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IN THE COURT OF CLAIMS OF OHIO

MATTHEW REIS, Admr., et al...

:

ORIGINAL

Plaintiffs

:

v.

:

Case No. 2010-10335

THE OHIO STATE UNIVERSITY
MEDICAL CENTER

:

Judge J. Clark

Defendant

:

DEFENDANT'S LEGAL MEMORANDUM IN SUPPORT OF IMMUNITY

I. INTRODUCTION

This medical negligence case was filed by the Estate of Michael McNew. It alleges that on September 15, 2009, Michael McNew received medical treatment from Dr. Syed Husain, a board certified colorectal surgeon employed by the defendant. The complaint alleges that Mr. McNew died at Riverside Hospital on September 18, 2009. Complaint, ¶¶ 10-17. Plaintiffs also filed an action against Dr. Husain in the Franklin County Court of Common Pleas, *McNew v. OSUP, Inc. et al.*, Case No. 10CVA-9-13096. A copy of that complaint is attached. Dr. Husain filed a motion to dismiss that claim based on his immunity. He now seeks immunity from this Court in accordance with the R.C. 2743.02(F)

II. SUMMARY OF THE FACTS

Dr. Husain joined the faculty at The Ohio State University College of Medicine in August 2008 after completing a fellowship in colorectal surgery at Brown University. He interviewed for the position at Ohio State with Dr. Scott Melvin, a professor in the

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Department of Surgery, and the division director of the division of gastrointestinal surgery. Dr. Husain's letter of offer sets forth his duties as a member of the faculty which includes teaching, research, and service. Dr. Melvin will testify that "service" includes clinical care of patients. Under the letter of offer Dr. Husain is required to practice through the "College Central Practice Group." Exhibit A, p. 1. The Board of Trustees has designated "Ohio State University Physicians, Inc." ("OSUP") as the "College Central Practice Group" for faculty of the College of Medicine.

Mr. McNew was referred to Dr. Husain for treatment of a painful hemorrhoid by Dr. Howard Rothbaum, his primary care physician. Dr. Husain saw Mr. McNew in the Colorectal Clinic at OSU East Hospital. Dr. Husain "evacuated" the thrombosed hemorrhoid, and gave Mr. McNew a prescription for pain medication. There is a short medical record to reflect this procedure. Dr. Husain will testify that the record contains his handwriting and the handwriting of a nurse. Because students and residents often are in the clinic as part of their training, Dr. Husain looked at other charts from that date, September 15, 2009, to see if there was handwriting of a student or resident made that day to see if a student or resident was actually present. He found a chart with handwriting from a student or resident in the chart of another patient. He does not recall if a student or resident was involved with Mr. McNew's care that day. After the procedure to relieve the hemorrhoid Mr. McNew and Dr. Husain spoke a number of times on the telephone. On September 18, 2009, Mr. McNew was taken to the hospital by ambulance. He had a rare form of blood malignancy and died that day, apparently of bleeding into his brain.

III. LAW AND ARGUMENT

A. For the purposes of personal immunity under R.C. 9.86, a state employed physician acts within the scope of his employment if the physician's actions are in furtherance of the interests of the state. *Theobald v. University of Cincinnati* (2006), 111 Ohio St. 3d 541.

The issue before the Court is whether Dr. Husain, a fulltime faculty member of The Ohio State University College of Medicine, is entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F). This Court has exclusive, original jurisdiction to make that determination. *See*, R.C. 2743.02(F); *Johns v. Univ. of Cincinnati Med. Assoc., Inc.* (2004), 101 Ohio St. 3d 234.

Pursuant to R.C. 9.86, an employee of the State of Ohio acting within the scope of his employment is granted personal immunity from civil liability. The statutory provision states in relevant part as follows:

“[N]o 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.” R.C. 9.86. 1

The court is required to go through a two-step process in addressing the issue of whether a physician has immunity. *See, e.g., Moore v. The Ohio State University Medical Center* (October 5, 2010), Ohio Court of Claims Case No. 2010-07067. The court must consider whether “the individual [was] a state employee, and if so, was the individual acting within the

¹ There is no allegation that Dr. Husain acted with malicious purpose, in bad faith, or in a wanton or reckless manner toward Mr. McNew.

scope of employment when the cause of action arose.” *Theobald v. University of Cincinnati* (2006), 111 Ohio St. 3d 541, at 543.

1. It is undisputed that Dr. Husain was an employee of The Ohio State University at the time he provided medical care to Michael McNew.

For the purposes of immunity, a state employee is defined in R.C. 109.36(A)(1) to include a “person who, at the time a cause of action against the person arises, is . . . employed by the state.”

It will be undisputed during the hearing that Dr. Husain was under contract with The Ohio State University the entire time he provided medical services to Mr. McNew. As reflected in the faculty appointment letter dated August 22, 2008, Dr. Husain was initially offered a faculty position as “Assistant Professor-Clinical, in the Department of Surgery at The Ohio State University.” Exhibit A, p. 1. It goes on to provide that “this is a full-time offer with 100 percent of your professional efforts being devoted to the Department of Surgery.” Exhibit A, p. 3.

Mr. McNew was a patient of The Ohio State University and Dr. Husain provided medical care to him pursuant to his faculty appointment. Since joining the staff at The Ohio State University, Dr. Husain has not had any medical practice outside of the OSU system. In fact, faculty members are not permitted to practice outside the OSU system without specific permission from the Dean of the College of Medicine and Dr. Husain never sought permission to do so.

2. Dr. Husain was acting within the scope of his employment with The Ohio State University College of Medicine in providing medical care to Michael McNew.

Unlike this case, many of the early immunity cases involved physicians who were on a university's faculty but provided care to patients through contracts with private practice plan corporations. The judiciary struggled with the issue of whether these providers enjoyed immunity in the treatment of private patients merely because they held a faculty position at a university medical center. *See, Theobald, supra*, 544-547. In those early cases, many decisions turned on billing procedures and other financial factors. *See, id.*

In light of the Theobald decision, however, courts should no longer struggle with the analysis. The Ohio Supreme Court explained that “[f]or the purposes of personal immunity under R.C. 9.86, a state employee acts within the scope of employment if the employee’s actions are ‘in furtherance of the interests of the state.’” *Theobald, supra*, at 544, quoting in part *Conley v. Shearer* (1992), 64 Ohio St. 3d 284, 287. The Theobald court explained that “the 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 the injury. Thus, proof of the content of the practitioner’s duties is critical.” *Theobald, supra*, at 546.

Dr. Robert Bornstein, Senior Associate Dean for Academic Affairs at The Ohio State University College of Medicine, will testify at the hearing. Dr. Bornstein’s responsibilities include faculty appointments, faculty promotions, and the development of faculty policies. Dr. Bornstein is familiar with the duties and responsibilities of the faculty including those

physicians within the Department of Surgery such as Dr. Husain. Dr. Bornstein will testify that a faculty member's responsibility of providing clinical services to patients is an integral part of the physician's faculty appointment to the College of Medicine. He will also identify a number of benefits the College of Medicine receives as a result of physicians providing clinical services to university patients.

As reflected in the testimony of Dr. Bornstein, the treatment of Mr. McNew by Dr. Husain furthered the interests of the state. Similar to teaching medical students and residents, a physician's clinical services are an integral part of the operation of an academic medical center such as The Ohio State University Medical Center. Providing those clinical services promotes the fundamental mission of the College of Medicine which is advancing medical knowledge. Payment for those clinical services generates much needed revenue to operate the College of Medicine.

The court will also have testimony from Dr. Scott Melvin, the division director of gastro-intestinal surgery and Dr. Husain "direct boss." He will testify that treatment of patients like Mr. McNew in the colorectal clinic is one of Dr. Husain's duties as member of the faculty. It was Dr. Melvin's assignment to Dr. Husain that he cover the clinic, and it was one of his anticipated duties when he took the position in the Department of Surgery. Only faculty surgeons in the division cover that clinic, and residents and students routinely rotate through the clinic as part of their educational experience. Participating in clinical care of patients like Mr. McNew is how physicians are trained to become surgeons.

The testimony of Dr. Bornstein and Dr. Melvin will provide this Court with the "proof of the content of the practitioner's duties" as required by *Theobald, supra*. Providing clinical

services to patients such as Mr. McNew was a part of Dr. Husain's duties as an employee of the state. In addition, providing those services was integral to The Ohio State University College of Medicine and a significant aspect of Dr. Husain's faculty responsibilities.

Dr. Husain will testify that he can not recall whether a medical student or resident was present during his examination and treatment of Mr. McNew. However, whether or not a medical student or resident was with Dr. Husain is not dispositive of the issue regarding immunity. *See, e.g., Yurkowski v. University of Cincinnati* 2008-Ohio-6483. The two-step analysis adopted by the Ohio Supreme Court in *Theobald* did not require proof of teaching in order for immunity to be found under R.C. 9.86. The Court merely required proof that the state employee was carrying out his or her faculty responsibilities at the time of the alleged negligent event. In the present case, there is ample proof that when Dr. Husain treated Mr. McNew, he did so pursuant to his job responsibilities with the Department of Surgery and in furtherance of his university faculty responsibilities as set forth in his letter of offer.

Plaintiff may argue that Dr. Husain receives compensation from two entities in an attempt to claim that he was not acting within the scope of his employment with the College of Medicine at the time he provided medical care to her. Dr. Husain receives a portion of his salary from the College of Medicine and the remaining amount from OSU Physicians, Inc. which is oftentimes referred to as OSUP.

OSUP is an Ohio State University College Practice Plan that was formed at the request of the board of trustees of The Ohio State University. It is the practice group approved by the College of Medicine and the Board of Trustees. Dr. Bornstein will explain it is "essentially a billing and collection agency."

Dr. Husain's participation in the practice group is a requirement of his employment with The Ohio State University College of Medicine. *See*, Exhibit A ("Participation in the College Central Practice Group is a requirement of employment.") The practice group, through OSUP, bills patients for services rendered by faculty members. OSUP then pays a portion of the faculty member's salary.

Whether Dr. Husain receives a portion of his salary from OSUP is irrelevant under the *Theobald* standard. Once it is established that the health care provider was a state employee, the immunity issue turns on whether "the employee's actions are 'in furtherance of the interests of the state.'" *Theobald, supra*, at 544. In a recent case, this Court reached this precise result regarding a similarly situated faculty physician. *Decision, Allgood v. The Ohio State University Medical Center*, Case No. 2010-04394 (March 8, 2011)(copy attached).

IV. CONCLUSION

Dr. Husain's treatment of Mr. McNew was "an activity that [was] logically related to the business of the principal or employer," the Ohio State University College of Medicine. *See, Theobald, supra*, at 544. A faculty member's provision of medical services to university patients is vital to the College of Medicine. Those clinical services provide an important means to teach medical students and the revenue generated by those services guarantees the financial well being of the College of Medicine.

Therefore, Defendant respectfully requests a determination by this Court that Dr. Husain has civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).

Respectfully submitted,

MICHAEL DEWINE
Attorney General



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Columbus, Ohio 43215
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COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was sent by regular U.S. Mail,
postage prepaid, this 4th day of May, 2011, to:

David I. Shroyer
536 South High Street
Columbus, Ohio 43215
Attorney for Plaintiff



KARL W. SCHEDLER,
Assistant Attorney General

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Cyrelle McNew
99 Needham St. #1121
Newton, MA 02461

and

Matthew Rles as Administrator for the
Estate of Michael McNew, deceased
536 South High Street
Columbus, OH 43215

Plaintiffs,

vs.

Ohlo State University Physicians, Inc.
C/O Statutory Agent
Timothy P. Nagy
21 East State Street, Suite 1200
Columbus, OH 43215

and

Syed G. Husain, M.D
410 West 10th Avenue
Columbus, OH 43210

and

John Doe Physicians Numbers 1-5
Names and Addresses
Unknown to Plaintiffs

and

John Doe Corporations Numbers 1-5
Names and Addresses
Unknown to Plaintiffs

and

John Doe Employees Numbers 1-5
Names and Addresses
Unknown to Plaintiffs

and

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Case No.:

Judge

COMPLAINT

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John Doe Nurses Numbers 1-10 :
 Names and Addresses :
 Unknown to Plaintiffs :
 :
 Defendants. :

COMPLAINT

Now come Plaintiffs, by and through counsel, and for their causes of action state as follows:

PARTIES:

1. Until his death, Decedent Michael McNew was a resident of 6190 Avery Crossing Blvd., City of Dublin, County of Franklin, and State of Ohio.
2. At all times relevant herein, Plaintiff Cyrelle McNew was a resident of 6190 Avery Crossing Blvd., City of Dublin, County of Franklin, and State of Ohio.
3. At all times relevant herein, Plaintiff Matthew Rics was a resident of the State of Ohio.
4. At all times relevant herein, Defendant Ohio State University Physicians, Inc. was ~~a professional corporation organized and existing under the laws of the State of~~
 Ohio or some other state of the United States of America, or some foreign jurisdiction, and at all times relevant and material to this action employed physicians, nurses, and other personnel to evaluate, care for, and treat patients.
5. At all times relevant herein, the acts and omissions performed by employees, servants, or agents of Defendant Ohio State University Physicians, Inc. were within the scope of their express, implied, or apparent authority as agents of Defendant Ohio State University Physicians, Inc.

6. At all times relevant herein, Defendant Syed G. Husain, M.D. was a resident of the State of Ohio, duly licensed to practice medicine in the State of Ohio, and held himself out as a physician as he received and treated patients for consideration.
7. Plaintiffs state that at all times relevant herein, Defendants John Doe Physicians Numbers 1-5 were residents of Ohio, were duly licensed to practice medicine in the State of Ohio, held themselves out as physicians under the laws of the State of Ohio, or some other state of the United States of America or some foreign jurisdiction, and that said Defendants were conducting, and have regularly conducted, business in the State of Ohio.
8. The true names and capacities of Defendants John Doe Physicians Numbers 1-5 are unknown to Plaintiffs at this time, and Plaintiffs have, therefore, sued these unknown Defendants under said fictitious names. When the true names and capacities of said John Doe Defendants have been discovered, Plaintiffs will seek leave to amend this Complaint accordingly. Plaintiffs are informed and believe ~~that Defendants are legally responsible, negligent, or in some other actionable~~ manner, for the events and occurrences hereinafter described and that said Defendants proximately caused injuries and damages to Decedent.
9. Plaintiffs state that Defendant John Doe Corporations Numbers 1-5 are professional corporations, incorporated under the laws of the State of Ohio, which employed physicians, nurses, and other personnel to evaluate, care for, and treat patients of John Doe Corporations Numbers 1-5, including Decedent.
10. The true names and capacities of Defendants John Doe Corporations Numbers 1-5 are unknown to Plaintiffs at this time, and Plaintiffs have, therefore, sued these

unknown Defendants under said fictitious names. When the true names and capacity of said John Doe Corporations Numbers 1-5 have been discovered, Plaintiffs will seek leave to amend this Complaint accordingly. Plaintiffs are informed and believe that Defendants are legally responsible, negligent, or some other actionable manner, for the events and occurrences hereinafter described and that said Defendants proximately caused injuries and damages to Decedent.

11. The true names and capacities of Defendants John Doe Nurses Numbers 1-10 and/or Employees Numbers 1-5 are unknown to Plaintiffs at this time. Therefore, Plaintiffs have sued these unknown Defendants under said fictitious names. When the true names and capacities of said John Doe Nurses Numbers 1-10 and/or Employees Numbers 1-5 have been discovered, Plaintiffs will seek leave to amend this Complaint accordingly. Plaintiffs are informed and believe that Defendants are legally responsible, negligent, or in some other actionable manner, for the events and occurrences hereinafter described and that said Defendants proximately caused injuries and damages to the Decedent.

JURISDICTION AND VENUE:

12. Jurisdiction is conferred on this Court by Ohio Revised Code §2305.01.
13. Venue is proper in Franklin County, Ohio by virtue of Ohio Rules of Civil Procedure 3(B)(2), (3), and (6) since Franklin County is where Defendants have their principal places of business. Defendants conducted activity in Franklin County, Ohio that gave rise to Plaintiffs' claims for relief, and all or part of Plaintiffs' claims for relief arose in Franklin County, Ohio.

SERVICE OF PROCESS:

14. Service of Process is permitted upon the Defendants by virtue of Ohio Rule of Civil Procedure 4.2(F).

COMMON ALLEGATIONS:

15. At the beginning of August 2009 Decedent Michael McNew began to experience the following symptoms: nausea; diarrhea; sore throat; and fatigue.

16. Decedent presented to a doctor of internal medicine at Ohio State University Medical Center

17. On September 14, 2009 Decedent presented to OSU Internal Medicine at Stone Ridge with complaints of extreme rectal pain. Decedent was prescribed Tramadol and referred to Defendant Dr. Hussain.

18. The following day on September 15, 2009 Decedent presented to Defendant Dr. Hussain. Defendant made an incision in Decedent's hemorrhoid in order to drain it and prescribed Decedent Oxycodone.

~~19. During the evening of September 15, 2009, after his appointment with Defendant~~
Dr. Hussain, Decedent called Defendant complaining of a large amount of bleeding.

20. On September 16, 2009, Decedent spoke again to Defendant Dr. Hussain via phone and informed Defendant that he was continuing to have a lot of bleeding and that he noticed bruising on his arm. Defendant instructed Decedent to cease taking Tramadol but to continue taking Oxycodone.

21. On September 17, 2009 Decedent began having shortness of breath.

22. On September 18, 2009 Decedent called Defendant Dr. Hussain twice with complaints of severe pain. At approximately 2:30 pm Defendant returned Decedent's call and instructed Decedent to take more Oxycodone for the pain. Defendant reassured Decedent that his shortness of breath was not caused by the Oxycodone.
23. During the evening of September 18, 2009 Decedent lost consciousness and was taken via ambulance to Dublin Methodist Hospital.
24. After being transferred to Riverside Methodist Hospital, Michael McNew died on September 19, 2009.
25. Decedent's cause of death was a cerebral hemorrhage from thrombotic thrombocytopenia, which went undiagnosed until after his death.

PLAINTIFFS' FIRST CAUSE OF ACTION

[Medical Malpractice - All Defendants]

26. Plaintiffs incorporate the preceding paragraphs as if fully restated herein.
-
27. Defendant Ohio State University Physicians, Inc., by and through its employees and/or agents, fell below the accepted standards of care, skill, and diligence for healthcare providers in Ohio and other similar communities in the care and treatment of Decedent. Defendant's failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to: (1) failing to properly diagnose Decedent's thrombotic thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombotic thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate

Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

28. Defendant Ohio State University Physicians, Inc., by and through its employees and/or agents, breached its duty of reasonable care owed to Decedent and Defendant is liable for the negligent acts and/or omissions of its employees and/or agents. The care and treatment rendered to Decedent by employees, agents, and servants of Defendant fell below the accepted standards of care for physicians, nurses, and other personnel, and they breached their duties of care owed to Decedent.

29. Defendant Syed G. Husain, M.D. fell below the accepted standards of care, skill, and diligence for physicians and healthcare providers in Ohio and other similar communities in the care and treatment of Decedent. Defendant's failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to:

~~(1) failing to properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.~~

30. Defendants John Doe Physicians Numbers 1-5 fell below the accepted standards of care, skill, and diligence for physicians practicing medicine in Franklin County,

Ohio and other similar communities in the care and treatment of Decedent. Defendants John Doe Physicians' Numbers 1-5 failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to: (1) failing to properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

31. Defendants John Doe Nurses Numbers 1-10 fell below the accepted standards of care, skill, and diligence for nurses in Franklin County, Ohio and other similar communities in the care and treatment of Decedent. Defendants John Doe Nurses Numbers 1-10's failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to: (1) failing to properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

32. Defendants John Doe Employees Numbers 1-5 fell below the accepted standards of care, skill, and diligence for medical provider employees in Franklin County, Ohio and other similar communities in the care and treatment of Decedent. Defendants John Doe Employees Numbers 1-5's failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to: (1) failing to properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

33. Defendants John Doe Corporations Numbers 1-5, by and through its agents and employees, breached its duty of reasonable care owed to Decedent. Defendants ~~John Doe Corporations Numbers 1-5 are liable for the negligent acts and~~ omissions of its employees. The care and treatment rendered to Decedent by employees, agents, and servants of Defendants John Doe Corporations Numbers 1-5 fell below the accepted standards of care for physicians, nurses, and other personnel and breached their duties of care owed to Decedent as referenced above.

34. As a direct and proximate result of the failure of the Defendants to meet accepted standards of skill, care, and diligence, Decedent suffered severe physical pain, mental anguish, lost earning capacity, extreme emotional distress, loss of

enjoyment of life, and, ultimately, death. Decedent incurred medical expenses and care expenses. All such damages were permanent and lasted until his death.

PLAINTIFFS' SECOND CAUSE OF ACTION

[Respondent Superior – OSU Physicians, Inc. and John Doe Corps #1-5]

35. Plaintiffs incorporate the preceding paragraphs as if fully restated herein.
36. At all times relevant herein, Defendant Ohio State University Physicians, Inc. was owned and/or operated by John Doe Corporations Numbers 1-5.
37. At all times relevant herein, Defendants John Doe Physicians Numbers 1-5, John Doe Employees Numbers 1-5, and John Doe Nurses Numbers 1-10 were duly employed by and/or acting on behalf of their employer Defendants Ohio State University Physicians, Inc. and/or John Doe Corporations Numbers 1-5.
38. At all times relevant herein, Defendants John Doe Physicians Numbers 1-5, John Doe Employees Numbers 1-5, and John Doe Nurses Numbers 1-10 acted within the scope of their employment with Defendants Ohio State University Physicians, Inc. and/or John Doe Corporations Numbers 1-5 while providing services for Defendants.
-
39. By virtue of the doctrine of respondent superior, Defendants Ohio State University Physicians, Inc. and/or John Doe Corporations Numbers 1-5 are liable for Decedent's injuries and death.
40. By virtue of the doctrine of agency by estoppel, Defendants Ohio State University Physicians, Inc. and/or John Doe Corporations Numbers 1-5 are liable for Decedent's injuries and death.

PLAINTIFFS' THIRD CAUSE OF ACTION
[Loss of Consortium - All Defendants]

41. Plaintiffs incorporate all allegations contained in the preceding paragraphs as if fully rewritten herein.
42. At all times relevant herein, Plaintiff Cyrelle McNew was the wife of Decedent Michael McNew.
43. Plaintiffs states that, due to the negligence of Defendants, Plaintiffs and Decedent's next of kin sustained a loss of his society, companionship, services, attention, consortium, and care, and also sustained mental anguish, and incurred reasonable and necessary expenses, in connection with the treatment, care, and burial of Decedent, or otherwise.

PLAINTIFFS' FOURTH CAUSE OF ACTION
[Wrongful Death - All Defendants]

44. Plaintiffs incorporate the preceding paragraphs as if fully restated herein.
45. Defendant Ohio State University Physicians, Inc., by and through their employees and/or agents, fell below the accepted standards of care, skill, and diligence for health care providers in Ohio and other similar communities in the care and treatment of Decedent. Defendant and their physicians, nurses, and/or employees failed to meet the accepted standards of care, skill, and diligence including, but not limited to: (1) failing to properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new

complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

46. Defendant Ohio State University Physicians, Inc., by and through their employees and/or agents, breached their duty of reasonable care owed to Decedent and are liable for the negligent acts and omissions of their employees and/or agents.

47. Defendant Dr. Husain fell below the accepted standards of care, skill, and diligence for a physician practicing medicine in Franklin County, Ohio and other similar communities in the care and treatment of Decedent. Defendant Dr. Husain's failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to: (1) failing to properly diagnose Decedent's thromdotytotenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thromdotytotenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

48. Defendants John Doe Physicians Numbers 1-5 fell below the accepted standards of care, skill, and diligence for physicians practicing medicine in Franklin County, Ohio and other similar communities in the care and treatment of Decedent. Defendants John Doe Physicians Numbers 1-5's failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to: (1) failing to

properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

49. Defendants John Doe Nurses Numbers 1-10 fell below the accepted standards of care, skill, and diligence for nurses in Franklin County, Ohio and other similar communities in the care and treatment of Decedent. Defendants John Doe Nurses Numbers 1-10's failure to meet the accepted standards of care, skill, and diligence includes, but is not limited to: (1) failing to properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; ~~(4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breathe; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.~~

50. Defendants John Doe Employees Numbers 1-5 fell below the accepted standards of care, skill, and diligence for medical provider employees in Franklin County, Ohio and other similar communities in the care and treatment of Decedent. Defendants John Doe Employees Numbers 1-5's failure to meet the accepted

standards of care, skill, and diligence includes, but is not limited to: (1) failing to properly diagnose Decedent's thrombocytopenia; (2) failing to order the appropriate tests and procedures to diagnose Decedent's thrombocytopenia; (3) failing to initiate and execute the appropriate treatment plan for Decedent; (4) failing to order blood work during Decedent's August 30, 2009 physical; (5) failing to evaluate Decedent, or order blood work, based upon new complaints of bleeding, bruising, and shortness of breath; (6) failing to refer Decedent to an Emergency Room for evaluation; and/or (7) any other negligent acts.

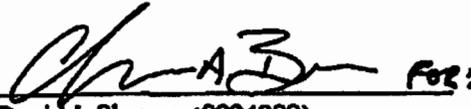
51. Defendants John Doe Corporations Numbers 1-5, by and through its agents and employees, breached its duty of reasonable care owed to Decedent and Defendants John Doe Corporations Numbers 1-5 are liable for the negligent acts and omissions of its employees. The care and treatment rendered to Decedent, by employees, agents and servants of Defendants John Doe Corporations Numbers 1-5 fell below the accepted standards of care for physicians, nurses and other ~~personnel and breached their duties of care owed to Decedent as referenced~~ above.

52. As a direct and proximate result of the failure of the Defendants to meet accepted standards of skill, care, and diligence, Decedent died wrongfully on September 19, 2009.

53. As a direct and proximate result of the failure of Defendants to discharge their duties of care owed to Decedent, and their failure to meet the accepted standards of care, skill, and diligence, Plaintiffs and Decedent's next of kin have suffered mental anguish, extreme emotional distress, lost earning capacity, loss of

enjoyment of life, and will continue to suffer indefinitely into the future. Additionally, Plaintiffs and Decedent's next of kin have incurred reasonable and necessary expenses in connection with the treatment, care, and burial of Decedent, or otherwise.

WHEREFORE, Plaintiffs demand judgment, jointly and severally, against the Defendants and in favor of the Plaintiffs, for compensatory, consequential, incidental, special, and medical damages in excess of Twenty-Five Thousand Dollars (\$25,000), together with attorney fees and costs herein.


David I. Shroyer (0024099)
COLLEY SHROYER & ABRAHAM CO., L.P.A.
536 South High Street
Columbus, Ohio 43215
614-228-6453
614-228-7122 (Facsimile)
Attorney for Plaintiffs

JURY DEMAND

Now come Plaintiffs and demands that the within matter be tried by a jury of eight (8).



David I. Shroyer (0024099)
Attorney for Plaintiffs

AFFIDAVIT OF MERIT

COUNTY OF DeKalb)
) SS.
STATE OF GEORGIA)

The Affiant, Kenneth Braunstein, M.D., being above the age of 18 and of sound mind,
after being duly sworn and cautioned, states that he has personal knowledge of the following:

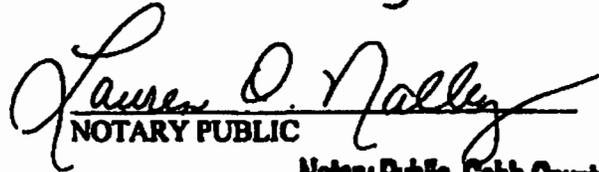
1. I am a medical doctor, specializing in internal medicine, licensed to practice medicine in the State of Georgia.
2. I have reviewed all the medical records of Michael McNew reasonably available to me concerning the allegations contained in the Complaint.
3. I am familiar with the applicable standard of care.
4. It is my opinion that treatment earlier in the day would, in all likelihood, have prevented the death of Michael McNew.
5. Affiant reserves the right to review any and all additional documentation that may become available in the future and to amend the opinions made herein.

Further affiant sayeth naught.



Kenneth M. Braunstein, M.D.

Sworn to before me and subscribed in my presence this 3RD day of Aug, 2010.


NOTARY PUBLIC

Notary Public, Cobb County, Georgia
My Commission Expires Jan. 30, 2013

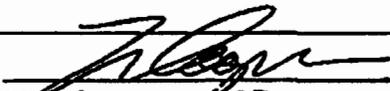
AFFIDAVIT OF MERIT

COUNTY OF FRANKLIN)
) SS.
STATE OF OHIO)

The Affiant, Dr. Marc Cooperman, being above the age of 18 and of sound mind, after being duly sworn and cautioned, states the he has personal knowledge of the following:

1. I am a medical doctor licensed to practice medicine in the State of Ohio, with a specialty in surgery.
2. I have reviewed all the medical records reasonably available to me concerning the allegations contained in the Complaint.
3. I am familiar with the applicable standard of care.
4. It is my opinion that the standard of care was breached by doctors and nurses at Ohio State University to the action and that the breach caused injury to Plaintiff, Michael McNew.

Further affiant sayeth naught.

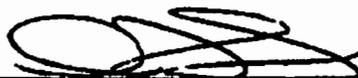


Marc Cooperman, M.D.

Sworn to before me and subscribed in my presence this 12 day of Sept, 2009.



DAVID I. SHROYER
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.



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2011 MAR -8 AM 11: 22

VERITA ALLGOOD

Plaintiff

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER

Defendant

Case No. 2010-04394

Judge Alan C. Travis

DECISION

On November 23, 2010, the court conducted an evidentiary hearing to determine whether David Hirsh, M.D. is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Upon review of the testimony and evidence presented at the hearing, the court makes the following determination.

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."

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DECISION

Plaintiff was a patient of Dr. Hirsh at The Ohio State University Medical Center (OSUMC) Havener Eye Institute from July 11, 2006 through October of 2008. According to plaintiff's complaint, Dr. Hirsh initially treated plaintiff for pseudotumor cerebri for which he prescribed Diamox until July 2007. Plaintiff asserts that she returned to Dr. Hirsh with recurring symptoms of pseudotumor cerebri in August of 2008, and was again prescribed Diamox. Plaintiff claims that on September 15, 2008, she underwent a lumbar puncture whereupon Dr. Hirsh increased her Diamox dosage. According to plaintiff's complaint, a second lumbar puncture was performed on October 28, 2008, after which plaintiff experienced decreased vision. She was thereupon admitted to OSUMC, where a shunt was installed. Plaintiff asserts that defendant failed to monitor her condition and failed to take action to prevent the progression of the pseudotumor cerebri, which led to blindness in her left eye.

On January 1, 2005, Dr. Hirsh became a Clinical Assistant Professor of Ophthalmology in the Department of Ophthalmology at The Ohio State University (OSU). (Defendant's Exhibit 2.) This was a 100 percent appointment to the auxiliary faculty. (Defendant's Exhibit 2.) On June 16, 2005, he was offered a full-time regular clinical faculty position as Assistant Professor-Clinical Ophthalmology, in the Department of Ophthalmology at OSU. (Defendant's Exhibit 3.) The full-time position became effective on July 1, 2005, for a five-year term. (Defendant's Exhibit 3.) Dr. Robert Bornstein, senior associate dean for academic affairs at OSU College of Medicine, testified that Dr. Hirsh still serves in this position.

As part of his OSU appointment, Dr. Hirsh is required to perform full-time clinical services at OSUMC and OSU East. (Defendant's Exhibit 3.) Dr. Hirsh testified that he presently sees patients at the Havener Eye Institute, the Havener Eye Institute's satellite office in Dublin, Ohio and at the Columbus Veterans' Administration Medical Clinic on Tuesdays.

Dr. Hirsh testified that he treated plaintiff at the Havener Eye Institute at its former location in Cramblett Hall and at the current location on Olentangy River Road. Dr. Hirsh

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DECISION

recalled seeing plaintiff at the current location after August of 2008. He explained that the Havener Eye Institute is a part of OSU and is an approved practice site of OSU. Dr. Hirsh testified that plaintiff was a patient of OSU.

Dr. Hirsh testified as to his duties as a member of OSU's full-time regular clinical faculty. He testified that, from 2005 through the present time, he has never been engaged in private practice outside of his faculty appointment at OSU. Dr. Hirsh's employment letter states, in part: "You should understand that this is a 100% FTE position with 100 percent of your professional efforts being devoted to the Department of Ophthalmology." (Defendant's Exhibit 3.) Further, Dr. Hirsh testified that Dr. Mauger, the chairman of the Department of Ophthalmology, directs Dr. Hirsh's practice and informs him of the locations where he is required to provide clinical care. Dr. Hirsh testified that no one outside of OSU directs his practice of medicine in any way.

As senior associate dean for academic affairs at OSU College of Medicine, Dr. Bornstein testified that he is familiar with the duties and responsibilities of the faculty at OSU College of Medicine. Dr. Bornstein stated that Dr. Hirsh was not permitted to maintain a private practice of medicine outside of OSU due to his position as a full-time clinical faculty member. Dr. Bornstein explained that faculty members cannot practice medicine outside of OSU unless they have explicit permission from the Dean. Dr. Bornstein reviewed Dr. Hirsh's personnel file; he testified that Dr. Hirsh has never requested permission to practice outside of OSU. He stated that OSU controls all of Dr. Hirsh's clinical and professional activities and that all of his billing to patients is provided through OSU's approved practice plan.

Dr. Hirsh's responsibilities, as set forth in his employment letter, state that he is to engage in full-time clinical services (Defendant's Exhibit 3), and that clinical activity is the primary employment responsibility of his faculty position. According to Dr. Bornstein, Dr. Hirsh's treatment of plaintiff was not a teaching activity, but it was a "practice activity." He stated that Dr. Hirsh's treatment of plaintiff was "unequivocally" part of his faculty duties

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DECISION

inasmuch as all of Dr. Hirsh's professional efforts had to be devoted to the Department of Ophthalmology at OSU.

Plaintiff argues that Dr. Hirsh is not immune from liability inasmuch as he was employed by OSU Physicians, Inc. (OSUP) and he cannot provide proof that a resident or medical student was present when he treated plaintiff. Dr. Hirsh testified that he considers himself an employee of OSU but that he also receives a paycheck from OSUP. Dr. Bornstein testified that Dr. Hirsh participated in the College Central Practice Group, as required by his letter of employment with OSU. (Defendant's Exhibit 3.) Dr. Bornstein stated that OSUP is the approved OSU College of Medicine Central Practice Group. He explained that OSUP is the billing and collections agency that was established by OSU to issue bills and collect fees for the clinical services rendered by OSU faculty physicians.

Whether a faculty physician was acting within his teaching capacity when treating a patient is relevant if the physician also maintains a private practice. See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208. Based upon the evidence presented at the immunity hearing, the court finds that Dr. Hirsh does not maintain a private practice of medicine. The court further finds that plaintiff was a patient of OSU; that Dr. Hirsh is a full-time clinical faculty member of OSU; that OSU controlled 100 percent of Dr. Hirsh's clinical activities; that Dr. Hirsh is not permitted to maintain a private practice; and that OSUP is the "business arm" that collects fees for services rendered by the faculty physicians of OSU. Inasmuch as no evidence was presented at the evidentiary hearing suggesting that Dr. Hirsh maintains a private practice, the court finds that Dr. Hirsh is immune from any civil liability resulting from his treatment of plaintiff.

Based upon the totality of the evidence presented, the court finds that Dr. Hirsh acted within the scope of his employment with defendant at all times relevant hereto. The court further finds that Dr. Hirsh did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, Dr. Hirsh is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas

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DECISION

do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.



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VERITA ALLGOOD

Plaintiff

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER

Defendant

Case No. 2010-04394

Judge Alan C. Travis

JUDGMENT ENTRY

The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that David Hirsh, M.D. is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that 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.

ALAN C. TRAVIS
Judge

cc:

David I. Shroyer
536 South High Street
Columbus, Ohio 43215

Jeffrey L. Maloon
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

JSO/cmd

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