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COURT OF APPEALS
FRANKLIN CO. OHIO
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
39 APR 19 2012
COURT OF CLAIMS OF OHIO

Matthew Ries, Admr. et al., :

Plaintiffs-Appellants, :

ORIGINAL

v. : No. 11AP-1004
(Ct. of Cl. No. 2010-10335)

The Ohio State University Medical Center, :

(REGULAR CALENDAR)

Defendant-Appellee. :

D E C I S I O N

Rendered on April 19, 2012

Colley Shroyer & Abraham, LPA, and *David I. Shroyer*, for appellants.

Michael DeWine, Attorney General, *Karl W. Schedler* and *Daniel R. Forsythe*, for appellee.

APPEAL from the Ohio Court of Claims

TYACK, J.

{¶ 1} The estate of Michael McNew is appealing from the decision of the Ohio Court of Claims which granted immunity to Syed Husain, M.D. The estate assigns a single error for our consideration:

> THE TRIAL COURT ERRED IN DETERMINING THAT SYED HUSAIN, M.D. WAS ACTING IN THE SCOPE OF HIS STATE EMPLOYMENT AND THEREFORE WAS ENTITLED TO CIVIL IMMUNITY FOR ACTS AND OMISSIONS THAT OCCURRED DURING HIS TREATMENT OF APPELLANT'S DECEDENT, MICHAEL MCNEW.

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{¶ 2} Certain facts are not in dispute. Dr. Husain was, at all pertinent times, an employee of The Ohio State University College of Medicine. Dr. Husain treated Michael McNew initially at The Ohio State University Medical Center East in the colorectal surgery clinic. He consulted with McNew after McNew left the hospital.

{¶ 3} McNew later lost consciousness and was transported to a different hospital, where he died from a cerebral hemorrhage.

{¶ 4} Physicians who work at The Ohio State University Medical Center ("OSUMC") have two employers, The Ohio State University College of Medicine and a private practice entity. In the case of Dr. Husain, the private practice entity is The Ohio State University Physicians ("OSUP"). Physicians who work at OSUMC are required to be a member of such a private practice entity.

{¶ 5} As with other physicians who are both professors at The Ohio State College of Medicine and practicing physicians, the duties of Dr. Husain sometimes overlapped. For instance, if Dr. Husain were treating a patient while being observed by a medical student or resident physician, he would be serving both of his employers at the same time. In such circumstances, a physician is considered to be a governmental employee and entitled to governmental immunity. See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208.

{¶ 6} Dr. Husain could not recall if a resident was present while he was treating McNew. The evidence before the Court of Claims was conflicting on the issue of the presence of a resident. Other medical records for patients seen at about the same time showed handwriting from a resident, but a family member of McNew was sure no one else was present when Dr. Husain drained McNew's hemorrhoid. The judge of the Court of Claims who addressed the immunity issue found that the evidence did not demonstrate Dr. Husain was teaching residents when he saw and treated McNew.

{¶ 7} The judge, however, granted immunity on a different basis. In the judge's words:

> Dr. Husain's duties as a state-employed faculty physician include teaching residents, and the evidence does not demonstrate that he was doing so when the alleged negligence occurred. However, the court finds that Dr. Husain was a full-

> time faculty physician who was required by defendant to provide clinical care, that his clinical activities were controlled by defendant, that he was required to devote all of his professional time and effort to the service of defendant, that OSUP functioned as the business arm of defendant, and that Dr. Husain did not maintain a private practice. Accordingly, the court concludes that Dr. Husain's duties of employment included providing clinical care and that he was engaged in such duties at the time of the alleged negligence.
>
> Therefore, the court finds that Dr. Husain was acting within the scope of his state employment at all times pertinent hereto. Consequently, Dr. Husain is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, 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.

{¶ 8} Counsel for the estate vigorously contests those findings, relying heavily upon counsel's interpretation of the employment contracts which were signed by Dr. Husain.

{¶ 9} The contracts set forth three major categories of duties for Dr. Husain, namely teaching, research and service. The evidence did not establish that Dr. Husain was teaching while treating McNew. The evidence also did not demonstrate that research was involved. The judge in the Court of Claims found that Dr. Husain's activity while treating McNew fit under the category of service.

{¶ 10} The letter regarding employment for Dr. Husain with the College of Medicine contained a section captioned "SERVICE." The section reads:

> We anticipate an evidence of commitment to the provision of service to the institution, the community, and the profession as reflected by completion of specialty board certification and maintenance of re-certification. Service will also be measured by evidence of a high level of clinical competence. It is anticipated that you will be an active participant in divisional, department, and college committee functions. It is also anticipated that you will hold office in local, regional, or national processional organizations.

{¶ 11} The letter is from OSUMC, so the "provision of service to the institution" phrase is a reference to provision of service to or for OSUMC. The sentence regarding service being measured by evidence of a high level of clinical compliance can only be a reference to patient care at OSUMC, since Dr. Husain was specifically barred from serving patients anywhere but OSUMC facilities.

{¶ 12} Under the circumstances, the judge of the Court of Claims who granted immunity to Dr. Husain was correct to find that part of Dr. Husain's employment with OSUMC and the College of Medicine was the rendering of patient care at facilities operated by OSUMC. The fact that Dr. Husain had responsibilities to OSUP and received payment from OSUP did not remove his responsibilities to OSUMC and the College of Medicine.

{¶ 13} Stated in more conventional terms, physicians with the employment contracts such as those provided to Dr. Husain wear two hats while treating patients. One hat says "OSUMC" and the other says "OSUP." Dr. Husain was wearing both while treating NcNew. Since one of the hats involved employment duties with a governmental entity, he was entitled to governmental immunity under R.C. 9.86 and R.C. 2743.02(F).

{¶ 14} The sole assignment of error is overruled and the finding of the Ohio Court of Claims with respect to immunity for Dr. Husain is affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.

THE STATE OF OHIO
Franklin County, ss
MARYELLEN O'SHAUGHNESSY, Clerk
OF THE COURT OF APPEALS
WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN
AND COPIED FROM THE ORIGINAL
NOW ON FILE IN MY OFFICE WITNESS MY HAND AND SEAL OF SAID
COUNTY THIS 27th DAY OF April A.D. 20 12
MARYELLEN O'SHAUGHNESSY Clerk
By Deputy