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COURT OF CLAIMS
OF OHIO

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ORIGINAL

IN THE OHIO COURT OF CLAIMS

YONG HUI SHEFFIELD, ET AL.	:	
Plaintiffs	:	
-v-	:	Case No. 2013-00013
THE OHIO STATE UNIVERSITY MEDICAL CENTER	:	Judge Dale Crawford
Defendant.	:	

PLAINTIFFS' BRIEF IN SUPPORT OF IMMUNITY FOR PAUL GULLET, RN

On January 14, 2014, a hearing was conducted on the issue of whether Paul Gullett, RN, is entitled to immunity for his conduct in delivering clinical care and treatment to Daniel Sheffield, deceased. The care and treatment at issue involved the removal of a central line, which resulted in Mr. Sheffield suffering an air embolism.

The Court requested the parties to submit a set of facts that are not in dispute, and to brief the following issues:

A. Is Mr. Gullett entitled to immunity under the three-pronged common law test set forth in *Poe v. University of Cincinnati*, 10th Dist. Franklin App. No. 12AP-929, 2013-Ohio-5451?

B. Under *Ries v. OSUMC*, 137 Ohio St.3d 151, 2013-Ohio-4545, can Mr. Gullett be considered an employee of both Medical Staffing Options, Inc. and OSUMC?

C. If the Court holds that Mr. Gullett is not an employee of OSUMC, can plaintiffs nevertheless pursue a claim against OSUMC for agency by estoppel under the auspices of *Cox v. OSUMC*, 117 Ohio App.3d 254, 690 N.E.2d 552 (10th Dist. 1996)?

D. Was Mr. Gullett working at OSUMC pursuant to a personal services contract that triggers immunity pursuant to R.C. 109.36(A)(1)(b)?

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Plaintiff will separately address these four issues.

I. Law and Argument

A. Is Mr. Gullett entitled to immunity under the three-pronged common law test set forth in *Poe v. University of Cincinnati*?

In *Poe v. University of Cincinnati*, 10th Dist. Franklin App. No. 12AP-929, 2013-Ohio-5451, the Tenth District Court of Appeals reversed a decision issued by the Court of Claims holding Dr. Michael Canady was immune for any negligence he may have committed during a surgery. *Id.* at ¶1. In so holding, the Tenth District set forth the criteria for a finding of immunity.

In determining immunity, the Court of Claims must undertake a two-part analysis. The court must first determine "whether the individual was a state officer and employee." If the court concludes that the individual is a state officer and employee, it must then determine whether the individual was acting within the scope of employment when the cause of action arose. *Id.* at ¶8. In the instant case, if Mr. Gullett is held to be a state employee, there is no dispute that he was working in the course and scope of his employment, so analysis under part two of the immunity determination is unnecessary. Squarely at issue, however, is part one of the analysis: whether Mr. Gullett qualifies as a state employee.

The immunity of a state employee is governed by R.C. 109.36(A)(1)(a) through (d). As noted in *Poe*, however, the statute does not offer any guidance as to the criteria necessary to establish the requisite employment relationship. *Id.* at ¶10. The court therefore looked to federal common law to see how courts have determined whether an individual qualifies as an "employee" in circumstances where the applicable federal statute does not provide a definition. *Id.* In such circumstances, the United States Supreme Court has instructed courts to rely on

common law agency principles. *Id.,* citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989); *Natl. Labor Relations Bd. v. United Ins. Co. of Am.,* 390 U.S. 254, 258, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968). The *Poe* Court took this guidance and applied a three-part common law analysis supplied by the Ohio Supreme Court in *Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St. 3d 263, 2011-Ohio-3375, 957 N.E.2d 764, which it found it to be a "useful framework from which to approach an inquiry into … status as a state employee." *Poe*, at ¶14.

The *Engel* Court identified the following three factors to consider when determining whether an individual is a state employee: (1) whether the state and the alleged employee had a contractual relationship; (2) whether the state had control over the alleged employee's actions; and (3) whether the state, or a private entity with a symbiotic relationship with the state, paid the alleged employee for his services. *Engel,* 2011-Ohio-3375, ¶¶11-15. The three factors will be separately addressed.

1. Employment/Contractual Relationship

Under the first of the *Engel* factors, courts are asked to determine whether a contract for employment exists. Citing *Lake Land Emp. Group of Akron, LLC v. Columber,* 101 Ohio St. 3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶17, the *Poe* Court noted that, "Generally, in a contract creating an employment relationship, 'the employee agrees to perform work under the direction and control of the employer.'" *Poe*, at ¶20.

Applying this definition, there is no question that Mr. Gullett was working at OSUMC pursuant to a contract. The only conceivable legal challenge to immunity under this factor

comes from the fact that Mr. Gullett's service at OSUMC came as the result of the execution of three separate contracts, none of which create direct privity between Mr. Gullett and OSUMC.

Mr. Gullett directly contracted with Medical Staffing Options, Inc. (Exhibit E)[1]. Pursuant to this contract, he was to work at "Ohio State University" on the "MST Unit." *Id.* The contract further spells out his term of employment, his rate of pay, that OSU may extend, limit, or terminate the agreement, and that Mr. Gullett is to receive his shift hours directly from the OSUMC nurse manager. *Id.* Medical Staffing Options, Inc. contracted with OHA Solutions, allowing it to serve as an agency who would supply nurses, pursuant to specific agreed upon terms, for positions posted on OHA's Shiftwise computer system. (Exhibit B). OSUMC contracted with OHA Solutions allowing it to post open positions on the Shiftwise system. (Exhibit A).

In *Poe,* Dr. Canady contracted directly with OSUMC, so the issue of privity is not addressed. It is therefore once again proper and instructive to examine common law doctrine to determine whether privity is necessary to a finding that an employment relationship exists by way of contract.

Long standing agency principles very clearly state that privity of contract is not necessary to the creation of an employment relationship. In *Walker v. Lahoski*, 9th Dist. Athens App. No. 19293, 1999 Ohio App. LEXIS 3435 (January 28, 1999); the plaintiff, Cynthia Walker, was injured while working as a home health care worker for Ben and Ann Lahoski. The Lahoski's hired Walker through a placement agency called Genny's Home Health Care ("Genny's). *Id.* at *2. *Walker* filed a claim with the Ohio Bureau of Workers' Compensation naming Ben and Ann

[1] The Exhibits referred to herein were presented to the Court at the time of the Immunity Hearing and the parties have stipulated to their authenticity and admissibility.

Lahoski as her employers. *Id.* Her claim was denied at the trial court level because she was held to be an independent contractor. *Id.* In support of the holding, the trial court relied on the same arguments being put forth by OSUMC in the instant case.

- Walker did not directly contract with the Lahoski's, thus privity was lacking.
- Walker signed a contract stating she was an independent contractor relative to the Lahoski's.
- The Lahoski's paid the agency for Walker's time, and Walker was in turn paid by the agency.

Id. at *4.

With respect to the lack of contract privity between Walker and the Lahoski's, the court dismissed this argument and held that it is "not sufficient to reach a substantive determination that there was not an employer/employee relationship by way of implicit contract, or by virtue of two contracts (Walker/Genny's and Genny's/Lahoski). *Id.* at *10.

With respect to the contract language labeling Walker an independent contractor, the court was similarly dismissive, holding that such a contract provision is not necessarily controlling. "The trial court must look to the substance of the relationship, not merely to a label attached to it." *Id.* at *8.

Finally, with respect to the issue of stream of payment, the court held as follows:

> If the worker is paid on an hourly basis, this tends to indicate that the worker is an employee, while payment by the job tends to indicate that the worker was an independent contractor. Historically, courts have looked at whether the "employer" paid the worker directly or paid a third party for the services. Over time, as more workers have been employed via agencies, the second factor has all but disappeared.

Id. at *5.

The court then turned to an examination of the nature of the employment relationship. "[T]he vital test, in determining whether a person employed to do certain work as an independent contractor or a mere servant, is the control over the work which is exercised by the employer." *Id.* at *12; citing *Indus. Comm. v. Laird*, 126 Ohio St. 617, 186 N.E. 718 (1933). "[T]he 'right to control' is agreeably [*sic*] the key factor in making the determination of whether an individual is an independent contractor or an employee." *Walker*, at *12; citing *Laird*, 126 Ohio St. at 619. There was sufficient evidence that the Lahoski's possessed the ability to control Walker's work. This was the determining factor in finding that there was in fact an employment relationship between Walker and the Lahoski's. The trial court decision was therefore reversed.

It is further instructive to look to the Restatement (Third) of Agency, Chapter 7 – Torts—Liability of Agent and Principal, for verification that the Ninth District Court of Appeals ruling is in keeping with national trends. It provides as follows on this central issue:

§ 7.07 Employee Acting Within Scope of Employment

(1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.

* * *

(3) For purposes of this section,

(a) an employee is an agent whose principal controls or has the right to control the means of the agent's performance or work.

Nowhere in the Restatement does it identify method of payment, privity of contract, or how an individual is labeled, as being relevant factors to the determination of whether or not one is an employee. The right to control the means of the agent's work or performance defines the relationship.

Under the guidelines set forth in *Poe*, an individual is working pursuant to contract where "the employee agrees to perform work under the direction and control of the employer." *Poe*, at ¶20; citing *Lake Land*, 2004-Ohio-786 at ¶17. In the instant case, the first prong of this test is satisfied.

2. Control Over the Alleged Employee's Actions

The second of the *Poe* criteria intersects with the first prong, and again emphasizes how critical the extent of control is to the analysis. The *Poe* Court states, "The right of control in the performance of work and the detailed manner in which the work is done **is the fundamental distinguishing element of an employment relationship.**" *Poe*, at ¶29 (emphasis added); citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 11th Dist. Ashtabula App. No. 93-A-1787, 1994 Ohio App. LEXIS 1262 (Mar. 25, 1994); and *Bd. of Edn. of City School Dist. of City of Cincinnati v. Rhodes,* 109 Ohio App. 415, 162 N.E.2d 888 (10th Dist. 1959). According to *Poe,* the factors to be considered in determining who has the right to control include the following:

> [W]ho controls the details and quality of the work; who controls the hours worked, who selects the materials, tools and personnel used; who selects the routes traveled; the length of employment; the type of business; the method of payment; and pertinent agreements or contract.

It cannot be reasonably disputed that Mr. Gullett was subject to the complete control of OSUMC during his term of nursing service. The term of his service and the hours he worked were directed by OSUMC. He was paid based on hours work, subject to the review and approval of the nurse manager. He was required to undergo a week of orientation and two weeks of preceptorship, to ensure that he understood OSUMC policies and procedures, and that he could perform his clinical responsibilities in accordance with the procedures prescribed by OSUMC. Failure to perform his clinical responsibilities in the manner prescribed by OSUMC subjected

him to termination. He was periodically evaluated by an OSUMC nurse manager. At no point while Mr. Gullett worked at OSUMC did Medical Staffing Options, Inc. exert any manner of control over Mr. Gullett.

Control, the "fundamental and distinguishing element of an employment relationship," clearly indicates that Mr. Gullett was an employee of OSUMC under all conceivable indicia. The second prong of *Engel* is satisfied.

3. Symbiotic Relationship with the State

The third of the *Engel* factors calls for the court to examine whether the state, or a private entity with a symbiotic relationship with the state, paid the alleged employee for his services. This factor addresses circumstances where the employee is not paid directly by the hospital. Citing *Povatin v. Univ. Med. Ctr.*, 10th Dist. Franklin App. No. 00AP-715, 2001 Ohio App. LEXIS 1787 (April 19, 2001), *Poe* instructs courts to look past the presence of an indirect payment stream in circumstances where the "university had a 'high degree' of control over [a] private practice group" such that the hospital and the practice group "functioned as one entity." *Poe* at ¶40. Once again, control is the primary driver for determining employment status.

Since Mr. Gullett was not serving the needs of OSUMC as part of a practice group, addressing this element makes for awkward analysis. Nevertheless, the relationship between OSUMC and Mr. Gullett appears to be symbiotic for alternative reasons. Mr. Gullett was paid hourly for his work. He entered his time into the Shiftwise system for review by the OSUMC nurse manager on his unit. Subject to the nurse manager's approval, the time was then submitted to the OSUMC accounting department. Payment was issued in direct correlation to the hours worked.

The indirect stream of payment to Mr. Gullett is a highlight of OSUMC's argument against immunity, yet *Poe* notes that "courts have found physicians to be an employee of a state university even where he or she is not directly paid by the university." *Id.* at ¶40. Mr. Gullett's compensation correlated with the hours he worked, which OSUMC directly controlled. This suggests that the relationship satisfies the indicia of a symbiotic relationship, thus satisfying the third of the *Engel* prongs.

The three *Engel* factors were born out of a litany of non-exclusive factors established by the United State Supreme Court when examining whether one is an employee. These factors include the following:

> [T]he hiring party's right to control the manner and means by which the product is accomplished; * * * the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in the business; the provision of employee benefits; and the tax treatment of the hired party.

Poe, at ¶10; citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed. 2d 581 (1992). Considering these factors, and the framework under which they were incorporated into the three *Engel* factors, the evidence in this case strongly favors the conclusion that Mr. Gullett was an employee of OSUMC for purposes of immunity. Moreover, contractual privity, payment stream, and how an individual is labeled, are not listed as proposed considerations.

B. Under *Ries v. OSUMC*, can Mr. Gullett be considered an employee of both Medical Staffing Options, Inc. and OSUMC?

Under established Ohio law, it is clear that one can be dually employed and still qualify for immunity. In *Ries v. Ohio State Univ. Med. Ctr.,* 137 Ohio St.3d 151, 2013-Ohio-4545, the Ohio Supreme Court held that Dr. Syed Musain, who was employed by both OSUMC and a non-profit corporation, was entitled to immunity for care and treatment he rendered. The Supreme Court adopted the Tenth District Court of Appeals conclusion that "[P]hysicians with employment contracts such as those provided to Dr. Husain wear two hats while treating patients. One that says '[the Ohio State University Medical Center]' and the other says OSUP.' Dr. Husain was wearing both while treating McNew. 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)." *Id.* at ¶15.

The fact that Mr. Gullett was an employee of Medical Staffing Options, Inc. is not in dispute. This does not, however, disqualify Mr. Gullett from state immunity if the Court finds that he was also serving as an employee of OSUMC during the period in question.

C. If Mr. Gullett is held not to be an employee of OSUMC, can plaintiffs nevertheless pursue a claim against OSUMC for agency by estoppel under the auspices of *Cox v. OSUMC*?

In *Cox v. Ohio State Univ. Hosps.,* 117 Ohio App.3d 254, 690 N.E.2d 552 (10th Dist. 1996), the Tenth District Court of Appeals held that the plaintiff could not recover against the hospital on an estoppel by agency theory where the physicians were not granted immunity. Its basis, however, indicates that such a cause of action is legally actionable where the facts and circumstances necessary to establish the claim are present. Citing *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994), the *Cox* Court held that a hospital

may be liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing in the hospital when: "(1) it holds itself out to the public as a provider of medical services; and (2) in the absence of notice and knowledge to the contrary, the patient looks to the hospital as opposed to the individual practitioner to provide competent medical care." *Cox,* 117 Ohio App.3d at 257. The plaintiffs in *Cox* could not establish a valid claim for estoppel because there was no evidence that the decedent looked to the hospital, as opposed to the individual physicians, to provide competent medical care. *Id.* at 258.

In the instant case, plaintiffs have not yet had an opportunity to put into evidence the facts necessary to establish a claim for agency by estoppel. It is nevertheless a valid cause of action that plaintiffs should be permitted to pursue if the Court holds that Mr. Gullett is not entitled to immunity.

D. Was Mr. Gullett working at OSUMC pursuant to a personal services contract that triggers immunity pursuant to R.C. 109.36(A)(1)(b)?

R.C. 9.85 states that the definition of "officer or employee" is the same as that provided in R.C. 109.36. R.C. 109.36(A)(1)(b) provides the following language within the definition of "[o]fficer or employee:"

> **A person that, at the time a cause of action** against the person, partnership, or corporation **arises, is rendering** medical, **nursing**, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological **services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state**.

(Emphasis added).

"Reduced to its essence, a personal services contract suggests a degree of control exercised by the purchaser over the services to be performed by a chosen individual or individuals; a purchased services contract indicates, as the name implies, a purchase of services

without regard to the specific individual to provide the service." *Smith v. Ohio State Univ. Hosps.*, 110 Ohio App. 3d 412, 416, 674 N.E.2d 721 (10th Dist. 1996). The facts establish that Mr. Gullett was providing nursing services for OSUMC pursuant to a personal service contract.

If OSUMC had contracted directly with Mr. Gullett, there would be no room for argument that he is entitled to immunity. Since this is not the case, the issue presented to the Court is whether the lack of privity due to the contractual construct present in the instant case, which interrupts privity, disqualifies Mr. Gullett from immunity. Plaintiffs submit that it does not.

As a threshold matter, the statute states nothing about privity as a requirement to immunity. It states merely that a nurse who is working for a state institution pursuant to a personal services contract is entitled to immunity. A personal services contract exists where the state exercises a degree of control over the contracted-for services. *Smith*, 110 Ohio App.3d at 416.

OSUMC clearly exercised an extensive degree of control over Mr. Gullett's services. Applying a plain reading of the statute results in the inescapable conclusion that the General Assembly intended for immunity to apply in circumstances such as those presented in this case. The lack of privity is semantics. It seems inconceivable that the General Assembly would strip a nurse working in the course and scope of employment for the state simply because the employment was facilitated by a placement agency.

A search of the legislative history, including the House Bill from which the statue was conceived, unfortunately did not provide any useful guidance. As such, Plaintiffs submit that a plain reading of the statute indicates that Mr. Gullett was indeed working for OSUMC pursuant to a purchased service contract, which entitles him to immunity. Plaintiffs further submit that

such an interpretation abides by the intent of the General Assembly and results in a common sense conclusion, consistent with other common law decisions resulting in immunity, even absent privity. *See Walker v. Lahoski, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following counsel of record via ordinary U.S. mail, postage prepaid, this 24th day of January, 2014:

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