

ORIGINAL

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/Third-Party Plaintiff,	:	
v.	:	
OHIO HEALTHCARE PURCHASING, INC., dba OHA SOLUTIONS STAFFING PROGRAM	:	
and	:	
MEDICAL STAFFING OPTIONS, INC.,	:	
Third-Party Defendants.	:	

2014 SEP 22 PM 3:17

FILED  
COURT OF CLAIMS  
OF OHIO

DEFENDANT-THIRD-PARTY PLAINTIFF'S MEMORANDUM CONTRA  
MOTION TO DISMISS OF OHA SOLUTIONS

Defendant-Third-Party Plaintiff, The Ohio State University Medical Center ("OSUMC"), respectfully submits that the motion to dismiss by Third-Party Defendant, Ohio Healthcare Purchasing, Inc., dba OHA Solutions Staffing Program ("OHA Solutions"), is not well taken and should be overruled. Pursuant to the contract between OHA Solutions and OSUMC, OHA Solutions - which placed a travelling nurse from Third-Party Defendant Medical Staffing Options, Inc. ("MSO") at OSUMC - was required to ensure that MSO had proper professional liability coverage for the nurse. If not, OHA Solutions is contractually required to hold harmless OSUMC. In reviewing the allegations set forth in the Third-Party Complaint in the light most favorable to OSUMC, it is clear that OHA Solutions is contractually required to indemnify OSUMC pursuant to the alleged facts.

ON COMPUTER

## I. INTRODUCTION & PROCEDURAL HISTORY

Plaintiffs allege 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. (Amended Complaint, ¶¶ 9-11). Nurse 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 MSO, a temporary nursing agency, and providing nursing care at OSUMC. In order to obtain the services of temporary nurses like Nurse Gullett, OSUMC entered into a contract with OHA Solutions to locate available agency nurses. (Third-Party Complaint, Exhibit A: *OHA Solutions Staffing Program Participation Agreement* ("Ex. A, Participation Agreement")). 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. (Third-Party Complaint, Exhibit B: *OHA Solutions Staffing Program Master Agreement* ("Ex. B, Master Agreement")).

On February 6, 2014, following an evidentiary hearing, this Court issued a decision in which it found that Nurse Gullett has state employee immunity under R.C. 9.86. That finding, however, does not disturb the contractual responsibilities regarding indemnification by OHA Solutions and MSO. After seeking and being granted leave by this Court, OSUMC filed a Third-Party Complaint against both OHA Solutions and MSO. MSO filed an Answer to the Third-Party Complaint, in which it admitted that (1) it contracted with OHA Solutions in order to place their agency nurses at participating institutions [such as OSUMC], and (2) that at the recent immunity hearing, the President of MSO, Robert Gammill, testified that that MSO's insurance carrier had denied coverage for

the allegations regarding Nurse Gullett's care and treatment of Mr. Sheffield at OSUMC. (Answer of MSO, ¶¶ 10, 15, filed September 11, 2014). Indeed, MSO recently sued its insurance company and broker in Franklin County Court of Common Pleas, for failure to defend its claim based on the actions of Nurse Gullett: *Garrmill Group, Inc., et al. v XL Insurance Co., et al.*, Case No. 14 CV 8165.

Instead of filing an answer, OHA Solutions filed a motion to dismiss, based on the unusual premise that a contractual *requirement* is really not a *requirement* after all. Notwithstanding the apparent intent of the parties based on the unambiguous terms of the contract, OHA Solutions argues that without a performance guarantee provision, OSUMC is unable to enforce its indemnification clause against OHA Solutions. However, the cases cited by OHA Solutions are distinguishable because they relate to guaranty, lease, and assignment contracts. On the other hand, the contract between OSUMC and OHA Solutions was entered into in order to provide temporary staffing at OSUMC. In addition, there are actually audit provisions in the contracts in question between OSUMC and OHA Solutions and between OHA Solutions and MSO, which did *require* OHA Solutions to ensure that MSO had the appropriate insurance.

In reviewing the allegations set forth in the Third-Party Complaint in the light most favorable to OSUMC, it is clear that OHA Solutions is contractually required to indemnify OSUMC pursuant to the alleged facts. The motion of OHA Solutions must therefore be overruled.

## II. LAW AND ARGUMENT

### A. Standard of Review

The proper judicial scrutiny of a Motion to Dismiss under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted requires acceptance of all material

allegations within the complaint as admissions by the opposing party and to take all reasonable inferences in the light most favorable to the nonmoving party. *State ex rel. Hanson v. Guernsey County Bd. Of Comm'rs* (1992), 65 Ohio St.3d 545, 548. Before dismissing the complaint, it must appear from the complaint that plaintiff can prove no set of facts entitling him to recovery. *Id.* (citing *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 245). When reviewing the Third-Party Complaint in the light most favorable to OSUMC, it is clear that the motion of OHA Solutions must be overruled.

**B. Both OHA Solutions and MSO are contractually required to indemnify and hold harmless OSUMC for any alleged negligent act of Nurse Gullett.**

Based on the contracts between OSUMC and OHA Solutions and between OHA Solutions and MSO, MSO must indemnify and hold harmless OSUMC from all actions, claims, and demands resulting from any alleged negligent act of Nurse Gullett. If MSO fails in this duty, then OHA Solutions must indemnify and hold harmless OSUMC from all liabilities, demands, claims and actions arising from its negligent failure in ensuring that MSO has the ability to indemnify OSUMC. The contractual language covers the exact alleged fact situation that arises in this case, i.e., Plaintiffs are alleging damages due to the negligence of MSO's employee who was placed by OHA Solutions.

The third-party claims involve the duties of MSO and OHA Solutions to indemnify OSUMC under certain circumstances. "Indemnification occurs when one who is primarily liable is required to reimburse another who has discharged a liability for which that other is only secondarily liable." *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 66 Ohio St.3d 75, 78, 609 N.E.2d 152 (1993), citing *Prosser & Keeton on Torts* (5 Ed.1984) 341, Section 51. The contracts in questions in this case set forth the duties of the Third-Party Defendants.

OSUMC's claims against the Third-Party Defendants are essentially for breach of contract. (Third-Party Complaint, ¶¶ 17-27). To prove breach of contract, a plaintiff must show: (1) that a valid contract exists; (2) performance by the plaintiff; (3) non-performance, or breach, by the defendant; and (4) damages resulting from that breach. *Bungard v Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 07AP-447, 2007-Ohio-6280 ¶22. Regarding the claim of breach of contract on behalf of a third-party beneficiary, the Tenth District has stated:

A third-party beneficiary is one for whose benefit a promise has been made in a contract but who is not a party to the contract. *Berge v Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 736 N.E.2d 517, 532. Before a third-party beneficiary can enforce that contract, however, the individual must be an intended beneficiary, as opposed to merely an incidental beneficiary. *Hill v Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 521 N.E.2d 780. It is not necessary for the third party to be expressly identified in the contract, however, the contract must have been made and entered into with the intent to benefit that individual. See *Doe v Adkins* (1996), 110 Ohio App.3d 427, 436, 674 N.E.2d 731; see, also, *Norfolk & Western Co. v U.S.* (C.A.6, 1980), 641 F.2d 1201, 1208.

*Bungard v Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 07AP-447, 2007-Ohio-6280 ¶ 23.

It is clear that OSUMC was an intended third-party beneficiary in the contract between MSO and OHA Solutions: "Participating Institutions [OSUMC] are an intended third-party beneficiary to this Master Agreement and are entitled to compel Agency's [MSO] performance under this Master Agreement." (Ex. B, Master Agreement, p. 24). OSUMC is also expressly identified in the addendum to the agreement between MSO and OSUMC Solutions. (Ex. B, Master Agreement: *Addendum to the Master Agreement for The Ohio State University Medical Center*, pages 1 of 8 through 8 of 8).

Accepting all the material allegations in the Third-Party Complaint as true, it is clear that MSO and OHA Solutions are contractually required to indemnify OSUMC pursuant to the alleged facts in the Third-Party Complaint.

1. **OHA Solutions is required to indemnify OSUMC.**

In order to obtain the temporary services of agency nurses, OSUMC entered into a contract with OHA Solutions. (Third-Party Complaint, ¶¶ 2-8). According to the contract between OSUMC and OHA Solutions, OHA Solutions was supposed to require its agencies such as MSO to indemnify OSUMC for negligence claims against its nurses, and to carry appropriate insurance to do such. In its motion, OHA Solutions does not dispute this duty and claims it did just that. (Motion to Dismiss of OHA Solutions, p. 4). However, OHA Solutions then attempts to relinquish this duty by stating all it had to do was include certain indemnity and insurance provisions in its contract with MSO without actually auditing whether MSO had the proper insurance to in fact indemnify a hospital.

OSUMC and OHA Solutions expressly contemplated that MSO would be legally responsible for the actions of its travelling nurses, such as Nurse Gullett. (Ex. A, Participation Agreement, p. 3-4). OHA Solutions' contract with OSUMC states that OHA Solutions "**shall** require Agencies to indemnify and hold harmless. . . Participating Institution [OSUMC]. . . against all actions, claims, and demands whatsoever, including costs, expenses and attorneys' fees resulting from or claimed to have resulted from any intentional or negligent acts, errors, omissions or statutory violations of Agency or Agency Personnel while providing services to Participating Institution [OSUMC] or otherwise participating in the Staffing Program." (Ex. A, Participation Agreement, p. 3, emphasis added). Likewise, OHA Solutions agreed to hold OSUMC "harmless from and against any

and all liabilities, demands, actions, or causes of action, ... , sustained or incurred by... ” OSUMC “...resulting from or arising out of, directly or indirectly, Provider’s [OHA Solutions] negligent failure to fulfill its material obligations under this Agreement, except as described in paragraph V. E. and F. below.” (Ex. A, Participation Agreement, p. 3). The exceptions do not apply here and these terms could not be clearer. Thus, if OHA Solutions failed to ensure MSO had the proper insurance to indemnify OSUMC, then it must step in and indemnify OSUMC.

Equally clear is the part of the contract which concerns insurance. It guarantees that OHA Solutions “shall require Agency [MSO] to maintain in effect at any and all times that the Agency is providing Agency Personnel to Participating Institution [OSUMC] a policy of professional liability insurance... for claims arising out of the acts or omissions of its [the agency’s]. . . agents, employees, or independent contractors in the performance of the services provided by the Agencies to Participating Institution pursuant to this Agreement. . . .” (Ex. A, Participation Agreement, p. 4-5). OHA Solutions does not dispute that it contracted with OSUMC to require such insurance provision with MSO. However, contradictory to these provisions, OHA Solutions attempts to argue that it was *not* contractually obligated to OSUMC to ensure that the MSO had, among other insurance, proper professional liability coverage for Nurse Gullett. In this confusing argument, it appears that OHA Solutions is in fact stating all it had to do was include these *terms* in its contract with MSO – without actually ensuring that MSO was following through on its contractual terms.

No one disputes that MSO is required to indemnify OSUMC for negligence claims against OSUMC based on the performance of its agency personnel. Unfortunately, based

on the current facts, it does not appear MSO has the ability to do so based on the actual terms of its insurance policy. OHA Solutions does acknowledge its duty to obtain a certificate of insurance from MSO (Motion to Dismiss of OHA Solutions, p. 8), but is silent as to the other “documentation... of such insurance coverage” which it was obligated to require from MSO. (Ex. A, Participation Agreement, p. 5). Interestingly, OHA Solutions’ motion is also silent as to its other duties as part of the “Audits” provisions of its contracts.

Pursuant to its contract with OSUMC, OHA Solutions was required to audit MSO’s insurance compliance, but it appears this was not done. Surprisingly, there is no mention in OHA Solutions’ motion regarding whether it ever reviewed MSO’s actual insurance policy, which would have included all the exclusions and limitations.

**2. OHA Solutions is contractually required to audit MSO’s insurance compliance.**

Before OHA Solutions can so easily be let go from this case, it must answer two questions: (1) did it have a duty to read MSO’s actual insurance policy, and (2) did anyone at OHA Solutions actually read it? With all the alleged facts in the Third-Party Complaint interpreted in the light most favorable to OSUMC, OHA simply cannot be dismissed at the motion to dismiss stage. In addition, it is difficult to envision OHA Solutions ever getting past the motion for summary judgment stage on its own behalf, because of the audit provisions in the contracts in question between OSUMC and OHA Solutions and between OHA Solutions and MSO, which required OHA Solutions to ensure that MSO had the appropriate insurance coverage.

OHA Solutions' contract with OSUMC states that OHA Solutions "shall conduct... an audit of Agency's [MSO's] records relating to the Agency's performance under the agreements between Provider [OHA Solutions] and the Agency [MSO]." (Ex. A, Participation Agreement, p. 5, emphasis added). The records related to MSO's performance under its contract with OHA Solutions would certainly include the insurance policy it was required to have. Unfortunately, if OHA Solutions merely relied upon the certificate of insurance from MSO's policy, then it breached its contract with OSUMC, because it was required to audit MSO's ability to perform under the contract, i.e. have the proper insurance so that it could indemnify the hospitals in which it was providing nursing services.

There was nothing stopping OHA Solutions from auditing and reviewing the actual MSO insurance policy. In fact, OHA Solutions contracted with OSUMC that it would require MSO to provide *documentation* of its liability insurance coverage, *including* a certificate of insurance, and nothing in that contract indicated that all OHA Solutions had to do was *only* review the certificate of insurance. As the facts will appear to play out in this case, had OHA Solutions properly audited and reviewed the actual MSO insurance policy, it would have learned from the MSO insurance policy that "personal injury" includes false arrest or imprisonment, libel, slander, and wrongful entry or eviction, but not "bodily injury," which was specifically excluded.<sup>1</sup> Had someone at OHA Solutions simply audited MSO's actual policy, which arguably was required under its policy with OSUMC, that individual should

---

<sup>1</sup> In discovery in this lawsuit, OSUMC has obtained a copy of MSO's actual insurance policy. However, because the insurance document is outside of the Third-Party Complaint, it will not be attached to this pleading at this time.

have detected the unusualness – and ineffectiveness – of a medical professional liability policy that did not cover bodily injury.

**C. The arguments set forth by OHA Solutions in its motion to dismiss are not persuasive.**

The cases cited by OHA Solutions in its motion to dismiss are distinguishable from the case at hand because they relate to guaranty, lease, and assignment contracts. In fact, as explained below, the law of the cited cases actually goes to support the allegations contained within OSUMC's Third-Party Complaint, based on the intent of the parties, which is easily discernible from the unambiguous terms of the contracts in question.

In the cited guaranty contract cases, the common theme that OHA Solutions focuses on is that “a guarantor is only bound by the precise words of his contract.” However, the contract between OSUMC and OHA Solutions is not specifically a guaranty contract. “A guaranty is a contract through which one party guarantees payment for debts incurred by another person or entity.” *Thayer v Diver*, 6th Dist. No. L-07-1415, 2009-Ohio-2053, ¶ 77. Rather, the contract between OSUMC and OHA Solutions is a staffing contract in which OHA Solutions receives an administrative fee of between 3.5-5.0% of the purchase price of the staffing services provided by the agencies. (Ex. A, Participation Agreement, p. 1). This staffing contract includes an indemnify clause, which provides that OHA Solutions will indemnify OSUMC due to any negligent failure on its part to fulfill its material obligations under the contract. (Ex. A, Participation Agreement, p. 3). The claim as alleged by OSUMC in its Third-Party Complaint is that OHA Solutions was obligated to ensure that MSO had the proper professional liability coverage for Nurse Gullett while he

was assigned at OSUMC, but that it failed to do so, and thus must now indemnify OSUMC for this failure. (Third-Party Complaint, ¶¶ 17-23).

The performance guarantee, or lack of, that OHA Solutions points to is frequently a part of guaranty, construction, lease, and assignment contracts. The cases cited in OHA Solutions' motion to dismiss are no different. In *Brogan v Coughlin Servs., Inc.*, 10th Dist. No. 12AP-810, 2014-Ohio-469, the Tenth District found that a lease agreement that contained a guaranty provision by the tenant was not assigned to successors of the lease. In reviewing contract case law, the court noted that “[i]n construing the terms of a written contract, the primary objective is to give effect to the intent of the parties, which we presume rests in the language that they have chosen to employ.” *Id.*, at ¶ 12, citing *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29. In another case cited by OHA Solutions, the Eighth District Court of Appeals also pointed to the intent of the parties. In *Telecom Acquisition Corp. I v Lucic Ents., Inc.*, 8th Dist. No. 95951, 2012-Ohio-472, the court reviewed an assignment of a lease agreement. In quoting the Ohio Supreme Court, the court stated, “If [courts] are able to determine the intent of the parties from the plain language of the agreement, then there is no need to interpret the contract.” *Id.*, at ¶ 11, citing *Saunders v Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9. When reviewing the language of the contract between OSUMC and OHA Solutions, this Court can determine that the intent of the parties was for OHA Solutions to meet the temporary staffing needs of OSUMC while ensuring that the temporary staffers had appropriate liability coverage.

OHA Solutions should not focus only a few of the “precise words” of the contract when the overall intent of the parties must be found in the contract as a whole. OHA

Solutions cites to *LaSalle Bank Natl. Assn. v Belle Meadows Suites L.P.*, 2nd Dist. No. 23766, 2010-Ohio-3773, which is a case dealing with a promissory note with a separate guaranty agreement. In that case, the Second District also stated, "The rule that a guarantor is held only by the express words of his promise does not entitle him to demand an unfair and strained interpretation of those words, in order that he may be released from the obligation which he has assumed." *Id.*, at ¶ 22. It would be a strained interpretation of the contract in question to say that the parties did not intend that OHA Solutions would ensure that its contracting agencies had the proper liability insurance to cover any worker placed at a participating hospital like OSUMC.

In reviewing Ex. A, Participating Agreement, and Ex. B, Master Agreement (including the Addendum to the Master Agreement for The Ohio State University Medical Center), it is clear that the parties intended that OHA Solutions would ensure that the nursing agencies it contracted with to place at OSUMC had the appropriate liability coverage to indemnify OSUMC under the current set of circumstances. In both contracts, there are not only indemnification and insurance provisions, but audit provisions as well. OHA Solutions had the duty to ensure that MSO had the proper professional liability coverage in this case. Despite OHA Solutions' contention, a "requirement" is still a "requirement." OHA Solutions believes it met its duty by simply putting in the same "requirement" language in its contract with MSO. (Motion to Dismiss of OHA Solutions, p. 9). But what good is requiring MSO to have insurance coverage if the policy itself does not even cover bodily injuries for a prospective medical malpractice claim? If MSO breached its contract with OHA Solutions, including if OHA Solutions failed to prevent said breach by allowing MSO to have a faulty insurance policy, then OHA Solutions must

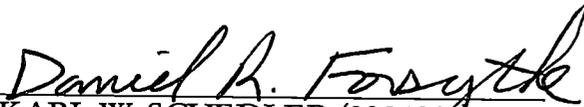
indemnify OSUMC. (Third-Party Complaint, ¶¶ 17-23; Ex. A, Participation Agreement, p. 3).

### III. CONCLUSION

It is clear from the contracts in question between OSUMC and OHA Solutions and between OHA Solutions and MSO that MSO must indemnify and hold harmless OSUMC from all actions, claims, and demands resulting from any alleged negligent act of Nurse Gullett. If MSO fails in this duty, then OHA Solutions must indemnify and hold harmless OSUMC from all liabilities, demands, claims and actions arising from its negligent failure in ensuring that MSO has the ability to indemnify OSUMC. Based on the allegations set forth in the Third-Party Complaint, OHA Solutions failed to ensure that MSO had the proper professional liability coverage for Nurse Gullett while he was assigned at OSUMC. Taking all allegations in the light most favorable to the Third-Party Plaintiff, the motion to dismiss cannot be accepted. Therefore, OSUMC respectfully urges this Court to overrule the motion to dismiss of OHA Solutions.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General

  
KARL W. SCHEDLER (0024224)  
DANIEL R. FORSYTHE (0081391)  
Assistant Attorneys General  
Court of Claims Defense  
150 E. Gay Street, 18th Floor  
Columbus, Ohio 43215  
(614) 466-7447

THEODORE P. MATTIS (0055229)  
Vorys, Sater, Seymour & Pease LLP  
52 East Gay Street, Post Office Box 1008  
Columbus, Ohio 43215  
(614) 464-6468  
*Special Counsel for Ohio Attorney General*

COUNSEL FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail, postage prepaid, this 22nd day of September, 2014, to:

Michael J. Rourke  
Robert P. Miller  
495 S. High St., Suite 450  
Columbus, Ohio 43215  
*Counsel for Plaintiff*

Thomas D. Hunter  
604 East Rich Street  
Columbus, Ohio 43215  
*Counsel for Third-Party Defendant*  
*Medical Staffing Options, Inc.*

Quintin Lindsmith  
Michael K. Gire  
100 South Third Street  
Columbus, Ohio 43215  
*Counsel for Third-Party Defendant*  
*Ohio Healthcare Purchasing, Inc.*

  
DANIEL R. FORSYTHE  
Assistant Attorney General