

IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al...

Plaintiffs

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER

Defendant

ORIGINAL

Case No. 2010-10335

Judge J. Clark

FILED
COURT OF CLAIMS
OF OHIO
2011 JUN -6 PM 3:10

**DEFENDANT'S POST HEARING BRIEF REGARDING
IMMUNITY OF SYED HUSAIN, M.D.**

I. INTRODUCTION

This medical negligence case was filed by the Estate of Michael McNew. Plaintiff 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 the complaint in that case is attached to the pre-hearing immunity brief filed May 4, 2011. Dr. Husain filed a motion to dismiss that claim based on his immunity. Ultimately, Judge Hogan granted the motion, but rather than dismiss the case it was stayed pending the outcome of this Court's immunity determination. A copy of Judge Hogan's order is attached hereto. On May 5, this Court conducted an immunity determination hearing regarding the

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claimed immunity status of Dr. Husain under R.C. 9.86. Following the hearing the Court requested that the parties file briefs on the issue of immunity.

II. SUMMARY OF THE EVIDENCE

The evidence showed that that Dr. Husain joined the faculty at The Ohio State University College of Medicine in September 2008 after completing fellowships in colorectal surgery at Brown University and the University of Rochester. He interviewed for the position at Ohio State with Dr. Scott Melvin, a professor in the Department of Surgery, and the division director of the division of gastrointestinal surgery. Following the interview, Dr. Melvin offered Dr. Husain a position as “Assistant Professor-Clinical, in the Department of Surgery at The Ohio State University.” This offer of employment was extended in a letter dated August 22, 2008, and was identified by Dr. Robert Bornstein, the Vice Dean of the College of Medicine, as a “Letter of Offer.” Bornstein, Hrg. Tr., p.71; Exhibit A, p. 1. When Dr. Husain interviewed for the position he was instructed that his clinical practice was to be conducted in accordance with the plan developed by the University Board of Trustees, and that the revenues from clinical practice would be handled by the College Central Practice Group. This is also outlined in the letter of offer. Exhibit A, p.1. Prior to starting at Ohio State, Dr. Husain also signed a contract with Ohio State Physicians, Inc. (OSUP). Exhibit B.

Dr. Husain’s letter of offer, Exhibit A, p. 2, sets forth his duties as a member of the faculty which include teaching, research, and service. Dr. Melvin testified that “service” is a term of art in academic medicine that includes clinical service taking care of patients. Deposition of Dr. W. Scott Melvin, pp. 41-42. Dr. Bronstein also testified to that effect.

Bornstein, Hrg. Tr., p. 74. Under the letter of offer, Dr. Husain is required to practice through the "College Central Practice Group." Specifically, the Letter of Offer provides: "Participation in the College Central Practice Group is a requirement of Employment." Exhibit A, p. 1. Dr. Bronstein testified that a faculty physician in the clinical track in the Department of Surgery, like Dr. Husain, can not perform his duties as such without clinical practice, involving taking care of patients at the medical center. Unless a faculty physician has been assigned to practice through OSUP it is not possible to practice at the medical center. Bornstein, Hrg. Tr., pp. 84-85. There is no other practice option open to members of the faculty of the College of Medicine, and in fact, practice in any other fashion is prohibited. Bornstein, Hrg. Tr. pp. 84-85. Indeed, the Letter of Offer expressly provides 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 (emphasis added).

In a 2002 Resolution of the Ohio State University Board of Trustees, the Board established a "Practice Plan" that specifically recognized that "the provision of patient care services by the regular and auxiliary faculty through the [College Central Practice Group] CCPG is an essential and critical part of their employment at OSU." Exhibit D, p. 1. The resolution also provides that "[a]s a condition of employment, all regular ... faculty ... will be required to join and remain members of the CCPG." Exhibit D, p. 5. Both Dr. Melvin, who is Dr. Husain's division director in the Department of Surgery and his "immediate boss," as well as Dr. Bornstein, testified that 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. Melvin Deposition, pp. 11-12; Bornstein, Hrg. Tr., pp. 81-82.

In addition to the Letter of Offer, Dr. Husain's contract with OSUP was admitted into evidence as Exhibit B. The express terms of that contract include the following provision: "compensation paid hereunder is approved by the Senior Vice president for Health Sciences. Services performed and compensation received by Employee under this Agreement are specifically recognized as being in fulfillment of obligations which are part of a concurrent faculty appointment and employment by [The Ohio State University College of Medicine and Public Health] COMPH." (Emphasis added.) It also states that "OSUP hereby employs employee to render professional medical services . . . pursuant to the practice plan ... under the authority of the Board of Trustees." Exhibit D, p. 1.

The specific physician-patient encounter giving rise to the plaintiff's claim is documented in a brief medical note dated September 15, 2009. Husain, Hrg. Tr. pp. 18-20; Exhibit C. Mr. McNew was referred to Dr. Husain for treatment of a painful hemorrhoid by Dr. Howard Rothbaum, his primary care physician. Dr. Rothbaum was also an OSU faculty physician. Husain, Hrg. Tr. p. 19. 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. Dr. Husain testified that the record contained his handwriting and the handwriting of a nurse. He could not recall if a student or resident was present in the clinic on that day. However, he testified that generally a student or resident is present about 60-70% of the time, and that when there present they would ordinarily observe a minor procedure such as the one performed by Husain in this case. Husain, Hrg. Tr. pp. 21-23.

Because students and residents often are in the clinic as part of their training, Dr.

Husain looked at another chart 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 was not able testify with certainty that a student or resident was involved with Mr. McNew's care that day. Husain, Hrg. Tr. pp. 21-23. After the procedure Mr. McNew and Dr. Husain spoke a number of times on the telephone. Husain, Hrg. Tr. pp. 20-21. 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.

Dr. Husain specifically testified that he was assigned to cover the colorectal clinic at OSU East on September 15, 2009, by virtue of his status as a faculty physician. He testified that he saw Mr. McNew as part of his responsibilities a member of the medical school faculty. This would be the case even if he was not teaching a student or resident on that specific day. Husain, Hrg. Tr., pp. 25-26.

As a member of the faculty Dr. Husain reported directly to Dr. W. Scott Melvin, the division director of gastro-intestinal surgery in the Department of Surgery. Melvin Deposition, pp. 6-8. Dr. Melvin testified that he assigned his faculty to cover the colorectal clinic at OSU East, and that coverage of the clinic, and taking care of patients referred to that clinic, were faculty responsibilities of the faculty physicians in his division. He testified that all of the physicians who covered that clinic in September 2009 were full time faculty in his division, and a physician would not be permitted to cover that clinic unless he was a full time faculty physician. It was Dr. Melvin's testimony that a claim against Dr. Husain

that arose out of patient care at the colorectal clinic at OSU East in September 2009 is a claim that arose out of the performance of his duties as a member of the faculty in the College of Medicine. Melvin Deposition, pp. 12-13.

Dr. Robert Bornstein testified that by virtue of his position he is thoroughly familiar with the duties and responsibilities of the faculty in the Department of Surgery. Bornstein, Hrg. Tr., p. 70. He testified that the College of Medicine has an interest in assuring the clinical excellence of its faculty, and that faculty are expected to provide clinical service to patients and are evaluated on the quality of that service. Bornstein, Hrg. Tr., p. 78. He testified that a claim like this one, arising out of patient care in the OSU East colorectal clinic (including the follow-up telephone calls), is a claim arising out Dr. Husain's performance of his duties as a faculty surgeon, and that this was true whether or not a student or resident was actually present with him when he saw this particular patient in the clinic or when he talked to him on the telephone afterward. Bornstein, Hrg. Tr., pp. 87-91.

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), 2005-Ohio-1510, 111 Ohio St. 3d 541, ¶ 14.**

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.

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 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 is undisputed 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; Husain, Hrg. Tr., pp. 13-14. 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. Husain, Hrg. Tr., pp. 27-28.

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, ¶ 16-20. 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, ¶ 15 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, ¶ 22.

Dr. Robert Bornstein, Senior Associate Dean for Academic Affairs at The Ohio State University College of Medicine, testified at the hearing. Bornstein, Hrg. Tr., p. 66. Dr. Bornstein’s responsibilities include faculty appointments, faculty promotions, and the development of faculty policies. Bornstein, Hrg. Tr., p. 69. Dr. Bornstein is familiar with the duties and responsibilities of the faculty including those physicians within the Department of Surgery such as Dr. Husain. Bornstein, Hrg. Tr., p. 70. Dr. Bornstein testified that a faculty member’s responsibility of providing clinical services to patients is an essential part of the physician’s faculty appointment to the College of Medicine. Bornstein, Hrg. Tr., p. 74. He also identified a number of benefits the College of Medicine receives as a result of physicians providing clinical services to university patients, and that the prestige of the college is often built on the clinical excellence of the faculty. Bornstein, Hrg. Tr., p. 78-81.

While there is ample evidence to sustain a finding that a resident or student was present in the clinic on the day of Mr. McNew’s encounter with Dr. Husain, even if the court is not able to find that a student or resident was observing or participating in this specific procedure, the treatment of a patient like Mr. McNew is within the scope of Dr. Husain’s faculty duties. 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. Bornstein, Hrg. Tr., p. 74.

Dr. Scott Melvin, the division director of gastro-intestinal surgery, testified that Dr. Husain reports directly to him. Melvin Deposition, pp. 6-8. He testified that treatment of patients like Mr. McNew in the colorectal clinic is one of Dr. Husain's duties as a member of the faculty. Melvin Deposition, p. 13. 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. Melvin Deposition, p. 13. Only faculty surgeons in the division cover that clinic, and residents and students routinely rotate through the clinic as part of their educational experience. Melvin Deposition, pp. 8-9. Participating in clinical care of patients like Mr. McNew is how physicians are trained to become surgeons. 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. Melvin Deposition, pp. 13-14. Dr. Melvin assigned Dr. Husain and the other colorectal surgeons in the division to cover the clinic at OSU East and only faculty saw patients there. The clinic is an important facet of providing teaching opportunities for students and residents, and patients like Mr. McNew are part of the teaching patient population. Melvin Deposition, pp. 10-11, 30-31. Accordingly, Dr. Melvin testified that a claim against Dr. Husain arising out providing medical care to Mr. McNew at the colorectal clinic at OSU East in September 2009 is a claim arising out of the performance of his duties as a member of the faculty of the College of Medicine. Melvin Deposition, p. 12-13.

The testimony of Dr. Bornstein and Dr. Melvin provide to this Court 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. Melvin Deposition, p. 13. 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. Bornstein, Hrg. Tr., p. 74.

Dr. Husain testified that after he reviewed other patients’ notes, it appeared a medical student or resident was in the colorectal clinic that day, but he could not recall whether a medical student or resident was present during his examination and treatment of Mr. McNew. Husain, Hrg. Tr. pp. 21-23. 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* does 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. 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. Bornstein, Hrg. Tr., p. 82. It is the practice group approved by the College of Medicine and the Board of Trustees. Bornstein, Hrg. Tr., p. 82. Dr. Bornstein explained it is “essentially a billing and collection agency.” Bornstein, Hrg. Tr., p. 84. Dr. Husain’s participation in the practice group is a requirement of his employment with The Ohio State University College of Medicine. Exhibit A (“[p]articipation in the College Central Practice Group is a requirement of employment.”); Bornstein, Hrg. Tr., p. 84. The practice group, through OSUP, bills patients for services rendered by faculty members. OSUP then pays a portion of the faculty member’s salary. Bornstein, Hrg. Tr., p. 84.

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, ¶ 15. 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 is attached to the pre-hearing immunity brief filed May 4, 2011.).

IV. CONCLUSION

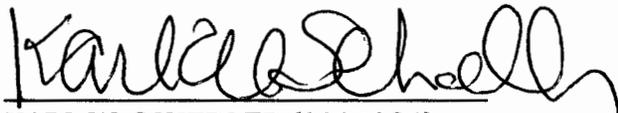
Dr. Husain’s treatment of Mr. McNew was “an activity that [was] logically related to the business of the principal or employer,” the Ohio State University College of Medicine. See *Theobald, supra*, at 544, ¶ 15. A faculty member’s provision of medical services to university patients is vital to the 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,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail, postage prepaid, this 6th day of June, 2011, to:

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2011 JAN 24 PM 12:08
CLERK OF COURTS

Cyrelle McNew, et al.,

Plaintiffs

v.

Case No. 10CVA-13096 (Hogan, J.)

Ohio State University Physicians, Inc., et al.,

Defendants

TERMINATION NO. 18
BY [Signature] 1-24-11

DECISION AND ENTRY PARTIALLY GRANTING
DEFENDANT'S MOTION TO DISMISS
FILED 11/10/10
AND
ORDER STAYING CASE

Defendant's 11/10/2010 Motion to Dismiss is PARTIALLY GRANTED. This Court finds that the Court of Claims has exclusive jurisdiction over the immunity and jurisdictional issues. However, it would seem better to stay the case at this time than dismiss it entirely. This case is STAYED pending determination of the immunity and jurisdictional issues by the Court of Claims.

[Signature] 1-21-11
DANIEL T. HOGAN, JUDGE

Copies to:

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Karl Schedler
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RECEIVED

JAN 25 2011

ATTORNEY GENERAL'S OFFICE
OFFICE OF PUBLIC DEFENSE