

Court of Claims of Ohio  
The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

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

{¶1} 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.

{¶2} R.C. 2743.02(F) states, in part:

{¶3} "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."

{¶4} R.C. 9.86 states, in part:

{¶5} “[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, 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**

{¶6} 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**

{¶7} 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.

{¶8} 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).

{¶9} “[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 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.

{¶10} 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.

{¶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.”

{¶12} “[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.*

{¶13} “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 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 Councell v. Douglas*, 163 Ohio St. 292 (1955).

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

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

{¶16} “(a) [T]he extent of control which, by the agreement, the master may exercise over the details of the work;

{¶17} “(b) [W]hether or not the one employed is engaged in a distinct occupation or business;

{¶18} “(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;

{¶19} “(d) [T]he skill required in the particular occupation;

{¶20} “(e) [W]hether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

{¶21} “(f) [T]he length of time for which the person is employed;

{¶22} “(g) [T]he method of payment, whether by the time or by the job;

{¶23} “(h) [W]hether or not the work is a part of the regular business of the employer;

{¶24} “(i) [W]hether or not the parties believe they are creating the relation of master and servant; and

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

{¶26} 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.

{¶27} 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).

{¶28} 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).

{¶29} 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 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.

{¶30} 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.

{¶31} 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.

{¶32} 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.<sup>1</sup> *Smith* at 416.

{¶33} 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).

{¶34} 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.

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DALE A. CRAWFORD  
Judge

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<sup>1</sup>R.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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JUDGMENT ENTRY

{¶35} 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.

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DALE A. CRAWFORD  
Judge

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