



This claim is being considered under the provisions of Tenn. Code Ann. § 9-8-307(a)(1)(F): which provides as follows:

(a)(1) 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, falling within one (1) or more of the following categories;

(F) Negligent care, custody or control of personal property;

On the date of the hearing, Dr. Armistead testified under oath as did several individuals employed by the State at the University of Tennessee in Knoxville and at the University’s Graduate School of Medicine which is located on the opposite side of the Tennessee River from the University’s main campus in Knoxville.

In the Commission’s twenty-eight (28) page July 9, 2013, Order, we set out in some detail the factual background of this claim. The Commission will repeat, in that connection, a portion of our earlier decision:

Dr. Armistead’s Claim for Damages provides necessary background information. As stated above, between 2000 and 2003, Claimant was a resident physician at the UTMC in Knoxville. For some time prior to the year 2000, there appears to have been Federal court litigation over the issue of whether medical residents qualified as students such that they and their employers were exempt from paying FICA taxes to the Federal government because of something known as the “student exception.” The “student exception” is provided for in 26 U.S.C. § 3121(b)(10) and waived payment of FICA taxes for individuals who were pursuing a course of study rather than earning a livelihood while engaged in a professional training program. The State of Minnesota had not withheld FICA taxes from residents’ earnings and consequently, engaged in a long Federal court case with the Social Security Administration. In 1998, the United States Court of Appeals for the Eighth Circuit held that medical residents were in fact students and thereby exempt from the payment of those taxes. Immediately thereafter, claims to recover wrongfully paid FICA taxes by hospitals, teaching institutions and those who had been or were currently involved in medical residency programs were filed. These suits were filed throughout the country and at one point in his filings, Dr. Armistead states that his professional specialty group, The American Academy of Family Physicians, was monitoring this litigation.

Because of the ongoing litigation regarding the “student exception,” many teaching institutions, such as the UTMC, filed so called “protective”

claims with the Internal Revenue Service (I.R.S.) for the tax years 1994-2005. Here, claims were filed by the University both for itself as well as its residents in an effort to preserve their eligibility in the event the I.R.S. and the Social Security Administration decided to issue refunds. The UTMC apparently submitted those protective filings for itself and its residents in 2004.

Dr. Armistead, who has an undergraduate background in finance, claims that he kept abreast of this issue prior to, during and after his residency. However, tax return information in 2002 led Dr. Armistead to question officials in the University's Graduate Medical Education office. He claims that he was told by that office that it would "... be handling this issue on behalf of the residents and [would be] protecting their interests ... ." Dr. Armistead further asserts that he later learned that it was in the best interest of the University as well to "handle" the claims as it would be far less laborious to secure its portion of any refunds.

On March 2, 2010, the I.R.S. and Treasury Department announced that FICA taxes paid by medical residents between 1994 and 2005 would be refunded. Dr. Armistead became aware of this development in April 2010 and contacted an Amy Paganelli at the University. He was also provided additional information from Brenda Chaves at UTMC. His correspondence with Ms. Paganelli and Ms. Chaves is attached to his claim.

As part of the procedure for receiving tax refunds, the University was required to "perfect" the previously filed "protective" claims. Residents such as Dr. Armistead, who were interested in allowing the University to process the claims on their behalf, signed a "Medical Resident FICA Tax Refund Claims Consent Form." Dr. Armistead signed this form on August 20, 2010, and it is also attached to his claim.

However, after the "perfect[ed]" claims were submitted to the I.R.S., that agency informed the University that it had never received the 2004 "protective" claims for the years 2000 through 2003 for residents at the UTMC, but that if the University could provide sufficient proof of mailing, the FICA taxes would be refunded. Sometime thereafter, Dr. Armistead contacted the University for an update and was informed by a Lester K. Mathews, Executive Director of Integrated R/3 Information System (IRIS) Administrative Support at the University, that the I.R.S. had denied refund claims for the 2000 through 2003 period because it had never received the "protective" filings for that period. The University insisted that the forms for the period had in fact been sent and provided the I.R.S. with copies of the claim forms, accompanying cover letters, and affidavits from University employees attesting to the fact that the forms had been sent in a timely manner to the I.R.S. However, the I.R.S. responded that the evidence submitted was inadequate and told the University that unless it could provide better proof of mailing (such as certified mailing receipts), the claims for 2000 through 2003 refunds would be considered untimely and denied.

In response to Dr. Armistead's inquiry, Mr. Mathews also told him that the University had been under no obligation to file a protective claim on any resident's behalf and only did so as a "courtesy" in 2004. Mr. Mathews also pointed out to Dr. Armistead that individual residents could have personally

filed a claim in 2004.<sup>1</sup> Mr. Mathews also wrote that the University could not provide a receipt of mailing since all of the protective filings (and in fact all other correspondence with the I.R.S.) previously had been sent via first class mail as was the University's general practice at the time.

Dr. Armistead asserts that the University was negligent in the manner in which it delivered the "protective" filing sent on his behalf in 2004. He claims that under 26 C.F.R. § 7502(c), the only prima facie evidence that a mailing actually occurred was through the utilization of the certified mail process. Thus, Dr. Armistead argues that the University was clearly negligent when it mailed the 2000-2003 "protective" claims via first class rather than certified mail. Dr. Armistead goes on to argue that the University volunteered to file those claims on behalf of the residents only because it was to their administrative advantage to do so. Thus, he argues that filing the claims on behalf of the residents formed an oral contract or possibly a written contract. He argues that in that situation, there was offer, consideration on both sides and acceptance. Therefore, it is his position that the University should be held responsible for its failure to fulfill a fiduciary duty. Consequently, he seeks \$11,190 in damages which he contends he would have received had his refund claim been properly handled. (*Id.* at pp. 6-9)

#### **ADDITIONAL PROOF AT TRIAL**

In addition to these facts, certain evidence was developed at the trial of this matter which bears consideration.

First, the University was made aware on March 2, 2010, that the Internal Revenue Service was relenting on the issue of whether payments made to residents between 1994 and 2005 represented compensation or a mere stipend while young physicians trained. (TR 1, 78, Exh. 12).<sup>2</sup> Claimant testified that he became aware of this development in April of 2010. (TR 1, 129).

This decision by the Internal Revenue Service meant that for the period 2000 through 2003, the University and its medical residents would be receiving refunds of twenty-one million five hundred sixty-eight thousand thirty-eight dollars and eighty-four cents (\$21,568,038.84). Dr.

---

<sup>1</sup> Dr. Armistead alleges he discovered that residents were not told in 2004 that a claim had then in fact been filed on their behalf.

<sup>2</sup> There are two volumes of transcript from the December 13, 2013 hearing. Reference to the transcript will be as follows: (TR \_\_\_\_, \_\_\_\_). Additionally, a third volume contains twelve exhibits, filed at the hearing and they will be referenced as follows: (Exh. \_\_\_\_).

Armistead's portion of the refund would have been approximately eleven thousand one hundred and nine dollars (\$11,109.00), plus an unspecified amount of interest. (TR 1, 40).

The return of these monies by the federal government assumed that the so-called "protective claims" had been timely filed in Ogden, Utah, within three years and fifteen days of the close of the last day of a rolling three year period beginning in 1994 and ending in 2005.

The proof shows that Dr. Armistead began his family or general practice residency in Knoxville in July of 2000 and completed the same in June of 2003. (TR 1, 14).

According to the proof in this case, the state of Minnesota had pursued the refund issue with the federal government for some time and that many residents and training universities and/or hospitals were closely monitoring developments in the litigation.

Proof at the hearing also made clear that in addition to the so-called "protective claims" which both the training institutions and residents were required to file in order to preserve a potential refund of FICA payments, they also had to "perfect" their claims by proving that Claim[s] for Refund and Request For Abatement (Forms 843) had been previously timely filed. The perfection step took place after the federal government decided in 2010 to no longer categorize the resident stipends as compensation.

And in fact, refunds were made both to the University and to resident physicians (who had matriculated through graduate medical education programs in Knoxville and other locations) for the years 1994 to 2000 and 2004 and 2005.<sup>3</sup>

The problem for both the University and Dr. Armistead is that the Internal Revenue Service claimed that it never received the protective filings for the years 2000 through 2003 although the University was able to provide copies of the documentation sent to Utah on March 30, 2004, along with an affidavit from the assistant director of payrolls at the University at the

---

<sup>3</sup> We believe that refunds were also made at other institutions operated by the State both to the institutions themselves and the residents who had trained there.

time, stating under oath the exact steps he had taken in completing the required forms and mailing them to the proper address.

Paragraph seven (7) of that affidavit states as follows:

I placed the envelope containing the cover letter and forms to be filed in the designated mail pickup box for the Payroll Department according to University policy. The University mail room affixes postage and delivers the mail to the United States Postal Service for delivery. (Exh. 6)

However, in the face of what would seem to be compelling proof that the University had in fact timely mailed the protective claims in March of 2004, the Internal Revenue Service would not relent in its contention that the proper refund information for the 2000-2003 period had never been received costing both the University and a number of residents literally millions of dollars in FICA tax refunds.

Both Lester Mathews, director of payrolls for the University in 2004, and Robert C. Chance, the assistant director of payrolls at the time, (now the director) testified at the hearing.

Mr. Mathews wrote in a letter to Dr. Armistead dated March 12, 2012, that “ ... a certified mail receipt could not be produced” for 2004 showing that the required filings had been sent to the Service at its office in Utah. (Exh. 10). Four days later Mr. Mathews sent a second e-mail letter to Dr. Armistead at 6:45 a.m. stating that the University in 2004 “ ... [had] no legal obligation” to file a protective claim for the residents [in 2004] but that “ ... as a courtesy to [them]”, the University had filed on their behalf at that time. However, Mr. Mathews continued, “ ... no notice was ever sent to the residents that the University had filed such a claim.” Accordingly, Mr. Mathews concluded there was “no expectation” that “the University was attempting to act on their behalf”, and nothing precluded the individual resident physician from filing his/her own claim.

According to the letter, the protective claims were sent to Utah by “uncertified, first class, U.S. Mail as was customary for all other I.R.S. required filings by the University.” (Exh. 10).

The Form[s] 843 signed by the University’s treasurer on March 17, 2004, state that they

were being filed both for the University of Tennessee and its “medical residents” in light of a case pending in the United States District Court in the District of Minnesota, Fourth Division, styled *Chater v. State*, (civil no. 4-96-756). The explanation provided by the University in this form provided that “[u]pon receipt of both the employer and employee share of any refunded taxes, ... the University will remit the employee’s share of the tax directly to each medical resident.”

On March 30, 2004, when Mr. Chance, the assistant payroll director, sent the protective claims for the years 2000, 2001, 2002 and 2003 to the Service, the pertinent provisions of 26 U.S.C. § 7502 read in relevant part as follows:<sup>4</sup>

**7502. Timely mailing treated as timely filing and paying**

**(a) General rule.--**

**(1) Date of delivery.--**If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

**(2) Mailing requirements.--**This subsection shall apply only if--

**(A)** the postmark date falls within the prescribed period or on or before the prescribed date--

**(i)** for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or ...

**(B)** the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

**(b) Postmarks.--**This section shall apply in the case of postmarks not made

---

<sup>4</sup> The Commission’s July 9, 2013, Order Granting in Part and Denying in Part State’s Motion to Dismiss, at pages 21, 22 and 23 attempted to set out these same passages from the United States Code and Code of Federal Regulations. However, although the language our earlier Decision generally sets out accurately the content of the cited passages, there are certain language quotation errors, numbering errors, and mis-citations set out in those pages. Those mistakes have been corrected in this Judgment. However, mistakes made in the quotations found in the July 9 Order do not change the conclusions reached in that Decision. The Commission regrets those mistakes.

by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary.

**(c) Registered and certified mailing; electronic filing.--**

**(1) Registered mail.--**For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail--

**(A)** such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

**(B)** the date of registration shall be deemed the postmark date.

**(2) Certified mail; electronic filing.--**The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

**(d) Exceptions.--**This section shall not apply with respect to--

**(1)** the filing of a document in, or the making of a payment to, any court other than the Tax Court,

**(2)** currency or other medium of payment unless actually received and accounted for, or

**(3)** returns, claims, statements, or other documents, or payments, which are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than by mailing. ...

**(3) Equivalents of registered and certified mail.--**The Secretary may provide a rule similar to the rule of paragraph (1) with respect to any service provided by a designated delivery service which is substantially equivalent to United States registered or certified mail. (emphasis supplied)

The provisions from the Code of Federal Regulations applicable in the implementation of 26 U.S.C. 301.7502-1, on March 30, 2004, provided in relevant part as follows:

**26 CFR § 301.7502(c)(1) *Mailing requirements—In general.***

Section 7502 is not applicable unless the document is mailed in accordance with the following requirements: ...

**26 CFR § 301.7502(c)(1)(ii) *Timely deposited in U.S. mail.***

The document must be deposited within the prescribed time in the mail in the United States with sufficient postage prepaid. For this purpose, a document is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Post Office. The domestic mail service of the U.S. Post Office, as defined by the postal regulations, includes mail transmitted within, among, and between the United States, its Territories and possessions, and Army-Air Force (APO) and Navy (FPO) post offices (see 39 CFR 2.1). Section 7502 does not apply to any document which is deposited with the mail service of any other country. (emphasis supplied)

**26 CFR § 301.7502(c)(1)(iii)(A) *Postmark.***

If the postmark on the envelope or wrapper is made by the U.S. Post Office, such postmark must bear a date on or before the last date, or the last day of the period, prescribed for filing the document. If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document, the document will be considered not to be filed timely, regardless of when the document is deposited in the mail. Accordingly, the sender who relies upon the applicability of section 7502 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document, but see subparagraph (2) of this paragraph (c), with respect to the use of registered mail or certified mail to avoid this risk. If the postmark on the envelope or wrapper is not legible, the person who is required to file the document has the burden of proving the time when the postmark was made. Furthermore, in case the cover containing a document bearing a timely postmark made by the U.S. Post Office is received after the time when a document postmarked and mailed at such time would ordinarily be received, the sender may be required to prove that it was timely mailed. ... (emphasis supplied)

**26 CFR § 301.7502(c)(2) *Registered or certified mail.***

If the document is sent by U.S. registered mail, the date of registration of the document shall be treated as the postmark date. If the document is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom such document is presented, the date of the U.S. postmark on such receipt shall be treated as the postmark date of the document. Accordingly, the risk that the document will not be postmarked on the day that it is deposited in the mail may be overcome by the use of registered mail or certified mail. (emphasis supplied)

**26 CFR § 301.7502(e)(1) *Delivery.***

(e) Delivery. (1) ... section 7502 is not applicable unless the document is delivered by U.S. mail to the agency, officer, or office with which it is required to be filed or to which payment is required to be made. However, in the case of a document ...- sent by registered mail or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued therefor, and that the envelope or wrapper was properly addressed to such agency, officer, or office shall constitute prima facie evidence that the document was delivered to such agency, officer, or office. (emphasis supplied).<sup>5</sup>

---

<sup>5</sup> Effective August 3, 2011, for documents mailed after September 21, 2004, the following provisions applied regarding filings carried out using certified or registered mail.

**26 CFR § 301.7502(e)(2)(i) *Exceptions to actual delivery—Registered and certified mail.***

Thus one hundred seventy-four (174) days after Mr. Chance used first class mail to send the documentation to Utah, the Code of Federal Regulations provided that the “exclusive means to establish prima facie evidence of delivery of a document” was through the use of certified or registered mail. Prior to that date, use of registered or certified mail constituted “prima facie” evidence of timely delivery but the terminology “exclusive means” of establishing delivery did not come into effect until September 21, 2004. Compare 26 CFR § 301.7502(e)(2)(i) and 26 CFR § 301.7502(c)(1)(iii)(A), supra.

Therefore, the issue in this case is rather starkly drawn. The issue is whether the University of Tennessee, and therefore the State, was negligent in mailing protective claims totaling in excess of twenty-one million five hundred sixty-eight thousand thirty-eight dollars and eighty-four cents. (\$21,568,038.84) to the Internal Revenue Service using first class mail rather than certified or registered mail which would have provided proof that the claims had actually been timely transmitted and received in 2004.<sup>6</sup>

This is an extremely interesting case. While it does not involve a particularly significant

---

In the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office. Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered. (emphasis supplied).

<sup>6</sup> There is some question raised by the State as to whether in 2004 Dr. Armistead owned any personal property for which the State could be consider negligent concerning its care, custody, or control since at that point there had been no determination that Claimant would ever receive a refund of FICA taxes which had been withheld from what was later determined to be a stipend rather than a paycheck during the three years of his residency.

The Commission does not find the State’s argument in this regard to be convincing. Rather, we view Dr. Armistead’s claim as representing an inchoate right containing a clearly determinable amount which would have been refunded had the proper forms been determined to have arrived at the offices of the Internal Revenue Service in Ogden, Utah, in 2004. See *Craig v. Turner*, 628 S.W.2d 33 (Tenn.Ct.App 1981), perm.app.denied (Feb., 1 1982) and *Smith v. Morris*, 778 S.W.2d 857 (Tenn.Ct.App. 1988). Analogous to this situation would be any case involving personal injury, wrongful death, or damage to personal property, all of which involve claims for monies allegedly due to a plaintiff or claimant but payable only if a claim was timely filed and a favorable decision on liability reached by the appropriate fact-finder.

amount of money, eleven thousand one hundred and nine dollars (\$11,109.00), it raises intriguing issues of negligence law. In fact Dr. Armistead testified that he was pursuing the matter vigorously because of the principle involved.

As discussed earlier, the University filed protective claims for refunds of FICA taxes paid by both it and its resident physicians for the period January 1, 1994 through March 30, 2005. (Exh. 9). Three separate claims had to be instituted since, according to the proof, filings were due within thirty-nine (39) months of the end of a tax period. (Exh. 10). The University continued to file claims during the pendency of the litigation instituted by the State of Minnesota against the Social Security Administration. The so-called “protective claims”, according to the University, were mailed to the Internal Revenue Service in Ogden, Utah, 84201. Unfortunately, overnight delivery services operated by the Postal Service, Federal Express, and United Parcel Service could not be utilized since the mailing destination did not include a street address. The proof in this case is also clear that two of the three protective filings were in fact received in Utah and refunds were paid for the years 1994 through 1999 and 2004 and 2005.<sup>7</sup>

However, sadly, the refund claims for the period of 2000 to 2003 in the amount of twenty-one million, five-hundred sixty-eight thousand thirty-eight dollars and eighty-four cents (\$21,568,038.84) were never received in Utah although the paperwork for the same was prepared and reviewed by the University’s treasurer on March 17, 2004, and mailed on March 31, 2005. Of course, that period encompassed the 2000 through 2003 time period during which Dr. Armistead was completing his family practice residency in Knoxville.

It appears that the University vigorously attempted to convince the I.R.S. that it had in fact mailed the required forms necessary to protect both its and the residents’ claims for refunds.

---

<sup>7</sup> The Internal Revenue Service had made a decision to honor all claims up to ending on April 1, 2005. In fact, the proof shows that FICA refunds were also processed for non-medical students at the University who received stipends during the same period while studying there.

Copies of all supporting documentation were provided to the Service, but it was unmoved by the tendered materials which included sworn affidavits provided by the University.

As a result, the University lost a huge refund and residents such as Dr. Armistead lost various amounts, which would have included interest on what had been previously withheld from their small stipends over the course of their residencies.

The core issue therefore is whether the University was negligent in mailing the protective claim filings to the Internal Revenue Service in 2004 via regular first class mail rather than by using registered or certified mail, which would have yielded proof positive that the protective filings had been timely dispatched (and therefore under the Code and Regulations deemed timely filed) to the Service.

The resolution of this negligence claim must be decided utilizing “traditional tort concepts of duty and the reasonably prudent person standard of care.” Tenn. Code Ann. § 9-8-307(c). On March 30, 2004, the date the University allegedly sent the protective filings to Utah, 26 C.F.R. § 301.7502-1(1)(a) defined the date of delivery of a document (such as the protective filings at issue here) as the date of the United States Postmark stamped on the cover [of the envelope] in which such ... document ... [was] mailed ... .” On March 30, 2004, 26 C.F.R. § 301.7502-1(c)(1)(ii) provided that in order to be considered timely filed, a document “ ... must [have been] deposited within the prescribed time in the mail in the United States with sufficient postage prepaid.” Such a document would have been deemed mailed in the United States when it was “ ... deposited with the domestic mail service of the U.S. Post Office.” *Id.* 26 C.F.R. § 301.7502(c)(1)(iii)(A) provided that the risk that the postmark showing that the item was timely mailed and therefore timely filed might not show a date on or before the document became due was born by the sender. However, that same subsection referred the reader to 26 C.F.R. § 301.7502-1 in which subsection (c)(2) provides that utilization of registered or certified mail would negate the possibility that the mailing

might not be properly postmarked on the day it was actually sent; and subsection 26 C.F.R. § 301.7502-1(e)(1) states that using registered or certified mail would constitute “prima facie evidence that the document was delivered to such agency, officer, or office.”<sup>8</sup> Therefore, utilization of either registered or certified mail on March 30, 2004, would have obviated this entire problem for both the University and to a much smaller financial extent, Dr. Armistead.

In 2002, Dr. Armistead received what he testified was an abatement letter from the Internal Revenue Service resulting in a refund to him of eight hundred sixty-nine dollars and thirty-four cents (\$869.34) for the tax period ending on December 31, 2001. (TR 1, 123-125; Exh. 11). He testified that upon receipt of this letter, he contacted the offices of the Graduate Medical Education Department at the University and inquired whether this refund might have something to do with the FICA refund litigation. Although Dr. Armistead testified that he received a response to his inquiry, the Commission sustained the State’s objection to that response on hearsay grounds. Further, the Commission was concerned that Claimant could not identify the individual who allegedly responded to his inquiry.

An important witness in this trial was Robert Chance, the assistant director of payrolls at the time the protective filings were sent to the Internal Revenue Service in Ogden, Utah, in 2004. Mr. Chance has a degree in accounting and had obtained the Certified Public Accountant designation. He testified that his office was responsible for mailing the Form[s] 843 in 2004. (TR 2, 84). The clerical or secretarial worker in charge of physically placing the materials in the

---

<sup>8</sup> Effective as pointed out above, for documents mailed after September 21, 2004, 26 C.F.R. § 301.7502(e)(2) contains the following language:

“Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.” (emphasis supplied)

Therefore, utilization of either registered or certified mail on March 30, 2004, could have obviated this entire problem for the University and to a much smaller extent, Dr. Armistead.

campus mail was Janet Gore. She and Mr. Chance discussed how to mail the documents to Utah. (TR 1, 83-84). According to Mr. Chance, the documents were initially placed in the campus mail slot and then transported to another location where the actual postage was affixed. (TR 1, 85-86). This process had always worked in the past and the payroll office had never mailed anything to the Internal Revenue Service by certified mail. (TR 1, 88, 95).

Mr. Chance testified that actually receiving refunds for the period 1994 through 2005 was “a long shot”. (TR 1, 91). Nevertheless, refunds were received for the years 1994 through 1998 and for 2004 and 2005. (TR 1, 93).

It was Mr. Chance’s testimony that his office “ ... followed directions in the I.R.S. publication ... .” According to this witness, nowhere in those directions was there a requirement that certified mail be used, nor was there an expectation that such a form of mailing would be utilized. (TR 1, 94-95).

#### **APPLICABLE CASE LAW AUTHORITIES**

Having undertaken the task of filing refund claims not only for its self but also for the resident physicians studying at the University between 2000 and 2003, the University assumed a duty of acting in a reasonably careful fashion with the processing of those claims. Earlier in this litigation the Commission cited the court of appeals decision in *Nidiffer v. Clinchfield R. Co.*, 600 S.W.2d 242 (Tenn.Ct.App.1980) for a proposition espoused by Justice Cardozo which we believe applies here:

It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all ...  
. *Id* at 246 citing *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275-6 (1922).

The concept of acting carefully clearly implicates certain well established principles of Tennessee negligence law which as pointed out above, are applicable by statute in cases filed with this Commission.

Of course, in any negligence action, the plaintiff or claimant is onerated with the task of establishing five separate and distinct elements by a preponderance of the evidence. Those five elements are as follows: 1) duty; 2) a breach of that duty; 3) resulting damages; 4) cause in fact; 5) proximate or legal cause. See *West v. East Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn.2005).

“[T]he imposition of a legal duty reflects society’s contemporary policies and social requirements, [and] the concept of duty ‘is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.’ ” *Biscan v. Brown*, 160 S.W.3d 462, 479 (Tenn. 2005) (quoting *Bradshaw v. Daniel*, 854 S.W.2d 865, 868 (Tenn. 1993), quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 53 at 358 (5th ed.1984)). Determining whether a possible risk is unreasonable to the extent that it gives rise to a duty requires the Commission to balance the “foreseeable probability and gravity of harm posed by [a] defendant’s conduct” with “the burden upon defendant to engage in alternative conduct that would have prevented the harm.” *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). In working through this balancing process, we are required to take into account the following factors:

the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct. *McCall*, 913 S.W.2d at 153.

In *West v. East Tennessee Pioneer Oil Co.*, 172 S.W.3d 545 (Tenn. 2005), our Supreme Court said the following:

The duty owed to the plaintiffs by the defendant is in all cases that of reasonable care under all of the circumstances. *Doe v. Linder Const. Co.*, 845 S.W.2d 173, 177 (Tenn.1992). Whether the defendant owed the plaintiffs a

duty of care is a question of law to be determined by the court. *Burroughs v. Magee*, 118 S.W.3d 323, 327 (Tenn.2003); *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89; *Coln*, 966 S.W.2d at 39.

If a defendant fails to exercise reasonable care under the circumstances, then he or she has breached his or her duty to the plaintiffs. The term reasonable care must be given meaning in relation to the circumstances. *Linder Const. Co.*, 845 S.W.2d at 178; *McCormick v. Waters*, 594 S.W.2d 385, 387 (Tenn.1980).

Reasonable care is to be determined by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury. \*551 *Linder Const. Co.*, 845 S.W.2d at 178. Thus, legal duty has been defined as the legal obligation owed by a defendant to a plaintiff to conform to a reasonable person standard of care for the protection against unreasonable risks of harm. *Burroughs*, 118 S.W.3d at 329; *Staples*, 15 S.W.3d at 89; *McCall*, 913 S.W.2d at 153; *see also* Keeton, *supra*, § 53.

..... “The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury.” *Tedder v. Raskin*, 728 S.W.2d 343, 348 (Tenn.Ct.App.1987).

We employ a balancing approach to assess whether the risk to the plaintiff is unreasonable and thus gives rise to a duty to act with due care. *Burroughs*, 118 S.W.3d at 329; *Staples*, 15 S.W.3d at 89. This Court has held that a risk is unreasonable, “ ‘if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.’ ” *Burroughs*, 118 S.W.3d at 329 (quoting *McCall*, 913 S.W.2d at 153). *Id.* at 550-551. (emphasis supplied)

Thus, a core issue in any negligence action is determining whether the Defendant has engaged in a sort of behavior which caused unreasonable danger to the Claimant. A determination as to whether the Defendant has exercised reasonable care to avoid such dangers must be made with regard to the circumstances in which the defendant operated. “Reasonable care is to be determined by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury.” *Usher v. Charles Blalock & Sons, Inc.*, 339 S.W.3d 45, 62 (Tenn. Ct. App. 2010) (quoting *West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005)). In turn, determining whether a defendant acted reasonably requires the Commission to also study whether the risk which caused the damages was foreseeable.

Then Judge Koch, in *Hodge v. State*, No.M2004-00137-COA-R3-CV, 2006 WL 36905

(Tenn. Ct. App.), discussed the legal concept of foreseeability. He wrote there:

Foreseeability is the test of negligence, ... because no person is expected to protect against harms from events that cannot be reasonably anticipated or that are so unlikely to occur that the risk, although recognizable, would commonly be disregarded. ... Thus, determining whether the State has exercised reasonable care under the circumstances depends on the foreseeability of the risk involved.

A risk of injury is foreseeable if a reasonable person could foresee the probability that injury will occur. ... To recover in a negligence action, the plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that the defendant could have taken some action to prevent the injury. ... Foreseeability does not require awareness of the precise manner in which an injury takes place, but rather a general awareness that injuries similar to those actually sustained could occur. *Id.* at \*3 (internal citations omitted). (emphasis supplied)

However, establishing that a defendant has breached a duty owed to a claimant by not taking reasonable measures to avoid a foreseeable risk does not automatically ensure the success of a claim. Claimants must also prove that the acts of the defendant were the cause in fact and the legal or proximate cause of their injuries. In fact, our Supreme Court has held that "... no negligence claim can succeed unless the [claimant] can first prove that the defendant's conduct was the cause in fact of the [claimant's] loss." *Waste Management, Inc. of Tenn. v. South Central Bell Telephone*, 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997). Further, although cause in fact and legal or proximate cause are "very different concepts," the two are inextricably intertwined in any negligence case. *Id.* "Causation in fact refers to the cause and effect relationship that must be established between the defendant's conduct and the plaintiff's loss before liability for that particular loss will be imposed." *Id.* The *Waste Management* court also observed that our "... courts have consistently recognized that conduct cannot be the cause in fact of an injury when the injury would have occurred even if the conduct had not taken place." *Id.* In assessing whether cause in fact has been established, the fact finder must undertake "... a common sense analysis of the facts that lay persons can undertake as competently as the most experienced judges." *Waste*

*Management*, 15 S.W.3d at 430. In making that determination, we have been directed to utilize the “but for” test articulated by Dean Prosser which provides as follows:

[t]he defendant's conduct is a cause in fact of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it. *Id.* at 431 (citing W. Page Keeton, *Prosser and Keeton on the Law of Torts*, § 41, at 266(5th ed. 1984)). (emphasis added).<sup>9</sup>

Once the cause in fact requirement has been met, Claimants must then address the issue of legal or proximate cause. Whether a determination of legal or proximate cause has been established requires a policy determination as to what the boundaries for legal liability should be “using mixed considerations of logic, common sense, justice, policy, and precedent.” *Waste Management*, 15 S.W.3d at 430. A well-known three part test has evolved for identifying legal or proximate cause:

1. The tortfeasor’s conduct must have been a “substantial factor” in bringing about the harm being complained of;
2. There is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm;

---

<sup>9</sup> Applying this test has proved difficult in situations where two or more independent causes produce an injury which one of them alone could not have produced. In that situation our courts have involved a second test- the “substantial factor” test -in resolving the cause in fact issue. That test, set out in the Restatement (Second) of Torts, states: The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm. *Id.* (citing Restatement (Second) of Torts § 431 (1965)).

This substantial factor test, according to the *Waste Management* court, has not been a “panacea for all causation in fact problems.” *Id.* Rather than supplanting the “but for” test in the cause in fact analysis, the “substantial factor” test utilizes the “but for” causation principle “as an essential part of the causation in fact analysis.” *Id.* Citing the Restatement (Second) of Torts § 432 (1965), the court in *Waste Management* stated that “except in circumstances where two independent causes produced an injury that neither of them could have produced alone ..., [an] actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.” *Id.* at 421. Apparently, according to the *Waste Management* court, while the substantial factor test may be used in the cause in fact analysis, it remains the predominant short hand test in the legal or proximate cause determination. When to use either analysis, according to the Supreme Court is “left to the trial courts who must select the legal principles most applicable to the facts of each particular case.” *Id.* at 432.

3. The harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. *See McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991).

### **DECISION**

The State argues that the Commission does not have jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1) in cases in which the claimant alleges that the State misrepresented to him/her or that it would or would not do something. However, because the State objected to admission into evidence of something Dr. Armistead claims he was told in the offices of the Department of Medical Education concerning the filing of refund claims for residents, an objection which the Commission sustained, we do not have before us a negligent misrepresentation claim.<sup>10</sup>

The Commission believes that the essential inquiry in this case is whether the University breached a duty it owed Dr. Armistead to insure that his protective claim was timely filed with the Internal Revenue Service in Ogden, Utah, when it sent both its and his protective filings there on March 30, 2004, by first class mail rather than by utilizing certified or registered mail. The proof here shows that up to and even after March 30, 2004, the University timely submitted refund claims to the Internal Revenue Service in Utah using regular, first class mail. Those filings, we believe, resulted in the recovery of literally tens of millions of dollars for both the University and for resident physicians who studied in Knoxville between 1994 and 1999, and in 2004 and 2005, based on the figures before us concerning the 2000-2003 period. In fact, non-medical students receiving stipends at the University during unspecified periods, according to the proof, also received FICA refunds. In other words, this method of sending the necessary paperwork to Utah had proved successful both before and after March 30, 2004.

---

<sup>10</sup> See *Bennett v. Trevecca Nazarine University*, 216 S.W.3d 293, 300-01 (Tenn.2007); and *Homestead Group, LLC v. Bank of Tennessee*, 307 S.W.3d 746, 753 (Tenn.Ct.App.2009) perm. app. d'nd, (Oct. 5, 2009), for a discussion of the elements of the claim based on negligent representation.

As pointed out above, prior to September 21, 2004, use of registered or certified mail constituted “*prima facie* evidence that [a] document was delivered to [an] agency, officer, or office.” After September 21, 2004, aside from proof of actual delivery, proof of proper use of registered or certified mail constituted “the exclusive means” of establishing *prima facie* evidence of delivery.

The closest analogous situation the Commission has been able to uncover during the course of our research in this case is found in *Beneficial Tennessee, Inc. v. Metropolitan Government of Nashville and Davidson County*, No. M2004-01071-COA-R3-CV, 2006 WL 568250 (Tenn.Ct.App.2005) perm. app. d’nd (Sep. 5, 2006). That case involved a property tax sale in Davidson County concerning which the lienholder, Beneficial Tennessee, Inc. never received notice until its one-year right of redemption period had expired. At the time the case arose, notice of such sales was sent to property owners by certified mail, return receipt requested. However, lienholders, such as Beneficial, received notice by regular U.S. Mail and not via a certified or registered mailing.

Our court of appeals held that while “certified mail may very well be ‘better notice’ ”, it was not constitutionally mandated in order for due process standards to be met. In support of its decision, the court cited the United States Supreme Court’s decision in *Memmonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) for its holding that regular mail was “a sufficient means to provide lienholders [with] notice of a tax sale.” *Beneficial Tennessee, Inc. v. Metropolitan Government* at \*5. In a footnote, the court cited the United States Sixth Circuit Court of Appeals’ decision in *DePiero v. City of Macedonia*, 180 F3d. 770, 787-88 (6th Cir.1999) for the proposition that “service of a summons by regular mail met due process requirements and specifically found that certified mail would not ensure receipt.” *Id.* at \*5, FN 8.

The Commission concludes again that the critical consideration in this case is whether the

State breached a duty it owed to Dr. Armistead because of the manner in which it mailed his protective filing in March of 2004.<sup>11</sup> As we pointed out above, having undertaken the task of submitting protective filings on behalf of residents working in its institutions, the State assumed the obligation of doing so in a reasonable and acceptable manner.

We discussed at some length above the concept of duty and have cited several cases in that connection. Additional recent cases in that area include *Downs ex rel. v. Bush*, 263 S.W.3d 812 (Tenn.2008) and *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn.2008). Earlier, the Supreme Court in *McCall v. Wilder*, 913 S.W. 2d 150 (Tenn.1995) defined duty as “ ... the legal obligation owed by [a] defendant to [a] plaintiff to conform to a reasonable person standard of care for ... protection against unreasonable risks of harm.” *Id.* at 153. Even more recently, in December of 2013, the Supreme Court in *Cullum v. McCool*, E2012-00991-SC-R11-CV, 2013 WL 6665074 (Tenn.2013), citing *McCall v. Wilder*, said that “[a]n unreasonable risk of harm arises and creates a legal duty if the foreseeability and gravity of harm caused by a defendant’s conduct outweighs the burdens placed on a defendant to engage in other conduct that would prevent such harm.” *Id.* at \*3.

In *Satterfield v. Breeding Insulation Co.*, the Supreme Court also held that it was important to recognize “[t]he role that the concept of foreseeability plays in the context of a court’s determination of the existence and scope of a duty ... .” *Id.* at 366. The Court said there:

“[h]owever, because almost any outcome is possible and can be foreseen, the mere fact that a particular outcome might be conceivable is not sufficient to give rise to a duty. For the purpose of determining whether a duty exists, the

---

<sup>11</sup> Somewhat analogous scenarios developed in cases involving the issue of whether insurance cancellation notices were actually mailed to the insured persons before a loss occurred and a claim was made. In this connection, see the following: *Cherokee Ins. Co. v. Harden*, 302 S.W.2d 817 (1957); *Stooksbury v. American Nat. Property and Cas. Co.*, 126 S.W.3d 505 (Tenn.Ct.App.2003) perm. app. d’nd. (Jan. 26, 2004); and *Blurton v. Grange Ins. & Cas. Co.*, 159 S.W.3d 1 (Tenn.Ct.App.2004) perm. app. d’nd. (Jan. 24, 2005). Of particular interest in these cases is the discussions in *Blurton*, at \*13 and *Cherokee* at \*819 concerning business routine and proof of custom in establishing that a document was properly mailed. Additionally, *Stooksbury*, at \*515-516, contains a discussion of the salutary use of certified mail in proving that a cancellation notice had been sent.

courts' consideration of foreseeability is limited to assessing whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it. In this context, the courts are not concerned with the ultimate reasonableness, or lack of reasonableness of the defendant's conduct. Rather, the courts are simply ascertaining " 'whether [t]he defendant was obligated to be vigilant of a certain sort of harm to the plaintiff' ". *Id* at 366-367.

In reaching this determination, "[c]ourts may consider 'among other things, the presence or absence of prior similar instances' when determining the foreseeability of an event." *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 365 (Tenn.2009), citing *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 901 (Tenn. 1996).

If a court determines that a particular incident was foreseeable, then we must examine relevant public policy considerations in order to make a determination of whether a duty existed at the time of the incident thus setting up the possibility that such a duty could be determined to have been breached by actions or inactions on the part of the defendant. "A duty of reasonable care will exist-and a risk of harm will be deemed unreasonable-where the foreseeability of the risk and the gravity of the potential harm outweigh the burden on the defendant to prevent the harm from occurring." *Marla H. v. Knox County*, 361 S.W.3d 518, 531 (Tenn.Ct.App.2011). perm. app. d'nd (Oct. 18, 2011). The *Marla H.* court went on to discuss a situation "[w]hen the existence of a particular duty is not a given ..." or when no established legal precedents are immediately available, forcing courts turn to the public policy for guidance on the issue. *Id.* at 531. Among those public policy considerations are those set out in *Burroughs v. Magee*, 118 S.W.3d 322, 329 (Tenn.2003):

- (1) the foreseeable probability of the harm or injury occurring;
- (2) the possible magnitude of the potential harm or injury;
- (3) the importance or social value of the activity engaged in by the defendant;
- (4) the usefulness of the conduct to the defendant;
- (5) the feasibility of alternative conduct that is safer;
- (6) the relative costs and burdens associated with that safer conduct;
- (7) the relative usefulness of the safer conduct; and
- (8) the relative safety of alternative conduct.

However, the first of these considerations -foreseeable probability- seems to have become the prime or paramount consideration. *Marla H. v. Knox County* at 532. Thus, we are left here to ponder whether it was a foreseeable probability to the University that the first class mailing on March 30, 2004, would not reach the Internal Revenue Service in Ogden, Utah.

The proof shows that Mr. Chance and his staff consulted I.R.S. publications and then mailed by first class mail, as they had done regularly in the past in situations involving filings with the federal government, the protective filings to Utah on March 30, 2004. The University insists that it proceeded according to directions contained in Internal Revenue Service publications. We have not been provided with any of those publications, or copies of the same, which might contradict or confirm the University's contention in this regard.

Furthermore, the University argues vigorously that it successfully used the same method for sending in the required information for residents who worked at its medical facilities between 1994 and 1999, and in 2004 and 2005. We assume the mailing for the 1994 through the 1999 period was made prior to those covering the 2000-2003 period. Apparently, physicians training during that period received their FICA refunds, as did the University, netting what we believe to have been millions of dollars returned to the State and the doctors. Additionally, Mr. Chance testified, with no rebutting evidence, that other non-medical students receiving stipends also received FICA refunds and that their protective filings were mailed in the same way as those sent to Utah for medical residents for the years 2000 through 2003.

We are struck by the language in the cases set out above holding that a key consideration in isolating the existence of a duty -and thus setting up the chance that such a duty could be breached- is whether there was a "foreseeable probability of the harm or injury occurring". *Marla H. v. Knox County* at 531. The word probability is of particular significance to us since it denotes a higher level of exactitude than words such as "possibility" or "chance".

While we seriously question why anyone would mail refund documents to the Internal Revenue Service by any means other than registered or certified mail in a situation involving millions and millions of dollars, in light of the State's unrefuted proof that the refunds for 1994 through 1999 and 2004 and 2005 were successfully processed using the same procedures used here, we cannot conclude that the University acted unreasonably in proceeding as it always had and by doing so created a "foreseeable probability" that its actions would harm Dr. Armistead financially.<sup>12</sup>

Dr. Armistead and his fellow resident colleagues for the period 2000-2003 lost a seemingly small amount of money because of the University's failure to use registered or certified mail on March 30, 2004. Perhaps had it even made a copy of the envelope showing the postmark date of the first class mailing, it might have been able to convince either the I.R.S. or some court that it had timely mailed the necessary FICA refund materials to Utah. We do note that while the refund Dr. Armistead might have received was small, it did represent a significant sum to a young physician living on a meager stipend while working very hard over a three (3) year period.

Although this is a very close case, we do not find that it was foreseeably probable to the University that Dr. Armistead's FICA refund paperwork would never be received in Utah given the fact that the same procedures had worked well in the past and indeed were adequate in connection with the 1994-1999 and 2004 and 2005 refunds.

Accordingly, we do not find that the State breached a duty it owed to Dr. Armistead in connection with his FICA refund claim. Therefore, this Claim must be and is Dismissed.

---

<sup>12</sup> Given the language set out above from the United States Code and the Code of Federal Regulations concerning what would constitute prima facie evidence and after September 21, 2004, the "exclusive means" of establishing prima facie evidence of mailing, it was clearly chancy and perhaps even unwise to use first class mail in March of 2004. The University paid an incredibly high price for that decision. However, given the long history of successfully using such a mailing method, we do not believe that it was foreseeably probable that Dr. Armistead's refund documents would not arrive in Utah, and that the University should be deemed to have failed to use reasonable care in that situation.

Entered this the 10<sup>th</sup> day of March, 2014.



**William O. Shults, Commissioner**  
P.O. Box 960  
Newport, Tennessee  
(423) 613-4809

**CERTIFICATE**

I certify that a true and exact copy of the foregoing **ORDER** has been forwarded to:

**Dr. Stephen H. Armistead**  
2420 Jenks Avenue, Ste. 5  
Panama City, FL 32405

**Joshua Walker, Esq.**  
**Office of the General Counsel**  
The University of Tennessee  
729 Andy Holt Tower  
Knoxville, TN 37996-0170

This the 16<sup>th</sup> day of March 2014.

  
\_\_\_\_\_