

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO

MATTHEW RIES, Admr., et al.,

Plaintiff,

vs.

THE OHIO STATE UNIVERSITY  
MEDICAL CENTER,

Defendant.

**ORIGINAL**

Case No. 2010-10335

Judge Joseph T. Clark

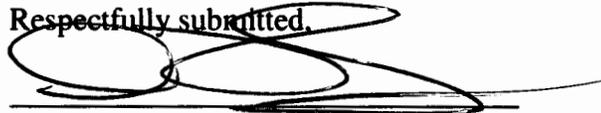
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FILED  
COURT OF CLAIMS  
OF OHIO

**PLAINTIFF'S POST-HEARING BRIEF ON THE ISSUE OF  
THE IMMUNITY OF SYED HUSAIN, M.D.**

Now comes Plaintiff in compliance with this Court's Entry of May 12, 2011, ordering the parties to file post-hearing briefs on the issue of state immunity for Syed Husain, M.D. Thus, Plaintiff respectfully files his Post-Hearing Brief on the issue of whether Syed Husain, M.D. is entitled to state immunity for his acts and omissions in connection with his treatment of Plaintiff's Decedent, Michael McNew. For the reasons set forth in the attached Memorandum, incorporated herein by reference, Dr. Husain does not meet the requirements for being a state actor, and therefore Defendant The Ohio State University Medical Center is not entitled to a finding that Dr. Husain has civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).

Respectfully submitted,

  
David I. Shroyer (0024099)  
**COLLEY, SHROYER & ABRAHAM CO., LPA**  
536 South High Street  
Columbus, Ohio 43215  
(614) 228-6453  
(614) 228-7122 (fax)  
Attorney for Plaintiff

**ON COMPUTER**

## MEMORANDUM

The issue before the court is whether Syed Husain, M.D. was acting as a state employee at the time he provided medical treatment to Plaintiff's Decedent, Michael McNew. The evidence has established that physicians who practice at the Ohio State University Medical Center ("OSUMC") are compensated and work for two different entities. One of these entities is the Ohio State University College of Medicine and Public Health ("COMPH") and the other is Ohio State University Physicians, Inc. ("OSUP"). Undisputedly, COMPH is a state entity, but OSUP is a private, non-profit company that operates independently of OSUMC, COMPH, and the State of Ohio. (OSUP Physician Employment Agreement, attached hereto as Exhibit 1.) Accordingly, membership in or affiliation with OSUP does not and should not be deemed to provide participants with the cloak of state immunity that covers state actors.

The details of Dr. Husain's employment are set forth in a contract ("medical college contract"), provided by Defendant OSUMC as Exhibit A to its Legal Memorandum in Support of Immunity. This five-page document outlines the participating physicians' employment duties and indicates a compensation of \$50,000.00. The COMPH contract sets forth specific activities involving teaching, research and service. The Court should interpret the contract solely based on the language in the contract, as witnesses' interpretations of that language were excluded at the evidentiary hearing.

The second contract under which Dr. Husain performed his duties was with OSUP ("OSUP contract"), a non-profit corporation that clearly is not a state agency. OSUP serves as an employer for physicians and is a practice group which does

everything that one would expect from a practice group: collecting fees for services rendered by the physicians it employs, setting salaries that are subject to change based on billing and expenses, and providing health insurance, malpractice insurance, life insurance, vacation pay, and sick pay. The OSUP contract supplies employment practice guidelines for physicians to follow, and further outlines disciplinary actions that may be imposed against noncompliant physicians up to and including termination of employment. Significantly, termination of employment is entirely controlled by OSUP, a separate, non-profit corporation. COMPH has no power to veto OSUP's firing of an OSUP physician. Thus, if OSUP terminates an OSUP physician, COMPH may retain the physician only as a classroom instructor, because the COMPH contract requires all clinical professors to be members of the OSUP.

The evidence also establishes that bonuses paid to physicians are at the discretion of OSUP and not controlled by COMPH. Dr. Robert Bornstein, OSUMC's witness on this issue, confirmed that some OSUP physicians make significantly more than Dr. Husain's admitted income of \$140,000.00. Plaintiff does not suggest that these physicians are not entitled to substantial compensation, rather, the point is that they are being paid these extra sums for valuable services they render on behalf of OSUP, not on behalf of OSUMC, COMPH, or the State of Ohio.

OSUMC's share of the physicians' compensation, by comparison, is a modest \$50,000.00. Obviously, this compensation not paid to physicians for caring for patients-- that money comes from the patients and their medical insurance, not from COMPH. COMPH is not subsidizing the revenue derived from billing patients.

Dr. Husain testified that he spends about 30% of his time performing duties outlined in his medical college contract. (Deposition of Syed Husain, M.D. at page 20.) It is probably not a coincidence that 30% of his overall salary is from COMPH, with the balance from OSUP (\$140,000.00 plus \$50,000.00 is \$190,000.00 and 30% of \$190,000.00 is \$60,000.00). Dr. Husain explained that his teaching slows him down, either resulting in his seeing fewer patients or in his working more hours. (Id. at pages 13-14.) According to Dr. Husain, the \$50,000.00 compensation from OSUMC corresponds to this additional time spent teaching, doing research, and serving on committees. (Id. at pages 15-18.)

No physician would agree to see and treat the number of patients that Dr. Husain does and put in the number of hours that he does for \$50,000.00 per year. He says he works 80 hours a week. (Id. at page 20.)

OSUMC's suggestion that its physicians work 80 hours a week for \$50,000.00 is simply not credible. The terms of the COMPH contract also clearly define what duties are expected for \$50,000.00. The contract does not call for treating patients for \$50,000.00, but does call for allowing students and interns to observe and learn while the physician earns the better portion of his income working for a non-state entity called OSUP.

The COMPH contract also requires physicians to conduct research, but nevertheless recognizes that some physicians, such as Dr. Husain, have a more limited research responsibility than would a tenure-track professor. For instance, if Dr. Husain were part of a research project or clinical study investigating a new device or procedure, such activity clearly would fall under the auspices of COMPH and immunity would

attach. Similarly, if he served on a committee engaged in supervising such research, his actions and decisions would constitute state action. But treating patients without teaching and without research simply is not contemplated by the COMPH contract, nor is there a credible argument that COMPH's share of his total income equates to his being a state actor during all of his activities.

The bottom line is that COMPH's focus is on teaching and research, while OSUP's focus is on providing medical care and collecting proper payment for such services. As such, while Dr. Husain may be entitled to state immunity while teaching and researching, he should not be accorded that benefit while caring for patients pursuant to his agreement with OSUP.

Support for this concept is found in *Theobald v. Univ. of Cincinnati* (2006), 111

Ohio St.3d 541, at paragraphs 22, 23:

“The court of appeals faulted that approach, stating that the financial factors ‘generally have little bearing upon whether a practitioner is acting within the scope of his employment.’ *Theobald*, 160 Ohio App. 3d 342, 2005 Ohio 1510, at paragraph 46. This is because, as the court of appeals explained, ‘[m]ost, if not all, Ohio state medical schools affiliate with separate corporations run and staffed by clinical faculty members to deal with the income generated from the clinical faculty members' practices. These corporations, or practice plans, employ the medical school clinical faculty and provide the majority of the clinical faculty members' salaries. Additionally, the practice plans are responsible for billing and collecting payments for the services the clinical faculty members provide as part of their practice of medicine.’ *Id.* at paragraph 36. This arrangement allows universities to attract and compensate highly qualified clinical instructors while the practice groups or corporations, in turn, financially contribute to maintain the medical departments within the university. *Id.* at paragraph 37.

We agree with the court of appeals. The financial factors may be relevant to the practitioner's status as a state employee; however, they do not necessarily establish whether he or she was within the scope of that employment at the time a cause of action arose. Instead, 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 an injury. Thus, proof of the content of the practitioner's duties is crucial. The Court of Claims must have evidence of those duties before it can be determined whether the actions allegedly causing a patient's injury were 'in furtherance of the interests of the state" or, in other words, within the scope of employment.'" (Emphasis added.)

Dr. Husain's duties as a state employee are to conduct research and teach. He was doing neither at the time he rendered care to Plaintiff's decedent, and therefore he is not entitled to the cloak of state immunity for his acts and omissions in treating decedent.

Additional guidelines for assessing Dr. Husain's status in this case may be derived from *Wayman v. Univ. of Cincinnati Medical Ctr.* (2000), 2000 Ohio App. LEXIS 2690, attached, a Tenth District case that was cited with favor by the Supreme Court in *Theobald*, supra. That case stated, in pertinent part:

"Beginning with *Katko v. Balcerzak* (1987), 41 Ohio App. 3d 375, this court has set significant precedent for assessing when a medical employee is acting outside the scope of his or her employment with the state. Thus, in *York v. Univ. of Cincinnati Med. Ctr.*, 1996 Ohio App. LEXIS 1682 (Apr. 23, 1996), Franklin App. No. 95API09-1117, this court determined that a physician who was chairman of the Department of Neurosurgery at the University of Cincinnati and also the Director of the Academic Division of Mayfield Neurological Institute, Inc., a privately owned professional association, was acting outside the scope of his employment when he rendered services to the plaintiff in that action. Factually, defendant there received compensation from the University of Cincinnati, but considerably more from his privately owned professional association. Moreover, that association paid his malpractice insurance, billed for the medical services rendered to the plaintiff at issue and received the compensation for those services. In particular, this court noted the University of Cincinnati received nothing for the medical services rendered to the plaintiff, evidencing the lack of an employment relationship with respect to those medical services.

Similarly, in *Balson v. The Ohio State Univ.* (1996), 112 Ohio App. 3d 33, the defendant doctor was employed as an associate professor at The Ohio State University, but also had a contract with the Department of Surgery Corporation as a physician in a division of that practice plan. The practice plan billed for the services rendered to plaintiff's decedent, the patient's insurance carrier made payment directly to the practice plan, and the practice plan provided the malpractice insurance for the defendant

doctor. In *Balson*, the court concluded that the defendant doctor was acting outside the scope of his employment with The Ohio State University.

Finally, in *Harrison* [(June 28, 1996), Franklin App. No. 96API01-81, 1996 Ohio App. LEXIS 2762], each department within the College of Medicine at the University of Cincinnati was required to have a practice plan filed and approved by the Dean of the College of Medicine. Each faculty member at the College of Medicine was required to be a member of a practice plan. The practice plans, however, were separate legal entities from the University of Cincinnati: the University of Cincinnati exercised no physical control over the plans, nor did the University of Cincinnati's operating budget include the private practice plans, even though the practice plans provided contributions to the University of Cincinnati. The physician in *Harrison* received a salary both from the university and from his practice plan, had two separate employment contracts, received two separate W-2's, and two sets of employee and retirement benefits. Applying the rationale of *Katko*, *York*, and *Balson*, the court in *Harrison* determined the doctor there was acting outside the scope of his employment with the University of Cincinnati.

From those cases, two major factors arise in determining whether a physician is acting outside the scope of his or her employment for a state university hospital: (1) whether the patient was the physician's private patient or a patient of the university, and (2) the university's financial gain from the treatment rendered compared to the physician's gain from it. *Norman, supra* [(1996), 116 Ohio App.3d 69].

Here, the Department of Obstetrics & Gynecology, to which Dr. McLain belonged, is part of UCMC, which in turn is part of the University of Cincinnati. Virtually all members of the Department of Obstetrics & Gynecology are also members of the practice plan, once called University OB/GYN Associates, Inc. and later called Foundation for Obstetrics and Gynecology.

While the Chairman of the Department of Obstetrics & Gynecology at UCMC reviews and determines the salary for the doctors in the practice plan, most of the monies generated from the physicians engaged in the clinical practice, as members of the practice plan, remain with the practice plan for distribution; only a small percentage of funds derived from the practice plan are directed to the Dean of the College of Medicine. The practice plan pays medical malpractice insurance premiums for its members, as well as telephone, rent, and electricity. As a member of the practice plan, Dr. McLain signed a separate contract with the practice plan, received a W-2 from the practice plan separate from UCMC, and had a retirement fund with the practice plan separate from that provided by UCMC."

The arrangements described in *Wayman* are virtually indistinguishable from Dr. Husain's arrangement with COMPH and OSUP. In *Wayman*, this Court concluded that the physician was outside the scope of his employment with the University of Cincinnati Medical Center at the time he rendered care to the plaintiff, and the Tenth District affirmed.

Defendant will try to distinguish *Wayman* on the basis that in that case the physician saw the plaintiff at a component office of the private plan, while here Dr. Husain saw decedent at OSU East. However, this is a distinction without a difference, given the financial arrangement that primarily compensated Dr. Husain through a separate legal entity, a private contract that governed virtually all of the terms of his employment, and the fact that Dr. Husain was neither engaged in research nor teaching at the time he treated decedent. In fact, the location at which the doctor-patient contact occurred was not relevant to the immunity determination in several of the above-cited cases, which instead focused on whether the patient was a private patient of the physician rather than a patient of the university, and the amount of financial gain, if any, benefiting the university versus the physician's private practice plan. *Norman v. The Ohio State Univ. Hosps.* (1996), 116 Ohio App.3d 69, 77.

Keeping in mind *Theobald's* enunciation of the test as being what the practitioner's duties are as a state employee and whether the practitioner was so engaged at the time of an injury, it is clear that in this instance Dr. Husain was not engaged in teaching, committee work, or research at the time he treated Plaintiff's decedent. Instead, he was solely acting as a private physician, and, in this capacity, was billing and receiving payment for his services. Defendant reads *Theobald* as holding that a physician

is a state actor any time he or she is furthering the interests of the state, yet this broad of a definition surely cannot be what the Court intended. By that standard, any physician treating an Ohio resident is “furthering the interests of the state” in having healthy citizens, but this does not make that physician a state actor. A similar position was rejected in *York*, supra, in which the university had argued that offering immunity to top physicians and having them on staff furthers an important public policy. Addressing this argument, the court in *York* noted that there were other key reasons for a university to want to provide immunity, including allowing professors to practice medicine for remuneration without violating state ethics laws prohibiting moonlighting, and so that faculty could compete with non-faculty physicians in the community. Clearly, there must be more to the analysis than simply whether the physician is furthering state interests at the time of rendering care.

Defendant also relies heavily on the testimony of Dr. Robert Bornstein, an OSU College of Medicine dean, and that of Dr. Scott Melvin, Dr. Husain’s supervisor, both of whom essentially assert that Dr. Husain’s job duties providing clinical care to patients is as much a part of his state employee duties as would be teaching or conducting research. Such testimony, while possibly relevant, does not resolve the legal and factual issues presented to this Court. *Harrison*, supra (while college of medicine dean might express his opinion that the physician was in the scope of his employment, that opinion is not determinative on the issue and not binding on the court.).

Dr. Husain’s contract with COMPH indicates that participating in OSUP is a requirement of employment, and also indicates that the physician must obtain approval by the self insurance committee of an application for malpractice coverage by the

University Self Insurance Program. It further indicates that this is a fulltime offer with 100% of the physician's professional efforts being devoted to the Department of Surgery, also known as OSU Surgery LLC. Certainly, this clause does not control whether Dr. Husain is a state actor since "the question of whether [a patient] is [a physician]'s private patient is a question of law and fact which must be determined by reference to the actual relationship between the parties" rather than unilaterally by the university "by internal regulatory fiat." *Norman*, supra at 78. The contract's only reference to compensation and benefits is that they are outlined in a separate letter from OSUP.

The OSUP contract equates the physician's clinical practice activities with the medical education program of COMPH. It indicates that compensation will be determined by OSUP, and that OSUP will be providing medical malpractice coverage through the University Self Insurance Program with approval of the university. The OSUP contract further states that OSUP will control the time and place of work, and gives OSUP the power to terminate employment for just cause. In a separate addendum, the contract indicates that the physician cannot engage in private practice except as an employee of OSUP assigned to OSU Surgery LLC, that the compensation through OSUP will be in the amount of \$140,000.00 along with bonuses, and further contains clauses relating to non-competition, benefits including death, disability and health insurance. It specifically states that the University Self Insurance Program will indemnify claims when the physician is in the scope of his employment. Again, the determination of when a physician is in the scope and whether, at any given time, he is a state actor, is a question for this Court and is--or should not be--resolved by contractual language.

It is well to ask why there are two separate contracts for physicians like Dr. Husain. From the contracts themselves, as well as the testimony of witnesses in this case, it is clear that OSUP was organized in order to give physicians the ability to control the terms of their employment; most particularly, the amount of their compensation. Because these items are controlled by the OSUP contract, a private contract that is not subject to the rules and control of COMPH and the State of Ohio, compensation is not dictated or controlled by the OSU Board of Trustees, by the State Comptroller, the General Assembly, or any other entity of the State of Ohio. The benefits of that arrangement are obvious: doctors are able to regulate and control their own income and other terms of employment rather than being subject to the state's legislative process and/or rulemaking authority. The benefit goes to the physicians, who get all the benefits of private practice, while at the same time avoiding the detrimental aspects of public employment.

Clearly, the position of Dr. Husain and OSUMC in this case is that he should be able to "have his cake and eat it too." They want both the benefits of private practice and the benefits of state immunity--and none of the detriments of either. There are many problems with letting them have that cake, but the most obvious one (and the one that Justice Pfeiffer noted in his dissent in *Theobald*, supra, at page 551) is that a finding that Dr. Husain is a state actor "effectively prohibits plaintiffs from asserting their fundamental constitutional right to a trial by jury" pursuant to Section 5, Article I of the Ohio Constitution.

For all of these reasons, Plaintiff respectfully requests a determination by this Court that Dr. Husain does not have civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).

Respectfully submitted,



David I. Shroyer (0024099)  
**COLLEY, SHROYER & ABRAHAM CO., LPA**  
536 South High Street  
Columbus, Ohio 43215  
(614) 228-6453  
(614) 228-7122 (fax)  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following counsel of record by regular U.S. Mail, postage prepaid, this 6<sup>th</sup> day of June, 2011:

Karl W. Schedler, Esq.  
Principal Attorney  
Office of the Ohio Attorney General  
Court of Claims Defense Section  
150 East Gay Street, Suite 1800  
Columbus, OH 43215  
*Attorney for Defendant*



David I. Shroyer (0024099)  
Attorney for Plaintiff



**Gloria Wayman, Plaintiff-Appellee, v. University of Cincinnati Medical Center, Defendant-Appellant.**

**No. 99AP-1055**

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY**

*2000 Ohio App. LEXIS 2690*

**June 22, 2000, Rendered**

**PRIOR HISTORY:** [\*1] APPEAL from the Ohio Court of Claims.

**DISPOSITION:** Affirmed.

**COUNSEL:** The Lawrence Firm, L.P.A., Roger N. Braden and Jennifer L. Lawrence, for appellee.

Betty D. Montgomery, Attorney General, and Susan M. Sullivan; Lindhorst & Dreidame, Michael F. Lyon and Brian M. Kneafsey, Jr., for appellant.

**JUDGES:** BRYANT, J., KENNEDY and LAZARUS, JJ., concur.

**OPINION BY:** BRYANT

**OPINION**

(ACCELERATED CALENDAR)

**BRYANT, J.**

Appellant, Clarence R. McLain, Jr., M.D., through defendant-appellant, University of Cincinnati Medical Center ("UCMC"), appeals from a judgment of the Ohio Court of Claims finding he was acting outside the scope of his employment with UCMC in rendering medical services to plaintiff-appellee, Gloria Wayman. Because the trial court properly determined Dr. McLain was acting outside the scope of his employment with UCMC, we affirm.

On September 25, 1997, plaintiff and her husband, Rel Wayman, filed a complaint in the Ohio Court of Claims against UCMC, contending Dr. McLain negli-

gently treated plaintiff by failing to adequately assess, diagnose, evaluate, and treat her.

The trial court ultimately held a hearing pursuant to *R.C. 2743.02(F)* to determine whether Dr. McLain [\*2] was acting within the scope of his employment with UCMC at the time he rendered care to plaintiff. To facilitate that determination, the parties stipulated that plaintiff's claims arise out of clinical care and treatment Dr. McLain provided during 1996, that the deposition of Dr. McLain properly could be considered by the trial court in determining the issue, that Dr. McLain's care and treatment of plaintiff occurred primarily at his office at his practice plan's Kenwood location, and that his Kenwood office is not located on the campus of the University of Cincinnati.

Following consideration of the submitted materials, the trial court issued a decision finding Dr. McLain was acting outside the scope of his employment with UCMC in treating plaintiff. Accordingly, the Court of Claims found Dr. McLain is not entitled to immunity under *R.C. 9.86*. Dr. McLain appeals, assigning the following errors:

I. THE COURT OF CLAIMS ERRED IN FAILING TO FOLLOW THE EXISTING CASE LAW WHICH HOLDS THAT A PHYSICIAN EMPLOYED AS A FACULTY MEMBER AS [sic] A STATE UNIVERSITY COLLEGE OF MEDICINE IS ENTITLED TO IMMUNITY FROM PERSONAL LIABILITY IN A MEDICAL NEGLIGENCE ACTION [\*3] WHEN THE PHYSICIAN'S INVOLVEMENT IN THE PATIENT'S CARE AND TREATMENT IS AS A FACULTY MEMBER TEACHING OR SUPERVISING RESIDENT PHYSICIANS.

II. THE COURT OF CLAIMS ERRED IN HOLDING THAT THE UNIVERSITY OF CINCINNATI DOES NOT HAVE THE LEGAL AUTHORITY TO DEFINE THE EMPLOYMENT DUTIES OF ITS MEDICAL SCHOOL FACULTY TO INCLUDE THE PROVISION OF PATIENT CARE SERVICES WITHIN A MEDICAL SCHOOL PRACTICE PLAN.

III. THE COURT OF CLAIMS ERRED IN HOLDING THAT DR. MCLAIN WAS NOT ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH THE UNIVERSITY OF CINCINNATI IN PERFORMING MEDICAL SERVICES WITH RESPECT TO PLAINTIFF/APPELLEE GLORIA WAYMAN BECAUSE A PROPER LEGAL INTERPRETATION OF THE DOCUMENTS DEFINING THE EMPLOYMENT CONTRACT ESTABLISHES OTHERWISE.

IV. THE COURT OF CLAIMS ERRED IN NOT LIMITING ITS DETERMINATION ON THE IMMUNITY OF DR. CLARENCE R. MCLAIN, JR. TO A REVIEW OF WHETHER THE CONDUCT ALLEGED IN THE COMPLAINT WAS MANIFESTLY OUTSIDE THE SCOPE OF DR. MCLAIN'S EMPLOYMENT DUTIES AS DEFINED BY THE UNIVERSITY OF CINCINNATI.

Preliminarily, although Dr. McLain was not a party to the proceedings in the Court of Claims, the court nonetheless permitted Dr. McLain to present evidence, to [\*4] argue the issue of immunity, and to participate as a party. Having participated in the proceedings from which this appeal is taken, Dr. McLain is entitled to participate in the appeal. *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App. 3d 69, 686 N.E.2d 1146.

Dr. McLain's four assigned errors are interrelated, and thus we address them jointly. Initially, Dr. McLain contends that because UCMC agreed he was acting within the scope of his employment at the time he rendered services to plaintiff, that determination resolves the immunity issue. While UCMC, through its representative, may have expressed an opinion concerning the scope of employment, that opinion is not determinative of the immunity issue, nor binding on the court. *Harrison v. Univ. of Cincinnati Hosp.*, 1996 Ohio App. LEXIS 2762 (June 28, 1996), Franklin App. No. 96API01-81, unreported. Accordingly, we review the facts to determine whether Dr. McLain was acting within the scope of his employment with UCMC in rendering services to plaintiff.

A state employee may be entitled to statutory immunity pursuant to R.C. 9.86 and 2743.02. Pursuant to R.C. 2743.02(F), the Court of Claims has exclusive [\*5] original jurisdiction to determine, initially, "whether the officer or employee is entitled to personal immunity un-

der Section 9.86 of the Revised Code." Thus, the question before the Court of Claims was not whether Dr. McLain was an employee of the state at the pertinent time, but rather whether he was acting outside the scope of his employment when he treated plaintiff.

Beginning with *Katko v. Balcerzak* (1987), 41 Ohio App. 3d 375, 536 N.E.2d 10, this court has set significant precedent for assessing when a medical employee is acting outside the scope of his or her employment with the state. Thus, in *York v. Univ. of Cincinnati Med. Ctr.*, 1996 Ohio App. LEXIS 1682 (Apr. 23, 1996), Franklin App. No. 95API09-1117, this court determined that a physician who was chairman of the Department of Neurosurgery at the University of Cincinnati and also the Director of the Academic Division of Mayfield Neurological Institute, Inc., a privately owned professional association, was acting outside the scope of his employment when he rendered services to the plaintiff in that action. Factually, defendant there received compensation from the University of Cincinnati, but considerably [\*6] more from his privately owned professional association. Moreover, that association paid his malpractice insurance, billed for the medical services rendered to the plaintiff at issue and received the compensation for those services. In particular, this court noted the University of Cincinnati received nothing for the medical services rendered to the plaintiff, evidencing the lack of an employment relationship with respect to those medical services.

Similarly, in *Balson v. The Ohio State Univ.*, 112 Ohio App. 3d 33, 677 N.E.2d 1216 (1996), the defendant doctor was employed as an associate professor at The Ohio State University, but also had a contract with the Department of Surgery Corporation as a physician in a division of that practice plan. The practice plan billed for the services rendered to plaintiff's decedent, the patient's insurance carrier made payment directly to the practice plan, and the practice plan provided the malpractice insurance for the defendant doctor. In *Balson*, the court concluded that the defendant doctor was acting outside the scope of his employment with The Ohio State University.

Finally, in *Harrison*, each department within the [\*7] College of Medicine at the University of Cincinnati was required to have a practice plan filed and approved by the Dean of the College of Medicine. Each faculty member at the College of Medicine was required to be a member of a practice plan. The practice plans, however, were separate legal entities from the University of Cincinnati: the University of Cincinnati exercised no physical control over the plans, nor did the University of Cincinnati's operating budget include the private practice plans, even though the practice plans provided contributions to the University of Cincinnati. The physician in

*Harrison* received a salary both from the university and from his practice plan, had two separate employment contracts, received two separate W-2's, and two sets of employee and retirement benefits. Applying the rationale of *Katko*, *York*, and *Balson*, the court in *Harrison* determined the doctor there was acting outside the scope of his employment with the University of Cincinnati.

From those cases, two major factors arise in determining whether a physician is acting outside the scope of his or her employment for a state university hospital: (1) whether the patient was the [\*8] physician's private patient or a patient of the university, and (2) the university's financial gain from the treatment rendered compared to the physician's gain from it. *Norman*, *supra*.

Here, the Department of Obstetrics & Gynecology, to which Dr. McLain belonged, is part of UCMC, which in turn is part of the University of Cincinnati. Virtually all members of the Department of Obstetrics & Gynecology are also members of the practice plan, once called University OB/GYN Associates, Inc. and later called Foundation for Obstetrics and Gynecology.

While the Chairman of the Department of Obstetrics & Gynecology at UCMC reviews and determines the salary for the doctors in the practice plan, most of the monies generated from the physicians engaged in the clinical practice, as members of the practice plan, remain with the practice plan for distribution; only a small percentage of funds derived from the practice plan are directed to the Dean of the College of Medicine. The practice plan pays medical malpractice insurance premiums for its members, as well as telephone, rent, and electricity. As a member of the practice plan, Dr. McLain signed a separate contract with the practice [\*9] plan, received a W-2 from the practice plan separate from UCMC, and had a retirement fund with the practice plan separate from that provided by UCMC.

Dr. McLain's private patients were seen pursuant to the practice plan frequently at the separate offices of the practice plan. By contrast, clinic patients usually came to the University Hospital Outpatient Department; they were not seen at the offices of the practice plan. Dr. McLain first saw plaintiff in 1983 at the practice plan's Madeira office; he later treated her pregnancy, briefly treated her for infertility thereafter, and generally saw her for gynecological care. Indeed, all care at issue in this lawsuit occurred in the practice plan component offices, not at the university hospitals. Dr. McLain admits plaintiff was a private patient of the practice plan; she was never a patient in the clinic. Moreover, the hospital did not bill for the services he provided in the practice plan, but instead the practice plan was responsible for both billing plaintiff and receiving the funds she paid.

Application of the two major factors from *Norman* indicates Dr. McLain was acting outside the scope of his employment in treating plaintiff. [\*10] Here, the separate practice plan both billed and received monies arising out of services rendered by members of the practice plan. In addition, plaintiff was never seen at UCMC, but was treated at the component offices of the private plan as a private patient. Moreover, other facts closely parallel those of *Harrison* and *York*. Dr. McLain's private practice through the practice plan required a separate contract and separate W-2, and it provided him separate malpractice insurance and retirement. Given the close factual similarity of this case with *York* and *Harrison*, the trial court did not err in finding Dr. McLain was acting outside the scope of his employment with UCMC in treating plaintiff as a private patient at the practice plan's offices.

Accordingly, the four assigned errors are overruled, and the judgment of the Ohio Court of Claims is affirmed.

*Judgment affirmed.*

KENNEDY and LAZARUS, JJ., concur.