

Court of Claims of Ohio

The Ohio Judicial Center
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DEBORAH MAROTTO, et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY MEDICAL CENTER

Defendant

Case No. 2011-02590

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} On January 27, 2007, plaintiff, Deborah Marotto, gave birth to her son, Mario, at The Ohio State University Medical Center (OSUMC).¹ Plaintiffs assert that Dr. Bell was negligent during his care and delivery of Mario. On July 25, 2013, an evidentiary hearing was conducted in this matter to determine whether David Bell, M.D., 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.”

¹“Plaintiff” shall refer to Deborah Marotto throughout this decision.

{¶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.” *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 30.

{¶7} “For purposes of R.C. 9.86 and 2743.02(F) ‘officer or employee’ must be defined in accordance with R.C. 109.36(A).”² *State ex rel. Sanquily v. Court of Common Pleas*, 60 Ohio St.3d 78 (1991).

²R.C. 109.36(A)(1) states:

“‘Officer or employee’ means any of the following:

“(a) 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.

“(b) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

“(c) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

“(d) A person who, at the time a cause of action against the person arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic,

{¶8} Dr. Bell asserts that during his care and treatment of plaintiffs, he was an officer or employee of the state pursuant to R.C. 109.36(A)(1), and consequently, that he is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F).

{¶9} Dr. Bell testified that he is a board certified obstetrician/gynecologist (OB/GYN) and that he is employed by Kingsdale Gynecologic Associates, Inc. Dr. Bell stated that since 1985, he has held a clinical appointment with The Ohio State University College of Medicine (OSUCOM). Dr. Bell described his appointment as a non-paid auxiliary faculty position, whereby his teaching obligations were fulfilled by allowing residents to participate during the care of his patients who were admitted to OSUMC. Dr. Bell's appointment did not require him to present lectures, perform research, or publish articles. According to Dr. Bell, if he refused to allow residents to participate in the care of his patients, his appointment would not be renewed. Dr. Bell explained that in exchange for his service of teaching residents at OSUMC, the residents provide coverage when one of his patients is admitted for delivery. Dr. Bell asserted that without the existence of auxiliary faculty, OSUCOM would lose its accreditation. Dr. Bell acknowledged that he had no written employment contract with either defendant or OSUCOM in 2007.

{¶10} Dr. Bell further testified that his medical offices are not located on the university campus; that Kingsdale issued the billing statements for the professional services that he rendered to plaintiff; that plaintiff received her prenatal care at the Kingsdale offices; that Kingsdale established his fee schedule; that defendant did not dictate Kingsdale's business practices; that he does not pay into a public retirement system; that his malpractice insurance is provided through Kingsdale; that he does not have to schedule his vacation through defendant; that defendant does not keep track of his hours or provide him with an office, phone, or pager; and that he is not required to

deliver a certain number of babies per year at OSUMC. Although Dr. Bell earned no reportable income from defendant in 2007 and was not issued either a W-2 or 1099 form, he receives free Continuing Medical Education courses and access to the medical library. Although he pays for parking himself, defendant provides him with a free “emergency” parking pass.

{¶11} Significantly, Dr. Bell testified that plaintiff was a patient of Dr. Carol Greco, one of his colleagues at Kingsdale, and that if Dr. Greco had been on the “call schedule,” she would have delivered Mario. Dr. Bell explained that the call schedule is a list of Kingsdale physicians who cover deliveries for their patients who go into labor at night or on the weekends, and that he was on-call at the time that plaintiff went into labor. Dr. Bell admitted that his employment status was the same as Dr. Greco’s in 2007.

{¶12} Dr. Greco’s immunity was at issue in *Phillips v. The Ohio State University Medical Center*, 10th Dist. No. 12AP-414, 2013-Ohio-464, wherein the Tenth District Court of Appeals determined that Dr. Greco was not a state “officer or employee,” and therefore, not entitled to personal immunity pursuant to R.C. 9.86 and 2743.02(A)(2). In *Phillips*, the plaintiff alleged that Dr. Greco was negligent during surgery that was performed on one of her private practice patients at OSUMC. Dr. Greco held a clinical appointment with OSUCOM which included hospital privileges and required her to teach residents in her clinical practice at OSUMC. Dr. Greco did not receive any monetary compensation or malpractice insurance coverage from OSUMC for serving as an unpaid auxiliary faculty member.

{¶13} In determining whether Dr. Greco was a state employee for the purpose of immunity, the court of appeals weighed several factors which were set forth in *Engel v. Univ. of Toledo College of Med.*, 130 Ohio St.3d 263, 2011-Ohio-3375. Although the factors applied in *Engel* comprise “a non-exhaustive list,” the court held that the factors

were relevant in analyzing whether a volunteer clinical instructor of a state university qualified as a state employee pursuant to R.C. 109.36(A)(1). In *Engel*, the Supreme Court of Ohio considered the existence of a contractual relationship between the state and the physician, the degree of control the university had over the physician's actions, and payment by the university for the physician's services. *Id.* at ¶ 10. In both *Engel* and *Phillips*, the court determined that the physician was not a state employee, and thus not entitled to immunity, based upon the findings that there was no employment contract, that no monetary compensation was paid, and that there was no exercise of state control over the physician. *Id.* at ¶ 16, *Phillips, supra* at ¶ 10.

{¶14} Daniel Pierce, administrator for the department of OB/GYN at OSU, testified that his duties in 2007 included billing for the OB/GYNs affiliated with the university's practice group, Ohio State University Physicians (OSUP). Pierce testified that OSUCOM has no ownership interest in Kingsdale, no day-to-day control over Kingsdale, and that no OSUCOM employees work at Kingsdale. Although physicians from Kingsdale had medical staff privileges at OSUMC, Pierce stated that neither OSUCOM nor OSUMC issued billing statements for Dr. Bell's services.

{¶15} Robert Bornstein, M.D., testified that in 2007 he was vice dean for academic affairs at OSUCOM. Dr. Bornstein described the difference between regular faculty and auxiliary faculty. According to Dr. Bornstein, regular faculty are full-time employees of the university who are on either the tenure track, the clinical track, or the research track. Regular faculty are issued three-year contracts, with the exception of positions that are funded by research grants. In contrast, auxiliary faculty are essentially volunteer faculty who are unpaid, and their primary role is teaching medical students and residents in a clinical setting. In 2007, all auxiliary faculty, whether paid or unpaid were provided letters of appointment that were renewed annually. According to the bylaws, any clinician must secure an appointment to the faculty in order to

practice at OSUMC. Dr. Bornstein explained that inasmuch as OSUMC is a teaching hospital, the university requires that any clinician have staff privileges.

{¶16} Philip Samuels, M.D., testified that he was an associate professor and the director of the OB/GYN residency program in 2007. Dr. Samuels explained that the Accreditation Council for Graduate Medical Education (ACGME) is the accrediting agency for the OB/GYN department, and that the ACGME has the power to shut down a medical program if certain requirements are not met. Dr. Samuels stated that full-time faculty care for clinic patients, are not allowed to practice at other hospitals without permission, are provided malpractice insurance through OSUCOM, and are required to conduct evaluations of residents. In contrast, auxiliary faculty do not provide care to clinic patients, but, rather, provide care only to their private patients who are admitted to OSUMC; there are no restrictions on auxiliary faculty practicing at other hospitals; auxiliary faculty are not provided malpractice insurance through OSUCOM; and auxiliary faculty are not required to conduct evaluations of residents. According to Dr. Samuels, OSUMC has a plethora of obstetric cases and OSUMC would maintain its accreditation without residents being supervised by auxiliary faculty.

{¶17} Mark Landon, M.D., testified via deposition that in 2007, he was vice chairman in the department of OB/GYN, clinical chief of obstetrics, and the director of maternal/fetal medicine for OSUCOM. Dr. Landon described full-time faculty as “attending staff” as opposed to auxiliary faculty who are “courtesy staff.” Dr. Landon explained that auxiliary faculty do not provide coverage for clinic patients, and that there is no expectation for research, teaching, or lecturing from auxiliary faculty.

{¶18} Although Dr. Bell testified that he does not have a written employment contract with defendant, and acknowledges that his employment status was the same as Dr. Greco’s in 2007, he maintains that his unpaid auxiliary faculty appointment constitutes an implied employment contract in that he was required to follow the bylaws

which require him to supervise and instruct residents any time that he practiced medicine at OSUMC. However, even if the court were to accept Dr. Bell's argument that his arrangement with OSUMC was contractual, it does not necessarily equate to a contract of employment. See *Phillips* at ¶ 12, citing *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."). Accordingly, the court finds that Dr. Bell did not have a contract of employment with defendant.

{¶19} Dr. Bell argues that even though he did not receive financial compensation from defendant, a "symbiotic relationship" existed between himself and defendant via his auxiliary faculty status. With regard to a symbiotic relationship, the court of appeals has stated: "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." *Phillips* at ¶ 15, citing *Potavin v. Univ. Med. Ctr.*, 10th Dist. No. 00AP-715, 2001 Ohio App. LEXIS 1787 (Apr. 19, 2001). In *Potavin*, the court of appeals found that the university had a high degree of control over the physician's practice group inasmuch as the practice plan contributed a significant amount of money to the university's OB/GYN department. However, Dr. Bell did not practice under defendant's practice plan, OSUP. Rather, Dr. Bell's practice plan, Kingsdale, was a separate corporate entity that exists independently from OSUP. Therefore, the court finds that no symbiotic relationship exists between OSUP and Dr. Bell's practice plan.

{¶20} In addition, the court finds that Dr. Bell did not establish that either defendant or OSUCOM exercised a significant degree of control over his medical practice. Specifically, neither defendant nor OSUCOM dictated which patients Dr. Bell treated in his office, when patient appointments were scheduled, how much he charged

for his services, or how his professional fees were billed and collected. Unlike the full-time faculty, Dr. Bell did not practice through OSUCOM's practice plan. Dr. Bell was not required to perform didactic teaching or lectures, contribute to medical literature, provide medical care to defendant's indigent patients, participate in resident clinics, or provide written evaluations for the residents he taught.

{¶21} Dr. Bell argues in the alternative that he was rendering medical services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state, and that he is therefore an employee of the state pursuant to R.C. 109.36(A)(1)(b). However, Dr. Bell admitted that he did not have any written employment contract with either defendant or OSUCOM. Furthermore, Daniel Pierce testified that all employment contracts with OSUCOM, including both personal services and purchased services contracts, are required to be in writing. In addition, Andrew Thomas, M.D., testified that in 2007, he was the associate medical director for university hospital and associate dean for graduate medical education. According to Dr. Thomas, OSUCOM has issued personal services contracts intermittently in the past, however, they are always in writing. Therefore, the court finds that Dr. Bell has failed to prove that he was rendering medical services pursuant to a personal services or purchased service contract with the state.

{¶22} With regard to whether Dr. Bell was serving in an "elected or appointed position" with the state pursuant to R.C. 109.36(A)(1)(a), the evidence does not support a finding that Dr. Bell was holding an elected office or position, or that he "possessed any sovereign functions of government to be exercised by him for the benefit of the public either of an executive, legislative, or judicial character." *Engel, supra*, ¶ 19; *Phillips* at ¶ 17. Furthermore, the court finds that Dr. Bell was not providing any services to defendant that would establish an employment relationship pursuant to 109.36(A)(1)(c) or (d).

{¶23} In the final analysis, the court finds that there was no employment contract between Dr. Bell and defendant, that Dr. Bell received no financial compensation from defendant as a result of the medical care he rendered to plaintiffs, and that defendant did not control the care and treatment that Dr. Bell rendered to plaintiffs. Furthermore, Dr. Bell has failed to prove that he served in an elected or appointed position with the state, or that he was rendering medical services pursuant to a personal services contract or purchased service contract with the state. For the reasons stated above, the magistrate finds that Dr. Bell was not an officer or employee of the state of Ohio as defined in R.C. 109.36. Therefore the magistrate recommends that David Bell, M.D., 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 him based upon the allegations in this case.

{¶24} 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

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