

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION

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TIMOTHY SUMNER

Claimant,

vs.

Claim No. T20130936

STATE OF TENNESSEE,

Defendant.

ORDER GRANTING CLAIMANT'S MOTION TO DISMISS

This cause came to be heard on Claimant's motion to dismiss this claim for lack of jurisdiction. On August 3, 2012, Claimant's counsel mailed via certified mail to the Division of Claims Administration, hereinafter referred to as DCA, its "Notice of Claim Pursuant to Tennessee Code Annotated Sections 29-26-121 and 9-8-402." In that notice, Claimant's counsel referred to "allegations of negligence and willful battery" regarding surgery performed at the Regional Medical Center in Memphis on July 19, 2011, against a number of physicians, including Dr. Jeffrey Kutsikovich, who was a resident physician at the University of Tennessee. Claimant's counsel apparently sent DCA an update on its "potential claim" on November 2, 2012, along with its Circuit Court "Complaint for Healthcare Liability and Intentional Medical Battery" and letter of inquiry on January 2, 2013. This matter was transferred to the Claims Commission on April 30, 2013.

On or about August 30, 2013, Claimant filed his "Amendment to Complaint for Healthcare Liability" along with a motion to transfer this matter to Circuit Court. Claimant's amended complaint contains the following language: **Plaintiff alleges that all actions taken by Dr. Kutsikovich were willful and intentional in respect to this matter. Plaintiff makes no allegations of negligence against Dr. Kutsikovich.**" ("Amendment to Complaint for Healthcare Liability," p. 5)

Subsequent to the filing of this Amendment, Claimant asked that a Consent Order be filed dismissing this claim for lack of subject matter jurisdiction. Claimant argues that pursuant to Sec. 9-8-307(d), Tenn. Code Ann., the Tennessee Claims Commission lacks jurisdiction over claims based solely on willful and intentional conduct.

In September, 2013, the State filed its Motion for Summary Judgment alleging that Claimant's claim was untimely filed and is barred by the applicable statute of limitations.

Claimant filed a response to the State's Motion for Summary Judgment in which it insisted that the Commission cannot rule on a Motion for Summary Judgment in a claim over which it lacks jurisdiction. Under Tennessee law, Claimant insists, "[a]n order issued by a court without subject matter jurisdiction is neither valid nor enforceable." *State of Tennessee Ex Rel. Whitney v. Lewis*, 244 S.W.3d 824 (Tenn. App. 2007).

The State argues that the only causes of action available to Claimant whose cause of action ^{occurred} ~~arose~~ on or about July 19, 2011, are medical

negligence and medical battery. Since Claimant's amended complaint abandons any negligence claim, what remains is only a claim for medical battery. The State insists the medical battery claim should be disposed of by the Commission through application of the statute of limitations.

The State further avers that the "Commission lacks subject matter jurisdiction only if the employee did not act within the course and scope of his or her employment or if the claim does not fall within a category specified in the Act." ("Defendant State of Tennessee's Reply to Plaintiff's Response to State of Tennessee's Motion for Summary Judgment," p. 7) The State insists that if the Commission rules on the State's jurisdiction over the medical battery claim, it also must rule on whether or not Dr. Kutsikovich was acting within the course and scope of his employment. The State argues that if Dr. Kutsikovich was acting within the course and scope of his employment, Claimant has waived his cause of action against Kutsikovich in circuit court pursuant to Sec. 9-8-307(b), Tenn. Code Ann., which states as follows:

Claims against the state filed pursuant to subsection (a) shall operate as a waiver of any cause of action, based on the same act or omission, which the claimant has against any state officer or employee. The waiver is void if the commission determines that the act or omission was not within the scope of the officer's or employee's office or employment.

The jurisdiction of the Claims Commission is circumscribed by Sec. 9-8-307 (a) (1) (A)-(V), which lists specific categories of claims over which this body has exclusive jurisdiction to determine monetary claims against the state. The language of the relevant section in July, 2011, read as follows:

(a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state . . . falling within one (1) or more of the following categories:

. . .

(D) Legal or medical malpractice by a state employee; provided, that the state employee has a professional/client relationship with the claimant.

In Tennessee, there are three basic types of cases involving injury to a patient by a doctor: medical malpractice, lack of informed consent and medical battery. The courts have made it clear that the tort of medical battery, which involves performance of a procedure by a doctor which was not authorized by the patient, does not sound in negligence and is not a medical malpractice case.

The Tennessee Supreme Court, in *Cardwell v. Bechtol*, 724 S.W.2d 739, 750 (Tenn. 1987), explained as follows:

As observed in *Lanford v. York*, 224 Tenn. 503, 457 S.W.2d 525 (1970), malpractice “is based on lack of care or skill in the performance of services contracted for, and [battery] on wrongful trespass on the person regardless of the skill employed. The assertion of one is the denial of the other.” 224 Tenn. at 510–511, 457 S.W.2d at 528 (citation omitted).

Thus, malpractice and battery are different and the difference is recognized by the case law. *Cardwell v. Bechtol*, 724 S.W.2d at 750. Although they are often plead alternatively, one cause of action sounds in negligence and one does not.

Thus, “whenever a physician performs [treatment] upon a person, not being authorized by consent and not being protected by the exception made in cases of emergency, the physician is liable to such person for consequent injuries, regardless of whether such injuries resulted from negligence or otherwise.” (Citations omitted.) *Id.* at 751.

As noted by the court in *Cardwell*, in finding liability in a medical battery, the Courts do not always even examine whether the doctor's actions where the result

of negligence. The performance of the act or procedure itself, such as performing surgery on the wrong knee, is an intentional act even if the resulting harm may not have been intentional.

Looking at the language of Sec. 9-8-307(a)(1)(a) in effect in July, 2011, it appears that the only claim left in Claimant's amended complaint is one for medical battery. At least until the language of the Act was changed from "medical malpractice" to include the broader category of "health care liability," the Commission **FINDS** that in July, 2011, it did not have jurisdiction over the intentional tort of medical battery¹ since subsection (D) enumerates only medical malpractice.

The Commission **FURTHER FINDS** that the claim(s) found in Claimant's amended complaint do not fall under any of the other jurisdictional categories enumerated in Sec. 9-8-307(a)(1)(A)-(V), Tenn. Code Ann.

Claimant's motion to dismiss his claim for lack of jurisdiction is, therefore, **GRANTED**.

Because this tribunal has no jurisdiction over this matter, both a ruling on whether Dr. Kutsikovich was acting in the scope and course of his employment when the alleged medical battery occurred, and therefore whether Claimant has waived his cause of action against Dr. Kutsikovich individually by filing a claim in the Claims Commission,² and a ruling on the statute of limitations issue raised in

¹ The Commission would note that even if it had jurisdiction over a broader category that includes medical battery when this cause of action accrued, Sec. 9-8-307 (d) provides that "[t]he state will not be liable for willful . . . acts by state employees. . ."

² In deciding this issue, the judge would sit as claims commissioner as the judge does whenever a claims commission case is transferred to Circuit Court of Tennessee.

the State's motion for summary judgment must be raised in the Circuit Court of Tennessee for Shelby County.

IT IS SO ORDERED.

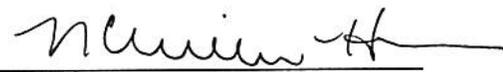

NANCY C. MILLER-HERRON
Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order was forwarded via hand-delivery or first-class mail, postage prepaid, this 14 day of February, 2014, to the following:

Mr. Joseph Michael Cook, Esq.
7692 Poplar Pike
Germantown, TN 38138

Ms. Rebecca P. Tuttle, Esq.
Associate General Counsel
The University of Tennessee
Office of General Counsel
66 North Pauline Street, Suite 428
Memphis, Tennessee 38163


NANCY C. MILLER-HERRON
Commissioner