

[Cite as *Metts v. Ohio Univ. Heritage College of Osteopathic Medicine*, 2015-Ohio-5644.]

BRADLEY METTS, etc., et al.

Plaintiffs

v.

OHIO UNIVERSITY HERITAGE
COLLEGE OF OSTEOPATHIC
MEDICINE

Defendant

Case No. 2014-00223

Judge Patrick M. McGrath
Magistrate Holly True Shaver

JUDGMENT ENTRY

{¶1} On February 18, 2015, a hearing was held for the purpose of determining whether Amy M. Zidron, D.O., is entitled to civil immunity pursuant to R.C. 9.86.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” On June 23, 2015, Dr. Zidron filed objections to the June 9, 2015 recommendation of the magistrate that Dr. Zidron be denied civil immunity. On July 6, 2015, defendant, Ohio University Heritage College of Osteopathic Medicine (OU-HCOM), filed a response to Dr. Zidron’s objections.

{¶3} Dr. Zidron raised the following two (2) objections:

- a. Objection 1: The Magistrate Erred in Shifting the Burden of Proof from Defendant to Dr. Zidron.

{¶4} Dr. Zidron argues that the burden of proof in determining whether a state employee was acting within the scope of his/her employment lies with the party seeking to prove that civil immunity does not apply. In support of this proposition, she cites *Botkin v. Univ. of Cincinnati Coll. of Med.*, 2005-Ohio-1122 (10th Dist.). However, the facts of this case are distinct from those in *Botkin*. Here, the state is taking the relatively

rare stance that its physician employee was acting outside the scope of employment and is therefore not entitled to immunity.

{¶5} It is true that the burden of proof rests with the party seeking to disprove a physician's immunity. However, the Tenth District in *Botkin* points out that, “* * * it would be illogical to require the employer, *or the state* to have the burden of proving that the employee was acting within the scope of his or her employment.” *Id.* at ¶ 37 (Emphasis added). Therefore, *Botkin* provides conflicting authority regarding which party bears the burden of proof when the state is the party denying immunity. Dr. Zidron did not provide any authority from which this court can infer that the state shall bear the burden of proof when it is the party seeking to disprove immunity. And, the court finds no such authority that stands for the proposition that the burden of proof ever lies with the state in determining immunity issues pursuant to R.C. 9.86.

{¶6} Further, Dr. Zidron's argument mischaracterizes the magistrate's decision. She states, “* * * the Magistrate in her Decision held that Dr. Zidron failed to prove that she was furthering the state's interest and acting within the scope of her employment * * *.” (Dr. Zidron's Objections, p. 8). The magistrate's decision does not mention a shifting of the burden of proof from defendant to Dr. Zidron. In fact, the decision does not mention the burden of proof at all. It certainly does not state that Dr. Zidron failed to meet her burden of proof. Rather, the magistrate held that the evidence before the court showed that Dr. Zidron was without a resident at the time she treated plaintiff, Bradley Metts, and was therefore not performing her clinical teaching duties on behalf of the state when she treated him. This court finds no evidence to support the assertion that the magistrate incorrectly placed the burden of proof on Dr. Zidron.

{¶7} Regarding the burden of proof, defendant argues that Dr. Zidron failed to object during the hearing and has therefore waived any objections as to the application of the burden of proof. This court does not agree with defendant's assertion.

{¶8} In support of its argument defendant relies on *Stores Realty Co. v. Cleveland, Bd. of Bldg. Standards & Bldg. Appeals*, 41 Ohio St.2d 41, 322 N.E.2d 629 (1975).

{¶9} The Supreme Court of Ohio in *Stores Realty Co.* held:

Ordinarily, errors which arise during the course of a trial, which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal.

(*Id.* at 42, citing *Snyder v. Stanford*, 15 Ohio St.2d 31, 238 N.E.2d 563 (1968). See also *Oney v. Needham*, 6 Ohio St.2d 154, 216 N.E.2d 625 (1966)).

Stores Realty and the other cases involve preserving one's right to appeal at a lower court. The magistrate's decision did not arise from a lower court. Rather, the recommendation made by the magistrate is one which must be adopted by a judge in this court. "Pursuant to Civ.R. 53(D)(3)(b), a party may not raise on appeal any error pertaining to a trial court's adoption of any finding of fact or conclusion of law by the magistrate, unless that party timely objected to that finding or conclusion, as required by the rule." *Little v. Watkins*, 2012-Ohio-5041 (10th Dist.), citing *State ex rel. Booher v. Honda of Am. Mfg.*, 88 Ohio St.3d 52, 2000-Ohio-269, 723 N.E.2d 571. By timely filing objections to the magistrate's decision, Dr. Zidron preserved her right to appeal this court's subsequent adoption thereof. See also *Normandy Place Assocs. v. Beyer*, 2 Ohio St.3d 102, 443 N.E.2d 161 (1982).

{¶10} Even though Dr. Zidron's right to appeal was not waived, the court finds, upon careful consideration, her first objection is without merit. There is no evidence that the magistrate applied the wrong burden of proof. Rather, it seems she considered all of the evidence before the court and decided there was more evidence in favor of the state's position that Dr. Zidron was not acting within the scope of her employment.

{¶11} Therefore, Dr. Zidron's first objection is OVERRULED.

b. Objection 2: The Magistrate's Erred in Finding that While Dr. Zidron was Employed by Defendant, She Was Not Acting Within the Scope of Her Employment at the Time of the Alleged Malpractice.

{¶12} Dr. Zidron argues that there is ample evidence before the court to prove that she was acting within the scope of her employment at the time she provided treatment to Bradley Metts. The court does not agree.

{¶13} The magistrate found that Dr. Zidron was not performing a duty of her employment with OU-HCOM when she treated Bradley Metts. She relies on the fact that neither Dr. Zidron's contract with OU-HCOM, nor the testimony during the hearing indicate that patient care is a duty of employment for Dr. Zidron with OU-HCOM. Rather, the only duties she has are those related to clinical teaching.

{¶14} She also found that the electronic medical record demonstrates that Dr. Zidron treated Metts without the assistance of a resident and therefore outside the scope of her employment. She based this finding on the fact that there is no evidence Dr. Fisher (the resident) was with Dr. Zidron at the time she saw Bradley Metts. Dr. Zidron testified that she could not recall whether or not Dr. Fisher was present at the time she treated Metts. Further, Dr. Fisher did not make any notes on Bradley Metts' charts. In fact, the evidence shows that Dr. Fisher never even accessed Bradley Metts' chart on the day in question. The evidence did, however, show that Dr. Fisher accessed the charts of Dr. Zidron's other patients while Dr. Zidron was with Bradley Metts.

{¶15} Dr. Zidron argues that the lack of access of Bradley Metts' chart by Dr. Fisher is not indicative of whether Dr. Fisher was present when Dr. Zidron treated Metts. She asserts that it is her common practice to have a resident in the room with her for every patient she sees. Dr. Zidron explains that if she saw a patient with the resident or if the resident saw the patient on her own, Dr. Zidron would make a note in the patient's

chart (not the resident). She also asserts that it is not her common practice to note the presence of a resident in a patient's chart.

{¶16} Dr. Zidron maintains that the magistrate erred in failing to consider the common practice, or habit evidence, from her testimony which she insists confirms the following:

- 1) It was Dr. Zidron's normal course of practice on October 28, 2013, to have Dr. Fisher with her the entire day seeing patients;
- 2) It was Dr. Zidron's normal course of practice to have Dr. Fisher in the room with every patient seen and treated; and
- 3) Pursuant to Dr. Zidron's routine practice, when a rotating resident is following/shadowing her at UMA, on October 28, 2013, Dr. Fisher would have been present with Dr. Zidron for Bradley Metts' appointment on October 28, 2013.

In support of this argument, Dr. Zidron relies on *Schultz v. Univ. of Cincinnati Coll. of Med.*, 2010-Ohio-2071 (10th Dist.). However, the facts in *Schultz* differ from the facts in this case in a crucial way. While it is true that the Tenth District relied on a physician's testimony regarding his common practice, or habit evidence, it did not rely solely on said testimony to establish the presence of a resident. In *Shultz*, "the "Record of Operation" completed by the circulating nurse during surgery indicated that one of this neurosurgery residents * * * was present." *Id.* at ¶ 26. There is no such evidence in this case that Dr. Fisher was present while Dr. Zidron treated Metts. The magistrate acknowledged the testimony related to Dr. Zidron's habit. However, she ultimately found that there was more evidence, albeit circumstantial, which demonstrates that Dr. Fisher was not present with Dr. Zidron while she treated Metts nor did she even access his charts.

{¶17} Dr. Zidron also argues that her involvement with Bradley Metts was inextricably tied to her duties and responsibilities to OU-HCOM because when she cared for him she did so in furtherance of the state's interest (as opposed to her own self-interest). She does not explain how she is furthering a state interest, or what that interest is. Dr. Zidron is correct that a furtherance of a state interest and actions which are not self-serving is merely one component of the immunity determination. See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573.

{¶18} The Supreme Court in *Theobald*, held that "if an employee's actions are self-serving or have no relationship to the employer's business then the conduct is "manifestly outside the scope of employment, and R.C. 9.86 does not apply." *Id.* at 28. *Theobald* also held that, "* * *[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. *Id.* at ¶ 26. "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." *Id.* at ¶ 31.

{¶19} However, as cited by the magistrate:

{¶20} "*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.

{¶21} Therefore, the analysis requires more than simply determining whether or not the physician was furthering the interest of the state and not acting in a self-

interested manner. The court must first consider the employment agreement/job description to determine what the scope of those duties are. Once that is determined, the court may determine whether those particular duties were occurring at the time in question.

{¶22} Pursuant to *Ries*, the magistrate first analyzed Dr. Zidron's letter of intent with OU-HCOM which states that her duties include clinical teaching. The scope and limit of her duties was corroborated by testimony of Dr. Zidron and Beth Maxon, Chief Administrative Officer for OU-HCOM (Hearing Transcript, p. 65, 91). Then, the magistrate correctly distinguished *Ries* from the facts in this case. In *Ries*, the physician's employment agreement with the state institution included "providing clinical services to patients." *Id.* at ¶ 31.

{¶23} Also, as further evidence that *Ries*' duties included patient care, the state institution "directed and controlled his clinical care of patients." *Id.* at ¶ 26. Here, University Medical Associates had exclusive control over Dr. Zidron's patient care: it maintained the schedule, required weekend/evening availability, provided fringe benefits, a medical office, equipment, supplies, a nursing staff and billed patients directly, etc. The evidence and testimony is clear that OU-HCOM had no control over Dr. Zidron's clinical practice.

{¶24} Again, the presence of a resident is not by itself determinative of acting within the scope of employment. However, since Dr. Zidron's duties with OU-HCOM only included clinical teaching and not clinical care, there is more evidence from which the court can infer Dr. Zidron was not teaching and therefore not acting within the scope of her employment with OU-HCOM when she treated Metts. Dr. Zidron herself testified that if there was not a resident present when she saw Bradley Metts, she would not be engaged in teaching. (Hearing Transcript, p. 71). Therefore, Dr. Zidron's second objection is OVERRULED.

{¶25} Upon review of the record, the magistrate's decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. It is hereby determined that Amy M. 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. The parties are reminded that they have an ongoing duty to inform the court of changes to the status of the connected action.

PATRICK M. MCGRATH
Judge

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