

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

BRADLEY METTS, etc., et al.

Plaintiffs

v.

OHIO UNIVERSITY HERITAGE COLLEGE OF OSTEOPATHIC MEDICINE

Defendant

Case No. 2014-00223

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} This matter came before the court for an evidentiary hearing to determine whether Amy Zidron, D.O., is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶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 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.”

{¶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.”

{¶6} “[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 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. If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.

{¶7} “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. If there is evidence that the practitioner’s duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred.” *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 30-31.

{¶8} On October 28, 2013, Bradley Metts, a minor, presented to the offices of University Medical Associates, Inc. (UMA), located on the campus of Ohio University Heritage College of Osteopathic Medicine (OU-HCOM), complaining of ear pain and fever. Dr. Zidron examined him and recommended treatment with Tylenol or ibuprofen, and to return if his symptoms worsened. Plaintiffs allege that Dr. Zidron failed to diagnose and treat a significant ear infection which led to mastoiditis, meningitis, and cerebral edema, resulting in permanent injury. Dr. Zidron asserts that she was acting on behalf of the state during her care and treatment of Metts, and

consequently, that she is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F).

{¶9} Dr. Zidron testified that she began her employment as an Assistant Professor of Pediatrics at OU-HCOM on August 1, 2013, as reflected in her letter of appointment dated December 3, 2012. (Defendant's Exhibit B.) The letter of appointment states, in part:

{¶10} "As a member of the college faculty, you are expected to join the faculty and administration in supporting the distinctive concepts of osteopathic medicine, striving to meet the College's goal of producing competent, compassionate physicians for the state of Ohio. Your duties will be to provide active classroom and laboratory teaching and leadership for the College's teaching programs, *including clinical teaching*, and participation in faculty development programs. Additionally, you may be asked to participate on committees and become involved with other College or University activities. Specifics of these academic activities will be negotiated with your Department Chair." (Emphasis added.) *Id.*, p. 2. The appointment letter also states that the offer of employment was contingent upon Dr. Zidron's acceptance of a separate offer of employment by UMA. "As a condition of employment at Ohio University, you must maintain employment or affiliation with UMA." *Id.*, p. 1.

{¶11} With regard to Dr. Zidron's clinical compensation, OU-HCOM agreed to reimburse UMA for her annual salary for a two-year period as long as she remained active with UMA. This was referred to as a "clinical salary guarantee." *Id.* OU-HCOM also offered Dr. Zidron a signing bonus, contingent upon a three-year period of employment. *Id.*

{¶12} Beth Maxon, CEO for OU-HCOM, testified that UMA was created in 2003 to separate clinical operations from OU-HCOM, and that UMA is the exclusive private practice group through which full-time faculty of OU-HCOM are permitted to practice medicine.

{¶13} Dr. Zidron's employment agreement with UMA states that her duties are to render medical and surgical services for UMA as determined by its Board of Directors. (Dr. Zidron's Exhibit 1, p. 1.) Dr. Zidron is a member of the pediatrics practice group through UMA, and her duties and responsibilities are established by the Department/Sub Group Director for the Practice Group. *Id.* Under the UMA employment agreement, Dr. Zidron's duties also include: keeping and maintaining appropriate medical records which are the property of UMA; maintaining and improving her professional skills for the benefit of UMA and its patients; and, other duties as set forth by the Board of Directors, including "on duty" and "on call" assignments at night and on weekends and holidays as determined by the Department/Sub Group Director. *Id.*

{¶14} UMA compensates Dr. Zidron at an annual rate to be paid monthly, with potential additional compensation through profit-sharing from the practice group. UMA also provides Dr. Zidron with fringe benefits, a medical office, equipment, supplies, and nursing and secretarial personnel. With regard to her dual employment status, her contract with UMA states:

{¶15} "UMA recognizes that the Doctor is otherwise employed and is devoting reasonable amounts of time as a faculty member of the COM [College of Medicine]. In addition, UMA recognizes the importance of maintaining a proper balance between the clinical activities the Doctor is expected to perform for UMA and the educational and research duties the Doctor has as a faculty member. Therefore, the Doctor shall fulfill all of his or her teaching, research or administrative responsibilities connected with and arising out of the Doctor's appointment to the faculty of the COM and shall be entitled to retain all remuneration from such employment; provided, however, that when the Doctor is not fulfilling his or her teaching, research or administrative responsibilities with the COM, he or she shall devote his or her full time and best efforts to the performance of

his or her employment under this Agreement.” *Id.* p. 3. UMA also provides malpractice insurance to Dr. Zidron. *Id.* p. 5.

{¶16} Based upon the evidence and testimony presented at the hearing, the magistrate finds that Dr. Zidron was an employee of both OU-HCOM and UMA. The dispositive issue in this matter is whether Dr. Zidron was acting on behalf of the state when she treated Metts.

{¶17} “[T]he question of scope of employment must turn on what the practitioner’s duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury. Thus, proof of the content of the practitioner’s duties is crucial. The Court of Claims must have evidence of those duties before it can be determined whether the actions allegedly causing a patient’s injury were ‘in furtherance of the interests of the state’ or, in other words, within the scope of employment.” *Theobald, supra*, at ¶ 23.

{¶18} The Supreme Court of Ohio has stated:

{¶19} “*Theobald* did not establish a categorical rule that a physician who is a member of the faculty of a state medical college is immune for providing clinical care only while teaching a medical student or resident. Rather, the scope of employment is a fact-based inquiry that turns on proof of the employee’s specific job description with the state and focuses on whether the employee’s conduct is related to and promotes the state’s interests.” *Ries v. Ohio State Univ. Med. Ctr.*, 137 Ohio St.3d 151, 2013-Ohio-4545, ¶ 23.

{¶20} As stated above, the duties that Dr. Zidron had pursuant to her employment with OU-HCOM included clinical teaching. Dr. Zidron’s duties pursuant to her employment with UMA included the clinical practice of medicine. Even though there is no categorical rule that immunity applies only if a medical student or resident is being taught in a clinical setting, the duties as set forth in Dr. Zidron’s letter of appointment with defendant specifically include clinical teaching. Therefore, if Dr.

Zidron was not teaching when she treated Metts, she was not performing her duties as set forth in her letter of appointment with defendant.

{¶21} The evidence shows that a resident named Jacqueline Fisher was accompanying Dr. Zidron on October 28, 2013, in the UMA offices. Maxon testified that Fisher was not an employee or a student of OU-HCOM, but, rather, she had graduated from medical school and was a resident at O'Bleness Memorial Hospital. Maxon explained that OU-HCOM is affiliated with the Centers for Osteopathic Research and Education (CORE) program, through which residents from 15 different hospitals participate in clinical practice. According to Maxon, OU-HCOM does not operate its own hospital or clinic. Maxon testified that OU-HCOM does not control the clinical duties of its physicians; that UMA rents office space from OU-HCOM; and that UMA does its own billing.

{¶22} According to Dr. Zidron, Fisher accompanied her the entire day when she treated patients at UMA, although Dr. Zidron had no independent recollection of whether Fisher accompanied her when she treated Metts. Dr. Zidron stated that on a typical day, any resident assigned to her would have accompanied her to see all of her patients. However, Dr. Zidron acknowledged that she may see a patient without a resident present if she is running behind schedule. Dr. Zidron stated that she does not typically chart the fact that a resident is with her. Dr. Zidron testified that her usual procedure is to have the resident meet with the patient first and write an initial note, and then she and the resident will examine the patient together. However, Dr. Zidron agreed that the electronic medical record does not reflect that Fisher wrote anything in Metts' chart that day.

{¶23} Alicia Porter testified that she is the finance, human resources director, and risk manager of UMA. Porter testified that UMA is a private, 501(c)(3) corporation, with its own board of directors. According to Porter, the sole division of UMA that provides revenue to OU-HCOM is the Student Health Services department, also known as

Hudson Health. Porter testified that the electronic medical record for patient care is maintained by UMA, and although Fisher accessed certain of Dr. Zidron's patients' charts, both before and after Metts' appointment, Fisher did not access Metts' chart. (Dr. Zidron's Exhibit 3.) Porter added that although UMA does not have a contract with the CORE program, UMA's affiliation with OU-HCOM allows residents from the CORE program to rotate through UMA's offices.

{¶24} Upon review of the evidence, the magistrate finds that although Dr. Zidron is employed by the state, she was not furthering the state's interests when she treated Metts at the offices of UMA on the date in question. The magistrate further finds that the facts in this case differ from the facts in *Ries, supra*, inasmuch as the letter of appointment from OU-HCOM specifically states that Dr. Zidron's duties include clinical teaching, as opposed to the clinical practice of medicine. The magistrate finds that the electronic medical record shows that Dr. Zidron treated Metts without the assistance of a resident. Therefore, the magistrate finds that Dr. Zidron was not performing her clinical teaching duties on behalf of the state when she treated Metts. Rather, the magistrate finds that Dr. Zidron was engaged in the clinical practice of medicine pursuant to her employment agreement with UMA when she rendered care to Metts. For the reasons stated above, the magistrate finds that Dr. Zidron was not educating a resident at the time she treated Metts. Therefore, the magistrate recommends that Amy Zidron, D.O., is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F), and that the courts of common pleas have jurisdiction over any civil actions that may be filed against her based upon the allegations in this case.

{¶25} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of*

any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

HOLLY TRUE SHAVER
Magistrate

cc:

Brian M. Kneafsey, Jr.
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Craig S. Tuttle
Gerald S. Leeseberg
175 South Third Street
Penthouse One
Columbus, Ohio 43215-5134

Filed June 9, 2015
Sent to S.C. Reporter 2/3/16