

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO

MATTHEW RIES, Admr., et al.,

Plaintiff,

vs.

THE OHIO STATE UNIVERSITY  
MEDICAL CENTER,

Defendant.

Case No. 2010-10335

Judge Joseph T. Clark

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO  
2011 JUN 13 PM 3:50

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

Now comes Plaintiff and respectfully replies to the Post-Hearing Brief of Defendant The Ohio State University Medical Center on the issue of whether Plaintiff's Decedent's treating physician, 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. In the attached Memorandum Contra, incorporated herein by reference, Plaintiff reiterates that 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,



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## MEMORANDUM

In its Brief on this subject, Defendant The Ohio State University Medical Center (“OSUMC”) claims at page 9 that there is “ample evidence” that a medical student was present in the clinic on the day Dr Husain encountered Plaintiff’s Decedent. However, Plaintiff has established that there is absolutely no reference to a medical student involved in the care of the Decedent. There are no notations by a student, such as history taking. Dr. Husain does not remember the presence of a student. Further, it was stipulated that Decedent’s wife would testify that she did not see a student. Thus, rather than there being ample evidence a student was present, the greater weight of the evidence establishes the *absence* of any student. It is not surprising that OSUMC would make such argument as they understand the inherent weakness in other arguments as to why immunity should attach.

OSUMC also argues that Dr Husain saw Decedent as part of his responsibility under his contract with the medical school (“COMPH”). As Plaintiff noted in his Brief on this subject, the doctors who testified that Dr. Husain was a state actor and is entitled to state immunity are not qualified to give legal opinions--and Plaintiff has objected to such testimony on that ground. This case should be decided based upon the four corners of the written contracts and not upon self-serving testimony of the COMPH or Ohio State University Physicians (“OSUP”) staff members. Dr. Husain’s contract with COMPH does not state that the “professor” must provide medical services to patients. It states that the professor shall provide instruction to the students of COMPH. This instruction could be in the classroom far removed from the patients. It could also occur when demonstrating or teaching a student using a patient. The COMPH contract also calls for the professor to do research and to serve on committees. Certainly, a professor who negligently performs research would be covered by the cloak of immunity. Further, a professor

servicing on a committee would be entitled to immunity for acts undertaken in that capacity. If the professor is instructing a student, such actions of instruction are immune. The four corners of the COMPH contract does not require more from the physician than research, committee work, and teaching. The contract only pays \$50,000. OSUMC argues that the \$50,000 compensation also requires the physician to provide patient medical services that are *not* associated with teaching a student. This defies credibility. If the COMPH contract requires patient care without being associated with a student, then why is there any need for an OSUP contract?

The COMPH contract is to pay the doctor for the extra time associated with allowing a medical student to follow him around. The testimony established that there are a few extra minutes associated with allowing a medical student to observe or perform procedures. This extra time is part of the compensation. Time is money. As a result of a student tagging along, the physician will either see fewer patients and make less money, or have to spend more time at work. The \$50,000 contract recognizes this extra work and compensates for it.

The COMPH contract and the OSUP contract are completely exclusive of each other because they cover completely different responsibilities. For instance, the COMPH contract requires the physician to allow medical students to participate in or observe treatment tasks and learn from the physician. When this is occurring, the physician is fulfilling both the OSUP contract and the medical school contract. But when the medical student is absent from the picture, as was the case here, the physician is not serving as a professor, but solely as a physician. How can the physician be acting as a professor without a student? A professor cannot teach without a student. In this case there was no student. Dr Husain was not teaching anyone. There was no one there. OSUMC has to concede he was not acting a professor, so instead they argue he was acting to enhance the prestige of the medical school. There is no

evidence of this and it does not serve as a basis for being given immunity. As Plaintiff has argued extensively in his brief, this basis for immunity would expose the State of Ohio to undeserved liability. OSUMC states that the fundamental mission of COMPH is advancing medical knowledge. Advancement of medical knowledge was not part of the care rendered in this case.

OSUMC also claims that, based on Dr Bornstein's testimony, OSUP is essentially a billing and collection agency. Although Dr Bornstein apparently believes this to be the case, the obligations of both OSUP and the physicians it employs, is anything but a billing and collection agency. The contract sets salaries, vacation, 401K, and many other duties and benefits. The OSUP contract alone serves as the basis for a medical practice.

Why is there not just one contract? Why is there a separate corporation organized as OSUP? Why are the physicians not just like other state employees? Clearly, OSUMC and, by extension, the State of Ohio, could do away with OSUP and make everyone a state employee for all purposes, yet it did not do this. Instead the OSU Board of Trustees decided to contract and negotiate with an outside agency, OSUP, to provide medical services on campus in the facilities owned by the State of Ohio. The State of Ohio hired nurses and support personnel who are State employees. Why not the physicians? OSUMC has not provided an answer to these questions. It is, however, clear that there were negotiations between the physicians and the Board of Trustees. Most negotiations involve money or working conditions. The doctors wanted appropriate compensation and there is nothing wrong with that desire. The contract fixes the flow of money, and the physicians in OSUP then have the right to divide the pot.

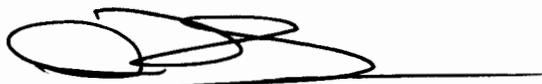
Moreover, the State of Ohio does not decide the salaries of the OSUP physicians. OSUP decides the salaries. The Governor and the General Assembly cannot intervene. Instead, the

State of Ohio is bound by a contract that allows a non-state agency to decide the hours, working conditions, and the pay of physicians engaged in practice on behalf of a private corporation that happens to operate on premises owned by the taxpayers. If the legislature wants to assume the costs of paying for the negligent care of OSUP physicians who are not instructing a medical student, then just a law should be passed granting such immunity. Why should the taxpayers of Ohio be stuck with the bill for substandard care? It is not enough that OSUMC simply wants to assume the financial responsibility. If this is a goal of the government of the State of Ohio, the law should clearly and specifically require OSUMC to assume such responsibility under these precise facts. It does not.

If this Court finds in favor of immunity, the effects would be far-reaching. Such a holding makes the taxpayers liable for damages for virtually every medical decision, deprives plaintiffs of their constitutional right to trial by jury, and imposes certain caps on damages that do not exist in common pleas court. A ruling that imposes this degree of hardship on the injured plaintiff and on the people of Ohio should be based on a reason much more worthy than those articulated by OSUMC in this case, such as promoting the prestige of The Ohio State University.

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,



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**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 13th day of June, 2011:

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