



{¶3} Plaintiff alleges that Drs. Gorgas and Khandelwal were employees of defendant, OSUMC, and were negligent in their failure to diagnose Mr. Barkan's condition as a serious problem or as a complication of the open heart surgery requiring immediate attention and treatment. Plaintiff further alleges that Drs. Gorgas and Khandelwal were negligent in allowing or authorizing Mr. Barkan's discharge from the hospital.

{¶4} R.C. 2743.02(F) provides, in part:

{¶5} 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. \*\*\*

{¶6} R.C. 9.86 provides, in part:

{¶7} \*\*\* no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages 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.* \*\*\* (Emphasis added.)

{¶8} At all times relevant to this action, Drs. Gorgas and Khandelwal were employed by defendant, OSUMC, as assistant professors in the Department of Emergency Medicine at The Ohio State University. During this same time period, Drs. Gorgas and Khandelwal were also employed by Emergency Care Associates, Incorporated (ECAI), a private professional practice corporation.

{¶9} There is no assertion that either Dr. Gorgas or Dr. Khandelwal acted with malice, in bad faith, or in a wanton or reckless manner in the treatment of plaintiff's decedent. Therefore, the sole issue before the court is whether Dr. Gorgas and Dr. Khandelwal were acting within the scope of their employment with OSUMC when plaintiff's decedent received treatment on September 18, 1999.

{¶10} The determination whether state employees are entitled to personal immunity is a question of law. *Nease v. Medical College Hosp.* (1992), 64 Ohio St.3d 396, 400, citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284. However, the question whether they acted manifestly outside the scope of their state employment is one of fact. *Lowery v. Ohio State Highway Patrol* (February 27, 1997), Franklin App. No. 96API07-835, unreported.

{¶11} In *Ferguson v. The Ohio State University Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863, unreported, the Tenth District Court of Appeals listed fifteen separate factors the trial court should evaluate in determining the issues of personal immunity. Analysis of these factors will define the nature of the relationship between the physician and patient as well as the method of billing for services rendered to the patient.

{¶12} In this case, Dr. Gorgas, as the attending physician, was responsible for overseeing all of the treatment needed by patients who presented to the emergency room. Dr. Gorgas testified at her deposition that she saw every patient who came to the emergency room during her shift. According to the medical records, Dr. Gorgas talked with Mr. Barkan, examined him, ordered diagnostic studies, evaluated test results, prescribed therapeutic intervention, and authorized the patient's discharge to home. As such, Dr. Gorgas treated plaintiff's decedent as a private physician in the scope of her clinical practice as an emergency room physician, not as a faculty member. Dr. Gorgas billed Mr. Barkan's insurance company for her services. ECAI determined the amount of her fee, received the payment and arranged for Dr. Gorgas to receive a salary. ECAI received remuneration only for the treatment rendered by Dr. Gorgas.

{¶13} Similarly, Dr. Khandewal had the same duties and responsibilities as had Dr. Gorgas during her shift. As the attending physician, Dr. Khandelwal allowed Mr. Barkan to be discharged from the hospital. Dr. Khandelwal was employed by ECAI and was working as a private physician in the scope of his clinical practice at the time Mr. Barkan was sent home. According to this court's holding in *Kaiser v. Ohio State University* (Feb. 13, 2002), Court of Claims No. 2000-07331, unreported, when an emergency room attending physician exercises the discretion to admit or

discharge a patient, that physician is acting as a private practitioner caring for the patient and not as an instructor supervising medical interns or residents.

{¶14} Based on the totality of the information submitted by the parties and the case law cited herein, the court finds Dr. Gorgas and Dr. Khandelwal acted outside the scope of their employment

{¶15} with defendant, OSUMC, regarding the treatment and care rendered to plaintiff's decedent. Consequently, neither physician is entitled to personal immunity pursuant to R.C. 9.86.

J. WARREN BETTIS  
Judge