[Cite as *Gerschutz v. Med. College of Ohio Hosp.*, 2004-Ohio-3825.]

IN THE COURT OF CLAIMS OF OHIO

MELINDA F. GERSCHUTZ, et al.	:	
Plaintiffs	:	CASE NO. 2003-04783 Judge Fred J. Shoemaker
v.	:	DECISION
MEDICAL COLLEGE OF OHIO HOSPITAL	:	
Defendant	:	

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{¶1} An evidentiary hearing was conducted in this matter to determine whether Bashar Kahaleh, M.D. and Henry Goitz, M.D. are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. The court notes that the evidentiary hearing was conducted on February 19, 2004, and that the court granted the parties' request to keep the record open until March 15, 2004, to allow additional testimony.

{¶2} As a preliminary matter, the court must address motions that were filed by the parties as a result of the decision of the Supreme Court of Ohio in *Johns v. Univ. of Cincinnati Med. Assocs., Inc*., 101 Ohio St.3d 234, 2004-Ohio-824, wherein on March 10, 2004, the Court found that "excluding a state employee from participating in the immunity-determination proceedings does not violate his or her due process rights or deny him or her access to Ohio's courts." Id. at paragraph 41.

{¶3} On March 11, 2004, counsel for Drs. Kahaleh and Goitz filed two depositions and affidavits in support of their claims of immunity. On April 14, 2004, the Supreme Court of Ohio issued its decision in *Theobald v. Univ. of Cincinnati*, 101 Ohio St.3d 370, 2004-Ohio-1527, finding that "a state employee has no right to participate in the immunity determination proceedings before the Court of Claims or to appeal that determination." Id.

at paragraph 6. On April 16, 2004, the doctors' counsel filed a brief in support of immunity. On that same date, defendant filed motions both to strike the "evidence" submitted on March 11, 2004, on behalf of Drs. Kahaleh and Goitz and to admit additional exhibits and deposition testimony. On April 20, 2004, defendant filed a motion to strike the doctors' brief in support of immunity. Upon review, defendant's April 16, 2004, motion to admit exhibits and testimony is GRANTED and its motions to strike are DENIED.

{¶4} At all times relevant to this action, Drs. Kahaleh and Goitz were full-time faculty members at the Medical College of Ohio (MCO) School of Medicine. The doctors were also employed through Associated Physicians of MCO, Inc. (APMCO), a private for-profit corporation which operates as the practice plan for the clinical faculty members of defendant's medical school. Dr. Kahaleh served as the division chief of Rheumatology and Immunology. Dr. Goitz served as the division chief of Sports Medicine in the Department of Orthopaedic Surgery. Neither doctor maintained a private practice outside the clinic and both spent all their professional time working at defendant's hospital or clinic.

{¶5} Prior to the incidents that gave rise to this case, plaintiff had been diagnosed and treated by her family physician for rheumatoid arthritis and fibromyalgia. Plaintiff was referred to defendant's rheumatology clinic by her family physician and was treated by Dr. Kahaleh, defendant's residents, and students at the clinic. In October 2001, plaintiff fell at her home and was treated for those injuries by Dr. Kahaleh and subsequently referred to Dr. Goitz. Plaintiff alleges that Drs. Kahaleh and Goitz failed to diagnose her hip fracture.

{¶6} There is no assertion that either Dr. Kahaleh or Dr. Goitz acted with malice, in bad faith, or in a wanton or reckless manner in their care and treatment of plaintiff. Therefore, the issue before the court is whether the physicians were acting within the scope of their state employment with MCO when the alleged injury occurred.

{¶7} R.C. 2743.02(F) states, in part:

{¶8} "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 the officer's or employee's 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. ***"

{¶9} R.C. 9.86 states, in part:

{¶10} "*** 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. ***"

{¶11} The determination of 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 of 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.

{¶12} The Tenth District Court of Appeals has identified 15 factors that it has routinely considered in determining whether or not a physician acted within the scope of state employment. *Ferguson v. The Ohio State University Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863. Subsequently, that court found that the *Ferguson* factors could be viewed in terms of two essential considerations: 1) whether the patient was the physician's private patient or a patient of the university medical facility; and 2) the relative financial gain for the university as compared to that of the physician. *Wayman v. University of Cincinnati Med. Ctr.* (June 22, 2000), Franklin App. No. 99AP-1055. The court stated that "the key factor" is whether or not the patient was essentially the doctor's private patient. *Barkan v. The Ohio State Univ*. Franklin App. No. 02AP-436, 2003-Ohio-985; see, also, *Verhoff v. Ohio State Univ. Med. Ctr.*, 125 Ohio Misc.2d 30, 2003-Ohio-4795.

{¶13} The parties assert that plaintiff was a private patient of both Drs. Kahaleh and Goitz because APMCO, rather than defendant, billed plaintiff for all of the medical services provided by the doctors at the clinic. However, the Tenth District Court of Appeals stated that "billing may be a relevant factor, but it is not always determinative in deciding whether a physician is acting within the scope of his duties as a private physician or as an employee of a university at the time he or she rendered medical services to a patient." *Hopper v. Univ. of Cincinnati* (Aug. 3, 2000), Franklin App. No. 99AP-787, citing *Ferguson v. Ohio State Univ. Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863.

{¶14} Article 1 Section(E)(4) of defendant's faculty rules for medical staff requires all full-time faculty within the medical college who engage in clinical practice to participate in the practice plan administered by APMCO "or other practice plans as approved by the Board." (Defendant's Exhibit A.)

{¶15} The evidence shows that defendant's physicians who worked at the clinic received income for the treatment of patients under their practice plan. The physicians are paid separately by the university for their faculty responsibilities. In 2002, Dr. Kaheleh received $87,605.62, almost one-half of his total salary, from defendant; he earned $89,697.82 from treating patients through APMCO. Dr. Goitz's salary from defendant totaled $80,227.92, whereas he received $320,000 through APMCO, because defendant desired to establish a "sports medicine" program with Goitz as director.

{¶16} The evidence shows that defendant considered salary received from APMCO when it formulated employment offers to potential medical faculty members. The "physician employment request form" that was completed for Dr. Goitz included an annual salary figure from both MCO and APMCO and the form was signed by both the dean of defendant's school of medicine and the president of APMCO. (Doctors' Exhibit C.) The letter from the chairman of defendant's Department of Orthopaedic Surgery that offered Dr. Goitz a faculty appointment explained that his $320,000 salary from APMCO was guaranteed by both defendant's hospital ($120,000) and by the department ($200,000). (Doctors' Exhibit D.) The trial testimony also established that a portion of APMCO revenue was transferred to defendant for use by the medical departments. Based upon

the foregoing, the court concludes that defendant had at least some influence with regard to APMCO and the salary that it paid to the medical staff.

{¶17} Furthermore, with regard to the treatment of plaintiff, both Drs. Kahaleh and Goitz testified that all of their medical services were rendered at defendant's clinic. Dr. Kahaleh testified that all of his medical practice and most of his teaching duties were performed at the clinic. Dr. Kahaleh explained that he did not have a private office at the clinic; that all appointments were made by MCO staff; and that almost all of the patients were first examined by a resident or a medical student. According to Dr. Kahaleh, the two rheumatologists assigned to the clinic treated the referred patients on a rotational basis. Dr. Kahaleh stated that his responsibilities to supervise, teach, and treat patients were inseparable. Similarly, Dr. Goitz testified that his only office is on defendant's campus and much of his practice involved teaching and supervising residents. According to Dr. Goitz, most of the surgical procedures that were assigned to him were completed by MCO residents under his direct supervision; that his records showed that residents were present when he treated plaintiff.

{¶18} Based upon the totality of the evidence presented at the hearing, the court finds that Drs. Kahaleh and Goitz saw plaintiff as a patient of MCO rather than as a private patient. As such, the court finds that Drs. Kahaleh and Goitz acted within the scope of their employment with defendant during all interactions regarding plaintiff that are at issue in this case. Consequently, Drs. Kahaleh and Goitz are entitled to personal immunity pursuant to R.C. 9.86 and the courts of common pleas do not have jurisdiction over civil actions against them based upon their alleged actions or inactions in this case.

IN THE COURT OF CLAIMS OF OHIO

MELINDA F. GERSCHUTZ, et al.	:	
Plaintiffs	:	CASE NO. 2003-04783 Judge Fred J. Shoemaker
v.	:	

JUDGMENT ENTRY

MEDICAL COLLEGE OF OHIO HOSPITAL :

:

Defendant

: : : : : : : : : : : : : : : : : :

This court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence, and for the reasons set forth in the decision, the court finds Bashar Kahaleh, M.D. and Henry Goitz, M.D. are entitled to immunity pursuant to R.C. 9.86. Therefore, the courts of common pleas do not have jurisdiction over this matter. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay. 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

Entry cc:

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AMR/cmd
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To S.C. reporter July 19, 2004