[Cite as *Wagner v. Ohio State Univ. Med. Ctr.*, 2013-Ohio-2451.]

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

John T. Wagner et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 12AP-399 (Ct. of Cl. No. 2005-05124)
The Ohio State University Medical Center,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 13, 2013

Robert Gray Palmer Co., LPA, and *Robert G. Palmer*, for appellants.

Michael DeWine, Attorney General, *Karl W. Schedler*, and *Brian M. Kneafsey, Jr.*, for appellee.

APPEAL from the Court of Claims of Ohio.

FROELICH, J.

{¶ 1} John T. Wagner appeals from a judgment, after a trial, of the Court of Claims of Ohio, which found that The Ohio State University Medical Center, College of Medicine, Department of Anesthesiology, and Pain Control Center (hereinafter collectively referred to as "OSU") were not liable for personal injury caused by Dr. Gregory Todd Schulte because those injuries were not foreseeable to OSU and because Schulte acted outside the scope of his employment.[1] For the following reasons, the judgment of the Court of Claims of Ohio is affirmed.

[1] Wagner's wife, Marilyn, also filed a loss of consortium claim, which is not directly at issue in this appeal.

{¶ 2} Schulte graduated from The Ohio State University College of Medicine in 1991 and completed his anesthesiology residency at The Ohio State University Medical Center. He was licensed to practice medicine, was board-certified in anesthesiology and interventional pain management, and belonged to several professional associations. However, Schulte developed a substance abuse problem, which eventually led to multiple sanctions from the State Medical Board of Ohio and the termination of his employment with OSU.

{¶ 3} While Schulte was in his residency at OSU, he met and began to treat Wagner in OSU's Pain Center, commonly known as the pain clinic. Wagner had been diagnosed with pancreatitis, a chronic condition that caused him extreme pain. In 2000, Schulte implanted a subcutaneous morphine pump into Wagner, which greatly relieved his pain and improved his quality of life. Schulte and Wagner developed a close relationship, which Wagner likened to a father-son relationship. According to Wagner, he (Wagner) also tried to set up a support group for patients of the pain clinic, with Schulte's support, and Schulte discussed with Wagner some research that Schulte hoped to conduct. The research related to the identification and tracking of a certain "marker" referred to as "Substance P" in the spinal fluid of chronic pain patients. Although Schulte testified in his deposition that research on Substance P had been approved by OSU, no evidence was presented to corroborate this assertion; Schulte's supervisors in the pain clinic denied any knowledge that he had been approved to conduct research.

{¶ 4} In 2001, after Schulte acknowledged to the Medical Board that he had a substance abuse problem, he entered into Step I and Step II Consent Agreements with the Medical Board regarding his substance abuse. These agreements provided, in part, for a three-month suspension of Schulte's medical license, the completion of a residential substance abuse treatment program, a probationary period upon reinstatement of Schulte's license, and random drug testing.

{¶ 5} In 2002, Schulte began working at OSU's College of Medicine and Public Health as a part-time clinical assistant professor in the department of anesthesiology, in accordance with the consent agreements. Eight months later, he became a full-time

employee. Under the terms of his employment, Schulte divided his time equally between his clinical assistant professorship and the practice of medicine in OSU's pain clinic. The nurses at the pain clinic and Schulte's supervisors were aware of his history of substance abuse.

{¶ 6} In the spring of 2004, Schulte began to exhibit signs that he was under the influence of drugs while working at the pain clinic. In May 2004, a urinalysis revealed that he had taken methadone; Schulte claimed that it had been administered when he underwent some dental work. Between June and September 2004, Schulte was observed on at least three occasions by various pain clinic staff members to have been impaired while at work; his impairment included symptoms such as excessive sleepiness, inability to focus, and slurred speech. During this time, two nurses also expressed suspicions that he had stolen medication from the clinic. He was sent home on at least one occasion due to his impairment.

{¶ 7} On September 7, 2004, Schulte fell face-first into a plate of spaghetti while at work. On this occasion, he explained to his supervisor, Dr. Steven Severyn, that he was having an adverse reaction to a prescribed medication, Neurontin. Dr. Severyn subsequently reported the incident to his supervisor, Dr. Michael Howie, who was the Chair of the Department of Anesthesiology; Schulte had specifically told Dr. Howie that he was no longer taking Neurontin.

{¶ 8} Also in September 2004, Schulte was ejected from a surgical procedure due to strange behavior. Amid some suspicions that Schulte was smuggling urine from other sources into his drug screenings, Schulte was closely supervised at a drug screening in mid to late September, and tested positive for morphine. Schulte claimed that the morphine was related to treatment for a leg injury.

{¶ 9} Effective September 21, 2004, OSU placed Schulte on administrative leave and forbade him from providing any patient care at the pain clinic. Schulte retained his faculty appointment, but he had no assigned faculty duties after September 21, 2004; he continued to receive a salary of $30,000 per year, and OSU maintained his health insurance "to afford Schulte and his family some income and some medical insurance."

However, Schulte's continued appointment was placed "under review." Schulte kept his pager, his faculty identification card, his computer password, and OSU scrubs that he had purchased with his own money.

{¶ 10} OSU notified the Medical Board of its concerns about Schulte, his positive drug screenings, and OSU's actions. In November 2004, the Medical Board suspended Schulte's medical license for at least one year. In response to this action, OSU formally terminated Schulte's employment at the pain clinic and revoked his staff privileges, effective December 1, 2004.

{¶ 11} Wagner had a routine appointment at the pain clinic in November 2004 and was treated by Dr. Rebecca Guttman. He inquired about Schulte's whereabouts at that time because Schulte usually treated him. Dr. Guttman simply stated that Schulte was not there and that she would be treating Wagner; she did not specifically state that Schulte was no longer working at the pain clinic or that his license had been suspended.[2]

{¶ 12} In December 2004, Schulte siphoned pain medication from the pain pump of his own seriously ill father, Tom Schulte. Tom Schulte was a patient of the OSU pain clinic, but the siphoning occurred at Tom Schulte's home.

{¶ 13} On January 3, 2005, OSU became aware of Schulte's actions involving Tom Schulte's pain pump. On that date, Dr. Severyn had three conversations with Cindy Workman, who was the home health nurse responsible for periodically visiting Tom to check and refill his pain pump. Workman reported to Dr. Severyn that, when she visited Tom on December 30, 2004, she "noticed 3 recent puncture sites in the skin overlaying the pump access port. She said that the only time she ever finds puncture sites over an access port is if she revisits a patient a day after accessing a pump reservoir."[3] She also reported that there was "absolutely nothing there" (referring to medication) in the pump, although the pump indicated that 2.6 cc of the pain medication Dilaudid should still have

[2] It is unclear from the record whether Wagner's visit occurred before or after the Medical Board suspended Schulte's license or whether Dr. Guttman knew of the suspension at the time of this visit.

[3] This account is taken from Dr. Severyn's "Memo for Record" of his conversations with Workman on January 3, 2005.

been in the pump. Workman reported that she had never seen such a large variance between the amount that the pump indicated should be present and the amount that she was able to aspirate from the pump. Workman further stated that:

> [S]he asked the patient if someone had stuck a needle into the skin overlying the pump access port. She related that the patient replied "I can't lie to you, Cindy, but yes, he did." She admonished the patient not to let anyone do that, and the patient began to cry, and responded "I'll never let him do it again." The patient asked [Workman] not to tell anyone, she told him that she had to, and the patient shook his head but did not provide any verbal response. [Workman] relates that she did not ask the patient any further details.

Dr. Severyn's report did not indicate that Workman or Tom Schulte expressly identified Schulte as the person who had tampered with Tom's pump.

{¶ 14} During their telephone conversations on January 3, Workman and Dr. Severyn also discussed the rate at which Tom's pump had been dispensing medication in the previous months. They discussed, and Dr. Severyn verified in Tom's medical records, what changes had been authorized and by whom. Between May 4 and June 4, 2004, there was a significant decrease in the rate at which medication was dispensed to Tom, and Workman reported, based on a conversation with Schulte, that he (Schulte) had made this change himself. Workman informed Dr. Severyn that Schulte possessed a "pump programming unit" that he had obtained from his prior employment and/or from another doctor. Workman also reported to Dr. Severyn that many of her patients, including Tom, mistakenly believed that "a rate change entailed a needle puncture." In fact, the rate at which a pain pump dispenses medication is adjusted without penetrating the skin using a pump "interrogator" or programming unit. Workman asked Tom whether Schulte had ever "performed needle puncture during rate adjustments," and he "did not ever indicate so."

{¶ 15} On January 4, the day after Dr. Severyn's conversations with Workman, Drs. Severyn and Howie consulted with OSU legal counsel about Workman's report. As a result of this meeting, OSU reported the incident involving Tom Schulte to the Ohio Department of Job and Family Services ("ODJFS") as elder abuse. They did not discuss

or contemplate contacting Schulte or notifying other pain pump patients of Schulte's actions at that time.

{¶ 16} On January 12, 2005, Schulte called Wagner, said that he was beginning the research that they had discussed in the past involving Substance P, and asked if Wagner was willing to participate by having Schulte come to his home to withdraw spinal fluid.[4] Wagner indicated that he was willing to participate and told Schulte to "come on out" to his house. Schulte had not previously treated Wagner at his home, although home visits were regularly conducted by home health nurses to refill pain pumps such as Wagner's with medications.[5] Schulte told Wagner that he (Schulte) would extract a sample of spinal fluid through Wagner's pain pump, which was connected with the spine for the delivery of the pain medicine. Schulte went to Wagner's home wearing his OSU scrubs and, possibly, his faculty badge; he was hunched over and explained that he was having back problems. During their conversation, Schulte asked Wagner whether Wagner had heard any rumors about Schulte; Wagner stated that he had not. The men also discussed a new job opportunity for Schulte with an insurance company. Then, under the guise of withdrawing spinal fluid, Schulte actually siphoned the morphine from Wagner's pain pump. Later that day, Wagner's pain began to escalate, and it continued to do so for several days.

{¶ 17} Two days later, Schulte came to Wagner's home again, seeking career advice and Wagner's opinion on employment issues. Schulte also asked Wagner again if Wagner had heard any rumors about Schulte. Schulte stated to Wagner that he (Schulte) was having mental problems, rather than drug-related problems (as the alleged rumors would have implied), and that he was hearing voices "in an empty

[4] Although Schulte apparently still had access to OSU's computer system at this time, the evidence does not suggest that he used this access to obtain Wagner's phone number; it seems that the men had exchanged contact information earlier in their relationship. Wagner also testified that, when he learned that Schulte was no longer working at the pain clinic, he called Schulte to wish him well and left his home phone number on Schulte's answering machine.

[5] The home health nurses who visited the patients of the pain clinic were employed by a separate agency, not by OSU, although this distinction – or any legal effect of it – probably was not known to patients of the pain clinic, and the prescriptions for the medications were provided by the doctors at the pain clinic. We express no opinion as to whether this distinction is legally relevant.

room." Schulte asked Wagner to trade six of Wagner's Percocet pills for six other pills that Schulte offered, claiming that the pills he possessed upset his stomach. Wagner made the trade, but he did not use the pills that Schulte gave to him. Wagner did not mention either of Schulte's visits to anyone else connected with OSU or to his home health nurse at that time.

{¶ 18} On January 18, 2005, six days after Schulte's first visit to Wagner's home, Schulte went to the home of another pain clinic patient, Jesse P., and siphoned morphine from his pain pump under the guise of conducting research.

{¶ 19} Also on January 18, Barbara Mortimer, Wagner's home health nurse, visited Wagner's home because he had called to complain about his pain; Mortimer had not been scheduled to visit Wagner until January 24. Mortimer found Wagner sweating, pacing, and in "the worst pain he had ever had." Based on the "interrogation" of the pump, it appeared that Wagner's pump contained the correct amount of fluid, but the fluid that Mortimer withdrew from the pump was an orangish color, which was not the normal color of the medication in the pump. Mortimer did not notice any stick marks or punctures at the pump site.

{¶ 20} Mortimer contacted the OSU pain clinic from Wagner's home and received permission from Dr. Severyn to administer a bolus, or a small amount of medication to try to "get on top of the pain." Dr. Severyn also authorized Mortimer to increase the pump rate of Wagner's medication. Mortimer could not recall whether she informed anyone at OSU of the color of the liquid taken from Wagner's pump, but she testified that she kept the solution and gave it to the pharmacist at her agency. She believed that the pharmacist had subsequently sent the solution to the Medical Board.

{¶ 21} According to Mortimer, Wagner did not mention Schulte's visit when she saw him on January 18. He did ask Mortimer whether spinal fluid could be obtained from the pain pump, and Mortimer answered that it could not.

{¶ 22} On January 21, 2005, OSU learned that Schulte had victimized Jesse P. when Jesse P. reported the incident to OSU. At that time, OSU contacted law enforcement personnel. OSU also decided to warn its pain clinic patients about

Schulte's conduct and began to gather information, in conjunction with the home health providers who visited pain clinic patients, about which patients should be notified.

{¶ 23} On January 24, Mortimer learned from Wagner, by phone, that he had been hospitalized and that Schulte had stolen morphine from Wagner's pump. It is unclear from the record what action, if any, Mortimer took in response to learning this information.

{¶ 24} On January 27, Dr. Severyn sent a letter to 63 pain clinic patients who were receiving medication via pain pumps, telling them that Schulte was no longer on staff at OSU, that he should have no contact with their pain pumps, and that OSU should be notified immediately if Schulte tried to examine the patient or the pain pump.

{¶ 25} Meanwhile, Wagner had suffered from an infection and other complications related to Schulte's actions. Wagner had been hospitalized at Mount Carmel East Hospital (not affiliated with OSU) for an "attack" of pancreatitis, which followed Schulte's removal of morphine from his pump. Even when his pain started to recede because of pain medicine administered at the hospital, his white blood cell count was increasing which was a sign of his infection. As Wagner and his treating physician were considering having his pain pump checked at OSU, Wagner was contacted by a Gahanna police officer about Schulte's actions. Eventually, Wagner's pain pump was removed, and it could not be reinserted for several months.

{¶ 26} Wagner was interviewed on January 25 by Stephanie Russell of the Fairfield County Sheriff's Department and two members of the Medical Board. During this interview, Wagner admitted that he had known "something had to be going on at OSU where the staff had reason to believe that Doctor Schulte was abusing narcotics" because Wagner knew, from Schulte, that OSU was not renewing Schulte's employment contract or had doubts about doing so. Also, during a meeting with Schulte and Dr. Howie in September or October 2004, Wagner had observed symptoms that caused Wagner to conclude "something ain't right" with Schulte; he looked heavily sedated or like he had been up all night, "he had one eye going one way and one going the other

way," and "he could hardly talk." Wagner stated that he "sure as hell [thought] that a doctor [Dr. Howie] would recognize these same symptoms."

{¶ 27} Schulte was subsequently arrested and indicted for 21 counts related to the incidents involving Wagner and Jesse P, including felonious assault, aggravated robbery, aggravated trafficking in counterfeit controlled substances, and practicing medicine without a certificate. He entered a plea agreement whereby he pled guilty to ten counts; he was sentenced to concurrent terms, with an aggregate sentence of 4 years of imprisonment.

{¶ 28} In April 2005, Wagner filed a complaint against OSU in the court of claims, alleging that, as the "master" of Schulte, who was acting within the scope of his employment, OSU was responsible for Schulte's actions and that OSU was negligent in (1) Wagner's care, (2) failing to advise Schulte's patients that he was practicing under consent agreements and that his license was eventually suspended, (3) failing to adequately monitor Schulte, (4) credentialing him as an employee/physician at OSU, and (5) retaining him as an employee/physician of OSU. Initially, the court granted a lengthy stay due to a "connected action" pending in another court.[6] In June 2008, OSU filed a motion for summary judgment. The trial court granted OSU's motion, concluding that there was no genuine issue of material fact that (1) Schulte was "acting manifestly outside the scope of his employment" when the injury to Wagner occurred, (2) he had not been negligently hired or retained, (3) the hospital had no duty to notify patients who were not receiving treatment on hospital grounds that a particular physician was no longer employed by the hospital, and (4) Schulte did not act with apparent authority when he acted outside the scope of his employment.

[6] The "connected action" was Wagner's civil suit against Schulte in the Franklin County Court of Common Pleas, which the court of claims found might "be partially or wholly dispositive of this action as a collateral recovery under R.C. 2743.02(D)." Entry Staying Proceedings, June 22, 2005. In that case, Schulte was found to be liable for Wagner's injuries, and Wagner was awarded $6 million in compensatory and punitive damages. Schulte filed for bankruptcy in 2005 and, although the judgment against him was "excepted from discharge," it is unclear from the record before us whether Wagner collected on this judgment in whole or in part. In any event, the court of claims case against OSU eventually proceeded.

{¶ 29} Wagner appealed the summary judgment in favor of OSU, and that judgment was reversed. *Wagner v. Ohio State Univ. Med. Ctr.*, 188 Ohio App.3d 65, 2010-Ohio-2561 (10th Dist.) ("*Wagner I*").

{¶ 30} On remand, the matter was tried to a three-judge panel on the issue of liability only, and the court entered judgment in favor of OSU. The court concluded that the risk to Wagner, in his own home, had not been foreseeable, that OSU had taken reasonable steps to protect pain pump patients from the risks that were foreseeable, and thus that OSU had not breached a duty of care to Wagner.

{¶ 31} Wagner appeals from the judgment of the court of claims with respect to OSU's liability. He raises seven assignments of error on appeal.

{¶ 32} Wagner's first assignment of error states:

> THE TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE BY FAILING TO APPLY THE SPECIAL RELATIONSHIP AS EXPLAINED IN *DOUGLASS V. SALEM COMM. HOSP.,* 153 OHIO APP.3D 350, 2003-OHIO-4006.

{¶ 33} Wagner claims that, in the prior opinion, the appellate court held that Wagner had a "special relationship" with OSU which created a duty for OSU to warn him about the risk posed by Schulte. He further claims that, because the opinion "framed the issues before the trial court on remand" by citing *Douglass v. Salem Community Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006 (7th Dist.), a case which found such a "special relationship," the court of claims ignored the law of the case when it concluded that *Douglass* did not apply.

{¶ 34} Our reading of *Wagner I* does not support Wagner's argument about the nature of the holding in that case. *Wagner I* stated that the "key inquiry" in the case was "whether OSU owed a duty to protect Wagner and Schulte's other patients with pain pumps," either at OSU or in their homes. *Id.* at ¶ 27. It also recognized that "[t]he existence of a duty will depend on the foreseeability of the injury to the plaintiff." *Id.* at ¶ 23. Its conclusion with respect to this issue, based on the evidence offered in support of and in opposition to OSU's motion for summary judgment, was that "reasonable minds can differ as to whether the injury to Wagner was foreseeable." *Id.* at ¶ 31.

Wagner I did not conclude that OSU ***had*** foreseen the possibility of a patient's injury; rather, it concluded that there was a genuine issue of material fact as to this issue, which could not be resolved on summary judgment.

{¶ 35} *Wagner I*'s discussion of *Douglass,* and the "special relationship" it recognized, likewise concluded that there was a genuine issue of material fact as to this fact, not that such a "special relationship" did, as a matter of law, exist in this case. *Douglass* involved a former Salem Hospital employee who had provided counseling services to adults and children; around the time that he resigned from his position, Salem Hospital became aware that, during the employee's prior employment at another hospital, there "were some problems concerning [the employee's] association with young children outside the hospital." *Douglass* at ¶ 5. Salem Hospital did not report these concerns to the employee's patients or to authorities, but it terminated his employment as soon as possible. *Id.* at ¶ 6.

{¶ 36} The employee maintained a continuing relationship with one of his young patients, F.C., after their formal sessions at the hospital had ended; the employee took F.C. and other children to amusement parks, swimming, and other activities. Several years after this relationship began, and more than three years after the employee's employment at the hospital had ended, the employee asked F.C. to come to his house for a weekend, and F.C. invited his cousin, S.K., to go along. S.K.'s mother, who worked at a nursing home and was familiar with Salem Hospital's social services employees, believed that there was some professional component to the visit and called the employee's former supervisor at the hospital to ask for advice about whether S.K. should accompany F.C. to the employee's house. According to S.K.'s mother, the supervisor gave the employee a "positive reference," did not mention any suspicions about the employee, and did not divulge that the employee no longer worked at the hospital. S.K. went along for the visit. That weekend and for several months thereafter, F.C. and S.K. were molested by the hospital's former employee. *Id.* at ¶ 7-9.

{¶ 37} *Douglass* held that "[a] duty to act affirmatively for another's aid or protection does not exist absent some 'special relationship' between the parties that

justifies the imposition of a duty." *Id.* at ¶ 57, citing *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 293 (1977). Further, it held that such a relationship had existed between the hospital and the children and children's parents because one of the children had seen the employee professionally while he worked at the hospital, because S.K.'s mother believed that the visits were "professional" in some manner, because she understood the supervisor's statements to be a "positive reference,"[7] and because she was not told about the hospital's suspicions or that the employee no longer worked at the hospital. Although the *Douglass* court found that a "special relationship" existed, it limited the nature of the hospital's duty to the facts of the case; the court stated that "the hospital may not have had an affirmative duty to disclose to all former patients or clients that were involved with [the employee] about his past history," but "when inquiry was made and [the hospital] was asked for advice concerning him, it was bound to offer that advice in a non-negligent manner. In this instance, it clearly did not." *Id.* at ¶ 69.

{¶ 38} Although *Wagner I* discussed *Douglass* and both cases involved the actions of a former hospital employee, *Wagner I* did not find, as a matter of law, that OSU owed a duty to inform or warn Wagner more fully of the circumstances surrounding Schulte's absence. As with the issue of foreseeability, discussed above, *Wagner I* only held that there was a genuine issue of material fact as to this issue. Moreover, even *Douglass* did not impose a general duty to warn patients of the employee's conduct in that case, only a need to respond to questions "in a non-negligent manner." As we will discuss infra, the responses of other OSU employees to Wagner's questions about Schulte did not vouch for him in this manner, which is another distinction from *Douglass*.

{¶ 39} We recognize that, in certain portions of the opinion, the language of *Wagner I* was imprecise and may have fostered confusion as to whether the opinion found a particular fact to have been established or, instead, found that a genuine issue of

[7] The Seventh District did not address the reasonableness of S.K.'s mother's belief that the employee was acting "in some professional manner" during the visits or that the supervisor's statements had constituted a "positive reference."

material fact existed as to that fact. In other words, some of the discussions of the evidence offered in support of and in opposition to summary judgment were framed in such a way that they appeared to state a factual finding, rather than pointing to evidence that created a genuine issue of material fact. Viewed on the whole, however, we think it is clear that *Wagner I* found only genuine issues of material fact, and it did not presume to make factual findings that would become the law of the case.

{¶ 40} This conclusion is evidenced by *Wagner I*'s legal conclusions that, "[c]onstruing these facts in the light most favorable to Wagner, we find that a genuine issue of material fact exists as to whether Schulte's actions were a reasonably foreseeable consequence of OSU's decision to retain Schulte in a faculty/researcher position at OSU," and its recognition that "factual disputes remain as to the credibility of witnesses and whether and how certain events took place." *Id.* at ¶ 36-37. Further, the opinion recognized that "reasonable minds can differ as to whether the injury to Wagner was foreseeable," and "[s]ummary judgment is not the vehicle for weighing the evidence or determining witness credibility. Only trial on the merits can resolve such disputes. While the question of the existence of a duty is a question of law, the resolution of that question must await the resolution of the factual disputes concerning foreseeability." *Id.* at ¶ 31.

{¶ 41} In sum, *Wagner I* held that there were genuine issues of material fact as to OSU's negligence, including its ability to foresee the risk posed by Schulte and its duty to protect patients from it. On the record presented, making factual findings in response to the motion for summary judgment would have been inappropriate, and an appellate court, in particular, is not in a position to make such findings.

{¶ 42} The trial court did not violate the law of the case when, in response to the remand in *Wagner I*, it heard evidence and made factual findings relating to the extent of OSU's duty to protect its patients and its alleged breach of that duty.

{¶ 43} The first assignment of error is overruled.

{¶ 44} Wagner's second assignment of error states:

> THE TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE BY FAILING TO APPLY THE SPECIAL

RELATIONSHIP OF EMPLOYER AND EMPLOYEE BETWEEN OSU AND DR. SCHULTE.

{¶ 45} Wagner again contends that the court of claims violated the law of the case doctrine by failing to acknowledge and address the "special relationship" he had with OSU, as determined in *Wagner I*. He also claims that OSU should be liable because it "knew or believed that Schulte posed a risk of bodily harm to patients or others if not controlled," as evidenced by its termination of Schulte's clinical responsibilities, but failed to "control" him effectively.

{¶ 46} As we discussed under the first assignment of error, *Wagner I* did not establish that a special relationship existed between Wagner and OSU or that, if a duty existed, it had been breached. *Wagner I* held that there were genuine issues of material fact as to these and other questions. Moreover, Wagner's argument, which is essentially that the finding of a "special relationship" requires a finding of OSU's liability, oversimplifies the cases upon which he relies.

{¶ 47} With respect to an employer's duty in a negligent retention case, Wagner relies on a portion of the discussion in *Wagner I*, which stated:

> Even if an injury is foreseeable, there may not be a duty to act. *Abrams* [*v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516 (10th Dist.)] at ¶ 16. The general rule is that a defendant has no duty to protect a plaintiff from or to control the conduct of a third person. *Id.* However, a duty will arise if the defendant shares a special relationship with the plaintiff or a third person that justifies the imposition of the duty. *Id.* That relationship may include an employer and employee relationship. *Id.*

Id. at ¶ 24. *Wagner I* further stated, however, that "[t]he existence of a duty will depend on the foreseeability of the injury to the plaintiff. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or non-performance of an act," based on the totality of the circumstances, and that a defendant will be held liable for the criminal act of its employee only when "the totality of the circumstances are 'somewhat overwhelming.' " *Id.* at ¶ 23, citing *Abrams* at ¶ 15, and *Staten v. Ohio Exterminating Co., Inc.*, 123 Ohio

App.3d 526 (10th Dist.1997). *Abrams* clearly stated that the two elements necessary for a duty to arise in negligent hiring and negligent retention cases were the existence of an employment relationship **and** the foreseeability of injury, which must be considered separately. *Abrams* at ¶ 18.

{¶ 48} Wagner's argument that the court of claims failed to address Wagner's "special relationship" with OSU in its judgment fails to recognize that the alleged "special relationship" was an insufficient basis to impose liability on OSU if the injury to Wagner were not also foreseeable. The lengthy analysis of the court of claims as to the foreseeability of Wagner's injury – and its conclusion that the injury was not foreseeable – eliminated the need for further discussion of the relationship; even assuming that a special relationship existed, OSU could not be held liable if the injury were not foreseeable.

{¶ 49} The court of claims' analysis of the foreseeability issue will be discussed in greater detail under the fourth assignment of error, infra.

{¶ 50} The second assignment of error is overruled.

{¶ 51} Wagner's third, fourth, fifth, and sixth assignments of error challenge the weight of the evidence.

{¶ 52} This court previously reversed a summary judgment, and the facts and evidence were presented to the court of claims for a trial. Since this cause was tried to a panel of judges, there could be an initial tendency to review the judgment under a different standard than with a jury. However, an appellate court reviews a verdict of a single judge or a panel of judges with the same standard as we would a jury verdict. The question is not whether we would have decided every issue or the ultimate issue identically; rather, as the attorneys for both sides expertly argued, we must determine whether the judgment was supported by the weight of the evidence, as that evidence was reasonably determined by the fact finders.

{¶ 53} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury [or other fact finder] that the party having the

burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶ 54} In weighing the evidence in criminal or civil cases, a court of appeals "must always be mindful of the presumption in favor of the finder of fact." *Id.* at ¶ 19, 21. "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * * If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." (Internal citations omitted.) *Id.*, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984), fn. 3. *See also Heffern v. Univ. of Cincinnati Hosp.*, 142 Ohio App.3d 44, 51 (10th Dist.2001); *Estate of Barbieri v. Evans*, 127 Ohio App.3d 207, 211 (9th Dist.1998).

{¶ 55} Wagner's third assignment of error states:

> THE TRIAL COURT'S FINDING THAT A SPECIAL RELATIONSHIP UNDER *DOUGLASS* DID NOT ARISE BETWEEN OSU AND WAGNER ON NOVEMBER 15, 2004, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 56} Wagner claims that OSU breached a duty owed to him when (1) in November 2004, Wagner asked another doctor about Schulte's whereabouts, and that doctor failed to reveal that Schulte was no longer a physician with OSU, and (2) it failed to "warn" patients, generally, as to the revocation of Schulte's medical license. Wagner again relies on his "special relationship" with the hospital, as discussed above.

{¶ 57} We have already addressed the fact that Wagner's status as a patient of Schulte and the hospital did not, in itself, create a duty for them to act in a particular

way, unless a danger to the patients as a result of or related to Schulte's employment was foreseeable.

{¶ 58} In its judgment, the court of claims acknowledged that Wagner and Schulte had a longstanding physician-patient relationship, and that OSU was aware of this longstanding relationship. The court found, however, that there was "little to no evidence" that OSU knew the relationship was a father-son type of relationship or that it was otherwise closer than the typical physician-patient relationship of such duration.

{¶ 59} The evidence established that Wagner attended one meeting with Dr. Howie and Schulte in 2004, but there was conflicting evidence about the purpose of that meeting; Wagner himself stated that he was at the meeting to "defend [Schulte's] competence," possibly due to a professional rivalry with another doctor, and because Schulte was having difficulty obtaining medical malpractice insurance. The court of claims found that Wagner's presence at this meeting showed only that Wagner thought Schulte was a "fine physician"; it did not permit an inference that OSU had a special relationship with Wagner or that it had assumed a duty to protect him more than any of its other patients.

{¶ 60} Wagner also stated that, in 2004, his meeting with Schulte and Dr. Howie was the only time he saw Schulte outside of his normal visits to the pain clinic. This testimony does not suggest that the relationship went beyond that of physician-patient.

{¶ 61} According to Wagner, when he went to the OSU pain clinic in November 2004 and learned that Schulte was not there, his treating physician, Dr. Guttman, explained to him that she was there to take Schulte's place, and she did not know "anything about" where Schulte was. In his statement to the police, Wagner claimed he was told, when he visited the clinic in the fall of 2004, that Schulte had been off for three months. These statements are arguably distinguishable from the ones at issue in *Douglass*, which gave the impression of a positive review of the problematic employee and did not suggest any break in the employment relationship.

{¶ 62} Based on this evidence, the court of claims could have reasonably concluded that OSU had done nothing to affirmatively suggest to Wagner that Schulte

was still at the hospital and had not misled Wagner as to Schulte's status. Although OSU was not proactive in informing Wagner that Schulte had left his employment with OSU or the reasons for his leaving, the record does not establish that OSU had a duty to do so or that it is required for medical groups, hospitals, or clinics to routinely inform patients of changes in personnel or to offer explanations for such changes.

{¶ 63} Moreover, Wagner acknowledged in his statement to the police that, in the fall of 2004, Schulte had been significantly impaired at the time of their meeting with Dr. Howie; he stated that he (Wagner) had been reluctant to advocate for Schulte that day in light of his condition. Wagner also admitted that he had known that OSU had doubts about renewing Schulte's employment contract because Schulte had asked Wagner, who had worked in labor relations, to look at some paperwork from OSU. Based on these encounters and Wagner's admission that, in November 2004, he knew Schulte had not been working for three months, the court might also have concluded that Wagner had actual notice of the change in Schulte's status by November 2004. We note, however, that the court did not expressly state such a finding.

{¶ 64} The court of claims' decision that no special relationship existed "such that OSU assumed a duty to protect Wagner, above all other patients, from a crime" that occurred at the patient's residence several months after he had been placed on leave was not against the manifest weight of the evidence. If such a duty existed, it arose from the foreseeability of the risk or injury, not the nature of the relationship.

{¶ 65} The third assignment of error is overruled.

{¶ 66} Wagner's fourth assignment of error states:

> THE TRIAL COURT'S DECISION FINDING DR SCHULTE'S ACTIONS WERE NOT FORESEEABLE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 67} The court of claims concluded that "[t]he circumstances that existed on or about November 12, 2004, when OSU elected to retain Dr. Schulte in his position as a faculty member would not have caused a reasonable person in Dr. Howie's or Dr. Severyn's position to anticipate the harm Dr. Schulte would subsequently inflict upon

Wagner in his home." Wagner contends that the court of claims' decision that his injury was not foreseeable was against the manifest weight of the evidence.

{¶ 68} As a preliminary matter, there can be little dispute that, by the summer and fall of 2004, OSU knew or strongly suspected that Schulte's substance abuse had resumed. They were aware of his history, of a positive drug test in the spring of 2004, and of multiple instances that raised serious questions about his sobriety. The record contains numerous documented incidents of strange behavior or missing drugs reported by nurses or concerned patients, and Schulte's supervisor himself acknowledged multiple instances in which he had intervened, taken over treatment of a patient, ejected Schulte from a procedure, or sent him home. These facts are not disputed. It is unclear what actions, if any, OSU was taking to address this problem prior to the most serious incident of Schulte's ejection from a procedure in September 2004 and his positive drug test that same month.

{¶ 69} Schulte's supervisors at OSU testified that, after he had been placed on administrative leave in September 2004, he had no access to pain patients; thus, they did not believe that his retention of his faculty position posed a risk to patients. Their failure to terminate his faculty position seems to have been rooted in their desire to avoid a "bureaucratic process" and to allow Schulte's family to retain medical benefits.

{¶ 70} Based on the testimony of numerous witnesses, OSU pain clinic nurses and doctors never visited pain clinic patients at their homes. Although medications were prescribed by pain clinic doctors, medications were delivered by home health care nurses employed by separate agencies. Both Wagner and Schulte's father, Tom, had longstanding relationships with particular home health nurses, who generally visited every 60 days to check and refill their pumps; both home health nurses and clinic nurses testified that this relationship was typical. Under these circumstances, the court of claims' conclusion that Schulte's retention of his faculty position, standing alone, did not make the injury to Wagner foreseeable, even when coupled with the supervisors' reasons to suspect that Schulte was abusing drugs, was not against the manifest weight of the evidence.

{¶ 71} Wagner argues, however, that once OSU learned, on January 3, 2005, of Schulte's theft of medication from his father's pain pump, the risk to other patients was apparent, and OSU had a duty to warn other patients. On the other hand, OSU contends that the risk to pain clinic patients (other than Schulte's father) was not apparent until they learned of Schulte's theft of drugs from the pump of patient Jesse P. on January 21, 2005. This distinction is critical because Schulte withdrew medication from Wagner's pump on January 12, 2005.

{¶ 72} OSU became aware of Schulte's removal of medication from his father's pain pump when home health nurse Cindy Workman reported her concerns to Dr. Severyn. Schulte was living with his father at that time; his mother (Tom's wife) had died a few months earlier. According to Dr. Howie, Tom Schulte was experiencing dementia and had been diagnosed with terminal cancer, and Schulte was his father's primary caregiver. It is unclear whether Schulte's dementia created any doubt about his account of the events related to his pump, but the health care professionals – Workman, Dr. Severyn, and Dr. Howie – seem to have readily accepted Tom's report that Schulte had interfered with the proper functioning of his pump. According to Dr. Severyn, Dr. Howie was "shocked" by Schulte's behavior toward his father.

{¶ 73} The court of claims concluded that, under the circumstances presented, the danger to other patients was not foreseeable to OSU even after OSU became aware of Schulte's actions with respect to his father's pain pump. The court observed that, by that time, Schulte's medical license had been suspended and he had no contact with patients through OSU. The court credited the doctors' testimony that it never occurred to them that Schulte would contact other patients at their homes, that they believed patients knew OSU doctors would not visit them at their homes, and that theft of drugs from elderly parents by drug-addicted children was a commonly-recognized form of abuse. The court also noted Dr. Severyn's testimony, after the fact, that because OSU's suspicions about Schulte's conduct had not been investigated by the proper authorities as of January 4 (when the matter was reported to ODJFS), a warning letter would not have been appropriate at that time. Based on these factors, the court concluded that

Wagner's injury had not been foreseeable to OSU until it learned of the first victimization of a patient by Schulte in the patient's home, which occurred on January 21, after Wagner's injury.

{¶ 74} It is well recognized in the medical community that a primary characteristic of addiction is relapse and that an addict will often demonstrate compulsive or impulsive and almost incomprehensible behavior to satisfy his or her dependence. Thus, we attach less than great weight to the "shock" expressed (albeit in good faith) by the doctors at OSU in response to the discovery of Schulte's actions toward his father. We also recognize, however, that one's actions toward a family member in the privacy of one's home are not necessarily reliable indicators of how one will act toward others.

{¶ 75} The evidence of Schulte's abuse of his father could be viewed in various ways: some might view it as evidence that others patients were at risk, and others might view it as an opportunistic crime that would only occur within a family. As such, the court of claims could have reasonably concluded, based on the evidence presented, that the risk posed by Schulte to pain clinic patients was not apparent to OSU, even after Schulte's actions toward his father came to light. OSU did report Schulte's abuse of his father to authorities, but, in light of the information available to OSU at that time, the court of claims could have reasonably found that the doctors believed that the pain clinic patients were not at risk. Schulte's actions clearly fell outside the normal procedures used by OSU and its pain pump patients, and, at the time of his crime, he acted without a medical license and under the threat of additional penalties from the Medical Board. Thus, the court of claims could have reasonably concluded that OSU had no basis to anticipate them. The court's conclusion was not against the manifest weight of the evidence.

{¶ 76} The fourth assignment of error is overruled.

{¶ 77} Wagner's fifth assignment of error states:

> THE TRIAL COURT'S DECISION WHICH DID NOT FIND OSU NEGLIGENT FOR RETAINING DR. SCHULTE AFTER

JANUARY 3, 2005, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 78} Wagner contends that he established all the elements of a negligent retention claim. He claims that OSU was negligent in retaining Schulte as an employee when it knew of his "actions and drug seeking behavior," both after November 12, when his license was suspended, and after January 3, 2005, when it learned of his criminal misconduct against Tom Schulte.

{¶ 79} Wagner relies, in part, on *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 742 (10th Dist.1996), which sets forth the elements of a claim for negligent retention: "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries." Wagner acknowledges, however, that in order for a duty to arise in a negligent retention case, the plaintiff must prove both an employment relationship and the foreseeability of the injury. We have already discussed the court of claims' conclusion that Wagner's injury was not foreseeable and found that this conclusion was not against the manifest weight of the evidence. This conclusion on the issue of foreseeability was fatal to his negligent retention claim.

{¶ 80} Further, the court of claims acted reasonably in finding that the existence of the traditional elements of negligent retention were not established, as Wagner claims. OSU took action in response to its knowledge of Schulte's "incompetence" (i.e., addiction), insulating its patients from the risk of harm by removing Schulte from all aspects of patient care. Although Schulte remained on faculty, he did not have any teaching responsibilities after September 2004. Given these restrictions, there was a question of fact as to whether, in keeping Schulte, at least nominally on its faculty, OSU had breached any duty to Wagner or had proximately caused any injury to him. The court of claims concluded that it had not.

{¶ 81} Wagner argues that OSU's position that Schulte had no duties after September 2004 was refuted by evidence of Schulte's own belief that he did have duties, at least as a researcher. But, "[u]nder an apparent authority analysis, the acts of the principal, rather than the agent, must be examined. * * * For the principal to be liable, the principal's acts must be found to have clothed the agent with apparent authority." *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 56, citing *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 576-77 (1991). And the injured party's belief that the alleged agent acted with the apparent authority of the principal must be a reasonable one. *Young v. Internatl. Bhd. of Locomotive Engineers*, 114 Ohio App.3d 499 (8th Dist.1996); *Dickenson v. Charter Oaks Tree & Landscaping Co., Inc.*, 10th Dist. No. 02AP-981, 2003-Ohio-2055, ¶ 29-30. Schulte's alleged "belief" that he was authorized to do research was not controlling.

{¶ 82} Schulte's requests to conduct research in 2004 and January 2005, to which Dr. Howie did not respond directly, did not constitute credible evidence that Schulte had, in fact, been authorized to do research. Dr. Howie was unequivocal in his testimony that he had no intention of approving Schulte to conduct research, and the court of claims found this testimony to be credible. Evidence was also presented about the stringent requirements for approval of human research studies, Schulte's active drug abuse, and the fact that Schulte did not have a medical license. There was no evidence whatsoever that Schulte had been approved to conduct Substance P research in 2004 or 2005, when he discussed such research with Wagner and approached Wagner and another OSU patient about tapping their spinal fluid. No one at OSU had talked with Wagner about such research, other than Schulte.

{¶ 83} Evidence was presented that Schulte had previously been approved as a "potential co-investigator" in research on steroid and local anesthetics for shoulder and neck pain, but this status did not permit him to see patients without the approval of the principal investigator, Dr. Constantine Benedetti; Dr. Benedetti never gave Schulte such approval. Moreover, the court of claims found that this project never proceeded to human trials.

{¶ 84} The court of claims' conclusion that OSU had taken reasonable steps, as Schulte's employer, to end his access to patients and their drugs after it became aware of his drug use and after his license was suspended, thus, to protect its patients, was not against the manifest weight of the evidence. Its conclusion that OSU did not know that Schulte was talking with patients about Substance P research also was not against the manifest weight of the evidence.

{¶ 85} The fifth assignment of error is overruled.

{¶ 86} Wagner's sixth assignment of error states:

> THE TRIAL COURT'S DECISION FINDING OSU DID NOT CLOTHED [SIC] SCHULTE WITH THE APPARENT AUTHORITY TO CONDUCT RESEARCH WAS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 87} Wagner asserts that, by retaining Schulte as a faculty member, OSU clothed him in apparent authority to act as he did, i.e., to conduct research, because OSU holds itself out to the public as a leading research center and because he retained an identification badge and computer access after his employment at the pain clinic was terminated.

{¶ 88} Wagner has cited no authority for the proposition that OSU's promotion of itself as a research facility clothed every employee, or even every doctor, with the apparent authority to conduct research on patients, particularly when the "research" was conducted in a patient's home. With the facts before the court of claims, such a sweeping interpretation of apparent authority is untenable.

{¶ 89} Schulte himself represented to Wagner that he was, at various points, interested in and authorized to conduct research; no one else at OSU made these representations to Wagner. The court of claims could have reasonably concluded that OSU had not "clothed" Schulte with apparent authority to conduct research simply by keeping him on faculty, although Schulte may have fostered such an impression himself.

{¶ 90} Schulte's alleged retention of an identification badge and computer access is more troublesome, as it might reasonably be construed to indicate continued

employment, if not research credentials, at OSU. However, Wagner made inconsistent statements as to whether Schulte had an identification badge when he came to Wagner's house; Wagner asserted at trial that Schulte was wearing a badge on January 12, but in his deposition he stated that he "[did]n't believe so." OSU did not present any evidence about whether Schulte retained an identification badge. Wagner also stated that he had agreed to participate in the research before Schulte arrived at his home and, thus, before he saw that Schulte still had an identification badge (if, in fact, he did). It was for the court of claims to weigh the credibility of Wagner's conflicting statements about Schulte having an OSU badge on January 12, 2005, and whether the badge, if any, affected Wagner's decision to cooperate with Schulte.

{¶ 91} If Schulte did, in fact, retain any access to OSU's computer system, Wagner did not present evidence that he knew about or relied on that access in allowing Schulte to treat him; there is no evidence that Schulte used a computer to commit the crime or to obtain information he did not otherwise possess about Wagner. Thus, there was no basis to conclude that Schulte's computer access, if any, played a role in the commission of his crimes against Wagner.

{¶ 92} A home health nurse testified that Schulte possessed a pump interrogator, a device used to program and measure the amount of medication in a pump, but she understood that he obtained the device from another doctor or his prior employment. There is no evidence that OSU knew Schulte had such a device, authorized Schulte to keep such a device after his termination, or that the device in his possession belonged to OSU.

{¶ 93} Moreover, Schulte's claim to Wagner that he had been approved to conduct Substance P research came *after* Wagner knew that Schulte was no longer working at the pain clinic, was having problems with his employment and/or obtaining malpractice insurance, and had been observed by Wagner to be impaired at a meeting with his supervisor; the statement was made simultaneously with Schulte's admission to Wagner that Schulte was having "mental problems." The court of claims could have

reasonably concluded that, given what he knew about Schulte by that time, Wagner's belief that Schulte acted with the support and approval of OSU was unreasonable.

{¶ 94} Finally, Wagner argues that OSU should have warned its patients about Schulte, to dispel any apparent authority that he had. This argument ignores the court of claims' conclusion that Schulte did not act with the apparent authority of OSU; OSU cannot be required to dispel an alleged appearance of authority which it had not created and of which it was unaware.

{¶ 95} The court of claims' conclusion that Schulte did not act with the apparent authority of OSU when he entered Wagner's home and withdrew medication from his pump was not against the manifest weight of the evidence.

{¶ 96} The sixth assignment of error is overruled.

{¶ 97} Wagner's seventh assignment of error states:

> THE TRIAL COURT ERRED IN FAILING TO ADOPT RESTATEMENT OF AGENCY SECTION 219(2)(d) FOR PURPOSES OF THIS CASE AND NOT FINDING OSU LIABLE TO WAGNER PURSUANT TO THAT SECTION.

{¶ 98} Wagner argues that we should apply Restatement of the Law 2d, Agency, Section 219(2)(d) (1958) to the facts of this case, thereby imposing liability on OSU for the act of its employee, Schulte.

{¶ 99} Section 219(2) provides:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

{¶ 100} The Supreme Court of Ohio has expressly declined to adopt Section 219(2)(d), noting that, by definition, the actions encompassed therein occur outside the scope of employment, and that it has not determined that an employer can be found liable for the acts of its employee committed outside the scope of employment. *Groob*. In *Groob*, the court was asked to determine, among other issues, if an employer can be held liable for the intentional act of an employee even if the "act does not facilitate or promote the employer's business," if the employee acted with apparent authority. *Id.* at ¶ 41. The court found this was not the law in Ohio and specifically held that, for an employer to be liable for a tortious act of its employee, the tort of the employee must be committed within the scope of employment. *Id.* "[M]erely being aided by [his] employment status is not enough." *Id.* at ¶ 58.

{¶ 101} Wagner urges us to "further extend" Section 219(2)(d), in cases involving the infliction of bodily harm, and to adopt a rule that, where such harm exists, the principal may be liable without benefitting from the agent's actions.

{¶ 102} As an intermediate appellate court, we are bound to follow the law as set forth by the Supreme Court, and we cannot make a determination that conflicts with a decision of the Supreme Court that has not been reversed or overruled. *State v. Rigsbee*, 174 Ohio App.3d 12, 2007-Ohio-6267, ¶ 43 (2d Dist.); *State v. Croskey*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶ 7.

{¶ 103} The seventh assignment of error is overruled.

{¶ 104} For all the foregoing reasons, the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

DONOVAN and HALL, JJ., concurs.

HALL, J., concurring:

{¶ 105} I agree with the reasoning of my colleagues on the dispositive issue. Under the circumstances of this case, the three-judge panel reasonably concluded that injury to the appellant was not foreseeable. Accordingly, we affirm.

{¶ 106} I write separately, however, to express my belief that the discussion, here and in *Wagner I*, about whether there was a "special relationship" between the appellant and Dr. Schulte, or with OSU, is unnecessary. A legal stranger has no duty to protect another from injury by a third party. But relationships, i.e., employer/employee, landlord/tenant, attorney/client or physician/patient, can support the existence of a duty if injury is foreseeable. The "special relationship" found in *Douglass v. Salem Community Hospital*, where the victim no longer was a patient of the hospital, was a substitute for the more traditional relationships that support a duty and was limited to the facts of that case. The relationship here that could have given rise to a legal duty, if there was a foreseeable risk of harm, is the medical provider/patient relationship.

{¶ 107} Moreover, calling the connection a "special relationship" does not enhance the scrutiny to be applied to make a foreseeability-of-harm determination. It only provides the basis to conclude that the parties are not legal strangers. In this case, it is not the relationship between the parties that is lacking. It is the foreseeability of injury.

FROELICH, DONOVAN, and HALL, JJ., of the Second Appellate District, sitting by assignment in the Tenth Appellate District.