**[Cite as *Hans v. Ohio State Univ. Med. Ctr.*, 2005-Ohio-4457.]**

**IN THE COURT OF CLAIMS OF OHIO**
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| LINDA L. HANS, Indiv., etc. | : | |
| Plaintiff | : | CASE NO. 2001-10140<br>Judge Fred J. Shoemaker |
| v. | : | DECISION |
| OHIO STATE UNIVERSITY MEDICAL CENTER | : | |
| Defendant | : | |

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**{¶ 1}** An evidentiary hearing was conducted in this matter to determine whether William J. Schirmer, M.D., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

**{¶ 2}** R.C. 2743.02(F) states, in part:

**{¶ 3}** "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or 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. ***"

**{¶ 4}** R.C. 9.86 states, in part:

**{¶ 5}** "*** no officer or employee [of the state] 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, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. ***"

**{¶ 6}** There is no assertion in this case that Dr. Schirmer acted with malice, in bad faith, or in a wanton or reckless manner in his care and treatment of plaintiff's decedent, Calvin Hans (Hans). Therefore, the only issue before the court is whether Dr. Schirmer was acting within the scope of his state employment with The Ohio State University (OSU) when the alleged injury occurred.

**{¶ 7}** In *Theobald v. University of Cincinnati,* 160 Ohio App.3d 342, 2005-Ohio-1510, the Tenth District Court of Appeals stated that: "[a]lthough the term 'scope of employment' is an elusive concept, both the Supreme Court of Ohio and this court have provided some guidance as to its meaning in the context of R.C. 9.86. *Oye v. Ohio State Univ.*, Franklin App. No. 02AP-1362, 2003 Ohio 5944, at P6. Primarily, a state employee is acting within the scope of his employment if he is acting 'in furtherance of the interests of the state.' [Citation omitted.] In other words, 'conduct is within the scope of employment if it is initiated, in part, to further or promote the master's business.' *Patena v. Univ. of Akron*, Franklin App. No. 01AP-845, 2002 Ohio 1917. Conversely, 'actions that bear no relationship to the conduct of the state's business' are outside of the scope of employment. *Oye*, supra, at P7." See *Theobald*, at 353-354.

**{¶ 8}** In the instant case, Dr. Schirmer was, at all times pertinent to this case, employed by OSU as an assistant professor of surgery. As a member of the OSU faculty, Dr. Schirmer's

responsibilities consisted of teaching and research. In addition, Dr. Schirmer was a member of the Department of Surgery Corporation (DOSC), a medical professional corporation consisting of medical practitioners engaged in the private practice of medicine.

**{¶ 9}** Dr. Schirmer has not asserted that he is entitled to personal immunity. Rather, he maintains that at all times pertinent he was an attending physician rendering treatment to Hans in his capacity as an employee of DOSC, his private practice group. Defendant also contends that Dr. Schirmer is not entitled to immunity. Conversely, plaintiff insists that Dr. Schirmer was acting within the scope of his employment with OSU at all times in question because he was engaged in teaching students and residents.

**{¶ 10}** The determination whether a physician is entitled to personal immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 1992-Ohio-133. However, the question whether the physician acted manifestly outside the scope of his state employment is one of fact. *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835; *Smith v. Univ. of Cincinnati*, Franklin App. No. 01AP-404, 2001-Ohio-3990.

**{¶ 11}** After review of the evidence and testimony, including the deposition of Dr. Schirmer, the court makes the following determination.

**{¶ 12}** Hans' treatment at OSU began as a result of a referral from his hometown physician who had diagnosed Hans as having a retroperitoneal mass. Dr. Schirmer, a general surgeon, met with Hans at his DOSC office one time before admitting him to defendant's hospital. Dr. Schirmer removed the retroperitoneal mass, and performed a left nephrectomy and left adrenalectomy.

During the surgical procedure a resident, Barbara Howard, M.D., and a medical student, Brandon Lu, were present. Due to the complexity of the surgery, Dr. Schirmer performed almost the entire procedure. Consequently, he dictated the operative report. Dr. Schrimer followed up with Hans for several post-surgery visits. Dr. Lu also followed up with Hans' care after the procedure.

**{¶ 13}** DOSC coordinated the billing, collections, accounts payable, payroll, and business operations for its physician members. DOSC billed Hans for the treatment rendered by Dr. Schirmer and received the payment/monies for those services. Dr. Schirmer was a shareholder with DOSC and held stock in the corporation. DOSC paid the premiums for Dr. Schirmer's medical malpractice insurance coverage. For the year in which Hans' surgery was performed, DOSC paid Dr. Schirmer a salary of approximately $150,000 for rendering patient care. In that same year, Dr. Schirmer earned a salary of approximately $35,000 from OSUMC for his faculty position.

**{¶ 14}** It has been frequently recognized that there is no bright-line rule for determining whether or not a physician acted within the scope of state employment. However, in *Theobald v. University of Cincinnati,* supra, the Tenth District Court of Appeals reviewed at length its previous decisions on the issue and discussed the factors to be considered in the analysis. Specifically, the court stated that: "[s]ince *Katko v. Balcerzak* (1987), 41 Ohio App.3d 375, 536 N.E.2d 10, this court has struggled with identifying the appropriate analysis for resolving this issue. In our earlier cases, we reasoned that a practitioner was acting within the scope of employment for whichever employer had the most significant financial involvement in the provided treatment. Thus,

our analysis centered primarily upon "financial" factors ***." *Theobald* at 354-355 citing, e.g., *Balson v. Ohio State Univ.* (1996), 112 Ohio App.3d 33; *Harrison v. Univ. of Cincinnati Hosp.* (June 28, 1996), Franklin App. No. 96API01-81, 1996 Ohio App. LEXIS 2762.

**{¶ 15}** However, the Court of Appeals noted that in each of the cases that focused upon financial factors the inevitable result was that the physician was found not to be immune. The court concluded that: "the financial factors generally do not address the core scope of employment issue: whether the practitioner was acting to further the medical school's interests." Id. at 355.

**{¶ 16}** The court in *Theobald* continued its review of prior holdings by noting that: "[b]eginning with *Norman v. Ohio State Univ. Hosps.* (1996), 116 Ohio App.3d 69, 686 N.E.2d 1146, we introduced a new factor into the scope of employment analysis: whether the practitioner only saw the patient in the course of supervising or instructing a resident (the 'education' factor). *** When a practitioner was treating a 'private patient' he was acting outside of the scope of his employment with the university. Conversely, a practitioner treating a 'patient of the university' was acting within the scope of his employment." (Additional citations omitted.) Id. 355-356.

**{¶ 17}** The *Theobald* analysis then turned to the Court of Appeals' attempts to synthesize the education factor with the financial factors, as set forth in the two-part test espoused in *Kaiser v. Flege* (Sept. 22, 1998), Franklin App. No. 98AP-146. However, the court concluded that, although the education-plus-financial-factors test "properly summarized the factors we had previously used to determine whether a practitioner was acting

within the scope of his employment, the test did not render a predictable result. Rather, the outcome of each case depended upon which factor we stressed." Id. at 356.

**{¶ 18}** The Court of Appeals acknowledged that it then took a somewhat different tact in *Ferguson v. Ohio State Univ. Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863, wherein it listed 15 factors that it had historically examined in determining whether a practitioner was acting within the scope of employment and concluded that, even though billing could be a relevant factor, it was not always the determinative factor. Id. After further discussion of that decision, the court held that, despite its listing of 15 relevant factors, "our holding in *Ferguson* elevated the education factor as the paramount factor in the analysis." Id. at 357.

**{¶ 19}** The court in *Theobald* went on to note that the importance of the education factor had been reiterated in its decision in *Kaiser v. Ohio State Univ.*, Franklin App. No. 02AP-316, 2002-Ohio-6030, because it had recognized that the financial aspects of the cases it reviewed were all essentially the same. The court stated that: "since *Ferguson*, this court has implicitly and explicitly retreated from applying the financial factors as determinative factors and, instead, the outcome of each case essentially has turned upon the education factor." Id. at 357.

**{¶ 20}** Thus, the Court of Appeals provided the following guidance for this court: "to determine whether a practitioner is acting within the scope of employment, the Court of Claims must primarily inquire whether the practitioner was educating a student or resident while rendering the allegedly negligent care to the patient. If the practitioner was educating a student or resident,

then the practitioner was acting within the scope of his employment and, thus, is immune from liability." Id. at 357-358.

**{¶ 21}** Further, the court stated that: "the Court of Claims must first identify the aspect of the course of treatment that the plaintiff alleges gave rise to damage or injury. Then, if education is the university's interest, the Court of Claims must determine whether a student or resident was somehow involved with the patient's care during that aspect of the course of treatment. Thus, for example, if during a patient's visit to the emergency room a physician is negligent, that physician was acting within the scope of his employment, and is immune, if a resident or student was involved in the patient's treatment during that visit. [Citations omitted.] Notably, the degree of the student or resident's involvement is not significant in this analysis as long as the practitioner was teaching at the time of the alleged wrongful act. Further, it is irrelevant how the patient views his relationship with the practitioner." Id. at 358.

**{¶ 22}** Based upon these principles, the court first finds that, in the instant case, the aspects of the course of treatment that gave rise to plaintiff's claims were the surgical procedures performed by Dr. Schirmer at OSU. More specifically, the allegations are whether it was appropriate to remove the retroperitoneal mass, or whether it could have been effectively managed through chemotherapy, and whether performing the nephrectomy compromised Hans' ability to withstand chemotherapy. Clearly, Dr. Schirmer was engaged in teaching a student and a resident at the time, regardless of how little "hands-on" experience they received in the process. This is confirmed in Dr.

Schirmer's deposition, wherein he responded to questioning as follows:

**{¶ 23}** "Q: So if, in fact, if Brandon Lu was there, he was there for purposes of the $35,000 a year you received from Ohio State to teach medical students, wasn't he?

**{¶ 24}** "Q: Isn't that correct, Doctor?

**{¶ 25}** "Q: He would have no other purpose for being there, would he?

**{¶ 26}** "A: Well, the way it—if you are interested, the way it worked is medical students were on our service, on our rotation. We would assign them to patients, and they would follow the patients through their care and treatment from before surgery, during surgery and after surgery. That's how they learned surgery. So Brandon Lu, I take it, would be in that capacity in this part of his education for medical school.

**{¶ 27}** "Q: And that was your job as his mentor, then, to teach him about this complex surgical procedure which, in fact, you dictated the operative report on and didn't even let the resident have any part in it because it was so unique and complex; isn't that correct?

**{¶ 28}** "A: It was a big operation that I did. (Joint Exhibit A, at pp. 33-34.)

**{¶ 29}** "Q: Okay. And this is all part of the education process at Ohio State University isn't that correct? Doctors don't learn by themselves, they learn as a result of people who are experienced and are then taught the procedures. They learn from them; is that correct?

**{¶ 30}** "A: I think it is a fair statement. (Joint Exhibit A, at p. 36.)

**{¶ 31}** In light of the above-quoted testimony, and in accordance with *Theobald*, this court must conclude that, because education was the university's interest and because both a student and a resident were involved with Hans' care and treatment, Dr. Schirmer was acting within the scope of his university employment when rendering the care and treatment in question. Further, even though Dr. Schirmer himself is not claiming immunity, the court in *Theobald* has held that even an individual who works for a university on a volunteer basis, not as an employee and not receiving compensation, can be deemed a state employee for purposes of immunity. Id. at 352. Accordingly, for all the foregoing reasons, the court finds that Dr. Schirmer is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

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| Plaintiff | : | CASE NO. 2001-10140<br>Judge Fred J. Shoemaker |
| v. | : | JUDGMENT ENTRY |
| OHIO STATE UNIVERSITY MEDICAL CENTER | : | |
| Defendant | : | |

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The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 2743.02(F) and 9.86. Upon hearing all

the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that William J. Schirmer, M.D., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Therefore, the courts of common pleas do not have jurisdiction over civil actions against Dr. Schirmer based upon the alleged actions and inactions in this case. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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FRED J. SHOEMAKER
Judge

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