ORIGINAL

IN THE SUPREME COURT OF OHIO

Matthew Ries, Plaintiff-Appellant, v. The Ohio State University Medical Center, Defendant-Appellee.	Case No. 2012-0954 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

BRIEF OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT MATTHEW RIES

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APPELLANT'S PROPOSITION OF LAW

A physician whose State employment duties are education-related must be shown to be engaging in education-related activity at the time he allegedly renders negligent care in order to qualify for civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).

INTEREST OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE

For at least 25 years, State-run medical colleges in Ohio have sought ever broader interpretations of R.C. 9.86 so as to provide their medical faculty with immunity from tort liability arising from their practice of medicine. The medical colleges have complicated the work of this Court, the Tenth District Court of Appeals, and the Court of Claims by requiring medical faculty to be "dually employed" by both the State and by private corporations. The scope of R.C. 9.86 immunity has been growing, with the medical colleges persistently testing the limits of the statute and promoting the growing scope of immunity as a fringe benefit for full-time, part-time, and even occasional educators.

The scope of immunity seemed to have reached its zenith with *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, which the Tenth District Court of Appeals and the Court of Claims have interpreted as meaning that the mere presence of a medical student or resident qualifies a physician's treatment of a patient as falling within his State responsibilities as an educator and thus immune from liability.[1] The Ohio Association for Justice believes that this interpretation of *Theobald* is too generous and that this Court at some point should clarify that *Theobald* does not stand for the proposition that a health-care practitioner treating a private pa-

[1] *See Clevenger v. Univ. of Cincinnati College of Medicine*, 10th Dist. No. 09AP-585, 2010-Ohio-88, ¶ 9; *Meredith v. Ohio State Univ. Med. Ctr.*, Ct. Claims No. 2006-04946, 2007-Ohio-5145; *Chappelear v. Ohio State Univ. Med. Ctr.*, Ct. Claims No. 2008-02703, 2009-Ohio-7059, ¶ 21; *Engel v. Univ. of Toledo College of Medicine*, 184 Ohio App.3d 669, 2009-Ohio-3957 ¶¶ 5-6 (10th Dist.), reversed on other grounds, 130 Ohio St.3d 263, 2011-Ohio-3375.

tient in the practitioner's private practice is acting within the scope of his employment or official responsibilities with the State merely because a pupil is present.[2] But this case does not present an opportunity for such clarification. The lower-court decisions in this case expand the scope of R.C. 9.86 immunity beyond even the most liberal interpretation of *Theobald.* The OAJ recommends, in this case, that the Court merely hold the line at *Theobald* and not expand the scope of R.C. 9.86 immunity even further.

The OAJ is Ohio's largest victims-rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The Association is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable. The OAJ fears that the lower-court decisions in this case, if affirmed, would (1) reduce the motivation of individuals to conduct themselves as reasonable people should – with a healthy fear of being liable for their own negligence; (2) fuel a transfer of insurance risk away from the private insurance market and upon the State's taxpayers; and (3) further diminish the role of juries in Ohio's civil justice system.

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[2] The presence of a student, whose presence is immaterial to the care the patient is receiving, should not determine issues as consequential as immunity, insurance coverage, court jurisdiction, and the right to a jury trial (juries not being a feature of the Court of Claims). Yet the result of *Theobald* and its progeny, the anecdotal evidence indicates, is that dual-employment physicians, with the medical schools' encouragement, manufacture immunity by making it a point to practice in the presence of students and residents – not so much because of the educational benefit to the pupil than the immunity provided by the pupil's talismanic presence.

STATEMENT OF THE CASE AND FACTS

The Ohio Association for Justice accepts the Statement of the Case and the Statement of Facts in Appellant Ries's brief.

ARGUMENT

I. Standard of review.

The issue of personal immunity for State officers and employees under R.C. 9.86 is a question of law. The issue of whether an individual acted manifestly outside the scope of employment is a question of fact. *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14.

II. Dr. Husain was manifestly outside the scope of his State responsibilities.

A. Dr. Husain was manifestly outside the scope of his State responsibilities because he was not educating a student or resident when the alleged negligence occurred.

State officers and employees have qualified immunity from liability for their conduct within the scope of their "employment or official responsibilities." When the tortfeasor is immune, the plaintiff's only recourse is suing the State in the Court of Claims. The immunity is provided by R.C. 9.86, which reads:

> Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no 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, [1] unless the officer's or employee's actions were ***manifestly outside the scope of his employment or official responsibilities***, or [2] unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(Emphasis added.) R.C. 2743.02(F) uses the same language in limiting action to suit against the State in the Court of Claims:

> A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges [1] that the officer's or employee's conduct was ***manifestly outside the scope of the officer's or employee's employment or official responsibilities***, or [2] that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

(Emphasis added.)

In *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, this Court held that the practice of medicine is within the scope of the practitioner's teaching responsibilities if "the practitioner was in fact educating a student or resident when the alleged negligence occurred":

> [T]he 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. . . . .
>
> If there is evidence that the practitioner's duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred.

Theobald ¶¶ 23, 31.

In this case, it is undisputed that Dr. Husain was not educating a student or resident when the alleged negligence occurred. For that reason, Dr. Husain should not have immunity in this case.

The lower courts, however, concluded that Dr. Husain is immune because he is immune in ***every*** instance of his practicing medicine. The Court of Appeals and the Court of Claims each had a different reason for reaching this conclusion. Both are wrong.

B. The Court of Appeals's rationale: The contractual obligation to be highly competent.

The Court of Appeals concluded that the alleged malpractice occurred within the scope of Dr. Husain's State responsibilities because Dr. Husain's contract with the State required him to maintain a high level of clinical competence. The Court of Appeals relied upon a document the OSU College of Medicine sent Dr. Husain, which the court referred to alternatively as a "letter" and a "contract." The document 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.***

(Ct. App. Op. ¶ 7 (emphasis added).) The Court of Appeals ruled that this passage causes every instance of Dr. Husain's practicing medicine to fall within his State responsibilities.

The Court of Appeals is wrong for four sets of reasons.

1. This document does not create an obligation to maintain a high level of clinical competence. Indeed, the document does not create any obligation but rather only expresses an expectancy ("We anticipate an evidence of commitment . . . ."). Moreover, this passage does not even say that this expectancy includes a high level of clinical competence. This passage says that the State anticipates an evidence of commitment to the provision of service as reflected by two different factors: completion of specialty board certification and maintenance of re-certification. A high level of clinical competence is mentioned in a separate sentence – apparently not part of what is "anticipated" but instead as an additional "measure[]" of service.

2. Dr. Husain's State responsibilities were educating, researching, and providing medical services to patients. His "level of clinical competence" is a measure of the quality of his performance, not a separate, substantive obligation.

3. The Court of Appeals's rationale implicitly rejects the rule of *Theobald* that immunity with respect to medical college faculty be based upon a determination of "whether the practitioner was in fact educating a student or resident when the alleged negligence occurred," *Theobald* ¶ 31. The Court of Appeals's decision in this case is also inconsistent with two Court of Appeals cases that *Theobald* cited with approval, *Theobald* ¶¶ 28-29: *Johnson v. Univ. of Cincinnati,* 10th Dist. No. 04AP-926, 2005-Ohio-2203, and *Wayman v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. No. 99AP-1055, 2000 Ohio App. LEXIS 2690 (June 22, 2000). In *Johnson*, the physician was not immune even though

- the incident occurred at "a facility that faculty member physicians staffed,"
- "[a]t the facility, the physicians provided professional clinical services to patients and supervised medical students and residents who rotated through the family practice center,"
- "[t]he University owned the family practice center's building and land,"
- "a large sign in front of the building identified the facility as the "University of Cincinnati, Wyoming Family Practice Center,"
- the "identifying name also was printed on business cards and appointment cards for the family practice members," and
- the university "required . . . that faculty members maintain a clinical practice in order to provide a continuing patient base for training medical students and residents."

Johnson, 2005-Ohio-2203 at ¶¶ 2-3. In *Wayman*, the physician was not immune even though

- the university's department chairman "reviews and determines the salary for the doctors in the practice plan [the private corporation], and
- "a small percentage of funds derived from the practice plan are directed to the Dean of the College of Medicine."

Wayman, 2000 Ohio App. LEXIS 2690 at * 8.

4. Allowing State agencies to bestow R.C. 9.86 immunity by making "competence" an "official responsibility" would be poor public policy. To do so would give executive-branch of-

fices *carte blanche* to immunize employees for any private conduct that mirrors their State responsibilities. To do so would, for example:

- allow the State Department of Rehabilitation and Corrections to bestow immunity upon its physicians who work in State prisons for malpractice committed in their private practices by making "clinical competence" an "official responsibility;"
- allow the State Highway Patrol to bestow immunity upon its officers with respect to any operation of any automobile by making "high level of competence operating motor vehicles" an "official responsibility;" and
- allow State law schools to bestow immunity upon its professors for malpractice committed in their private practices by making "high level of clinical/practitioner competence" an "official responsibility."

Such a liberal construction of R.C. 9.86 immunity would have three deleterious effects: (1) It would reduce the motivation of individuals to conduct themselves as reasonable people should – with a healthy fear of being liable for their own negligence. (2) It would fuel a transfer of insurance risk away from the private insurance market and upon the State's taxpayers. (3) It would further diminish the role of juries in Ohio's civil justice system

This Court should reject the Court of Appeals's rationale for granting Dr. Husain immunity.

C. The Court of Claims's rationale: Dr. Husain did not have a private practice.

The Court of Claims had a different rationale for concluding that every instance of Dr. Husain's practicing medicine is within the scope of his State responsibilities. The Court of Claims's rationale does not so much evade *Theobald*'s dual employment framework as it does simply reject it. Dr. Husain derives most of his pay from, and has his medical practice adminstered by, a private corporation, Ohio State University Physicians, Inc. ("OSUP, Inc."). The Court of Claims nevertheless rejected the notion that Dr. Husain has any private practice:

> [T]he 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.

(Ct. Claims Op. 3, last paragraph (emphasis added).)

There are four problems with the Court of Claims's reasoning.

1. The conclusion that Dr. Husain was a "full-time faculty physician . . . required to devote all of his professional time and effort to the service of defendant" is contradicted by the fact that Dr. Husain had an employment contract to practice medicine for OSUP, Inc. (and for three times more money than he was paid by the State). If Dr. Husain and his colleagues were "full-time faculty physicians," corporations such as OSUP, Inc. would not exist.

2. If Dr. Husain's medical practice is "100 percent" within the scope of his official responsibilities as a State employee, then his acceptance of money from OSUP, Inc. for conducting that medical practice violates R.C. 2921.43. R.C. 2921.43 provides:

> (A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:
>
> > (1) Any compensation [exceptions omitted] to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation . . . .

(Violation of R.C. 2921.43 is a first-degree misdemeanor and disqualifies the violator from State employment for seven years. R.C. 2921.43(D), (E).)

3. The Court of Claims's conclusion that Dr. Husain's "clinical activities were controlled by defendant" is not supported by the evidence. Dr. Husain's clinical activities were controlled by the chair of the surgery department:

> Dr. Robert Bornstein, defendant's Vice Dean of Academic Affairs, testified that . . . the chair of the department of surgery controls all aspects of Dr. Husain's practice, including the type of work that he performs and his work location.

(Ct. Claims Op. 3, ¶ 2.) But Dr. Bornstein also testified that the chair of the department of surgery is also the manager of OSUP, Inc. (Tr. 107:12-13 (May 5, 2011) [contained in the Dec. 15, 2011 Stipulation to Supplement Record on Appeal].) Dr. Husain's clinical activites were controlled by one person, who – just like Dr. Husain – wears the hats of both the State and OSUP, Inc. – which only begs the question of how R.C. 9.86 applies with respect to the dual employment of both Dr. Husain and Dr. Bornstein.

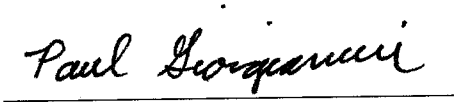
4. The Court of Claims's mysterious finding that OSUP, Inc. is "the business arm" of the State of Ohio seems to be the Court of Claims's basis for ignoring *Theobald*'s "dual employment" analysis. To the extent the Court of Claims meant that employment with OSUP, Inc. carries with it R.C. 9.86 immunity, the court is incorrect. It is only employment with the State that carries R.C. 9.86 immunity. Moreover, the Ohio Constitution bars the General Assembly from enacting any "special act conferring corporate powers." Ohio Const., art. XIII, sec. 1. The General Assembly could not bestow immunity upon isolated corporations or their employees.

This Court should reject the Court of Claims's rationale for granting Dr. Husain immunity.

CONCLUSION

Because Dr. Husain was not educating a student or resident when the alleged negligence occurred, Dr. Husain is not immune. This Court should reverse the judgment of the Court of Appeals and remand to the Court of Claims for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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