

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Carla Phillips, | : | |
| Plaintiff-Appellee, | : | |
| (Carol Greco, M.D., | : | |
| Plaintiff-Appellant), | : | No. 12AP-414 (Ct. of Cl. No. 2009-07971) |
| v. | : | (REGULAR CALENDAR) |
| The Ohio State University Medical Center, | : | |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on February 12, 2013

The Triona Firm, James P. Triona, and Paul J. Vollman, for appellant.

Michael DeWine, Attorney General, and Brian M. Kneafsey, Jr., for appellee The Ohio State University Medical Center.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶ 1} Appellant, Carol Greco, M.D., appeals from a judgment of the Court of Claims of Ohio finding that she was not entitled to immunity pursuant to R.C. 9.86, 109.36(A)(1)(a), and 2743.02(F). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} In September 2009, plaintiff-appellee, Carla Phillips, filed a complaint against defendant-appellee, The Ohio State University Medical Center ("OSU" or "OSUMC"), in the Court of Claims seeking damages related to injuries allegedly suffered

as a result of a surgical procedure performed at OSUMC in February 2009. Phillips also filed a complaint in the Franklin County Court of Common Pleas against Dr. Greco and Kingsdale Gynecological Associates, Inc. The common pleas court dismissed the action against Dr. Greco on the grounds that it lacked jurisdiction to hear the matter until the Court of Claims determined whether Dr. Greco was entitled to immunity under R.C. 9.86, 109.36(A)(1)(a), and 2743.02(F).

{¶ 3} The Court of Claims held a hearing on December 9, 2011 to determine whether Dr. Greco was entitled to immunity. The contested issue at the hearing was whether Dr. Greco was affiliated with OSUMC such that she could be considered a state "officer or employee" under the definition in R.C. 109.36(A)(1)(a). Among the evidence presented, the Court of Claims considered Dr. Greco's deposition testimony and heard testimony from Daniel Pierce, M.D., the administrator of the obstetrician and gynecologist ("OB/GYN") department, and Robert Allen Bornstein, M.D., the vice dean for academic affairs at the college of medicine. The evidence established that Dr. Greco, a board certified OB/GYN, was one of 40 physicians employed by the Kingsdale Gynecologic Division of MaternOhio Clinical Association. According to the testimony of Drs. Greco, Pierce, and Bornstein, Dr. Greco had held a clinical faculty position with OSUMC since 1991, serving as an auxiliary faculty member who did not receive monetary compensation. OSUMC granted Dr. Greco privileges to practice at OSUMC, and, in exchange, Dr. Greco was required to maintain certain requirements such as teaching and involving residents in furtherance of the university's academic mission. According to Dr. Greco, residents were always involved in her treatment of patients at OSUMC.

{¶ 4} In a decision and entry filed April 10, 2012, the Court of Claims determined that Dr. Greco was not a state "officer or employee," as defined in R.C. 109.36(A), and, therefore, was not entitled to personal immunity under R.C. 9.86, 109.36(A)(1)(a), and 2743.02(F).

II. DISCUSSION

{¶ 5} Dr. Greco now appeals, advancing the following assignment of error for our consideration:

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN
IT DENIED APPELLANT CAROL GRECO MD PERSONAL

IMMUNITY UNDER RC§9.86, RC§2743.02(F), AND
RC§109.36(A)(1)(A) [sic].

{¶ 6} Dr. Greco's sole assignment of error challenges the Court of Claims determination that she was not entitled to immunity under R.C. 9.86, 109.36(A)(1)(a), and 2743.02(F). In pertinent part, R.C. 9.86 states that "no 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." "[W]hether a doctor is entitled to personal immunity from liability under R.C. 9.86 involves a question of law, an issue over which the Court of Claims has exclusive, original jurisdiction." *Marotto v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-27, 2012-Ohio-6158, ¶ 9, citing *Nease v. Med. College Hosp.*, 64 Ohio St.3d 396, 400 (1992); *Johns v. Univ. of Cincinnati Med. Assocs., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824.

{¶ 7} When deciding whether an individual is entitled to immunity under R.C. 9.86, the Court of Claims must determine (1) whether the individual was a state "officer or employee," and if so, (2) whether the individual was acting within the scope of employment when the cause of action arose. *Engel v. Univ. of Toledo College of Medicine*, 130 Ohio St.3d 263, 2011-Ohio-3375, ¶ 6, citing *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14. "If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply." *Theobald* at ¶ 30.

{¶ 8} In this case, Dr. Greco disputes the Court of Claims' determination that she was not a state "officer or employee" under the definition set forth in R.C. 109.36(A)(1)(a). While R.C. 109.36(A)(1) provides four definitions of "officer or employee"—three of which are specifically confined to the context of medical providers, *see* R.C. 109.36(A)(1)(b), (c), and (d)—the litigation in this case centers around the first definition: "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)(a). Specifically, Dr. Greco argues that she was "[a] person * * * employed by the state." *See* R.C. 109.36(A)(1)(a).

{¶ 9} This definition of employee (a person employed by the state) is similar to analogous federal definitions in that it " 'is completely circular and explains nothing.' " *Bryson v. Middlefield Volunteer Fire Dept., Inc.*, 656 F.3d 348, 352 (6th Cir.2011), quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (interpreting similar definition under Title VII and ERISA). In cases where the term "employee" is used in a federal statute but not helpfully defined, the United States Supreme Court instructs courts to rely on common law agency principles. *Darden* at 322-24; *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (Copyright Act of 1976); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (National Labor Relations Act). Factors to determine an employment relationship include the principal's right to control the manner and means by which the product is accomplished, the skill required, the source of instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the principal has the right to assign additional projects to the alleged employee, the extent of the alleged employee's discretion over when and how long to work, and the method of compensation. *Darden* at 323-24.

{¶ 10} In *Engel*, the Supreme Court of Ohio applied a non-exhaustive list of factors in addressing whether a volunteer clinical instructor of a state university was an "officer or employee" for purposes of immunity under the definition in R.C. 109.36(A)(1)(a). "[E]mphasiz[ing] that other factors may be considered," the court looked to (1) the existence of a contractual relationship between the state and the alleged employee, (2) the degree of state control over actions of the alleged employee, and (3) payment by state for services of the alleged employee. *Id.* at ¶ 10. The court determined that the physician was not a state employee based on its finding that there was no contract of employment, no exercise of control, and that the university did not pay the physician. *Id.* at ¶ 16.

{¶ 11} Here, we find several factors weighing against a finding that Dr. Greco was a state employee for purpose of immunity. First, we must look to the existence of an employment contract between Dr. Greco and OSUMC. "If there is no express contract of employment, the court may require other evidence to substantiate an employment relationship, such as financial and corporate documents, W-2 forms, invoices, and other billing practices." *Theobald* at ¶ 30. The record does not contain any written employment contract between OSUMC and Dr. Greco, and, notably, Dr. Greco does not claim that her

services were performed under a "personal services contract or purchased service contract" so as to satisfy the definition of "officer or employee" in R.C. 109.36(A)(1)(b). Instead, Dr. Greco argues that her faculty position with OSUMC was contractual in that she educated residents in exchange for the ability to have privileges at OSUMC as well as parking and access to football tickets.

{¶ 12} Even if we were to accept Dr. Greco's argument that her arrangement with OSUMC was *contractual*, it did not necessarily equate to a contract of *employment*. In a variety of contexts, courts recognize that the mere granting of hospital privileges to a physician does not automatically confer employee status. *See Bansal v. Mt. Carmel Health Sys.*, 10th Dist. No. 10AP-1207, 2011-Ohio-3827, ¶ 22 (recognizing that a physician with staff privileges is not necessarily a hospital employee for purposes of anti-discrimination provisions in R.C. 4112.02); *Costell v. Toledo Hosp.*, 98 Ohio App.3d 586, 593 (6th Dist.1994) ("Ohio courts have consistently held that the granting of hospital privileges to a physician is not alone sufficient to show the creation of a direct actual agency relationship between the doctor and the hospital."); *Shah v. Deaconess Hosp.*, 355 F.3d 496 (6th Cir.2004) (physician with surgical privileges was not an employee of hospital and, thus, could not bring suit under either the Age Discrimination in Employment Act or Title VII); *see also Schelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175, ¶ 16.

{¶ 13} Moreover, the evidence did not demonstrate that OSUMC possessed a sufficient degree of control over the manner and means of Dr. Greco's ability to practice medicine. *See Engel* at ¶ 12; *Reid* at 751 (applying common law agency analysis of control). Dr. Greco asserts that OSUMC possessed the requisite control over her by virtue of its ability to revoke her privileges to practice at the hospital, which were contingent on her ability to secure a faculty appointment, maintain specific credentials, and contribute to the academic mission of the department.

{¶ 14} Although OSU had the right to review and potentially revoke Dr. Greco's privileges to practice at OSUMC, it did not dictate Dr. Greco's schedule or require her to perform the clinical duties of full-time, paid faculty members. Dr. Pierce testified that, unlike full-time faculty members, Dr. Greco was not paid by the university, did not receive a W-2 from the university in 2009, did not practice through the university's practice plan,

and was not required to cover either the outpatient resident clinic or on-call duties for labor and delivery. The deposition testimony of Mark Landon, M.D., the chairman of the OB/GYN department, further indicated that auxiliary or volunteer faculty members such as Dr. Greco did not participate in scheduled didactic teaching responsibilities. Moreover, according to Dr. Bornstein, auxiliary faculty members were also not required to maintain office locations or treat a specific number of patients at OSU each year. Under these circumstances, we cannot agree that the privileges granted by OSUMC represented a sufficient degree of control over Dr. Greco's manner and means to practice. See *Wojewski v. Rapid City Regional Hosp., Inc.*, 450 F.3d 338, 344 (8th Cir.2006) (hospital privileges did not constitute sufficient degree of control where physician "performed highly skilled surgical work, leased his own office space, scheduled his operating room time, employed and paid his own staff, billed his patients directly, did not receive any social security or other benefits from [the hospital], and did not receive a form W-2 or 1099").

{¶ 15} We also must consider the lack of monetary compensation paid by OSUMC to Dr. Greco. See *Engel* at ¶ 15. Although courts have found a physician to be an employee of a state university even where he or she is not directly paid by the university, this has only been so where a "symbiotic relationship" exists between the university and the physician's practice plan. *Id.*; see also *Potavin v. Univ. Med. Ctr.*, 10th Dist. No. 00AP-715 (Apr. 19, 2001). For instance, in *Potavin*, this court held that a volunteer clinical instructor for the University of Cincinnati's ("UC") OB/GYN department was a state employee for purposes of immunity because the record showed that UC had a "high degree" of control over the instructor's practice group. *Id.* We found that the practice group and UC "functioned as one entity" where compensation of practice group employees was subject to the approval of the dean of the College of Medicine, the practice plan contributed a significant amount of money to the OB/GYN department, and the director of the OB/GYN department testified that the practice plan would not exist if not for its relationship with UC. *Id.* In *Engel*, the Supreme Court of Ohio found that "no such symbiotic relationship exist[ed]" where the university did not pay the physician and where the procedure was performed at a county hospital unaffiliated with the hospital. *Id.* at ¶ 15.

{¶ 16} Here, nothing in the record reveals that OSUMC dictated the budget of Dr. Greco's practice group or that the practice group could not exist without its relationship with OSUMC. OSUMC did not provide Dr. Greco with malpractice insurance coverage and did not collect any portion of her billings or fees for professional services. Unlike the facts in *Potavin*, there is no evidence in this case indicating that Dr. Greco's practice group and OSUMC functioned as one entity.

{¶ 17} Finally, it is unclear whether Dr. Greco argues that she was serving in an "elected or appointed office or position" with the state pursuant to R.C. 109.36(A)(1)(a). Nevertheless, we find that the evidence would not support such a claim. As with the physician in *Engel*, Dr. Greco "possessed no 'sovereign' function of an executive, legislative, or judicial character," and her "duties were not of a level consonant with those of a public office." *Id.* at ¶ 19. On the evidence presented, we find that the Court of Claims did not err in determining that Dr. Greco was not a state "officer or employee" for purposes of immunity under R.C. 9.86, 109.36(A)(1)(a), and 2743.02(F).

{¶ 18} Accordingly, Dr. Greco's sole assignment of error is overruled.

III. CONCLUSION

{¶ 19} Having overruled Dr. Greco's sole assignment of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

CONNOR, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 20} I find this a very close case, but reach a different conclusion than the majority. The Ohio State University Medical Center ("OSU Medical Center") and hence the state of Ohio has significant control over everyone who has staff privileges at the OSU Medical Center. Carol Greco, M.D., has such privileges. In order to have staff privileges, she has to be a faculty member at the Ohio State University College of Medicine. She does not have a salary from the OSU Medical Center, but has parking privileges and has the right to purchase tickets to athletic events. The record does not tell us if the parking privileges are in a faculty area (A sticker lot) or in a staff area (B sticker lot). The ability to

park in either lot is a financial benefit, as opposed to the cost of parking in a public lot near the hospital.

{¶ 21} Dr. Greco's employment status with OSU Medical Center is a mixture of employee and private contractor. She has some freedom as to the hours she is at the hospital, but must supervise medical interns and must also generally abide by the rules and regulations for staff at the OSU Medical Center.

{¶ 22} The record before us indicates that Dr. Greco was supervising interns on the hospital grounds when the facts underlying this case arose. Since she was actively fulfilling her duties as a faculty member on the actual hospital premises, I see her as an employee of OSU Medical Center at that time, and hence a person entitled to statutory immunity, despite the minimal financial benefit she was receiving directly from the medical center.

{¶ 23} I would therefore sustain the sole assignment of error, but again acknowledge that this is a very close case—one worthy of the review of the Supreme Court of Ohio. The OSU Medical Center has many physicians in the position of Dr. Greco. Both the physicians and OSU Medical Center need to know whether or not the physicians are officers or employees, if only so all involved are clear as to who provides medical malpractice insurance coverage.

{¶ 24} I respectfully dissent.
