



Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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YONG HUI SHEFFIELD, Exec., etc.,
et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER

Defendant

Case No. 2013-00013

Judge Dale A. Crawford

DECISION

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COURT OF CLAIMS
OF OHIO

An evidentiary hearing was conducted in this matter to determine whether Paul Gullett, R.N., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. According to the Complaint, Plaintiff's decedent, Daniel Sheffield, was admitted to The Ohio State University Medical Center to be treated for an infection. During Sheffield's admission, a central line venous catheter was placed. Plaintiffs allege that Gullett negligently removed the central line venous catheter, ultimately resulting in Sheffield's death.

R.C. 2743.02(F) states, in part:

"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."

R.C. 9.86 states, in part:

"[N]o 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,

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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."

Findings of Fact

On January 24, 2014, the parties filed a Stipulation of Facts, which is APPROVED and incorporated herein as Attachment 1. The Stipulation along with facts found by the Court form the basis of the Findings of Fact.

Conclusions of Law

Plaintiff argues that Gullett is entitled to immunity inasmuch as he was an employee of the state pursuant to 109.36(A)(1)(a). In the alternative, Plaintiff argues that at the time of the alleged negligence, Gullett was performing nursing services pursuant to a personal services contract and/or purchased service contract with the state. Defendant argues that Gullett is not an employee of the state and was not performing services pursuant to a personal services contract or a purchased services contract and is therefore not entitled to immunity.

There is no doubt that Gullett was an employee of Medical Staffing Options, Inc. (MSO). However, a "single act may be done to effect the purposes of two independent employers. * * * He may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment for both." *Ries v. Ohio State Univ. Med. Ctr.*, 137 Ohio St.3d 151, 2013-Ohio-4545, ¶ 25. (Citations omitted).

"[I]n an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02(A)(2), the Court of Claims must initially determine whether the practitioner is a state employee. * * * If the court determines that the practitioner is a state employee, the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting 'manifestly outside the

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scope of employment' for purposes of R.C. 9.86." *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 30-31; *Engel v. Univ. of Toledo College of Med.*, 130 Ohio St.3d 263, 2011-Ohio-3375, ¶ 6.

For purposes of R.C. 9.86 and 2743.02(F) "officer or employee" is defined in accordance with R.C. 109.36(A). *Engel* at ¶ 7; *State ex rel. Sanquily v. Court of Common Pleas of Lucas Cty.*, 60 Ohio St.3d 78 (1991). The term "employee" may have different definitions depending upon the inquiry, such as in the context of workers compensation, collective bargaining, tax withholding purposes, or as in this case regarding an employer's liability for the negligence of an alleged employee. However, the Court must look to statutory interpretation and common law principles to determine whether Gullett was an "employee" of the state. *Poe v. Univ. of Cincinnati*, 10th Dist. Franklin Nos. 12AP-929, 13AP-210, 2013-Ohio-5451, ¶ 10-11.

R.C. 109.36(A)(1)(a) provides, in relevant part, that an employee is "[a] person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state." R.C. 109.36(A)(1)(b) provides, in relevant part, that "[a] person that, 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."

"[D]efining a state employee as a person employed by the state is completely circular and explains nothing." *Poe* at ¶ 10. (Quotations omitted). In *Engel*, the Supreme Court of Ohio considered when a practitioner is employed by the state for purposes of R.C. 9.86 immunity. The court identified three non-exclusive, relevant factors to such an analysis: (1) Contractual relationship between state and alleged employee; (2) State control over actions of purported employee; and (3) Payment by state for services of alleged employee. *Id.*

"In cases where federal statutes use but do not helpfully define the term 'employee,' the United States Supreme Court [*Nationwide Mut. Ins. Co., v. Darden*, 503 U.S. 318, 112

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S.Ct.1344, 117 L.Ed.2d 581 (1992)] instructs courts to rely on common law agency principles. In this context, relevant considerations when determining 'whether a hired party is an employee' include 'the 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 business; the provision of employee benefits; and the tax treatment of the hired party.'" *Poe* at ¶ 10. (Citations omitted). *See also Councill v. Douglas*, 163 Ohio St. 292 (1955).

Restatement of the Law 2d, Agency, Section 220(2) (1958), provides as follows:

"In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"(a) [T]he extent of control which, by the agreement, the master may exercise over the details of the work;

"(b) [W]hether or not the one employed is engaged in a distinct occupation or business;

"(c) [T]he kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) [T]he skill required in the particular occupation;

"(e) [W]hether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) [T]he length of time for which the person is employed;

"(g) [T]he method of payment, whether by the time or by the job;

"(h) [W]hether or not the work is a part of the regular business of the employer;

"(i) [W]hether or not the parties believe they are creating the relation of master and servant; and

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“(j) [W]hether the principal is or is not in business.”

Upon review, the Court concludes that Paul Gullett, R.N., was an employee of the state pursuant to R.C. 109.36(A)(1)(a). Indeed “[T]he 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. (Citations omitted.) Defendant interviewed and selected Gullett for the position. Defendant scheduled Gullett’s hours of work, which were subject to review and approval by Defendant. Defendant required Gullett to participate in an orientation and a two-week preceptorship wherein Gullett received computer login credentials to both chart patient records and access Defendant’s policies and procedures. Defendant trained Gullett on its policies and procedures, including the procedure for removal of a central line, which is the subject matter of this litigation. Defendant required Gullett to perform his work in accordance with Defendant’s policies and procedures. Defendant issued Gullett an Ohio State University Medical Center (OSUMC) ID badge and nurse uniform. Gullett was paid at an hourly rate for his service.

Defendant argues that the three *Engel* factors are independent and that no factual factor outweighs the others; however, under the circumstances in this case, control outweighs all the other factors. *Poe* at ¶ 29. Additionally, the *Engel* factors are not to be construed as a “formal test” of state employment. *Engel* at ¶ 10. Accordingly, the Court finds that Gullett is an employee under R.C. 109.36(A)(1)(a).

Next, the Court will consider whether Gullett was providing nursing services pursuant to a personal service contract with the state pursuant to R.C. 109.36(A)(1)(b).

In *Wade v. State Univ. Med. Ctr.*, 10th Dist. Franklin No. 99AP-759, 2000 Ohio App. LEXIS 3435 (August 1, 2000), the Ohio Department of Rehabilitation and Corrections (ODRC) contracted with the Ohio State University Medical Center (OSUMC) to provide medical services to inmates in the custody of ODRC. OSUMC entered into a contract with the Department of Surgery Corporation (DSC), a private physician practice group comprised of faculty of OSUMC’s Department of Surgery. James G. Wright, M.D., both

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a faculty member at OSUMC and an employee and shareholder of DSC, performed plaintiff's surgery and was assisted by Charles H. Cook, M.D. Citing the contractual relationship between DRC, OSUMC, and DSC, the Court of Appeals affirmed the decision of the Court of Claims finding that Dr. Wright was an employee of the state inasmuch as he was providing services pursuant to a purchased service agreement.

A personal services contract, however, "suggests a degree of control exercised by the purchaser over the services to be performed by the chosen individual or individuals." *Smith v. Ohio State Univ. Hosps.*, 110 Ohio App.3d 412, 416 (10th Dist.1996). As discussed earlier, Defendant selected Gullett for the position and Defendant exercised considerable control over Gullett's services.

There is no dispute that OSUMC entered into a contract with OHA Solutions setting forth the terms for the placement of agency nurses such as Gullett at OSUMC. OHA Solutions entered into a contract with MSO setting forth the terms for placement of agency nurses with hospitals that participate in the OHA Solutions Placement Program, of which OSUMC is a participant.

Defendant argues that the additional contractual relationship between OHA Solutions and MSO precludes a finding that Gullett was performing nursing services pursuant to a personal services contract with the state. However, it appears to the Court that R.C. 109.36(A)(1)(b) was amended to prohibit state employers from avoiding liability by contracting out services that are typically provided by that institution, i.e., nursing services in a hospital.¹ *Smith* at 416.

Gullett's relationship to MSO is similar to Dr. Wright's relationship to DSC. Gullett was performing nursing services pursuant to a contractual relationship between OSUMC, OHA Solutions, and MSO. Therefore, the Court concludes that Gullett was performing nursing services pursuant to a personal services contract with the state at the time of the alleged negligence. R.C. 109.36(A)(1)(b).

¹R.C. 109.36 was amended in 1982 to include a nurse rendering nursing services pursuant to a personal services contract with the state within the definition of state employee. R.C. 109.36 was amended in 1994 to include a purchased service contract within the definition of state employee.

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Finally, the parties have stipulated that Gullett was acting within the scope of his employment at the time of the alleged negligence. Accordingly, Gullett is entitled to immunity.



DALE A. CRAWFORD
Judge

Attachment 1

IN THE COURT OF CLAIMS OF OHIO

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

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STIPULATION OF FACTS

Now come the parties, by counsel, and pursuant to this Court's order, and offers the following facts, which were presented during the immunity hearing of Paul Gullett, R.N., on January 14, 2014, and which are not in dispute.

1. OHA Solutions has developed a staffing program whereby it enters into agreements with employment agencies to assist in the placement of nurses for temporary assignment at Ohio hospitals.
2. Medical Staffing Options, Inc. is an employment agency that hires nurses with the intent of finding them temporary assignments at hospitals that participate in the OHA Solutions staffing program. A contract exists between OHA Solutions and Medical Staffing Options, Inc. setting forth terms for placement of agency nurses with hospitals that participate in the OHA Solutions placement program. Exhibit B is a true and accurate copy of this contract.
3. Paul Gullett, RN, was an employee of Medical Staffing Options, Inc.
4. The Ohio State University Medical Center ("OSUMC") is a participating hospital in the OHA Solutions program. A contract exists between OSUMC and OHA Solutions setting forth terms for the placement of agency nurses. The contract provides that OHA Solutions will provide

nurses through outside agencies. Per the language of the contract, these nurses are not employees of the University. Exhibit A is a true and accurate copy of this contract.

5. OHA Solutions utilizes an automated system called "Shiftwise" to facilitate the placement of nurses and to streamline the process through which agency nurses are placed.

6. Participating hospitals post queries on Shiftwise for staffing needs, which employment agencies can access. If an employment agency has a nurse who is qualified for the posted position, it may then forward that candidate's resume for consideration by the hospital.

7. Carrie Aurin, RN, is the Nurse Manager in the Blood and Marrow Transplant Unit at OSUMC. Her responsibilities include assessing the need for agency nursing personnel, and then reporting any such needs to the director of nursing and the CEO.

8. In April of 2012, Ms. Aurin identified a need for an agency nurse on the Blood and Marrow Transplant Unit at the OSUMC. After gaining the necessary approval, she submitted a query for candidates on the Shiftwise system to fill a thirteen week commitment.

9. Medical Staffing Options responded to the query by submitting the resume of Paul Gullett, RN.

10. Mr. Gullett was one of several candidates selected by Ms. Aurin for an interview, and he was ultimately chosen by her to fill the position. Prior to the assignment, Ms. Aurin discussed her staffing needs with Mr. Gullett to determine his availability.

11. A contract was executed between Medical Staffing Options, Inc. and Paul Gullett for the placement of Mr. Gullett at OSUMC for a period of 13 weeks. Exhibit E is a true and accurate copy of this contract.

12. Neither Paul Gullett nor MSO were in privity of contract with OSUMC.

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13. Mr. Gullett was required to undergo a week of classroom orientation at OSUMC where he was taught OSUMC policies and procedures, including how to perform clinical procedures. He was also trained on how to obtain computer access to all OSUMC policies and procedures. The details of this orientation are set forth in Exhibit F, the OSUMC - Division of Nursing – Orientation Record.

14. Included in OSUMC policies and procedures is a clinical procedure for the proper removal of a central line, which is the procedure at issue in the instant litigation. Exhibit H is a true and accurate copy of this policy.

15. While working on the Blood and Marrow Transplant Unit, Mr. Gullett was expected to follow all OSUMC policies and procedures.

16. The orientation agency nurses go through at OSUMC is different than the orientations for an OSUMC staff nurse. Agency nurses on the Blood and Marrow Transplant Unit go through one week of nursing education, including reviewing OSUMC policies and procedures, as well as two weeks of on the job preceptor training. During this orientation period, the agency nurse's assignment can be terminated if the preceptor gives an unsatisfactory evaluation. An OSUMC staff nurse goes through a longer orientation that can last 12-16 weeks. 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 went through an agency nurse orientation, he must still go through the university employee orientation.

17. During Mr. Gullett's preceptorship, multiple OSUMC nurses oversaw his patient care, providing him with instruction and guidance and confirming he was able to fulfill the duties of a nurse on the Blood and Marrow Transplant Unit. The preceptor initialed and signed Exhibit F,

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the OSUMC – Division of Nursing Agency RN Orientation Record confirming completion of the preceptorship.

18. Once Mr. Gullett assumed full clinical responsibilities, he was expected to perform his duties just like a permanent OSUMC nurse. Before each shift, Mr. Gullett was instructed to report to the specific unit's nurse manager. In Mr. Gullett's case, he reported to nurse manager, Carrie Aurin. While Ms. Aurin did schedule Mr. Gullett for specific shifts, he still had the opportunity to request that he not be assigned certain dates or shifts. OSUMC staff nurses also had the ability to request leave on certain dates and shifts. While Ms. Aurin can mandate that OSUMC staff nurses work overtime shifts pursuant to the nurses' collective bargaining agreement, because agency nurses are not a part of the union, Ms. Aurin could ask, but could not require, that Mr. Gullett work overtime shifts. Mr. Gullett's hours, however, were scheduled by Ms. Aurin. He also received daily patient assignments from the OSUMC charge nurse, he wore an OSUMC nurse uniform, he was issued an Ohio State Medical Center identification badge, he was given an identification number that allowed him to access, modify and create patient records, and he was given an identification number that enabled him to obtain medications from the OSUMC pharmacy and administer them to patients.

19. Mr. Gullett entered his time into Shiftwise for review by an OSUMC nurse manager. Once his time was approved, it was sent to the OSUMC accounting department for payment. Payment was then issued by OSUMC to an escrow account at US Bank, based on his hourly rate. An escrow agent then paid Medical Staffing Options, Inc. and an administrative fee to OHA Solutions. Medical Staffing Options, Inc. paid Mr. Gullett.

20. Once Mr. Gullett's thirteen week term was completed, OSUMC exercised its right to extend his term on two consecutive occasions.

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21. During Mr. Gullett's term at OSUMC his performance was evaluated by Ms. Aurin, the nurse manager on the unit.
22. At no point during his assignment at OSUMC did Medical Staffing Options Inc. provide Mr. Gullett with direction, oversight or training regarding his clinical duties or at OSUMC.
23. OSUMC has its own policy regarding agency personnel. It states that "[t]he agency nursing personnel are not employed by the OSU Health System." (Joint Exhibit I, p. 1). According to OSUMC policy, "Agency resources are used to supplement staffing when no other means of providing adequate staff are available." (Joint Exhibit I, p. 1). It further states that, "All agency personnel are expected to assume patient care responsibilities in accordance with all OSUMC and Division of Nursing Policies/Procedures/Protocols." (Joint Exhibit I, p. 1).
24. "An agency nurse shall not be assigned leadership or charge nurse responsibilities, unless the agency nurse has had the appropriate charge nurse experience at the Hospitals." (Exhibit P, p. 11). Regardless of this policy in the union contract, it is Ms. Aurin's practice to not allow agency nurses to be in charge of her unit because she does not allow agency nurses to perform all levels of care on her unit. Ms. Aurin testified that agency nurses are not trained in providing chemotherapy to transplant patients.
25. The President of MSO, Robert 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).
26. OSUMC did not provide Mr. Gullett with a W-2 or a 1099 form for tax purposes. OSUMC did not provide benefits, including health insurance, life insurance, retirement benefits.

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OSUMC did not provide professional malpractice insurance for Mr. Gullett. OSUMC does not provide agency nurses with paid leave for illness, holidays, or vacation.

27. During his assignment at OSUMC, Mr. Gullett wore an OSUMC identification badge, but 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). **The badge bears the same Ohio State University Medical Center logo as appears on all OSUMC nursing identification badges.**

28. Agency nurses who are assigned at OSUMC are not members of the union and cannot avail themselves of many of the provisions provided in the collective bargaining agreement. (Joint Exhibit P). Agency nurses do not pay union dues, nor are they required to pay a fair share. Educational programs, seminars, and conferences are provided to OSUMC staff nurses, but not agency nurses. (Joint Exhibit P, p. 7). The assignment of an agency nurse can be terminated immediately, and the agency nurse has no right to grievance, arbitration, or corrective discipline. (Joint Exhibit P, p. 11). Agency nurses have no rights to the benefits as provided by the union contract.

29. In July 2012, OSUMC had an entirely electronic medical record system. Accordingly, in order for Nurse Gullett to make entries in patient charts he was assigned a User ID number and password for the OSUMC record system. For example, with his User ID, and his password, he was able to make the entry reflected in Joint Exhibit J. This is similar to the system ID and password he was assigned on a different agency assignment he took at a Texas Hospital. Without a User ID and password, it would not be possible for a nurse at an institution with a fully electronic record to perform any nursing duties that required the nurse to make entries in the patient's chart. During his orientation at OSUMC, Nurse Gullett was also given similar

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authorization to use the OSUMC Pyxis system to dispense medications to patients. In that documentation he was specifically designated as “RN, Agency/Traveler” as opposed to “RN Staff.” (Joint Exhibit F, p. 23).

30. If the Court concludes that Mr. Gullett is a state employee, which OSUMC denies, it is stipulated that he was acting within the scope of that employment when the cause of action arose.

31. The parties stipulate to the authenticity and admissibility of Exhibits A-V.

Respectfully submitted,

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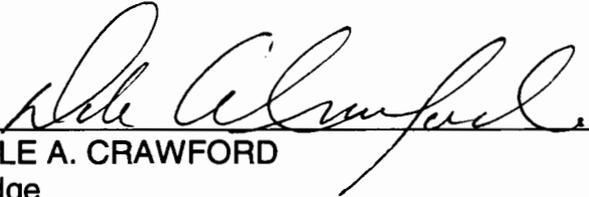
Judge Dale A. Crawford

JUDGMENT ENTRY

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The 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 filed concurrently herewith, the court finds that Paul Gullett, R.N., is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.


DALE A. CRAWFORD
Judge

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