beyond health care. Operating a hospital is not a governmental function, but a proprietary function, in other words, "one that *** involves activities that are customarily engaged in by nongovernmental persons." R.C. 2744.01(G)(1)(b).

D. OSUMC Mischaracterizes Appellants' Argument Regarding Jury Trials.

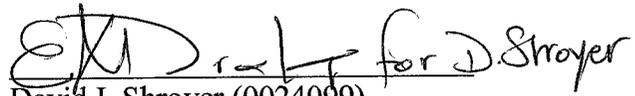
OSUMC misunderstands Appellants' argument regarding the lack of jury trials in the Court of Claims. The battle to declare R.C. 2743.11 unconstitutional has been fought and lost, and Appellants are not attempting to re-open that debate here. Instead, Appellants' point is that patients who treat at state university hospitals, such as OSUMC, unknowingly give up significant rights if they are harmed by medical negligence. As described in Appellants' Merit Brief, such injury victims must sue in the Court of Claims, where they are denied the right to a jury and where cases are decided by an unelected judicial officer. Patients are not told this, nor is there anything about OSUMC facilities, practices, billing, or physicians, that would reveal this to them. In fact, in every way that would be visible to a patient treating there, OSUMC operates exactly like its private hospital counterparts.

A finding of immunity eliminates the injured plaintiff's right to a jury trial. There is no other way to look at this. The significance of the immunity determination, therefore, has ramifications beyond, simply, which clerk of court gets the filing. It is a determination that goes to the heart of the injured plaintiff's rights, and affects whether, and how much, he will be compensated for his injury.

CONCLUSION

For these reasons, as well as those articulated in Appellants' Merit Brief, this Court should reverse the Tenth District's decision and, following *Theobald*, require OSUMC to demonstrate that a practitioner was engaged in teaching a student or resident at the time of the allegedly negligent care before that physician may qualify for civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Shroyer" with a stylized flourish at the end.

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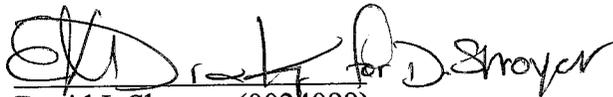
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Certificate of Service

I certify that a copy of the foregoing was sent by ordinary U.S. mail to counsel of record for Appellee, Alexandra T. Schimmer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, and upon Paul Giorgianni, Giorgianni Law LLC, 1538 Arlington Avenue, Columbus, Ohio 43212-2710, on February 25, 2013.

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