

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

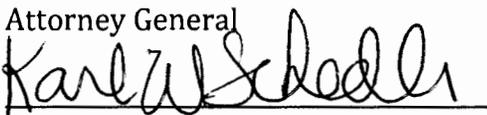
FILED
COURT OF CLAIMS
OF OHIO
2011 NOV - 1 PM 3:26

MATTHEW RIES, Admr., et al...	:	
	:	
Plaintiffs	:	
v.	:	Case No. 2010-10335
THE OHIO STATE UNIVERSITY	:	Judge J. Clark
MEDICAL CENTER	:	
	:	
Defendant	:	

DEFENDANT OSU'S MOTION FOR PROTECTIVE ORDER

In accordance with Rule 26(C) of the Ohio Rules of Civil Procedure, Defendant, the Ohio State University Medical Center moves this court for a protective order directing that OSU employee Syed Husain, M.D., not be deposed with regard issues other than his employment and his entitlement to statutory immunity under R.C. 9.86, until such time as this Court has made its immunity determination in accordance with R.C. 2743.02(F). The grounds for this motion are set forth in the memorandum in support attached hereto.

Respectfully submitted,

MICHAEL DEWINE
Attorney General

KARL W. SCHEDLER (0024224)
DANIEL R. FORSYTHE (0081391)
Assistant Attorneys General
Court of Claims Defense
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215
(614) 466-7447
COUNSEL FOR DEFENDANT

ON COMPUTER

MEMORANDUM IN SUPPORT

A. Introduction and Statement of Facts

This is a medical malpractice case brought by Matthew Reis, Administrator of 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. 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. On May 5, 2011, this Court conducted an immunity determination hearing regarding the claimed immunity status of Dr. Husain under R.C. 9.86. To date no decision has been forthcoming.

Plaintiff has already deposed Dr. Husain with regard to employment status. However, defendant has received a Notice of Deposition for Dr. Husain to appear at a deposition regarding the medical issues in this case on November 9. Defense counsel sent a letter to plaintiff's counsel on October 20, 2011, a copy of which is attached. Plaintiff's counsel has insisted on the opportunity to depose Dr. Husain on the medical issues of this case even though his status has not yet been determined.

To be clear, OSU does not oppose a deposition of Dr. Husain on the merits *after* the jurisdictional and representation issues have been determined. However, to require him to provide testimony about the merits of plaintiffs' claims *before* he knows whether or not

he is potentially facing personal liability, and before he know who will represent his interests with regard to those issues, is both premature and patently unfair.

B. Law and Argument

Civ. R. 26(C) allows a party to seek the protection of the court against discovery that would be oppressive or burdensome, and allows for limitations to be put on the topics and scope of discovery.

Rule 26. General provisions governing discovery

(C) Protective orders.

Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; . . . **(4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; . . .**

(emphasis added).

The issue of whether an individual is entitled to personal immunity under R.C. 9.86 is of obvious great importance to that individual as well as to the state entity that employs him. If Dr. Husain is immune because he was acting within the course and scope of his state employment when the alleged negligence occurred, then only defendant is liable for his actions, and he need not obtain private counsel because he is not a defendant to the Court of Claims case. Further, only the Court of Claims has jurisdiction over the lawsuit, and so discovery may proceed under the supervision of the Court of Claims. R.C. 2743.02(A) and 2743.02(F).

If, on the other hand, Dr. Husain is found *not* to be entitled to personal immunity, then the action proceeds against him in the common pleas court and his private assets are put at risk. As an individual defendant Dr. Husain would not be represented by the Attorney General's Office; rather, he have to retain private counsel. Finally, discovery would proceed under the rules and supervision of the common pleas court, not the Court of Claims.

Plaintiff actively disputes that Dr. Husain is entitled to immunity under R.C. 9.86. Because the question of immunity is a matter of subject matter jurisdiction between the common pleas court and the Court of Claims, and because it is unclear whether Dr. Husain will need to go to the expense of retaining private counsel to represent him individually, discovery on the merits of a plaintiff's claims has traditionally commenced only *after* the jurisdictional and representation issues are resolved.

This Court has previously held that discovery depositions of two OSU physician whose immunity was undecided should be limited exclusively to "whether or not they were acting within the course and scope of their employment with defendants at all times relevant to the care and treatment of plaintiff ... until the court has made a determination as to whether ... [they] are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86." *Dewiel v. Ohio State Medical Center*, Case No. 2010-11188, Entry, June 3, 2011, copy attached. That decision is a prudent and appropriate application of the Court's power under Civ. R. 26 to limit the scope of discovery.

Again, OSU will make Dr. Husain for deposition to permit full and fair discovery by the plaintiffs once there is a resolution of the immunity issue. Until then, however, it is

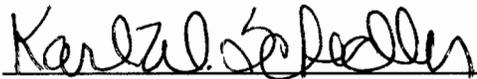
unclear which court will have jurisdiction over the merits of the case, and it is unclear as to whether Dr. Husain needs to hire private counsel to represent him. To proceed with a deposition on the merits of the plaintiff's medical claims under such circumstances would be oppressive and burdensome.

CONCLUSION

Therefore, OSU respectfully requests that this Court issue an order directing that OSU employee Syed Husain, M.D., not be deposed beyond the issue of his employment and his entitlement to statutory immunity under R.C. 9.86, until such time as this Court has made its immunity determination in accordance with R.C. 2743.02(F).

Respectfully submitted,

MICHAEL DEWINE
Attorney General

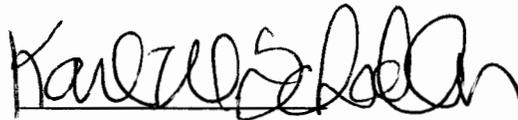


KARL W. SCHEDLER (0024224)
DANIEL R. FORSYTHE (0081391)
Assistant Attorneys General
Court of Claims Defense
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215
(614) 466-7447
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail, postage prepaid, this ¹⁵ day of November, 2011, to:

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


KARL W. SCHEDLER,
Assistant Attorney General



FILED
COURT OF CLAIMS
OF OHIO

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

2011 JUN -3 AM 11: 33

DAVID R. DEWIEL, et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER, et al.

Defendants

Case No. 2010-11188

Judge Alan C. Travis

ENTRY

On June 2, 2011, the court conducted a status conference with the parties. As a result of the conference, defendants' June 1, 2011 motion for a protective order is hereby GRANTED, such that Susie Chang, M.D. and Sunday Olatunji, M.D. shall be deposed only with regard to whether they were acting within the course and scope of their employment with defendants at all times relevant to the care and treatment of plaintiff, David Dewiel, until the court has made a determination as to whether Drs. Chang and Olatunji are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

ALAN C. TRAVIS
Judge

cc:

Anne B. Strait
Paula Luna Paoletti
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Michael L. Inscore
13 Park Avenue West, Suite 400
Mansfield, Ohio 44902-1741

AMR/cmd

JOURNALIZED

BA
NW



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Court of Claims Defense Section

Office 614-466-7447

Fax 614-644-9185

150 East Gay Street, Floor 18

Columbus, Ohio 43215

www.OhioAttorneyGeneral.gov

October 20, 2011

COPY

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

Re: *Matthew Ries, Admr., et al. v. OSUMC*
Court of Claims Case No. 2010-10335 and 2011-11246

Cyrelle McNew, et al. v. Ohio State University Physicians, et al.
Franklin County Court of Common Pleas Court Case No. 10CVA09-13096

Dear David:

I am in receipt of your letter dated October 14 which included notices with depositions of Dr. Husain and Dr. Rothbaum. As you are well aware, our office has consistently taken the position that until the immunity of faculty physicians has been decided any discovery depositions should be limited strictly to immunity related issues. In that regard, a motion will shortly be filed on behalf of Dr. Rothbaum seeking dismissal of the Common Pleas Court action based on the fact that he was a 100% full-time employee of the Ohio State University at the time of the incident alleged in the Complaint. However, until that issue has been finally decided and put to rest, it is not fair to subject him to a deposition on the substantive issues in the case because it may turn out that he is not entitled to immunity, and therefore would not be represented by our office. If you would be willing to stipulate that he is immune, then we can proceed to set a date for his deposition, although November 9 is not a date that is available at this time.

Presently I am scheduled to begin a trial on Monday, October 24. Once that trial is completed if we cannot work out some accommodation in regard to this I plan to file a Motion for Protective Order regarding the deposition of Dr. Rothbaum and Dr. Husain. As you know Dr. Husain's deposition on immunity issues has already been taken. We are awaiting a decision from the Court regarding his status. Once that decision has been rendered we will be in a position to make him available for deposition provided the Court of Claims rules that he is entitled to immunity. If that is not the case, then he will have to retain private counsel and you will need to deal with that individual in scheduling him for a discovery deposition on the medical aspects of the case.

Regardless, please be advised that we do not intend to produce Dr. Husain or Dr. Rothbaum for deposition on November 9, per your notice. Once the immunity issues have

David I. Shroyer
October 20, 2011
Page Two

been resolved we are prepared to move forward with discovery on the medical aspects of the case.

Very truly yours,

MICHAEL DEWINE
Ohio Attorney General



KARL W. SCHEDLER
Assistant Attorney General
(614) 466-7447
Karl.schedler@ohioattorneygeneral

KWS:iy

cc: Tim Tullis
Tracy McGuire
e-cc: Dan Malkoff

COLLEY

SHROYER

ABRAHAM

*A Professional
Association of
Trial Lawyers*

MICHAEL F. COLLEY

DAVID I. SHROYER

DANIEL N. ABRAHAM

ELENI A. DRAKATOS
ALSO LICENSED IN THE
DISTRICT OF COLUMBIA

ELIZABETH S. BURKETT
OF COUNSEL

HOSTER & HIGH BUILDING
536 SOUTH HIGH STREET
COLUMBUS, OHIO 43215-5674

614-228-6453
FAX 614-228-7122

FED ID# 31-0999302

WEB SITE: WWW.COLLEYSHROYERABRAHAM.COM

October 14, 2011

Karl Schedler, Esq.
Daniel R. Forsythe, Esq.
Assistant Attorney Generals
Court of Claims Defense Section
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215

Timothy T. Tullis, Esq.
Traci A. McGuire, Esq.
Kegler, Brown, Hill & Ritter
65 E. State Street, Suite 1800
Columbus, Ohio 43215

**Re: Matthew Ries, Admr., et al. v. The Ohio State University Medical Center
Court of Claims of Ohio Case No.: 2010-10335 & 2011-11246**
**Cyrelle McNew, et al v. Ohio State University Physicians, et al.
Franklin County Common Pleas Court Case No. 10 CVA09-13096**

Dear Counsel:

Enclosed please find a separate Notice of Deposition Duces Tecum setting the deposition of Dr. Husain for Wednesday, November 9th at 12:30 p.m., followed by the deposition of Dr. Rothbaum, M.D. at 3:00 p.m. Our office has scheduled Higgins & Associates as the court reporter.

Unfortunately, David did not know what else to do to try and get discovery moving again in this case. Obviously, please feel free to call him to discuss any concerns you might have.

Very truly yours,



Cheryl I. Botkin
Paralegal to David I. Shroyer

/clb/encl.

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO

MATTHEW RIES, Admr., et al.,

Plaintiff,

vs.

Case No. 2010-10335

Judge Joseph T. Clark

**THE OHIO STATE UNIVERSITY
MEDICAL CENTER,**

Defendant.

NOTICE OF DEPOSITION DUCES TECUM

Please take notice that Plaintiffs, by and through counsel, will take the deposition of Syed Husain, M.D. on Wednesday, November 9, 2011 beginning at 12:30 p.m., to be taken at The Ohio State University Medical Center, Meiling Hall, 370 W. 9th Avenue, Room 233, Columbus, OH 43210 or some other location mutually agreed upon by the parties. The deposition will be taken by an officer duly authorized to administer oaths, pursuant to Rule 30 of the Ohio Rules of Civil Procedure.

PLEASE TAKE FURTHER NOTICE that the deponent is required to produce the documents that were used to prepare him for said deposition, used for rendering opinions, all billing information relative to his care rendered to the decedent, or other documentation that will be offered into evidence at any subsequent trial or hearing, at the time of his deposition.

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 Plaintiffs

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 14th day of October, 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

Timothy T. Tullis, Esq.
Traci A. McGuire, Esq.
Kegler, Brown, Hill & Ritter
65 East State Street, Suite 1800
Columbus, OH 43215
*Courtesy Copy, Franklin County Common Pleas
Case No. 10CVA09-13096*



David I. Shroyer (0024099)
Attorney for Plaintiffs

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO

MATTHEW RIES, Admr., et al.,

Plaintiff,

vs.

Case No. 2011-11246

Judge Joseph T. Clark

**THE OHIO STATE UNIVERSITY
MEDICAL CENTER,**

Defendant.

NOTICE OF DEPOSITION DUCES TECUM

Please take notice that Plaintiff, by and through counsel, will take the deposition of Howard R. Rothbaum, M.D. on Wednesday, November 9, 2011 beginning at 3:00 p.m., to be taken at The Ohio State University Medical Center, Meiling Hall, 370 W. 9th Avenue, Room 233, Columbus, OH 43210 or some other location mutually agreed upon by the parties. The deposition will be taken by an officer duly authorized to administer oaths, pursuant to Rule 30 of the Ohio Rules of Civil Procedure.

PLEASE TAKE FURTHER NOTICE that the deponent is required to produce the documents that were used to prepare him for said deposition, used for rendering opinions, all billing information relative to his care rendered to the decedent, or other documentation that will be offered into evidence at any subsequent trial or hearing, at the time of his deposition.

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 14th day of October, 2011:

Office of the Ohio Attorney General
Court of Claims Defense Section
150 East Gay Street, Suite 1800
Columbus, OH 43215
Attorney for Defendant

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
Courtesy Copy

Timothy T. Tullis, Esq.
Traci A. McGuire, Esq.
Kegler, Brown, Hill & Ritter
65 East State Street, Suite 1800
Columbus, OH 43215
*Courtesy Copy, Franklin County Common Pleas
Case No. 11CVA09-11689*



David I. Shroyer (0024099)
Attorney for Plaintiff