

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED
CLERK'S OFFICE
2015 MAR 25 A 9:49

WILLIE HARRIS #157914,)
)
 Claimant,) Claim No. T20130859
)
 vs.)
)
 STATE OF TENNESSEE,)
) Regular Docket
 Defendant.)

ORDER GRANTING SUMMARY JUDGMENT AND DISMISSAL OF CLAIM

This claim came before Robert N. Hibbett, Commissioner and judge of the facts and law, upon the State's Motion for Summary Judgment filed November 4, 2014. Oral argument of the motion was heard on March 6, 2015 by video at the Rachel Jackson Building in Nashville, Tennessee. The Claimant is self-represented. Senior Counsel Pamela S. Lorch of the State Attorney General's Office represented the State of Tennessee.

The State filed a motion for permission to file its motion for summary judgment out of time. The Claimant opposed the motion. The Tribunal found that the motion was well taken and allowed it to be filed and argued. The Claimant filed a motion on January 6, 2015 to hold ruling on the State's summary judgment motion in abeyance pending further discovery. Discovery requests

were to be made by November 30, 2013 pursuant to the scheduling order.

According to the State, the Claimant never served any discovery upon the State.

Furthermore, before and during the pendency of the motion for summary judgment, there were no requests for the Tribunal to enforce or compel discovery. Therefore, the Tribunal did not grant the motion for abeyance.

Claimant brings a claim pursuant to T.C.A. § 9-8-307(E) for injuries resulting from the negligent care, custody, and control of persons. Claimant also had alleged medical negligence related to the failure to provide adequate medical care. Previously, the State had moved to dismiss on the grounds that Claimant's claims are essentially medical malpractice claims subject to the requirements of T.C.A. § 29-26-121 et. seq. On August 7, 2013, the Tribunal granted the State's motion to dismiss with respect to the medical negligence claims, but denied the motion with respect to the claim arising from negligent custody, care, and control of persons.

The State alleges in its motion for summary judgment that (1) The Claims Commission does not have subject matter jurisdiction over claims of negligence committed by non-state employees and (2) The Claimant failed to state a claim and the Claims Commission lacks subject matter jurisdiction of any claim based

upon Tenn. Code Ann. § 41-1-408. In support of its motion for summary judgment, the State has filed the Affidavit of Dr. Otis Campbell M.D. and the medical records of the Claimant. In its statement of undisputed material facts, the State alleges the following:

The Claimant, Willie Harris, is an inmate of the Tennessee Department of Correction, housed at the Turney Center prison in Only, Tennessee. Mr. Harris went to the prison clinic on July 13, 2012 and stated that he had fallen and hurt his hand. The nursing staff examined Mr. Harris' hand, and he was given ibuprofen, referred to Dr. Campbell and x-rays ordered. Dr. Campbell examined Mr. Harris on July 18, 2012. The x-ray showed a nondisplaced fracture of the fifth metacarpal of the left hand. Dr. Campbell is a physician licensed by the State of Tennessee. In July and August, 2012, Dr. Campbell was an employee of Corizon. Corizon is a private company, not a State Agency; and Dr. Campbell is a Corizon employee, not a state employee. At the time of the period at issue, as a Corizon employee, Dr. Campbell was the medical director at the Turney Center prison in Only, Tennessee. Dr. Campbell wrote a consult request to Corizon for Mr. Harris to see an orthopedic doctor and faxed the request to Corizon on July 19, 2012 for approval and scheduling. Corizon employees are the persons who give

approval for consults and schedule appointments, not state employees. Corizon approved the request on July 20, 2012 and scheduled Mr. Harris' appointment with Dr. Baker, the orthopedic surgeon, for August 2, 2012. Dr. Baker is a private physician. Dr. Baker is not a state employee and he is not a Corizon employee. Mr. Harris' August 2, 2012 appointment was rescheduled to August 9, 2012 because Dr. Baker was not available for clinic on August 2, 2012. Dr. Baker examined Mr. Harris on August 9, 2012. Dr. Baker's hand-written consultation note stated:

Left articular 5th metacarpal fracture 3 weeks old. Malunited. Needs to undergo ORIF. Will discuss with Dr. Limbird. Request authorization for ORIF (surgery) 5th metacarpal head [sic] fracture. However patient may be able to increase range of motion without surgical intervention. I will discuss with team and call tomorrow.

Dr. Campbell received a copy of Dr. Baker's note on August 15, 2012 and on that day, faxed a consult request for surgery to Corizon. Corizon approved the surgery request on September 5, 2012. When Corizon contacted Dr. Baker to schedule the surgery, Dr. Baker said it was too late to do the surgery; that he was "unable to proceed with procedure due to authorization time lag." Corizon instructed Dr. Campbell to cancel the consult request for surgery which Dr.

Campbell did on September 6, 2012. Mr. Harris' failure to receive surgery for his left hand injury was not the fault of any state employee.

In his reply in opposition to the State's statement of undisputed material facts, the Claimant disputed the following:

1. That the x-ray showed a nondisplaced fracture of the fifth metacarpal of the left hand because Claimant is not a medical expert.
2. That at the time period at issue, as a Corizon employee, Dr. Campbell was the medical director at the Turney Center prison in Only, Tennessee. Claimant alleges that Dr. Campbell was not and is not the medical director.
3. That Dr. Baker is a private physician. Also, that Dr. Baker is not a State employee and he is not a Corizon employee. Claimant does not know if Dr. Baker is a private physician or a State employee.
4. That Mr. Harris' failure to receive surgery for his left hand injury was not the fault of any State employee. Claimant vehemently disputes this based on T.C.A. § 41-1-408 and 41-21-204(b).

The Claimant has failed to cite to evidence in the record to support his dispute of the alleged facts. Therefore, the Tribunal finds that the State of Tennessee's statement of undisputed materials facts is true and correct.

CONCLUSIONS OF LAW

The Claims Commission's jurisdiction over this action is set forth in Tenn.

Code Ann. § 9-8-307(a)(1)(E), which states:

The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:

* * *

(E) Negligent care, custody and control of persons;

Tenn. Code Ann. § 9-8-307

Negligence by private medical contractors

It is well-settled law that the State may not be held liable for the negligence of its contractors. In a case in which the Claimant was suing the State because of the acts of CCA, a private prison contractor, the Court of Appeals held that the State was not liable for the negligence of the contractor's employees:

This Court has previously held that CCA employees are not state employees. See *Martin v. State*, No. No. M1999-01642-COA-R3-CV, 2001 WL 747640 (Tenn.Ct.App. July 5, 2001). The *Martin* Court noted

that, under the Private Prison Contract Act of 1986 (as codified at T.C.A. § 41-24-107(b)), the sovereign immunity of the State does not apply to private contractors, such as the CCA. *Martin*, at *2. The *Martin* Court specifically stated that, “[w]here the acts complained of were not committed by state employees, the State enjoys sovereign immunity.” Consequently, as the Commission correctly found, the proper defendant for negligence claims arising from the action of private contractors, or their employees, in operating correctional facilities is the contractor, and not the State. *See also Greer v. Corrections Corp. of America*, No. 01A01-9604-CH-00150, 1996 WL 697942 at *2 (Tenn.Ct.App. Dec.6, 1996) (no Tenn. R.App. P. 11 application filed).

Younger v. State, 205 S.W.3d 494, 499 (Tenn. Ct. App. 2006)

In an unreported case adjudicated before *Younger*, the Court of Appeals found that the State was not liable for the alleged negligence of a contracted medical provider. Dr. Paul Somers was a physician contracted by the Department of Correction to provide medical care for inmates. In upholding the dismissal of the Claims Commissioner (Trial Court), the Court affirmed his holding that:

Dr. Somers was not a “state employee” within the meaning of Tennessee Code Annotated section 8-42-101(a)(3)(A)(Supp.1998).

Paul v. State, No. M2003-01244-COA-R9CV, 2003 WL 22964298, at *3 (Tenn. Ct. App. Dec. 16, 2003)

The law is clear that the State cannot be held liable for the alleged negligence of contracted medical providers. None of the medical providers

named in the instant claim were state employees. Therefore, the claim fails on this specific basis.

Private right of action

Tenn. Code Ann. § 41-1-408 states:

The department of correction shall provide adequate medical care, including twenty-four-hour emergency care, at all prison facilities. The department may contract with the county health department or other appropriate entities to secure trained medical personnel.

This statute does not contain language conferring a private right of action to an individual to sue the State. To sue for alleged negligent deprivation of statutory rights against the State in the Claims Commission, the statute must contain such language, pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(N), which states that the Claims Commission has jurisdiction over claims for

(N) Negligent deprivation of statutory rights created under Tennessee law, except for actions arising out of claims over which the civil service commission has jurisdiction. The claimant must prove under this subdivision (a)(1)(N) that the general assembly expressly conferred a private right of action in favor of the claimant against the state for the state's violation of the particular statute's provisions.

Because the General Assembly did not grant a private right of action in Tenn. Code Ann. § 41-1-408, the claim also fails on this basis.

General negligence under Tenn. Code Ann. § 9-8-307(a)(1)(E)

The State does have the duty to render medical aid when necessary. In other words, the State must provide reasonable access to necessary health care. In an unreported opinion involving the negligence claims of an inmate, the Court of Appeals concurred with the determinations of the Claims Commissioner (Trial Court):

However there is a factual issue concerning subsection five of TCA 9-8-307 concerning the negligent care, custody, and control of persons. In order for the claimant to recover, the claimant must show that the State of Tennessee was negligent and failed in the required duty that it had toward the claimant. It is the opinion of the Commissioner that the duty of care required by the State of Tennessee is one in which it owes to a prisoner in its care the duty to exercise ordinary diligence to keep him safe and free from harm, *to render him medical aid when necessary*, and to treat humanly and refrain from oppressing that prisoner. Where the State or its officials is negligent in the care and custody of a prisoner or fails in the performance of its duties to him, and as a result the prisoner is injured, the State of Tennessee is liable. (Emphasis added)

Laws v. State of Tennessee Dep't of Correction, No. C.A. 36, 1986 WL 8820, at *1 (Tenn. Ct. App. Aug. 14, 1986)

In the instant case, the Tribunal finds the State rendered Mr. Harris access to reasonable medical aid or care. When the State contracted Corizon to provide medical care to inmates, the State fulfilled its obligation under Tenn. Code Ann. § 9-8-307(a)(1)(E). Although it appears that the contractor was

dilatory and perhaps negligent in scheduling surgery for the Claimant, that is not the fault of the State of Tennessee. Because of the foregoing reasons, summary judgment must be rendered in favor of the State of Tennessee.

IT IS, THEREFORE. ORDERED:

1. That Summary Judgment is granted to the State of Tennessee.
2. That the claim is dismissed with prejudice.
3. That the court costs are taxed to the Claimant.
4. This is a final judgment.

ENTERED this 23 day of March, 2015.



ROBERT N. HIBBETT
Claims Commissioner
Sitting as the Trial Court of Record

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 25th day of March, 2015.

Paula Merrifield

PAULA MERRIFIELD
Administrative Clerk
Tennessee Claims Commission