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IN THE COURT OF CLAIMS OF OHIO

YONG HUI SHEFFIELD, ET AL., :
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 Plaintiffs :
 :
 v. :
 :
 THE OHIO STATE UNIVERSITY :
 MEDICAL CENTER, :
 :
 Defendant :

Case No. 2013-00013

Judge Dale A. Crawford

ORIGINAL

**DEFENDANT'S POST HEARING BRIEF REGARDING
IMMUNITY OF PAUL GULLETT, R.N.**

I. INTRODUCTION

This medical negligence case was filed by the Estate of Daniel Sheffield. Plaintiffs claim that on July 5, 2012, Paul Gullett, R.N., negligently removed a central venous catheter line from their decedent, Daniel Sheffield, which allegedly caused the formation of an air embolus, in turn allegedly causing a stroke and ultimately Mr. Sheffield's death. Complaint, ¶¶ 9-11. Mr. Gullett is what is commonly referred to as a traveling or agency nurse. At the time of the alleged negligent conduct he was employed by a temporary nursing agency, Medical Staffing Options, Inc. ("MSO"), and providing nursing care at The Ohio State University Medical Center ("OSUMC"). Plaintiffs also filed an action against Mr. Gullett and MSO in the Franklin County Court of Common Pleas, *Sheffield, et al. v. Medical Staffing Options, Inc., et al.*, Case No. 13 CV 6204. (Joint Exhibit T). Mr. Gullett recently filed an Answer admitting to his employment status with MSO, but also claiming immunity. (Joint Exhibit V). On January 14, 2014, this

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Court conducted an immunity determination hearing regarding the claimed immunity status of Mr. Gullett under R.C. 9.86. Following the hearing the Court requested that the parties file briefs on the issue of immunity.

II. SUMMARY OF THE EVIDENCE

Pursuant to this Court's order, the parties have filed a joint stipulation of the facts. In addition, the parties agree to the admission of all of the Joint Exhibits (A-V).

From time to time, OSUMC is in need of temporary nursing services to staff a variety of its nursing units. In order to obtain the services of temporary nurses, OSUMC entered into a contract with Ohio Healthcare Purchasing, Inc., (doing business as OHA Solutions)("OHA Solutions") to locate available agency nurses. (Joint Exhibit A). Pursuant to that agreement, OHA Solutions agreed to provide temporary nursing services through agreements it had with nursing agencies. Among the agencies with which OHA Solutions had an agreement was MSO. (Joint Exhibit B). The agreement between OHA Solutions and OSUMC, Joint Exhibit A, is a one year contract dated March 24, 2011, but it was mutually extended for one year. The terms of the agreement set forth in Joint Exhibit A were in force on July 5, 2012, when the events giving rise to this lawsuit took place.

The contract between OSUMC and OHA Solutions provides that OHA Solutions will provide nurses through outside agencies and that these nurses are not employees of the University. Specifically, the agreement (Joint Exhibit A) provides the following:

- A. “Agency Personnel shall not be on Participating Institution’s payroll, nor shall they be considered employees of the Participating Institution.” (Joint Exhibit A, p. 11)
Pursuant to the terms of the agreement, OSUMC is the Participating Institution.
- B. OHA Solutions requires its agencies such as MSO to provide liability insurance covering any claims of negligence or malpractice against one of their agency nurses (Joint Exhibit A, p.5; see also Joint Exhibit B, p. 18-19). In this case, MSO was required to provide professional liability insurance for Mr. Gullett while he was assigned to OSUMC.
- C. OHA Solutions requires its agencies such as MSO to indemnify the OSUMC for negligence claims against its nurses. Under these facts, the parties expressly contemplated that the agency would be legally responsible for the actions of its travelling nurses. (Joint Exhibit A, p. 3-4).
- D. OHA Solutions requires its agencies such as MSO to maintain workers compensation insurance to cover its agency personnel. (Joint Exhibit A, p. 5).
- E. If an agency nurse does something that compromises patient care, or anything else deemed inappropriate, OSUMC can send the agency nurse home as well as terminate the assignment. (Joint Exhibit A, p. 6).
- F. OHA Solutions requires its agencies such as MSO to be responsible for maintaining all personnel and compensation records for agency personnel, as well as being responsible for payment of payroll taxes, workers compensation payments, and unemployment compensation. (Joint Exhibit A, p. 11)

G. “No contractual relationship shall be established between Participating Institution [OSUMC] and Agency Personnel or between Provider [OHA Solutions] and Agency Personnel.” (Joint Exhibit A, p. 13).

Mr. Gullett did not have a contract with OSUMC. MSO also did not have a contract with OSUMC. OSUMC never paid any monies directly to Mr. Gullett or Medical Staffing Options.

III. LAW AND ARGUMENT

A. Paul Gullett is not a state employee under R.C. 109.36 and therefore not entitled to immunity under R.C. 9.86.

The issue before the Court is whether Mr. Gullett is an employee under R.C. 109.36. This Court has exclusive, original jurisdiction to make that determination. See R.C. 2743.02(F); *Johns v. Univ. of Cincinnati Med. Assoc., Inc.* (2004), 101 Ohio St. 3d 234. If this Court determines that Mr. Gullett is not an employee under R.C. 109.36, then he is not entitled to immunity, and the case against him can proceed in the Court of Common Pleas.

Pursuant to R.C. 9.86, an employee of the State of Ohio acting within the scope of his employment is granted personal immunity from civil liability. The statutory provision states in relevant part as follows:

[N]o 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, 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.

The Ohio Supreme Court has laid out the two-step process that this Court must consider in making a determination of immunity. This Court must first decide whether “the individual [was] a state employee, and if so, was the individual acting within the scope of employment when the cause of

action arose.” *Theobald v. University of Cincinnati* (2006), 111 Ohio St. 3d 541, 543. In this case, defendant’s position is that because Mr. Gullett was not an employee, this Court need not address the second issue. The first threshold has not been crossed.

The issue of immunity relates to the status of the employee, and does not address the issue of the state’s alleged vicarious liability for his claimed negligence. This limited scope of inquiry is specifically set forth in R.C. 2743.02(F):

[T]he court of claims that 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. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

Therefore, although the plaintiffs have attempted to argue ostensible agency principles as part of the immunity determination, the potential vicarious liability of OSUMC for Nurse Gullett (if he is deemed to not be an “employee”) is a separate issue not now before the Court. The only issue to be decided is whether or not Paul Gullett is entitled to immunity under R.C. 9.86. No more, no less.

1. Mr. Gullett was not an employee of OSUMC at the time he provided nursing care to Mr. Sheffield.

For the purposes of immunity, a state employee as defined in R.C. § 109.36(A)(1)(a) includes a “person who, at the time a cause of action against the person arises, is . . . employed by the state.” Mr. Gullett did not have a contract with OSUMC, was not paid by OSUMC, and OSUMC did not treat him like one of its own employees.

The Supreme Court has analyzed the meaning of “employee” for purposes of R.C. § 9.86 immunity in *Engel v. Univ. of Toledo College of Medicine*, 2011-Ohio-3375, 130 Ohio St.3d 263. The Court declined to adopt a formal test and emphasized that other factors may be considered, but nonetheless provided three “helpful” factors to determine whether a person is a state employee: (1) contractual relationship, (2) control, and (3) payment by state. *Id.*, at ¶¶ 10-16. The *Engel* decision continues to serve as guidance on state employee immunity cases. See, e.g., *Poe v. Univ. of Cincinnati*, Franklin App. Nos. 12AP-929, 13AP-210 (private physician who had written agreement to provide training to state hospital resident physicians was determined not to be a state employee); *Phillips v. Ohio State Univ. Med. Ctr.*, Franklin App No. 12AP-414 (private physician with hospital privileges was determined not to be a state employee).

While OSUMC did have control over Nurse Gullett’s nursing performance while he was on the BMT unit, there is clearly no contractual agreement between Mr. Gullett and OSUMC, and no compensation was paid to him by OSUMC. Moreover, the terms of the agreements between OSUMC and OHA Solutions (Joint Exhibit A), and between OHA Solutions and MSO (Joint Exhibit B), as well as OSUMC’s own policies (Joint Exhibit I), evidence an overwhelming intention that agency nurses sent on assignment to OSUMC (or any other hospital) are not hospital employees.

In order to obtain the temporary services of agency nurses, OSUMC entered into a contract with OHA Solutions. According to the contract between OSUMC and OHA Solutions, “Agency Personnel shall not be on Participating Institution’s [OSUMC] payroll, nor shall they be considered employees of the Participating Institution.” (Joint Exhibit A, p. 11). OSUMC also

has its own policy regarding agency personnel, which clearly states that “[t]he agency nursing personnel are not employed by the OSU Health System.” (Joint Exhibit I, p. 1).

The President of MSO, Robert Gammill, also testified that while Mr. Gullett was assigned at OSUMC, he was not considered to be an employee of OSUMC and that no co-employment status was intended. In addition, Mr. Gammill testified that his company paid Mr. Gullett for his services at OSUMC, and was responsible for any withholding of payroll taxes, and paying any workers compensation insurance and unemployment compensation. As part of MSO’s agreement with OHA Solutions, Mr. Gammill signed an affidavit testifying to these facts as well. (Joint Exhibit S). In addition, a contractual process was put into place by OHA Solutions and MSO to make MSO legally responsible for the professional malpractice of agency nurses, like Mr. Gullett. OHA Solutions required MSO to indemnify OSUMC for negligence claims against its nurses, as well as provide professional liability insurance for its nurses. (Joint Exhibit A, p. 3-5; Joint Exhibit B, p. 18-19).

In addition to the absence of a contractual agreement between OSUMC and Nurse Gullett, the evidence also establishes that OSUMC never paid Mr. Gullett for any nursing services during his OSUMC assignment. OSUMC did not provide Mr. Gullett with a W-2 or a 1099 form for tax purposes. He paid nothing into the state employee retirement plan. OSUMC did not treat him like an employee as exhibited by the lack of payment and benefits, different orientation, a difference of job duties on his specific nursing unit, and even a different identification badge.

The evidence presented showed numerous differences between agency nurses and OSUMC staff nurses. (Stipulation of Facts, ¶¶ 16, 18, 24, 26-28). For example, agency nurses

on the BMT unit go through one week of nursing education, as well as two weeks of on the job preceptor training. An OSUMC staff nurse goes through a longer orientation that can last 12-16 weeks. Also, if an agency nurse wants to be hired permanently at OSUMC, he must go through the entire application process, including being interviewed again. If he is hired by OSUMC, even if he went through an agency nurse orientation, he must still go through the university employee orientation, which includes an explanation of employee benefits. In addition, Ms. Aurin, the BMT nurse manager, testified that agency nurses are not trained on the more complicated aspects of patient care, such as providing chemotherapy to transplant patients. Rather, agency nurses on the unit provide routine patient care. Lastly, while Mr. Gullett wore an OSUMC identification badge, his badge was different than an OSUMC staff nurse's badge, because it was blue instead of red, had the title "R.N. Traveler" on it, and also had an expiration date on the front of his badge. (Joint Exhibit Q).

While OSUMC admittedly did exercise some control over Mr. Gullett while he was providing nursing care at one of its hospitals – he had to follow OSUMC nursing policies, follow OSUMC dress code, and report for duty as assigned by OSUMC's nurse manager – this degree of control should not outweigh any other factor. *Engel* speaks of "factors" and none of them is identified as predominant. Of the three factors listed in *Engel*, the evidence shows that two indisputably point to a finding that Mr. Gullett was not an employee: Mr. Gullett had no contract with OSUMC, and OSUMC did not pay him. And, the contractual documents that allowed for MSO to assign Nurse Gullett to OSUMC for thirteen weeks clearly expressed the intention of the parties that he would not be an OSUMC employee. Under *Engel*, this Court should find that Mr. Gullett is not an employee under R.C. 106.36(A)(1)(a).

2. Mr. Gullett was not providing nursing care pursuant to a personal services contract or a purchased services contract with the state.

R.C. 109.36(A)(1)(b) also defines an “employee” of the state to include “a person who, at the time a cause of action against the person . . . arises, is rendering nursing, . . . services pursuant to a personal services contract or purchased services contract *with* a department, agency, or institution *of the state*.” (Emphasis added.) The Tenth District has described a personal services contract and a purchased services contract as follows:

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. Hosp. (1996) 110 Ohio App. 3d 412, 416. Because OSUMC never entered into a personal services contract or a purchased services contract with either Mr. Gullett or his employer MSO, Mr. Gullett does not qualify as an employee under R.C. § 109.36(A)(1)(b).

Plaintiffs attempt to argue that Mr. Gullett was providing nursing care pursuant to a “contract.” However, under R.C. § 109.36(A)(1)(b), it must be nursing care provided “pursuant to a . . . contract . . . *with* a department, agency, or institution *of the state*.” (Emphasis added). Mr. Gullett provided his services pursuant to an assignment with MSO. (Joint Exhibit E). In addition, MSO had an agreement with OHA Solutions. (Joint Exhibit B). But neither Mr. Gullett nor his employer MSO had a contract *with the state*. Only OHA Solutions had a contract with the state. (Joint Exhibit A).

The Tenth District has held that an individual is an “employee” when he provided medical services pursuant to a purchased services contract with a state agency. *Wade v. Ohio State Univ. Med. Ctr.* (2000), Franklin App. No. 99AP-759. In *Wade*, the Ohio Department of Rehabilitation and Correction (“DRC”) contracted with OSUMC to provide medical services to inmates in the custody of DRC. *Id.* OSUMC then entered into an agreement with the Department of Surgery Corporation (“DSC”), a private physician practice group, to provide medical services to the inmates. *Id.* Plaintiff’s physician, who was an OSUMC faculty member, was employed by DSC, and plaintiff attempted to argue that the physician should not have immunity because DSC did not have a contract with DRC. *Id.* However, the court found that because DSC had a contract with OSUMC, the physician could be considered a state employee because he was providing medical services pursuant to a purchased services contract [DSC’s] with a state agency [OSUMC]. *Id.* In *Wade*, DRC (state agency) contracted with OSUMC (state agency) which contracted with DSC (private corporation). Here, however, OSUMC (state agency) contracted with OHA Solutions (private corporation) which contracted with MSO (private corporation). Unlike in *Wade* where the physician’s company contracted directly with a state agency, Mr. Gullett’s company contracted directly with a private corporation. Therefore, Mr. Gullett was not providing nursing services pursuant to a purchased services contract with a state agency.

In order to be deemed an officer or employee under R.C. 109.36(A)(1)(b), the individual must have entered into a personal services contract or be providing services pursuant to a purchased services contract with a department, agency, or institution of the state. Here, there was no contract between OSUMC and Mr. Gullett or MSO. The key element of R.C. 109.36(A)(1)(b) is that the

agreement must be “with... [an] institution of the state.” Because there is not any agreement between Nurse Gullett or his employer “with ... [an] institution of the state,” Mr. Gullett is not an “employee” under R.C. 109.36(A)(1)(b).

3. Plaintiffs’ agency by estoppel claim is not relevant to the Court’s immunity determination of Mr. Gullett.

This Court recently granted plaintiffs leave to add the claim of agency by estoppel pursuant to the authority of *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St. 3d 435. However, arguments supporting such a claim are not relevant to determine Mr. Gullett’s immunity. His immunity determination must be based on R.C. 9.86 and 109.36, and based on whether or not this Court finds that he is an “employee.” If this Court determines that Mr. Gullett is not an employee, then he is not entitled to immunity, and the case against him will proceed in the Court of Common Pleas. If that happens, there is nothing preventing plaintiffs from still raising the argument of agency by estoppel against OSUMC at the liability phase of this litigation.

The state’s waiver of immunity is limited to the conditions set forth in R.C. Chapter 2743 which allow for liability based on the actions or omissions of employees or officers who have immunity as state employees or officers. R.C. 2743.02(A). However, nothing within the Court of Claims Act states that the state may be liable for the actions or omissions of non-employees, such as an independent contractor. In fact, if an individual is determined to not have immunity for any action or omission, then the state is not liable. R.C. 2743.02(F). Plaintiffs may argue that under *Cox v. Ohio State Univ. Hosp.* (1996), 117 Ohio App.3d 254, the Tenth District has stated that an agency by estoppel claim may be made against a state hospital. However, in that case, in finding that plaintiff did not prove agency by estoppel, the court never even specifically

addressed the effect of the state's limited waiver of immunity under R.C. Chapter 2743 on a claim for agency by estoppel. Defendant is not aware of any court which has upheld such a claim and held a state hospital liable for the actions or omissions of a non-employee.

Regardless of whether or not plaintiffs might ultimately be able to impose vicarious liability upon the state for the alleged negligence of a contractor, the issue now before this Court under R.C. 2743.02(F) is strictly limited to the immunity claimed by Nurse Paul Gullett. To argue about the application of *Clark v. Southview* at this point puts the cart before the horse. R.C. 9.86 does not confer immunity to "ostensible agents" of the state. Instead, the statute expressly states that immunity is reserved to "employees."

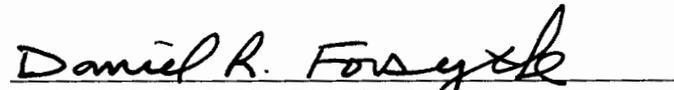
IV. CONCLUSION

Paul Gullett never had a contract with OSUMC. His employer MSO also did not have a contract with OSUMC. Everyone involved in having Mr. Gullett assigned to OSUMC as a temporary agency nurse never intended him to be an employee of OSUMC as shown by the relevant contracts and policies. While assigned to OSUMC, Mr. Gullett was an employee of his agency MSO. OSUMC did not treat him like an employee as exhibited by the lack of payment and benefits, different orientation, a difference of job duties on his specific nursing unit, and even a different identification badge.

Therefore, defendant The Ohio State University Medical Center respectfully requests a determination by this Court that Mr. Gullett does not have civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F).

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

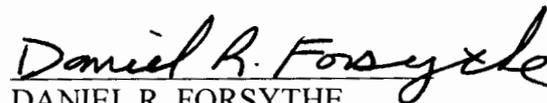


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail, postage prepaid, this 24th day of January, 2014, to:

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