

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JOHN W. HAYDEN, M.D.)

Appellant/Intervenor,)

VS.)

CORNELIUS WALLER,)
STATE OF TENNESSEE and)
THE CLAIMS COMMISSION OF)
THE STATE OF TENNESSEE,)

Respondents/Appellees.)

Tennessee Claims No. 301-698

Appeal No. 02A01-9511-BC-00241

FILED

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APPEAL FROM THE CLAIMS COMMISSION OF TENNESSEE
THE HONORABLE MARTHA B. BRASFIELD, COMMISSIONER

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

DAVID R. FARMER, J.

HOLLY KIRBY LILLARD, J.

This appeal is from the decision of the Claims Commission of the State of

Tennessee (hereinafter, "Claims Commission") finding that John Hayden, M.D., (hereinafter "Dr. Hayden" or "Hayden") acted beyond the scope of his employment with the State of Tennessee. Specifically, the Claims Commission found that on October 30, 1992, Dr. Hayden was engaged in the private practice of medicine on behalf of his dual employer, UT Medical Group, Inc., (hereinafter, "Medical Group"), a private entity, when he treated Rosalyn Waller (hereinafter "Mrs. Waller") at the Shelby County Regional Medical Center (hereinafter, "The Med") in Memphis. As a result of his actions, the Claims Commission determined that Dr. Hayden was acting beyond the scope of his employment as an associate professor at the University of Tennessee School of Medicine (hereinafter, "UT" or "University") and was not entitled to absolute immunity from liability pursuant to T.C.A. § 9-8-307(h). Dr. Hayden timely appealed the Claims Commission's decision, and the appeal is properly before this Court. After careful review of the record, briefs and argument of the parties, it is the opinion of the Court that the Claims Commission's decision should be affirmed.

FACTS

Dr. Hayden is a board certified emergency physician. In 1991, he responded to an advertisement placed by the University in the Annals of Emergency Medicine seeking an academic emergency physician to join the University's faculty. Dr. Hayden was recruited by and hired by Dr. Arthur Kellerman, Chief of the Division of Emergency Medicine at the University. Dr. Hayden accepted a position in the Division of Emergency Medicine, Department of Medicine, at the University and also served as the Associate Program Director for the proposed Emergency Medicine Residency Program. Dr. Hayden's job duties included supervision and teaching of medical residents and medical students who were rotating through The Med. Dr. Hayden's job duties were specified in Dr. Kellerman's letter of July 30, 1991, which stated in relevant part:

Your primary academic responsibilities [sic] will include serving as associate program director for our proposed Emergency Medicine Residency Program. You will also direct and coordinate our present and future undergraduate and graduate medical education programs in emergency [sic] medicine. Your primary clinical responsibility will be supervision and teaching of residents and medical students in the Emergency Department of the Regional Medical Center at Memphis.

Other appropriate academic/educational work will be assigned by me. Your academic appointment will be in the Division of Emergency Medicine and your office will be based at the Regional Medical Center.

Your guaranteed annual income will be \$100,000. Your income will be made up to [sic] two components, for which you will receive two checks each month. Part of your salary will come from the University of Tennessee and the remainder will come from the University Physicians Foundation. The benefits are the same, so there is no consequence to you for your salary being split like this. It is simply a budgeting matter for this institution. As a full time faculty member you will be asked to sign a practice limiting contract. This means that you cannot deliver outside medical services and receive direct payment for them unless it is arranged through the University and UPF. Since any outside clinical work scheduled must not compromise your principal responsibilities to the division, I reserve the right to review and approve outside clinical schedules.

Your benefits will include malpractice insurance, life insurance, health insurance, a pension plan, two vacation days per month which may be utilized as earned, and one sick leave day accumulated per month.

.....

Dr. Hayden was a dual employee of the University and the UT Medical Group. The Medical Group is a private practice organization composed entirely of members of the University's medical faculty. The Medical Group is the successor to University Physicians Foundation, and it is not an agency of the State of Tennessee. In 1992, approximately 24% of Dr. Hayden's income came from the University, and the remaining 76% was paid by the Medical Group. While Dr. Hayden did not execute an employment agreement with the Medical Group, he understood that he was an employee of both the University and the Medical Group. As he stated in this deposition:

Q. As of October 30, 1992, you were an employee of UTMG, University Physicians Foundation, correct?

A. Yes.

Q. And you were assigned to the emergency room, at least in part, in your capacity as an employee of UTMG on that occasion, correct, based upon your understanding?

A. Based upon my understanding, I was there in a supervisory role and my function there was the teaching and training of residents. That was my understanding. I treated patients independently. If the room became too busy or there was not manpower, then I managed patients, but essentially my understanding was that my role was that of a supervisory

capacity in a teaching function.

Q. But, of course, you were primarily responsible for all of the patients in which you were supervising residents, correct, primarily and ultimately responsible, weren't you?

A. Make sure I answer your question carefully. I was responsible to supervise the resident and to assist that resident with what I perceived to be his capabilities and ability to manage the patient.

Q. You had the last call, didn't you?

A. That's correct.

The Medical Group billed for the services of its physician employees, and it is undisputed that the Medical Group had the right to bill for Dr. Hayden's treatment of Mrs. Waller. The Medical Group maintained a system for billing for patient services by having its physicians complete orange billing cards. The Medical Group's physicians, including Dr. Hayden, were required to complete these cards for billing.

In October, 1992, the Medical Group, The Med and the University were parties to various contracts. Pursuant to one of these contracts, the Medical Group agreed to furnish physicians to The Med. The Med agreed to pay the Medical Group for emergency room services and also for the care its physicians rendered to Shelby County's indigent patients. The Med directly paid the Medical Group for the services of supervising physicians at The Med. The Medical Group had the exclusive right to bill for its physicians' direct patient care services at The Med. Thus, the Medical Group received payments from The Med for the staffing and supervisory services rendered by the Medical Group's physicians, and the Medical Group could also directly bill patients and third party payors for its physicians' services.

The University did not contract to provide physicians to render direct patient care services at The Med. The Medical Group was responsible for the payment of the salaries of its professional employees as well as their pension, retirement, deferred compensation and other benefits. In 1992, the Medical Group paid Dr. Hayden more than \$80,000 for the services he rendered on its behalf at The Med. Further, the Medical Group paid Dr. Hayden's professional malpractice insurance premiums.

On October 30, 1992, Mrs. Waller presented herself to the Emergency Department at the Med with an acute exacerbation of asthma. Dr. Hayden assessed Mrs. Waller at that time and assigned her care to Dr. Ulrich Duncan, a medical resident. While treating another patient, Dr. Hayden was notified that Waller's situation had become critical and that his assistance was required. Dr. Hayden rendered direct, "hands on" care to Mrs. Waller, including intubation by inserting a laryngoscope and ordering X-rays and arterial blood gas studies. Despite Dr. Hayden's efforts on October 30, 1992, Mrs. Waller died.

The October 30 incident was not the first time Mrs. Waller had presented herself to The Med in need of treatment for her asthma. On October 2 and 7, 1992, Medical Group physicians had treated her and had billed for their services. While the Medical Group did not bill for the services Dr. Hayden rendered to Mrs. Waller on October 30, it did charge for the radiological treatment which Dr. Hayden ordered as part of her emergency treatment.

Cornelius Waller, decedent's husband, filed two medical malpractice actions in connection with the death of his wife. The first action, Waller v. Shelby County Health Care Corp., et al., Shelby County Circuit Court No. 56214, included as defendants both Dr. Hayden and the Medical Group. That lawsuit alleged that Dr. Hayden was an employee of the Medical Group. The second action, Waller v. State of Tennessee, Tenn. Claims Comm. No. 301698, named Dr. Hayden and Ulrich Duncan, the medical resident, as State employees. On March 13, 1995, Cornelius Waller moved the Claims Commission for partial summary judgment, seeking a determination that the Commission lacked jurisdiction to adjudicate the adequacy of Dr. Hayden's treatment of Mrs. Waller. Waller sought clarification concerning whether the lawsuit against Dr. Hayden should continue in the Claims Commission or whether the claim should proceed in the Circuit Court. The determination is crucial because in the Claims Commission there can be no individual liability or punitive damages and there is a \$300,000 statutory damages cap; however, in

the Circuit Court, individual liability can be imposed, punitive damages are recoverable and there is no cap on potential liability.

On May 16, 1995, the Circuit Court proceedings were stayed pending the Claims Commission's determination concerning Dr. Hayden's status. On May 22, 1995, Dr. Hayden sought to intervene in the Claims Commission proceeding to assert that he was acting within his capacity as a state employee at the time he treated Mrs. Waller and was therefore entitled to the State's sovereign immunity under T.C.A. § 9-8-307. On August 10, 1995, the Claims Commission granted Dr. Hayden's motion to intervene. Oral argument was had before the Claims Commission in this cause on August 31, 1995. On October 3, 1995, the Claims Commission entered an order finding that Dr. Hayden was not acting within his capacity as a State employee when he treated Mrs. Waller on October 30, 1992. Instead, the Claims Commission determined that Dr. Hayden was an employee of the Medical Group when he performed the acts complained. Therefore, the Claims Commission was without jurisdiction to hear claims arising from Dr. Hayden's treatment of Mrs. Waller because its jurisdiction is limited to claims involving State employees. Dr. Hayden timely filed a petition for review appealing the Claims Commission's decision to this Court.

Rule 13(d) T.R.A.P. requires this Court to review the findings of fact by the Claims Commission *de novo* upon the record, accompanied by a presumption of the correctness of the findings. Unless the preponderance of the evidence is otherwise, we must affirm the Claims Commission, absent an error of law.

ISSUE PRESENTED FOR REVIEW

The issue on appeal is as follows:

Whether the Claims Commission correctly determined that Dr. Hayden was acting within the scope of employment with his private practice group, UT Medical Group, Inc., and not within the scope of employment with the University of Tennessee, in the care and treatment of Rosalyn Waller at The Med on October 30, 1992.

ANALYSIS

T.C.A. § 9-8-307(h) expressly provides immunity for state employees acting within the scope of their employment. That section provides in relevant part:

State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious or criminal acts or omissions or for acts or omissions done for personal gain...

T.C.A. § 9-8-307(h)

Claims alleging professional malpractice by a State employee are within the jurisdiction of the Claims Commission. T.C.A. § 9-8-307(a)(1)(D). However, the Act expressly excludes from Claims Commission coverage those "acts done for personal gain." T.C.A. § 9-8-307(d). On October 30, 1992, Dr. Hayden was an employee of both the University and of the Medical Group. The Medical Group is a private practice group that is not part of the University or of the State of Tennessee.

According to Dr. Kellerman's July 30, 1991, letter appointing Dr. Hayden, the University hired Dr. Hayden to perform teaching, administrative and supervisory functions in regard to the University's Emergency Medicine program. The University paid Dr. Hayden in excess of \$25,000 in 1992 to perform these services for the University. The Medical Group paid Dr. Hayden a separate salary to render direct treatment to patients at The Med, and the Medical Group, in turn, billed the patients or their third party providers for these services. Thus, Dr. Hayden served both public and private interests.

While all members of the Medical Group are members of the University's medical faculty, the University may not bill or otherwise receive payment for patient care services that said physicians render. The Medical Group is "the sole and exclusive entity through and under which the patient care activities of the University's faculty members in the College of Medicine shall be conducted." Patient care activities are defined as:

The rendering of medical and related professional services for which a professional fee is, or may be, charged and for which the University does not otherwise compensate the faculty

member.

The Medical Group is responsible for "...the payment of the regular salaries of the professional employees of the Foundation..."

Both the University and the Medical Group are engaged in a symbiotic relationship. The Medical Group benefits the University's faculty by allowing the University to attract physicians of high professional and academic stature, and the University benefits the Medical Group by designating the Medical Group as the exclusive agency through which its faculty may engage in private practice. Thus, the physicians are engaged in a dual employment situation: They perform administrative duties, research and teaching responsibilities for the University, and they also render direct medical care to patients for the Medical Group. The University pays its faculty for the administrative, teaching, and research activities, and the Medical Group pays the physicians for their direct patient care services.

The University and The Med were parties to a contract in October, 1992, which set forth the duties to be carried out by the University for The Med. Those duties were limited to (1) providing "graduate medical and dental students " (interns and residents) to The Med; and (2) providing medical and dental faculty to instruct and supervise the house staff and to perform other medical-administrative services. According to Dr. Kellerman's July 30, 1991, letter appointing Hayden to the faculty, the University hired Dr. Hayden to perform the following functions:

- a. To serve as Associate Program Director for the Emergency Medicine program;
- b. To direct and coordinate present and future undergraduate and graduate medical education programs in emergency medicine;
- c. To supervise and teach medical residents and medical students in the emergency department at The Med; and
- d. To perform other academic duties as assigned by Dr. Kellerman.

These duties comprised the totality of Dr. Hayden's job duties for the University. Any acts beyond those duties were also beyond the duties undertaken for the University. Nowhere

in either the University's contract with the Med or the University's contract with Dr. Hayden is there a provision that non-resident physicians are to perform direct patient care services. The Medical Group is a party to the aforementioned contract, and the Medical Group's obligations to The Med are different than those of the University. The contract provides that the Medical Group will "...provide necessary attending, consultative and other direct physician services for all patients of The Med who require such services..." Thus, the Medical Group obligated itself to provide physician services to patients at The Med. It fulfilled its obligation, in part, by staffing the emergency department, and it was paid for providing said services. In explaining his understanding of his employment status, Dr. Hayden stated that his primary responsibility was to supervise and teach and that he treated patients independently. As Hayden stated in his deposition:

Q. And you were assigned to the emergency room, at least in part, in your capacity as an employee of UTMG on that occasion, correct, based upon your understanding?

A. Based upon my understanding, I was there in a supervisory role and my function there was the teaching and training of residents. That was my understanding. I treated patients independently. If the room became too busy or there was not manpower, then I managed patients, but essentially my understanding was that my role was that of a supervisory capacity in a teaching function. (Emphasis Added).

The University anticipated that its physicians would engage in activities apart from their service to the State that were not afforded immunity. Therefore, the University drafted guidelines for determining when faculty members would and would not be covered by the Claims Commission. That policy states in relevant part:

The Tennessee Claims Commission Act (T.C.A. § 9-8-307d) provides: "The State will not be liable for, malicious, or criminal acts by State employees, or for acts on the part of state employees done for personal gain."

It is the University's opinion that the intent of the above statement is to exclude coverage under the Claims Commission Act for incidents arising out of the ordinary practice of medicine and for incidents in a teaching setting in which the physician ... might be expected to obtain personal gain by billing for his or her services.

.....

It is recognized that all encounters between a physician and a patient done in a teaching setting, i.e., those in which a resident or student participates, have some potential element for gain to the State as well as the potential for personal gain

to the individual professional.
(Emphasis in the Original).

The University anticipated that professional malpractice claims might be levied against its faculty, and in such case, the University predetermined that Claims Commission immunity would not attach if the physician billed or might have billed for his services. The University's policy links Claims Commission coverage to whether the physician billed or could have billed for the services rendered. The policy relies upon the regulations set forth in Medicare Intermediary Letter No. 372 in determining whether the physician could bill for the services. That letter states in relevant part:

A. Conditions Which Must be Met for a Teaching Physician to be Eligible for Part B Reimbursement as an Attending Physician

5. An emergency room supervising physician may not customarily be considered to be the attending physician of patients cared for by the house staff. It is only through his direct personal involvement with a patient that a charge may be recognized under part B. Such an involvement would necessarily include personal examination of the patient as well as direction of and responsibility for the treatment provided.

The Medical Group did not bill for Dr. Hayden's services to Mrs. Waller, but it admitted that under its contract with The Med, the payments it received for direct patient care for Shelby County's indigent patients would have anticipated Mrs. Waller's care. Thus, even if the Medical Group did not submit a bill for Dr. Hayden's treatment, the Medical Group had already received some remuneration for the direct patient care services given to Mrs. Waller under the contract. The Medical Group further admitted that it was entitled to bill for Dr. Hayden's services to Mrs. Waller. In fact, the Medical Group billed for the services its physicians rendered to Mrs. Waller on October 2 and 7, 1992, as well as for the radiological treatment Mrs. Waller received on October 30.

University policy requires that for direct patient care that occurs within the teaching setting where residents or students participate in the care of the patient, faculty members are eligible for Claims Commission coverage only if:

- (a) The intent not to bill is set forth in a prior agreement between the individual and the University; and
- (b) Any right or interest in billing is transferred by the faculty member to the University by prior agreement.

Unless a prior agreement containing both of these elements existed, liability cannot be shifted to the State. Appellant received direct payment from the Medical Group. He billed for services on behalf of the Medical Group by filling out the orange billing cards that recorded treatment given to patients at The Med. The Medical Group processed these cards for billing. The Medical Group received payment from The Med for the services rendered to the hospital by the Medical Group's physicians. Dr. Hayden received a salary from the Medical Group for services he performed on its behalf at The Med, and there was no agreement between Dr. Hayden and the University documenting an intent to not bill or to transfer his right or interest in billing to the University.

In Hutsell v. Block Medical, Inc., No. 92-303, (U.S.D.C., W.D. Tenn. 1994), the federal court was faced with a situation similar to the instant case. Dr. Einstein was both a University faculty member and Medical Group physician, and he was sued for professional malpractice in regard to surgery performed at a private hospital on a private paying patient. Like Dr. Hayden, Dr. Einstein argued that he was entitled to immunity pursuant to T.C.A. § 9-8-307(h) because he was an employee of the University of Tennessee and was supervising a medical resident in performing the allegedly negligent operation. In denying Dr. Einstein's motion for summary judgment, the federal court determined that Dr. Einstein was acting in a dual capacity and received only a percentage of his compensation from the State. The court noted,

In his capacity as a treating physician treating patients, for which he was paid by privately owned UTMG, Dr. Einstein is not functioning as a State employee.

Furthermore, when treating physicians through UTMG, Dr. Einstein acts for personal gain. Although Dr. Einstein does not receive payment directly from the patient, the patient pays UTMG, who in turn pays 80% of Dr. Einstein's income.

Consequently, as to acts or omissions in treating patients, Dr. Einstein is not acting in the service of the University but, rather, is functioning in a separate capacity as a private physician. Because Dr. Einstein was acting in his capacity as a private physician when the conduct complained of by plaintiff occurred, he is not entitled to immunity from personal liability for said conduct.

Dr. Hayden asserts that the instant case differs from Hutsell because Mrs. Waller

was not a private patient being treated at a private medical institution. The Court finds Hutsell and the instant case to be substantially similar. Contrary to Dr. Hayden's assertion, we do not believe that either the location of the work or the patient's ability to pay is of any consequence. So long as the physician is receiving payment from an employer other than the State of Tennessee to perform the work in question, he is not entitled to immunity.

Dr. Hayden was a dual employee of both the University and of the Medical Group. When he worked in the emergency department at The Med, he did so as an employee of both the University and of the Medical Group. At The Med, Dr. Hayden served the University by supervising medical students and residents such as Dr. Duncan, and he served the Medical Group by rendering direct patient care to patients such as Mrs. Waller. The University did not employ Dr. Hayden to perform direct patient care services at The Med; That was the Medical Group's obligation. For treating patients such as Mrs. Waller, the Medical Group paid Dr. Hayden in excess of \$80,000 annually, which is clearly a personal gain to him.

It is not his service to the University that affords him absolute immunity in this case. Rather, it is his service to the Medical Group which removes the shield of absolute immunity. Accordingly, we affirm the decision of the Claims Commission with costs taxed to Appellant for which execution may issue if necessary.

HIGHERS, J.

CONCUR:

FARMER, J.

LILLARD, J.