

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

CLAIMS COMMISSION
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ESTATE OF)
DONALD WAYNE OLIVER, JR.,)
) Claim No. T20050925
 Claimant.)
)
v.)
)
STATE OF TENNESSEE)
) Regular Docket
 Defendant;)

JUDGMENT FOR DEFENDANT AND DISMISSAL OF CLAIM

This claim was tried before Robert N. Hibbett, Commissioner and judge of the facts and law. The Claimant seeks damages alleging Donald Oliver's wrongful death while in the custody of the Tennessee Department of Correction at the Riverbend Maximum Security Institute (RMSI) in 2004. The claim was tried on February 3, 2015 in the City Courtroom of Mount Juliet, Tennessee. The Claimant was represented by David W. Wyatt, Esq. and Jack Arnold, Esq. The State was represented by Senior Counsel Pamela S. Lorch of the Attorney General's Office. The Trial Transcript was filed with the Clerk of the Claims Commission on February 26, 2015.

STIPULATIONS

The parties stipulated to the admission into evidence the depositions of Dr. Dipan Shah, Donnie Frank Jones, Danny Ray Meeks, and Billy Murrell Meeks as well as Mr. Oliver's medical records.

Pursuant to Tenn. Code Ann. § 9-8-403(i), the Tribunal makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Testimony of Donnie Frank Jones, Sr. by deposition

Donnie Jones was an inmate at RMSI at the time of Donald Oliver's death. He had known Mr. Oliver for at least seven years and they were friends. Four or five days before his death, Oliver had expressed that he was having pains. Every now and then, Oliver would talk about going to medical and being checked out. He complained to Mr. Jones that all medical wanted to give him was Maalox for gas. At least a couple of times a day, for three or four days before his death, Oliver would mention his chest hurting. Mr. Jones had noticed Mr. Oliver had not been as energetic the last couple of days and looked weak.

On the night of Oliver's death, he saw medical go to Mr. Oliver's cell. One responder, a male nurse, fell out and so they had to work on him. Mr.

Jones saw the nurse that fell out being carried from the cell. A guard was standing at the door while Mr. Oliver was still inside the cell. Later, the ambulance personnel came, and then Mr. Oliver was carried out in a body bag. The Tribunal believes and accredits the testimony of Mr. Jones.

Testimony of Danny Ray Meeks by deposition

Danny Ray Meeks was an inmate at RMSI at the time of Donald Oliver's death. He only knew Mr. Oliver in passing at the prison for two or three months. He had talked with Mr. Oliver a time or two in the law library but he really did not associate with him.

While in the library, Mr. Oliver had talked to Meeks about his condition and stated he was having chest pains. Mr. Oliver had a pale look and stated he could not get any medical help. This conversation took place maybe three weeks before Oliver's death. Just after they spoke, he observed that Mr. Oliver looked really bad. Meeks would see Oliver sometimes, and he looked ashen and dehydrated. The Tribunal believes and accredits the testimony of Mr. Meeks.

Testimony of Billy Murrell Meeks by deposition

The Tribunal believes and accredits the testimony of Mr. Billy Murrell Meeks, but did not find his testimony to be probative.

Testimony of James V. Sanders

James Sanders was the cellmate of Donald Oliver at RMSI at the time of Oliver's death. He knew that Mr. Oliver had a maintenance job inside the prison at the time. He expressed that their relationship was "real cool" and they had discussions with one another. Mr. Oliver was older, and Mr. Sanders respected him. Mr. Sanders explained that to summon medical assistance one had to press a button by the cell door. A guard would come to the cell, and then the guard would call medical assistance.

On the day of his death, Mr. Oliver was complaining about having chest pains. He kept going to the clinic and the clinic gave him Maalox. He had approximately ten bottles of Maalox in the cell. He had been receiving Maalox every other day for approximately two weeks.

On the night of April 8, Oliver lay down after the 10:00 p.m. count and told Sanders his chest was hurting. Sanders asked him if he needed to call a guard, and Oliver said no. He was then pacing back and forth in the cell. Sanders never observed any medical staff come with a guard before Oliver passed away.

Sanders had dozed off, and he then thought that Oliver had fallen out of bed so he jumped down off the bunk to check on him. He found Oliver in the corner, and he was complaining about his chest. Oliver got up, paced around, got down on the floor and then back into his bunk. Sanders got back into his top bunk. He then heard Oliver making a moaning noise and observed him shaking.

Sanders ran to the cell door, hit the button and started kicking the door. A correctional officer came to the door and told Sanders to move back so that he could see. Oliver was huddled up in the corner where he made a sound like a deep breath and "that was it." The officer opened the door and then he left to get medical help. Sanders estimated it took approximately ten minutes for medical assistance to arrive.

The medical staff attempted CPR--then the nurse fainted, and CPR was performed on the nurse. After Oliver died, he had a bluish-purple color. Sanders was then removed to another location. The Tribunal believes and accredits the testimony of Mr. Sanders.

Testimony of Paul Windham

Paul Windham is a correctional officer with the Tennessee Department of Correction. He was working on the cell unit at the time of Donald Oliver's

death. Mr. Windham did not know or have any personal conversations with Mr. Oliver before he died.

Early on April 9, 2004, between midnight and 12:30 a.m., Mr. Windham was called to Oliver's cell. Oliver told him his chest was hurting, and he wanted to see someone from medical. Windham was not aware of Oliver's medical issues, and Oliver had not made any complaints to him before that time. After his request, Windham notified medical, and a male nurse came to see Oliver.

Mr. Windham was present when the nurse examined Mr. Oliver. The nurse sat on the edge of the bed and asked Oliver what was going on. Oliver told him his chest was hurting. The nurse put his stethoscope to Oliver's chest and told him that he heard a gurgling sound, and it might be indigestion. The nurse stated he would be back if there were any further issues. Mr. Windham could not remember with any certainty whether Oliver's blood pressure or pulse was taken.

The next time Windham came to Oliver's cell was approximately 2:00 a.m. He asked Oliver how he was feeling and whether medical needed to come back. Oliver told him that he thought he was feeling better. That was the last time he spoke to him while alive.

The next time he came to the cell was in response to the call light button. When he arrived, James Sanders was at the door and told him he had heard a thumping sound. Windham saw Oliver extended on his bed, leaning up in the corner and making a gurgling sound. Windham called out to him twice, but Oliver did not respond. He then called the nurse on the telephone. He came back to the cell, and Oliver was still in the same position. When he did not respond again, Windham opened the cell door and approached him. He was about to touch him when Oliver took his last breath. He called code four (medical emergency) over the radio.

Medical arrived within four minutes and started CPR on Oliver. A male nurse came in first and then a female nurse. They removed him off the bed and onto the floor and started CPR. More security staff started to enter the cell. Windham then took Sanders out of the cell and went back to his security desk to write in his logbook. There were no TDOC employees on the medical team.

Windham returned to the cell after the ambulance and fire department arrived. Captain Tyler, the shift commander, was told that Mr. Oliver met the requirements of being deceased. The fire department would not take possession of the body because he was deceased. The fire department left by

4:30 a.m. About that time, Windham closed the door to the cell and covered the window so inmates would not be able to look in and see Oliver on the floor. The Tribunal believes and accredits the testimony of Mr. Windham.

Testimony of Dipan Shah, M.D. by deposition

Dr. Dipan Shah, M.D. is a board certified cardiologist that practiced medicine in Nashville, Tennessee during 2004-05. At the time of his deposition in 2012, he was practicing medicine in Houston, Texas. He had hospital privileges at St. Thomas Hospital throughout his time in Nashville. He was retained as an expert to review the medical records of Donald Oliver, Jr. He was familiar with the standard of care for cardiac events based on published guidelines and the local standard of care based on his personal practice in that area.

Dr. Shah opined that Mr. Oliver suffered an acute coronary syndrome. In layman's terms, he died from a heart attack. This opinion was absolutely consistent with the findings of the medical examiner. He found that Mr. Oliver had a history of cigarette smoking and complained of epigastric pain that was treated with Mylanta, but it did not resolve his symptoms. His age and risk profile put him at risk for the development of coronary disease. A standard evaluation would have involved performing a 12 lead electrocardiogram

(EKG) to make sure there were no electrographic abnormalities that could suggest a few symptoms were coronary in nature. It is well known that a myocardial infarction that infects the right coronary artery often times may not present classic chest pain but may often present more with nausea and abdominal pain.

At autopsy, Mr. Oliver had multiple coronary obstructions, and the one that was the most likely culprit, was the one in the right coronary artery. The classic presentation with that type of heart attack was to have abdominal or epigastric pain as well as nausea. The records Dr. Shah reviewed did not show that an EKG was performed. It appears that Maalox was the only attempt to alleviate Oliver's symptoms.

When a patient presents with symptoms such as Oliver's, the first thing is to rule out a cardiac etiology. After excluding a cardiac etiology, you can look at other etiologies. Dr. Shah opined that in Oliver's case a cardiac etiology was never investigated or excluded. This fell below the appropriate standard of care.

All of Oliver's complaints and symptoms prior to his death were consistent with a cardiac event. In reviewing the medical records, he did not

find any other steps were taken to respond to Oliver's complaints other than using Maalox.

Dr. Shah opined that the failure to perform certain measures, including an EKG, fell below the appropriate standard of care. He noted that there were nurses or nurse practitioners that saw Oliver before his death, including some initial healthcare provider interaction. These providers had a duty to evaluate or monitor Oliver. At the least, a 12-lead EKG should have been performed. It was more probable than not that Oliver would have survived had he received the appropriate level of care for his condition based on the statistical data. The Tribunal accredits the expert testimony of Dr. Shah and finds it was probative and aided the Tribunal in applying the facts to the law.

Testimony of Gloria Darlene Wright

Mrs. Wright was the older sister of Donald Oliver by twelve years. She described her brother as being a jolly fellow who stayed by himself. He did not like school but he enjoyed mechanic work and became a welder. He also liked the printing business. He had a job offer to weld after he had passed away. He had lived with Mrs. Wright when he was not incarcerated and worked as a welder during that time. He also worked with leather and made belts.

While Mr. Oliver was incarcerated, Mrs. Wright would visit him once a month and sometimes more. She did not believe his two children ever visited him while he was in prison. During 2004 until the time of his death in April, Mrs. Wright saw her brother ten or eleven times.

The last time she saw him was a couple of weeks before his death. As they were sitting and talking, her brother told her that he did not want anything to eat because he was sick. She could tell he was sick and he looked like his blood pressure was up. She believes they cut the visit short that day. She could tell his physical appearance had changed from January because he looked flushed. He did not want to visit that last time because he wanted to go and lie down. Mr. Oliver told Mrs. Wright that he had been to see the doctor and had been to the infirmary because his chest had been hurting. He told her he had been to the infirmary quite a few times but all he had received was Maalox. He would also complain of a headache.

After his death, Mrs. Wright picked up his personal belongings from TDOC. There were between 15 to 20 Maalox bottles among his possessions. She arranged a memorial service for her brother at Spring Hill Cemetery. There was also a memorial service at RMSI. The Tribunal believes and accredits the testimony of Mrs. Wright.

Testimony of Deborah Gail Dolan

Ms. Dolan is the assistant director for human resources for the Tennessee Department of Correction. She testified that the medical providers, including the nurses, at RMSI in April 2004 were employees of a private contractor. RMSI was the first facility to have fully contracted medical staff since it opened in 1989 and it continues to have contracted medical staff. The medical providers at the prison have the duty to provide medical care.

In the central office of TDOC, there are state contract regulators that review the contract and the work of the contract staff to ensure they are meeting the requirements of the contract. TDOC has policies or standards to which contractors must adhere. There are state contract monitors who review basic medical care and ensure that the contractors are providing the services required within the contracts. The medical contractor at RMSI during April 8-9, 2004 was CMS, Correction Medical Services. The Tribunal accredits and believes the testimony of Ms. Dolan.

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

Liability

The Claimant has anchored his complaint on two bases. (1.) The State owed a duty to Donald Oliver to provide reasonable medical care and (2.) The State is liable for the acts of medical personnel and prison guards. The State has argued that (1.) The State of Tennessee is not liable for the acts of medical personnel that are not state employees and (2.) TDOC was not negligent in its care, custody and control of Mr. Oliver.

The facts are clear that the nurses that attended Mr. Oliver were employees of Correctional Medical Services. CMS was contracted by TDOC to provide medical services to inmates incarcerated at RMSI. 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. Therefore, the claim fails on this specific basis.

However, 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 another unreported opinion involving the negligence claims of an inmate, the Court of Appeals concurred with the determinations of the Claims Commissioner (Judge):

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)

The question in the instant case turns on whether the State rendered Mr. Oliver access to reasonable medical aid or care. The facts show the State contracted CMS to provide all medical services to the inmates at RMSI. CMS had a presence at RMSI including a clinic and health care providers. The correctional officer did call medical assistance when requested by Mr. Oliver. The correctional officer offered to call CMS at approximately 2:00 a.m. but Mr. Oliver declined. Later, when the correctional officer found Mr. Oliver in obvious distress, he called a medical emergency over the radio. That was all the correctional officer had a duty to do under the circumstances and he fulfilled his duty by notifying employees of CMS at the appropriate times.

Although it appears that the standard of care for the treatment of Mr. Oliver was breached by the employees of CMS, this is not the fault of the State of Tennessee. In contracting CMS to provide medical services, the State gave Mr. Oliver reasonable access to necessary medical assistance and care. Therefore, TDOC did not breach its duty to Mr. Oliver embodied in Tenn. Code Ann. § 9-8-307(a)(1)(E).

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

1. That the State of Tennessee is not liable for the wrongful death of Donald Wayne Oliver, Jr.

2. That the claim is dismissed with prejudice.
3. That the court costs, if any, are taxed to the Claimant.
4. That this is a final judgment.

ENTERED this the 26 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 31st of March, 2015.



PAULA MERRIFIELD
Administrative Clerk
Tennessee Claims Commission