

IN THE DISTRICT COURT OF WYANTOTTE COUNTY, KANSAS
CIVIL COURT DIVISION

LOWELL L. TILZER M.D.,)	
)	
Petitioner,)	
)	Case No.
v.)	
)	K.S.A. Ch 60
UNIVERSITY OF KANSAS)	
HOSPITAL AUTHORITY)	
A Kansas Administrative Agency,)	
)	
Serve:)	
Bob Page, Pres. and Chief Exec. Officer)	
The University of Kansas Hospital)	
3901 Rainbow Blvd.)	
Kansas City, KS 66160)	
)	
Respondent.)	

PETITION FOR JUDICIAL REVIEW PURSUANT TO K.S.A. §§ 77-613, 77-614
AND
KANSAS WHISTLEBLOWER ACT K.S.A. § 75-2973

COMES NOW Lowell Tilzer M.D., by and through his attorneys and pursuant to K.S.A. §§ 75-2973, 77-613 and 77-614 alleges the following claim against the University of Kansas Hospital Authority as set forth below.

INTRODUCTION

Lowell L. Tilzer M.D. is a physician licensed in the State of Kansas. Tilzer is Board Certified by the American Board of Pathology in the field of Anatomic and Clinical Pathology. Tilzer is employed by University of Kansas Physicians and the University of Kansas Hospital Authority (hereinafter “KU Hospital”). Tilzer is employed in the Department Of Pathology which is jointly managed and operated by Kansas University Medical Center and KU Hospital. Tilzer evaluates human blood, body fluids and tissue samples for patients of Hospital and determines whether the patients suffer from cancer or other illnesses.

In 2015 Tilzer learned that the Chair of KUMC's/KU Hospital's Department Of Pathology misdiagnosed a patient's tissue sample by concluding that the patient had cancer. As a result of the misdiagnosis, the patient was erroneously informed that the patient had cancer, and the patient's essential body organ (or a substantial portion of the essential body organ) was removed at Hospital. The patient was not told of the misdiagnosis, and was not informed that the essential body organ was not cancerous. For months KUMC/Hospital withheld the correct diagnosis from the patient, and to the best of Tilzer's knowledge and belief the patient is still unaware that the patient did not have cancer.

When Tilzer learned of the misdiagnosis and the Respondents' failure to inform the patient, Tilzer complained to administrative authorities at KUMC and KU Hospital, and urged the physicians and administrators to rectify the errors by correcting the patient's medical errors and informing the patient. KUMC's and KU Hospital's administrators resisted Tilzer's efforts to thoroughly investigate the matter and conduct a review known as a "Root Cause Analysis"; and KUMC and KU Hospital and did not take corrective action. After KUMC and KU Hospital failed to investigate and take corrective action, Tilzer submitted a report to the Joint Commission, an outside auditing agency. As a result of Tilzer's submission of the report and his persistent requests that the records be corrected and the patient informed, Tilzer has been retaliated against and his job has been threatened in violation of K.S.A. § 75-2973.

In order to avoid disclosure of facts that might be confidential under the Health Information Portability and Accountability Act ("HIPAA") or other statutes, information regarding the patient's age, sex, race, date of surgery, and the bodily organ that was unnecessarily removed, have been omitted from this Petition.

PARTIES

1. Lowell L. Tilzer M.D. is a medical doctor and an individual residing in Johnson County, Kansas.

2. Non-party University of Kansas Medical Center (“KUMC”) is a Kansas administrative agency, as defined by K.S.A. § 77-602(k) and K.S.A. § 77-502(a), with a mailing address at University of Kansas, School of Medicine, Mail Stop 2015, 3901 Rainbow Blvd., Kansas City, Kansas 66160.

3. Respondent University of Kansas Hospital Authority (hereinafter “KU Hospital”) is a Kansas administrative agency organized pursuant to K.S.A. § 76-3301 *et seq.* with a mailing address at University of Kansas Hospital Authority, 3901 Rainbow Boulevard Kansas City, KS 66160-7220.

THE MISDIAGNOSIS BY THE CHAIR OF THE DEPARTMENT OF PATHOLOGY

4. The Chair of the KUMC/KU Hospital Department of Pathology is not board certified in cytopathology.

5. In 2015 the Department Chair of the KUMC/KU Hospital Department of Pathology reviewed a tissue sample from the essential body organ of a patient.

6. The KUMC/KU Hospital Chair of the Department of Pathology misdiagnosed the patient’s tissue sample as cancerous.

7. As a result of the misdiagnosis by the Department Chair, the patient’s essential body organ was surgically removed.

8. After the patient’s essential body organ was removed, tissue samples from the patient’s essential body organ were examined by other members of the KUMC/KU Hospital

Department of Pathology. The post-surgery examination of the patient's essential body organ established that the patient's essential body organ was essentially normal and was not cancerous.

9. After the post-surgery examination determined that the patient's essential body organ was not cancerous, the pre-surgery tissue sample was re-examined.

10. The post-surgery re-examination of the pre-surgery tissue sample established that the pre-surgery sample was not cancerous, and that the pre-surgery tissue sample had been misdiagnosed by the Chair of the KUMC/KU Hospital Department of Pathology. The removed essential body organ, in fact, was normal, and should not have been removed.

11. The Chair of the KUMC/KU Hospital Department of Pathology examined the patient's tissue samples after she was informed of her misdiagnosis. The Department Chair did not recognize the difference between acinar cell and islet cells, and covered up her misdiagnosis by placing an addendum to her original report stating the original cancer diagnosis and the normal removed organ matched, thereby concealing her original misdiagnosis and perpetuating the patient's mistaken belief that the patient's removed organ was cancerous.

CONCEALMENT OF MISDIAGNOSIS FROM PATIENT

12. The Chair of the Pathology Department did not report her misdiagnosis to KU Hospital's Chief Medical Officer, Risk Management Committee or Risk Manager.

13. In September of 2015 Tilzer informed the KU Hospital's Chief Medical Officer and the Risk Management Officer that a "Root Cause Analysis" must be conducted regarding the misdiagnosis. A Root Cause Analysis investigates the underlying cause of the mistake so that preventive measures can be adopted to avoid the same mistake in the future. A Root Cause Analysis is the standard tool for health care agencies to understand and prevent mistakes such as the erroneous removal of the patient's essential body organ that occurred at KU Hospital.

14. The Chief Medical Officer stated that the Chair's original diagnosis was correct because two other pathologists signed the report; but the two other pathologists did not agree with the original diagnosis, and the Chair simply wrote their names in the electronic medical record.

15. The Chief Medical Officer refused Tilzer's requests to talk to any other pathologist. The Chief Medical Officer's failure to interview other pathologists perpetuated the cover up of the misdiagnosis by the Hospital.

16. Despite Tilzer's request, and in violation of KU Hospital's policies, a Root Cause Analysis was not conducted.

17. In early 2016 the Chair of the Pathology Department instructed others to alter medical records regarding the Chair's misdiagnosis, and to remove from records the any reference that a Root Cause Analysis was necessary.

18. The patient was not informed of the misdiagnosis as of February 2016, and to the best of Tilzer's knowledge the patient still has not been informed that the patient did not have cancer, and that it was unnecessary to remove the patient's essential body organ.

19. Tilzer advocated that the medical records be corrected and that the patient be informed of the misdiagnosis.

20. Tilzer's concerns regarding the competence of the Chair of the Department of Pathology were reinforced by limitations imposed by the Division Director of Cytopathology preventing the Chair from performing cytopathology reviews.

21. Tilzer's concerns regarding KU Hospital's ability and desire to manage the Department of Pathology were reinforced when the Chair of the Department of Pathology

unilaterally decided that she would perform cytopathology reviews despite the limitation imposed by the Division Director of Cytopathology.

22. Tilzer's concerns regarding the competence of the Chair of the Department of Pathology and KU Hospital's ability and desire to manage the Department of Pathology were further reinforced when continuing mistakes by the Chair and actual or potential patient harm were brought to Tilzer's attention.

SIGNIFICANCE OF THE FAILURE TO INFORM THE PATIENT

23. The form of cancer that was erroneously diagnosed within the patient is commonly known to be potentially lethal; and the patient who was misdiagnosed has lived with this unwarranted fear for as long as KUMC/KU Hospital have concealed the misdiagnosis.

24. The failure to inform the patient has created a conflict of interest between KU Hospital, the physicians and the patient – but unless and until the patient is informed of the misdiagnosis and cover up the patient is not aware of the conflict.

25. The failure to inform the patient and the conflict or interest are contrary to American Medical Association Ethics Opinion 10.01(1) and (3). A copy of AMA Opinion 10.01 is attached as Exhibit 1.

TILZER'S REPORT TO THE JOINT COMMISSION

26. After the Chair requested that medical records be altered, and after KU Hospital failed to conduct a root cause analysis, Tilzer concluded that an external review was necessary.

27. The Joint Commission is an independent, not-for-profit organization that was formerly known as the "Joint Commission On Accreditation Of Healthcare Organizations". The Joint Commission evaluates and accredits hospitals and other health care organizations and programs in the United States.

28. On April 1, 2016, Tilzer submitted a report to the Joint Commission regarding the misdiagnosis and KUMC's/KU Hospital's concealment and failure to correct medical records.

29. Tilzer's report to the Joint Commission was assigned Incident #72413QOS-12536ZZC.

30. On April 1, 2016, The Joint Commission sent Tilzer the email that is attached as Exhibit 2 asking whether the Joint Commission could provide Tilzer's name to KU Hospital regarding the report to the Joint Commission.

31. Tilzer informed the Joint Commission that the Joint Commission could provide his name to KU Hospital.

32. Tilzer's report to the Joint Commission:

- a. identified KUMC and KU Hospital,
- b. explained the misdiagnosis,
- c. identified the Chair of the Department of Pathology,
- d. recited the sequence of events and concealment,
- e. recited the failure to correct the patient's medical records, and
- f. explained that the patient had not been informed of the misdiagnosis.

RESPONDENTS' REACTION TO TILZER'S REPORT TO THE JOINT COMMISSION

33. On May 5, 2016, Tilzer met with the KU Hospital's Risk Management Officer and Chief Medical Officer regarding Tilzer's report to the Joint Commission and Tilzer's criticisms of KUMC's and KU Hospital's actions and concealment.

34. On May 6, Tilzer met with the Director of Risk Management and discussed the need to conduct a proper Root Cause Analysis by interviewing the five Board Certified Cytopathologists and the Head of Surgical Pathology. The Director of Risk Management

informed Tilzer that she would do so; but to the best of Tilzer's knowledge the Director of Risk Management still has not interviewed the five Board Certified Cytopathologists and the Head of Surgical Pathology.

35. The Director of Risk Management also told Tilzer that she would meet with the Cytopathology supervisor who had been told to modify the Quality Improvement document, and that she would meet with the secretary that was instructed to modify the Minutes of the Quality Improvement committee meeting where this problem was discussed. To the best of Tilzer's knowledge she still has not interviewed either the Cytopathology supervisor or the secretary.

36. On May 31, 2016, KU Hospital President Bob Page asked Tilzer to meet; and Tilzer met with Page in Page's office.

37. During Tilzer's May 31 meeting, KU Hospital's President Bob Page reprimanded Tilzer and attempted to intimidate Tilzer by:

- a. Asking Tilzer if Tilzer wanted to resign (to which Tilzer stated that he would not resign),
- b. Berating Tilzer for contacting the Joint Commission,
- c. Accusing Tilzer of lying to the Joint Commission (to which Tilzer responded that his statements to the Joint Commission were truthful),
- d. Saying that he (Page) was irritated that Tilzer had contacted the Joint Commission,
- e. Asking why Tilzer had "done this alone" (to which Tilzer responded that others in the department were too scared to act), and
- f. describing Tilzer's report to the Joint Commission as "pitiful" and "despicable" behavior.

38. Tilzer justifiably perceives Page's May 31 reprimand and attempted intimidation as a serious threat to Tilzer's employment and as an attempt to prevent Tilzer from further reporting to the Joint Commission.

39. On June 4, 2016, KUMC inquired whether Tilzer wanted to take a sabbatical.

40. Because KU Hospital President Bob Page did not provide Tilzer with written documentation of the May 31 reprimand, and because there is not a typical administrative record for the events surrounding Page's reprimand of Tilzer and the events leading to the reprimand and attempted intimidation, the administrative record for review should be supplemented through pre-trial discovery as contemplated by K.S.A. § 77-619(a).

THE JOINT COMMISSION, K.S.A. § 65-429, K.A.R. § 28-34-2 AND K.S.A. § 75-2973

41. The Joint Commission is recognized by the State Of Kansas as the outside agency that audits and certifies hospital compliance with medical standards.

42. The Joint Commission conducts audits of KU Hospital and certifies KU Hospital compliance with medical standards.

43. The Joint Commission performs its audits and certifications under the provisions of state law, including K.S.A. § 65-429 and Kansas Administrative Regulation § 28-34-2.

44. K.S.A. § 65-429 states:

§ 65-429. Issuance and renewal of licenses; funding the cost of administration of the medical care facilities licensure and risk management program; display of license

Upon receipt of an application for license, the licensing agency shall issue with the approval of the state fire marshal a license provided the applicant and the physical facilities of the medical care facility meet the requirements established under this act. A license, unless suspended or revoked, shall be renewable annually without charge upon the filing by the licensee, and approval by the licensing agency, of an annual report upon such uniform dates and containing such information in such form as the licensing agency prescribes by rules and regulations. A medical care facility which has been licensed by the licensing agency and which has received certification for participation in federal

reimbursement programs and which has been accredited by the joint commission on accreditation of health care organizations or the American osteopathic association may be granted a license renewal based on such certification and accreditation. The cost of administration of the medical care facilities licensure and risk management program provisions of this act pursuant to K.S.A. 65-433 and 65-4921*et seq.*, and amendments thereto, shall be funded by an annual assessment from the health care stabilization fund, which assessment shall not exceed \$200,000 in any one fiscal year. The licensing agency shall make an annual report to the health care stabilization fund regarding the use of these funds. Each license shall be issued only for the premises and persons or governmental units named in the application and shall not be transferable or assignable except with the written approval of the licensing agency. A separate license is not required for two separate establishments which are located in the same or contiguous counties, which provide the services required by K.S.A. 65-431 and amendments thereto and which are organized under a single owner or governing board with a single designated administrator and medical staff. Licenses shall be posted in a conspicuous place on the licensed premises. (Emphasis added.)

45. Kansas Administrative Regulation § 28-34-2 of the Department Of Health And

Environment states in part:

§ 28-34-2. Licensing procedure

Each applicant for an initial license to operate a hospital shall file an application on forms provided by the licensing agency at least 90 days prior to admission of patients. A license previously issued shall be renewed after the licensee has filed an annual report and the licensing agency has approved the same. The licensing agency shall approve the renewal after it has documented that the applicant is in substantial compliance with these regulations. Each application for license renewal shall be filed with the licensing agency at least 90 days before the expiration date of the current license, and the annual report shall be filed no later than 60 days after the beginning of each calendar year. The annual report may include information relating to:

(e) If during the term of its current license a facility is surveyed by the joint commission on accreditation of health care organizations (JCAHO) or the American osteopathic association (AOA), the facility shall submit the survey report to the licensing agency toward satisfying the survey requirements for licensure. After reviewing the survey report, the licensing agency may notify the facility that a licensing survey will be conducted. (Emphasis added.)

46. The Joint Commission is an “Auditing Agency” as defined by K.S.A. § 75-2973(b)(1) because the Joint Commission is an “authority performing auditing or other oversight activities under authority of any provision of law authorizing such activities”.

47. KUMC and KU Hospital are “State Agencies” as defined by and K.S.A. § 75-2973(b)(3) and K.S.A. § 46-1112.

48. KU Hospital President Bob Page’s statements to Tilzer in their face-to-face meeting on May 31, 2016 threatened Tilzer’s employment and constitute a “reprimand” and “warning of possible dismissal” under K.S.A. § 75-2973(b)(2).

49. Tilzer is an unclassified employee of two state agencies, KUMC and KU Hospital, and is entitled to file this Petition For Judicial Review pursuant to K.S.A. § 75-2973(h) within 90 days of after the disciplinary act.

50. This Petition for Judicial Review is filed within 90 days after the May 31, 2016 reprimand and attempted intimidation by KU Hospital President Bob Page.

51. Tilzer is entitled to protection from retaliation, protection from dismissal, an award of his legal fees pursuant to K.S.A. § 75-2973(h), and such other relief as the Court deems just and proper.

WHEREFORE, Lowell L. Tilzer M.D. prays that this Court enter judgment:

- a. Allowing Tilzer to conduct discovery pursuant to K.S.A. § 77-619(a);
- b. Preventing and enjoining the University of Kansas Hospital Authority and its agents including President Bob Page from retaliating against Tilzer for his opposition to the concealment and his report to an auditing agency;
- c. Preventing and enjoining the University of Kansas Hospital Authority and its agents including President Bob Page and attempting to intimidate Tilzer and others from reporting to auditing agencies;
- b. Preventing and enjoining the University of Kansas Hospital Authority and its agents including President Bob Page from terminating Tilzer’s employment;

- c. Awarding Tilzer's legal fees and costs;
- d. Awarding such other relief as the Court deems just and proper.

Respectfully submitted,

COLANTUONO BJERG GUINN, LLC

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EXHIBIT 1
AMA OPINION 10.01

Opinion 10.01 - Fundamental Elements of the Patient-Physician Relationship

From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient. Patients share with physicians the responsibility for their own health care. The patient-physician relationship is of greatest benefit to patients when they bring medical problems to the attention of their physicians in a timely fashion, provide information about their medical condition to the best of their ability, and work with their physicians in a mutually respectful alliance. Physicians can best contribute to this alliance by serving as their patients' advocate and by fostering these rights:

- (1) The patient has the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives. Patients should receive guidance from their physicians as to the optimal course of action. Patients are also entitled to obtain copies or summaries of their medical records, to have their questions answered, to be advised of potential conflicts of interest that their physicians might have, and to receive independent professional opinions.
- (2) The patient has the right to make decisions regarding the health care that is recommended by his or her physician. Accordingly, patients may accept or refuse any recommended medical treatment.
- (3) The patient has the right to courtesy, respect, dignity, responsiveness, and timely attention to his or her needs.
- (4) The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest.
- (5) The patient has the right to continuity of health care. The physician has an obligation to cooperate in the coordination of medically indicated care with other health care providers treating the patient. The physician may not discontinue treatment of a patient as long as further treatment is medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care.

(6) The patient has a basic right to have available adequate health care. Physicians, along with the rest of society, should continue to work toward this goal. Fulfillment of this right is dependent on society providing resources so that no patient is deprived of necessary care because of an inability to pay for the care. Physicians should continue their traditional assumption of a part of the responsibility for the medical care of those who cannot afford essential health care. Physicians should advocate for patients in dealing with third parties when appropriate. (I, IV, V, VIII, IX)

EXHIBIT 2

APRIL 1, 2016 EMAIL
FROM JOINT COMMISSION

From: <complaint@jointcommission.org>

Subject: Correspondence from The Joint Commission Office of Quality Monitoring: 6

Date: April 1, 2016 at 9:38:18 AM CDT

To: <lowell.tilzer@gmail.com>

Friday, April 1, 2016

Lowell Tilzer
KU Hospital
12879 Lamar
Overland Park, KS 66209

Regarding: The University of Kansas Hospital Authority
Incident #72413QOS-12536ZZC

Dear Dr. Tilzer:

This is to confirm receipt of the correspondence you forwarded to us about The University of Kansas Hospital Authority. We would like to contact the organization for its written response to this matter. ***The Joint Commission is requesting permission to release your name and share a copy of your correspondence with the organization.*** If you agree, please provide us with your written statement telling us we may share this information.

We offer the following options for submitting your permission statement:

On-line: www.jointcommission.org/GeneralPublic/Complaint (You must have your complaint incident number)

E-mail: complaint@jointcommission.org

Fax: Office of Quality and Patient Safety: (630) 792-5636

Mail: Office of Quality and Patient Safety
The Joint Commission
One Renaissance Boulevard
Oakbrook Terrace, IL 60181

The Joint Commission does not assess specific care of an individual patient, thus we are unable to tell you if appropriate medical care has been provided. Instead, our evaluation focuses on processes and policies that are required within our standards. For example, if we get a report regarding a patient's infection, we will look at an organization's infection control practices and policies to determine their compliance with Joint Commission requirements. If any opportunities for improvement are identified, we will work with the organization to correct practices and systems so that they meet or exceed our standards. You should understand that our purpose is to help improve the quality and safety of care.

Please be aware that in line with our Public Information Policy, we cannot provide you with the organization's response.

Thank you for bringing your concerns to our attention. Please include the incident number indicated at the top of this letter on any future correspondence regarding this matter.

Sincerely,

Office of Quality and Patient Safety