IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION

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OMOWALE A. SHABAZZ,	}	
	}	
Claimant,	}	
	}	
v.	}	**Claim No. 20090126**
	}	**Regular Docket**
STATE OF TENNESSEE,	}	
	}	
Defendant.	}	

ORDER GRANTING STATE'S MOTION TO DISMISS

THIS CASE IS BEFORE the undersigned on the Defendant's Motion to Dismiss and Memorandum in Support, the Claimant's response thereto, and the record as whole.

Motions pending before the Tennessee Claims Commission are to be decided without oral argument pursuant to Tennessee Claims Commission Rule 0310-1-1-.01(5)(a) unless otherwise ordered. There has been no order for oral argument in this matter. Further, there has been no motion by either party for oral argument. Therefore, the State's Motion is properly before the Commission and will be heard on the record.

Procedural History

This claim was initially filed by Mr. Shabazz with the Division of Claims Administration on August 4, 2008. The claim was transferred by the Division to the Commission, pursuant to Tennessee Code Annotated, Section 9-8-402(c) on November 3, 2008.[1]

[1] At the time the claim was filed, Mr. Shabazz was incarcerated at the Brushy Mountain Correctional Complex ("BMCX") in Petros, Tennessee. Mr. Shabazz subsequently has been transferred by the Tennessee Department of Correction ("TDOC") to Riverbend Maximum Security Institution ("RMSI") in Nashville, Tennessee.

On December 1, 2008, the State filed a Motion to Dismiss with Supporting Memorandum. Subsequently, on December 11, 2008, Mr. Shabazz filed a response to the State's Motion. On January 30, 2009, Mr. Shabazz filed a Motion to Supplement Pleadings pursuant to the Tennessee Rules of Civil Procedure, Rule 15.04. Attached to that Motion was a document styled Sworn Supplemental Claim.

Factual History

Mr. Shabazz is currently serving a sentence for second degree murder. (See *Shabazz v. Jim Worthington, Warden*, No. E2007-00634-CCA-R3-HC, 2007 WL 2984694 (Tenn. Crim. App.).)

At one point during his incarceration, Mr. Shabazz was being held at TDOC's South Central Correctional Facility ("SCCF") in Pikeville, Tennessee.

On December 16, 2004, Mr. Shabazz had a "physical fight" with an inmate named Williams. Inmate Williams, according to prison records, apparently had "multiple puncture wounds and was bleeding" following that altercation.

Mr. Shabazz was apparently moved from Pikeville to the TDOC facility at Brushy Mountain where, according to a Memorandum from Jim Worthington, Warden at Brushy Mountain Correctional Complex dated June 27, 2008, Mr. Shabazz was placed in "IAS/MAX CUSTODY" since the assault on Williams "involved a weapon". Additionally, a TDOC record attached to Mr. Shabazz' claim captioned "Administrative Segregation Review" indicates that Mr. Shabazz was segregated on December 23, 2004, at the Brushy Mountain Facility. That document recites the following facts:

> INMATE ARRIVED AT BMCC: 07-08-05 … INMATE PLACED ON IAS AT SCCF FOR 'ASSAULT ON INMATE … WAS TRANSPORTED TO OUTSIDE HOSPITAL FOR TREATMENT OF INJURIES CONSISTANT (SIC) WITH STAB WOUNDS … BECAUSE OF THE SERIOUS NATURE OF THE ASSAULT, THE BOARD DETERMINES THAT INMATE DEAN #244104 IS A THREAT TO BOTH INMATES AND STAFF AND SHOULD NOT BE IN GENERAL POP"; HAS BEEN 'GOOD' … INMATE IS

APPROVED FOR PHASE DOWN BUT WANTS CLOSE SECURITY.

A decision was made by the Administrative Segregation Review Panel to release Mr. Shabazz from Administrative Segregation with a recommendation that he be placed in "phase down". However, on July 3, 2008, the Warden disapproved the panel recommendation reasoning that Mr. Dean was already approved for phase down – "recommendation should have been (unreadable) continuance – approved for phase down".

Mr. Shabazz' Complaint revolves around his contention that TDOC and Brushy Mountain had no such thing as a "phase down" program. Instead of being placed in the "phase down" program, Mr. Shabazz alleges the Administrative Review Panel can only recommend release from administrative segregation, following which he could be assigned to something known as "closed custody" unless he was in maximum security for violations which involved an assault resulting in the serious injury or death of an inmate. Mr. Shabazz contends that his altercation with Mr. Williams did not involve serious injury or death and therefore, he should not have been placed in a "phase down" program at a Level IV facility. Apparently, a Level IV facility involves maximum security with serious restrictions on what the prisoner can and cannot do.

Importantly, in Mr. Shabazz' claim, it is his contention that placement in the "phase down" program "prevents the petitioner from meeting the parole board, gaining good time credits, and enjoying the various activities that other inmates not placed on maximum security enjoy".

As indicated above, Mr. Shabazz argues that an inmate released from Administrative Segregation should be recommended for something known as "closed custody" unless he had originally been segregated for an offense involving assaults on employees, a visitor, the serious injury or death of another inmate, or involvement in a hostage situation. Again, Mr. Shabazz argues vigorously that he was not involved in an assault on Williams involving "serious physical injury".

Mr. Shabazz' legal argument is succinctly set forth in paragraph 21 of his claim where he writes as follows:

> For the above cited reasons, petitioner asserts that he has, and continues to be, negligently deprived of his statutory rights as secured by T.C.A. 41-21-28 and 41-21-404, and that the acts or omissions of the respondent constitutes a violation of T.C.A. sections 9-8-307(a)(1)(N); 4-3-602; 4-3-603; 41-1-103; 41-1-104; 41-1-106; 41-1-407; 41-21-201; 41-21-218; and 41-21-404.

Additionally, in paragraph 1 of his Notice of Claim, Mr. Shabazz also alleges that these actions constitute a violation of section 9-8-307(a)(1)(E) of the Tennessee Claims Commission Act involving the negligent care, custody and control of persons.

In his Supplemental Complaint filed with the Commission on January 30, 2009, Mr. Shabazz contends that on September 16, 2008, he was transferred to Riverbend Maximum Security Institution ("RMSI") where in October he was approved to start the "phase-down/phase-out" program. Again, Claimant contends that this program is not authorized by any TDOC policy and that if there was such a program, he would not meet the criteria of entering the same. Mr. Shabazz seriously alleges that his improper placement in such a program was caused by the fact that his unit manager and counselor "falsified information on his monthly administrative segregation review sheet in an attempt to justify placing [him] onto this fictitious program". Mr. Shabazz contends that he filed a grievance over the alleged falsified information, and that the institutional grievance board agreed with him that the manager and counselor had, in fact, falsified information regarding administrative segregation, a decision which he claims was also agreed to by RMSI's Warden. The falsified information, according to Mr. Shabazz, is again the allegation that he was placed in maximum security for an assault on another inmate involving serious injury. He contends that having been classified for involvement with a serious injury assault has resulted in his placement in a maximum security facility at a Level IV institution. Mr. Shabazz concludes by contending that TDOC officials have been "negligent in their

custody and control" of him in violation of Tennessee Code Annotated, sections 9-8-307(a)(1)(E) and (N) because no TDOC rule or regulation would allow prison officials to recommend him for a phase-down/phase-out program, nor has the legislature or the Commissioner of TDOC given prison officials "the authority to implement any such programs". Consequently, he again argues that he has been denied access to good time credits, program credits, parole opportunities, and a wide variety of programs not available to maximum security inmates.

Decision.

Mr. Shabazz' well-organized, literate, and respectful claim in this case initially raises an important jurisdictional issue. Of course, the jurisdiction of this Commission to hear certain cases represents a waiver of the State's innate sovereign immunity against suit.

Sovereign immunity is a principle of law immunizing a governmental body against suit. It has long been a part of the jurisprudence of every state in the Union. The thought behind the concept is the protection of the government against a wide variety of legal claims which could cause a state without sovereign immunity severe financial problems to the detriment of the population as a whole.

The doctrine of sovereign immunity against suit in Tennessee derives from the common-law as it developed in North Carolina and subsequently in this state. *Lucas v. State*, 141 SW3d 121, 125 (Tenn. Ct. App. 2004).

With that principle in mind, the drafters of the Constitution of Tennessee embedded as a paramount principle of governance the concept that only the Legislature of the State could determine those circumstances in which the shield of sovereign immunity would be lowered and suit against the State permitted. Article I, Section 17 of our Constitution provides as follows:

> "Section 17. That all courts shall be open; every man, for an injury done him and his lands, goods, person or reputation, shall have remedy by due course of law and right and justice administered, without sale, denial or delay. Suits may be brought against the State in such manner

> and in such courts as the Legislature may by law direct. (Emphasis supplied.)

The General Assembly itself later enacted statutory law which reiterates the concept of the sovereign immunity of this State. Tennessee Code Annotated, Section 20-13-102(a) reads as follows:

> "20-13-102. Actions Against State Prohibited. – (a) No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, property, and all such suits shall be dismissed as to the state or such officers, on motion, plea or demurrer of the law officer of the state, or counsel employed for the state." See also *Brewington v. Brewington*, 387 SW2d 777, 778-779 (1965).

However, in 1984, the General Assembly made a significant change to the law of sovereign immunity with the enactment of The Tennessee Claims Commission Act, Tennessee Code Annotated, Section 9-8-301, *et. seq.* In Tennessee Code Annotated, Section 9-8-307(a)(1), the Legislature set out very clearly those areas in which the State has relinquished its immunity to the financial extent permitted by other provisions of that Act.

An adjunct principle to the State's decision, through its Legislature, to partially waive its sovereign immunity rights is the rule that statutes waiving immunity, because they are in derogation of the common-law, must be strictly construed. *State ex Rel Allen v. Cook*, 106 SW2d 858, 860 (1937); *Stokes v. University of Tennessee*, 737 SW2d 545, 547, (Tenn. Ct. App., 1987).

The Supreme Court has made it abundantly clear that if a particular cause of action is not enumerated in Tennessee Code Annotated, Sections 9-8-307, this Commission does not have jurisdiction since sovereign immunity has been waived only in the areas set out therein.[2] *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

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[2] Briefly, the Commission did have jurisdiction of cases involving alleged negligent deprivation of constitutional rights. However, in 1989, the words "or constitutional" were deleted from Section 9-8-307(a)(1)(N). See *Shell v. State*, 893 S.W.2d 416, 418-420 (Tenn. 1995).

Paragraph 21 of the original claim in this matter, asserts a negligent deprivation of statutory rights as does paragraph 35 of Mr. Shabazz' recently received Supplemental Claim.

Tennessee Code Annotated, Section 9-8-307(a)(1)(N) provides as follows:

> **9-8-307. Jurisdiction Claims Waiver of actions Standard for tort liability Damages Immunities Definitions Transfer of claims.**
>
> **(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(3), falling within one (1) or more of the following categories:
>
> . . . .
>
> **(N)** Negligent deprivation of statutory rights created under Tennessee law, except for actions arising out of claims over which the civil service commission has jurisdiction. The claimant must prove under this subdivision (a)(1)(N) that the general assembly expressly conferred a private right of action in favor of the claimant against the state for the state's violation of the particular statute's provisions;...

Mr. Shabazz' claim under subsection N must fail based upon a well-established line of cases. The Commission has read each and every statute cited by Mr. Shabazz in his various pleadings and finds in none of those statutes a conferral upon him of a private right of action. As the Western Section Court of Appeals put it in *Madkins v. State of Tennessee*, No. W2001-03002-COA-R3-CV, 2002 WL 1162338 (Tenn. Ct. App.):

> Therefore, the above statute conferring jurisdiction on the Claims Commission specifies that Mr. Madkins must show that the statute allegedly violated by the State <u>expressly</u> grants individuals a private right of action to enforce those rights. For every statutory right allegedly violated by the State, Mr. Madkins must reference explicit statutory language that would grant him the private right of action to enforce the statute. *Id.* at *2; see also *Williams v. State*, 139 S.W.3d 308, 312 (Tenn. Ct. App. 2003), *Al-Jabbar A'la v. State*, 2002 WL 1838162 *2 (Tenn. Ct. App.) (Swiney, J., concurring).

Since Mr. Shabazz has not anywhere in his pleadings identified express statutory language conferring a private right of action in his favor in this case, his claim under that subsection MUST fail.

Additionally, there is another basic jurisdictional reason why Mr. Shabazz' claim before this Commission is not proper and therefore, why this Commission does not have the power to address the matters of which he complains.

Both in his original claim and his recently filed Supplemental claim, Mr. Shabazz alleges not only a violation of Tennessee Code Annotated, Section 9-8-307(a)(1)(N) but also a negligence allegation under Tennessee Code Annotated, Section 9-8-307(a)(1)(E) regarding the State's supposed negligence in the nature of his care, custody, and control. That section provides as follows:

> **9-8-307. Jurisdiction Claims Waiver of actions Standard for tort liability Damages Immunities Definitions Transfer of claims.**
>
> **(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(3), falling within one (1) or more of the following categories:
>
> . . . .
>
> **(E)** Negligent care, custody and control of persons;

This negligence claim under subsection E is premised on Mr. Shabazz' contention that the conditions of his incarceration are being dictated through a "phase-down/phase-out" program, following release from high security segregation, which either does not even exist under TDOC departmental regulations; or alternatively, if it does, was implemented by TDOC without any authorization from the Legislature or the Commissioner. Therefore, Mr. Shabazz questions either the validity or the applicability of "phase-down/phase-out" program to him.

Again, two reported cases, copies of which are attached hereto, have made it abundantly clear that the Claims Commission does not have jurisdiction over questions regarding the validity or applicability of a state agency regulation.

The Court of Appeals wrote in *E.L. Reid v. State*, 9 S.W.3d 788 (Tenn. Ct. App. 1999) as follows:

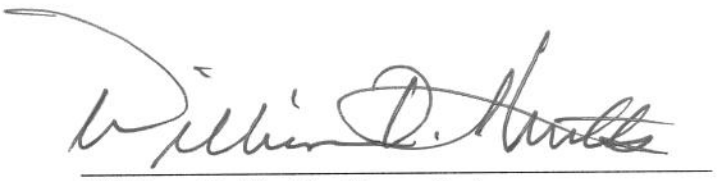
> As framed, Reid's last issue constitutes a challenge to a TDOC policy governing its facilities and inmates. In *Baptist Hospital v. Tennessee Department of Health*, 982 S.W.2d 339, 341 (Tenn. 1998), our supreme court held that the Claims Commission lacked subject matter jurisdiction to issue a declaratory order as to the validity or applicability of a State agency's regulation. Based upon this holding, we conclude that the Claims Commission likewise lacked subject matter jurisdiction to rule on the validity or applicability of the TDOC policy challenged by Reid in this case. *Id.* at 794.

As the Supreme Court pointed out in the *Baptist Hospital* case, cited by the *Reid* court, claims challenging the applicability and validity of a statute, rule, or order are brought under the Uniform Administrative Procedures Act, Tennessee Code Annotated, Section 4-5-223(a). This Commission does not have jurisdiction over Uniform Administrative Procedures Act cases.

If, in fact, Mr. Shabazz is being denied important prison rights because of a misconstruction of the seriousness of the injury to a fellow inmate that occurred at the Pikeville facility, then this misunderstanding needs to be addressed. However, the Tennessee Claims Commission simply does not have jurisdiction over the complaints he voices.

For the reasons stated herein, this claim is therefore **DISMISSED** respectfully.

ENTERED pursuant to **Tenn. R. Civ. P.** 58 this the 24th day of February, 2009.



William O. Shults, Commissioner
P.O. Box 960
Newport, TN 37822-0960

CERTIFICATE OF SERVICE

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

Omowale A. Shabazz, #244104
R.M.S.I./4-C-110
7475 Cockrill Bend Blvd.
Nashville, TN 37209-1048

Kellena Baker, Esq.
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

This the 25 day of February, 2009.

Marsha Richeson

Marsha Richeson, Administrative Clerk

The TBR also takes issue with the Chancery Court's conclusion that because he had not been informed by the University that there was a problem with his behavior toward students, Dr. Wells could not have known that his conduct evinced a *capricious* disregard for accepted standards of conduct within the meaning of Tenn.Code Ann. § 49–8–302(5) (1996 Repl.). In essence, Dr. Wells contends that the statute does not sufficiently define what conduct it encompasses.

In *Phillips v. State Bd. of Regents*, 863 S.W.2d at 50, this Court addressed Phillips' contention that the "capricious disregard" statute was void for vagueness by stating:

> We agree with the Third Circuit that it is not unfair or unforeseeable for a tenured professor to be expected to behave professionally towards students and coworkers and to comply with the directives of a superior.... Clearly, Phillips, using her common sense and general knowledge of employer-employee relationships, had fair notice that the conduct charged put her at risk of dismissal under the standard of 'capricious disregard of accepted standards of professional conduct.'

Id. quoting San Filippo v. Bongiovanni, 961 F.2d 1125, 1137 (3rd Cir.1992).

[15] Applying the rule in *Phillips v. State Bd. of Regents*, 863 S.W.2d at 50, that a tenured employee must use common sense in discerning what is appropriate behavior, it is clear that Dr. Wells had ample notice that his alleged conduct was not appropriate within the meaning of Tenn.Code Ann. § 49–8–302(5) (1996 Repl.). The allegations in this case, including asking female students to go to happy hour, grabbing a female student's breast, and commenting on female students' clothing in a suggestive and sexual manner, establish a pattern of behavior that common sense dictates deviates from accepted standards.

Moreover, Dr. Wells had been disciplined by TSU on a prior occasion, when Ms. Jones had filed charges against him for sexual harassment. Contrary to Dr. Wells' contention that he was unaware of TSU's standards with regard to sexual harassment, the probation he received in connection with Ms. Jones' complaint should have alerted him that his behavior, in some fashion, did not comport with university standards. We find no merit to the Chancery Court's conclusion that Dr. Wells did not have notice that his conduct, while perhaps constituting a "disregard" for accepted standards of professional conduct, could have also amounted to a "capricious" disregard for those standards.

CONCLUSION

We conclude that the evidence does not preponderate against the Chancellor's finding that the record in this case fails to clearly and convincingly establish the charge of "capricious disregard of accepted standards of professional conduct." Accordingly, the judgment of the Chancery Court reversing the Tennessee Board of Regent's dismissal of Dr. Wells is affirmed. Costs of this appeal are taxed against the Tennessee Board of Regents.

ANDERSON, C.J., BARKER, HOLDER, JJ., concur.

BIRCH, J., Not Participating.

E.L. REID, Claimant/Appellant.

v.

STATE of Tennessee, Defendant/Appellee.

Court of Appeals of Tennessee, at Jackson.

April 28, 1999.

Application for Permission to Appeal Denied by Supreme Court Nov. 22, 1999.

Prison inmate filed claim with the Claims Commission, Martha B. Brasfield,

Commissioner, for the loss of his radio/compact disc player that was allegedly not returned following a period in punitive segregation. The Commission awarded inmate $50, but determined he was not entitled to damages for his loss of use and enjoyment. Inmate appealed. The Court of Appeals, Farmer, J., held that: (1) inmate was not entitled to extensive discovery regarding Department of Corrections procedures in the handling of prisoners' property; (2) inmate did not meet burden of proving value of property at time of loss; and (3) Commissioner of Claims was prohibited from awarding discretionary costs.

Affirmed.

1. Pretrial Procedure ⚷36.1

None of the requested discovery was relevant to issue of the value of prison inmate's radio, and thus inmate was not entitled to extensive discovery regarding Department of Corrections procedures in the handling of prisoners' property, in civil claim for loss of radio, even if discovery requests were relevant to state's liability, where Commissioner of Claims already ruled in favor of inmate on issue of state's liability for the loss of his property, and value of property was at most $150.

2. Convicts ⚷6

When a civil lawsuit is being pursued by a prison inmate, the trial court has the authority to impose appropriate limitations on the discovery conducted by the prisoner.

3. Pretrial Procedure ⚷27.1

The scope of discovery permitted to a prison inmate bringing a civil lawsuit is within the trial court's sound discretion.

4. Pretrial Procedure ⚷17.1

Statute requiring each state agency to make "available" for inspection and copying the agency's rules, final orders, and decisions does not grant pretrial discovery rights to parties involved in litigation with the agency. T.C.A. § 4-5-218.

5. Damages ⚷188(1)

Prison inmate's opinion that the actual value of his radio, which was lost by prison officials, was $150 and that he suffered additional damages of $100 per day for loss of radio's use and enjoyment did not meet burden of proving value of property at time of loss, where his affidavit did not specify whether $150 value represented radio's purchase price, its value at the time of the loss, or its value at the time he filed his affidavit, and he presented no evidence to substantiate his claimed damages for loss of use and enjoyment, even assuming such damages were awardable.

6. Damages ⚷105

As a general rule, damages for the loss or destruction of personal property are measured by the market value of the property at the time of its loss.

7. Damages ⚷105

If no market for property exists, or if the market value is inadequate, the proper measure of damages for the loss of personal property is the actual value of the property to the owner.

8. Damages ⚷105

Damages for the loss or destruction of personal property are calculated with reference to the date of the loss of the property, not the date of its acquisition or purchase by the owner.

9. Evidence ⚷474(19)

As the owner of the property lost by prison officials, inmate was competent to testify as to its value at the time of its loss, for purposes of assessing his damages.

10. States ⚷184.33

Under Claims Commission Act, Commissioner of Claims was prohibited from awarding discretionary costs incurred by prison inmate who successfully brought civil claim against state, even assuming inmate's claims for postage, photocopying, and time spent performing legal research were allowable discretionary costs. T.C.A. § 9-8-307(d).

11. States ⟹184.2(2)

Claims Commission lacked subject matter jurisdiction to rule on the validity or applicability of policy of Department of Corrections prohibiting inmates from having radios.

12. Appeal and Error ⟹169

As a general rule, appellate courts do not consider issues not dealt with in the trial court and not properly developed in the proof.

13. Appeal and Error ⟹169

If an issue is not properly raised in the trial court, it will not be considered on appeal.

E.L. Reid, pro se.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, Sohnia W. Hong, Assistant Attorney General, for Defendant/Appellee.

FARMER, Judge.

Claimant E.L. Reid appeals the final order of the Commissioner of Claims which awarded Reid $50 for the loss of a radio/compact disc player. We affirm the Claims Commissioner's final order.

In September 1996, Reid, an inmate at the Northwest Correctional Center (NWCC) in Tiptonville, Tennessee, filed a claim with the Division of Claims Administration for the loss of a radio/compact disc player. Reid's claim alleged that, during the summer of 1996, Tennessee Department of Correction (TDOC) officials required Reid to spend sixty days in segregation in retaliation "for his jail house lawyer type activities." During his segregation, TDOC officers took Reid's radio to be stored in the facility's small property room holding area. Apparently, the radio was not returned to Reid after his sixty-day segregation ended, and Reid alleged that TDOC officers had stolen the radio. Reid sought an award of damages against the State of Tennessee in the amount of $150 for the actual value of the radio, plus $100 per day for "doing without" the radio.

The Division of Claims Administration offered to settle Reid's claim for $85. Unsatisfied with this amount, Reid filed his claim with the Claims Commission. *See* T.C.A. § 9–8–402(c) (Supp.1997).[1] Thereafter, Reid filed a motion to remove his claim from the Claims Commission's small claims docket to its regular docket. *See* T.C.A. § 9–8–403(a)(2) (Supp.1997).[2] The Claims Commissioner entered an order transferring Reid's claim to the regular docket. *See* T.C.A. § 9–8–403(c) (Supp. 1997).[3] The Commissioner's order also indicated that, pursuant to section 9–8–403(h) of the Tennessee Claims Commission Act, Reid's claim would be heard on affidavits. *See* T.C.A. § 9–8–403(h) (Supp. 1997).[4]

1. As pertinent, the Tennessee Claims Commission Act provides that, "[i]f the claim is honored and the damages may be ascertained within the ninety-day settlement period, the division shall so notify the claimant and inform the claimant of the conditions of the settlement offer and of the claimant's right to file such claimant's claim with the claims commission within ninety (90) days of the date of the settlement notice if the conditions of the settlement offer are unacceptable." T.C.A. § 9–8–402(c) (Supp.1997).

2. The Claims Commission's small claims docket consists of "claims satisfying the monetary limit applicable to the general sessions court of Davidson County." T.C.A. § 9–8–403(a)(2) (Supp.1997).

3. Section 9–8–403(c) provides that, "[a]t the discretion of either party at any time prior to a hearing, a claim may be removed from the small claims docket to the regular docket. Once removed, the claim shall be treated like any other claim on the regular docket." T.C.A. § 9–8–403(c) (Supp.1997).

4. Section 9–8–403(h) provides that "[c]laims based on the negligent care, custody or control of personal property by persons in the legal custody of the state shall proceed on affidavits only, except where the commission determines that witnesses should be heard." T.C.A. § 9–8–403(h) (Supp.1997).

In the spring of 1998, Reid filed several discovery requests, including a motion to compel discovery, in which he asked TDOC to produce various documents in its possession. Despite the Commissioner's previous order indicating that Reid's claim would be heard on affidavits, Reid also sought to depose various TDOC employees and officials.

In June 1998, the Commissioner entered an order denying Reid's discovery requests and motion to compel on the ground that the requested items were irrelevant to Reid's personal property claim. In her order, however, the Commissioner ruled in favor of Reid on the issue of the State's liability for the loss of Reid's property. Based upon documents submitted by Reid, the Commissioner made the following findings:

> [Reid] has shown that he owned the property in question and that the property was confiscated when [Reid] was sentenced to punitive segregation.... The [State] has not been able to show that the property was returned to [Reid]. It appears that the [State] had the care, custody and control of [Reid's] property, and that said property was never returned to [Reid].

In light of these findings, the Commissioner then ruled that the only remaining issue to be determined was "the value of the lost property and the amount of the award to be granted." The Commissioner ordered Reid to submit proof of the value of the radio by August 1, 1998, so that the Commissioner could make an award.

In response to the Commissioner's order, Reid filed a document entitled "Motion; Affidavit; Evidence; Memorandum of Law in Support of this Case Based in Law." The document indicated that it was made under oath, and it included Reid's signature; however, the document did not contain a jurat or a notary's signature. Reid asserted in the document that the actual value of the radio was $150 and that he had suffered additional damages of $100 per day for his loss of use and enjoyment of the radio.

In August 1998, the Commissioner entered a final order in which she awarded Reid $50 for the loss of his radio. The Commissioner ruled that Reid was not entitled to the damages requested in his "Motion; Affidavit" because he failed to submit proof of the value of the radio. Nevertheless, the Commissioner awarded Reid $50 based upon her estimate of the property's value. The Commissioner also ruled that the $100 per day claimed by Reid for his loss of use and enjoyment of the radio was not awardable under the Tennessee Claims Commission Act.

[1] On appeal from the Commissioner's final order, Reid has presented thirteen issues for this court's review,[5] many of which overlap and repeat each other. In his first three issues, as well as his eighth, ninth, and eleventh issues, Reid contends that the Commissioner erred in denying his various discovery requests, including his motion to compel discovery. Specifically, Reid's requests sought discovery of the following items:

1. TDOC rules & regulations
2. Claims Commission rules & regulations for Tennessee
3. NWCC building/pod operation procedures for Building "A" # 1 housing unit
4. Post orders for officers in "A" type buildings
5. Post orders for all unit management team members for "A" type buildings
6. Staff/officers log books during the time [period] of this claim and its investigation

5. The Tennessee Claims Commission Act specifically grants this court the authority to review the Commissioner's decision. *See Shell v. State*, 893 S.W.2d 416, 420 (Tenn.1995); T.C.A. § 9-8-403(a)(1) (Supp.1997).

7. All grievances on theft of property from cells and or pods from 1992 to 1998 in TDOC, and the results
8. NWCC policy & operation procedures for investigating theft during the time of # 7 till now
9. TDOC, NWCC policies, operation procedures for providing security & requirements for inmates and their property.
10. Staffing requirements for "A", building # 1 housing type buildings.
11. Operation procedures for opening electronic locks to cells for "A" type buildings by local building [controls] and main operations [override] type [controls] from operations to include telephone or radio procedures.
12. All [incident] related reports on this claim, on all theft claims from inmates or their cells in TDOC since 1992 in pods, gilds, or other [similar] housing for inmates.
13. All records on keys for this Claimant's cell, pod, or keys to other cells or pods that will operate Claimant's cell in this claim for a [period] of one year before and after this claim.
14. Record on all [compatible] cell keys at NWCC or other institutions and their [assigned] inmate.
15. Standards of [hiring] staff/officer [personnel] for TDOC & NWCC and policy.
16. Training requirements for staff/officer employees and the training of the staff involved in this claim:

. . . .

17. Operation procedures for working employees overtime at TDOC/NWCC.
18. Overtime worked by employees working in HSA & "A" building NWCC for years 1995 to 1998.
19. Security procedures, post orders for officers working NWCC–HSA unit; policy for same.
20. List any inmates over security at NWCC; what and how does any inmate at NWCC have security [control] . . . over any thing.
21. List any policy, procedures, hiring practices at NWCC that inmates have any [control] of and if so, to what extent.
22. Any discovery described above on all other staff [involved] with Claimant during his time at HSA, June 1996 to August, 1996.

Reid also sought to depose various TDOC employees and officials. As previously indicated, the Commissioner denied Reid's requests based upon her conclusion that the requested discovery items were irrelevant to Reid's personal property claim.

[2, 3] When a civil lawsuit is being pursued by a prison inmate, the trial court has the authority to impose appropriate limitations on the discovery conducted by the prisoner. *Bradfield v. Dotson*, No. 02A01–9707–CV–00152, 1998 WL 63521, at *3 (Tenn.App. Feb. 17, 1998). The scope of such discovery is within the trial court's sound discretion. *Id.* Under the Tennessee Rules of Civil Procedure, which apply to proceedings before the Claims Commission,[6] "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." T.R.C.P. 26.02(1). Upon its own initiative, or pursuant to a motion, however, the trial court may limit discovery sought in a particular case if the court

6. The Tennessee Claims Commission Act provides, *inter alia*, that claims proceedings on the Commission's regular docket "shall be conducted pursuant to rules of the Tennessee Rules of Civil Procedure where applicable and otherwise pursuant to rules and regulations promulgated by the commission." T.C.A. § 9–8–403(a)(1) (Supp.1997); *see also* Tenn.Comp.R. & Regs. 0310–1–1–.01 (1992).

determines, *inter alia*, that "the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive," or that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." T.R.C.P. 26.02(1).

We conclude that the Commissioner did not abuse her discretion in denying Reid's requests for discovery in this case. At the time the Commissioner denied Reid's requests, the Commissioner ruled in favor of Reid on the issue of the State's liability for the loss of Reid's property. Thus, the only issue remaining for the Commissioner's determination was the value of the lost property and the amount of the award to be granted. While the requested items might have been relevant to the State's responsibility for the loss of Reid's property, none of the requested items appeared to be relevant to the only remaining issue in this case, the value of Reid's radio. Moreover, the amount in controversy in this case was relatively low. Except for his claim for loss of use and enjoyment, the most Reid contended the radio was worth was $150. In light of these considerations, we affirm the Commissioner's order denying Reid's motion to compel the discovery of the listed items.

In support of his discovery requests, Reid cites section 4–5–218 of the Uniform Administrative Procedures Act (APA), which requires each State agency to make available for inspection and copying the agency's rules, final orders, and decisions. Specifically, the APA provides that

> (a) Each agency shall make available for inspection and copying:
>
> (1) Agency rules, final orders and decisions;
>
> (2) Written statements of policy or interpretations formulated, adopted or used by the agency in the discharge of its functions;
>
> (3) Opinions of the attorney general and reporter rendered to the agency; and
>
> (4) A description of its current organization stating the general course and method of its operation and the methods whereby the public may obtain information or make submissions or requests.

T.C.A. § 4–5–218(a) (Supp.1997).

[4] We are not convinced that this provision of the APA is relevant to our analysis of the discovery issue in this case. The cited statute does not require a State agency to copy its rules and provide them to a requesting party. Instead, the statute merely requires the State agency to "make [its rules] *available* for inspection and copying." T.C.A. § 4–5–218(a)(1) (Supp. 1997) (emphasis added). Contrary to Reid's argument, the statute does not grant pretrial discovery rights to parties involved in litigation with the agency. *See State v. Killebrew*, 760 S.W.2d 228, 231 n. 6 (Tenn.Crim.App.1988) (concluding that T.C.A. § 40–32–101(c)(3), which requires release of arrest histories of defendant or potential witness in criminal proceeding to attorney of record upon such attorney's request, does not grant pretrial discovery rights to defendant). In any event, we question whether pretrial discovery procedures even apply to documents that are a matter of public record. *See State v. Adkins*, 725 S.W.2d 660, 663 (Tenn.) (noting that proof sought by defendant's counsel through pretrial discovery procedures was available as public records), *cert. denied*, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987); *State v. Cottrell*, 868 S.W.2d 673, 677 (Tenn.Crim.App.1992) (noting that judgment document sought through pretrial discovery was public record available for inspection).

In his fourth issue, Reid contends that the Commissioner erred in failing to sanction the assistant attorney general for her failure to comply with Reid's discovery requests. *See* T.R.C.P. 37.02. Based upon our conclusion that the Commission-

er did not abuse her discretion in denying Reid's various discovery requests, we likewise conclude that the Commissioner did not abuse her discretion in denying Reid's motion for sanctions.

[5] In his fifth and sixth issues, Reid challenges the adequacy of the Commissioner's award of $50. In this regard, Reid contends that the Commissioner erred in failing to award him the full $150 requested to compensate Reid for the loss of his radio. Reid also contends that the Commissioner erred in denying his claim for $100 per day for his loss of use and enjoyment of the radio.

In response, the State contends that the Commissioner properly refused to award the requested damages because Reid failed to prove these damages and, further, because the Tennessee Claims Commission Act permits claimants to recover their "actual damages only." As pertinent, the Act provides that

> [t]he state will be liable for actual damages only. No award shall be made unless the facts found by the commission would entitle the claimant to a judgment in an action at law if the state had been a private individual.

T.C.A. § 9–8–307(d) (Supp.1997).

[6–8] We agree with the Commissioner's ruling that Reid failed to prove his damages in this case. As a general rule, damages for the loss or destruction of personal property are measured by the market value of the property at the time of its loss. *MCI Telecomms. Corp. v. Bonnell*, 1989 WL 19925, at *2 (Tenn.App. Mar. 8, 1989) (citing *Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d 250 (Tenn.App. 1980)). Alternatively, if no market for the property exists, or if the market value is inadequate, the proper measure of damages for the loss of personal property is the actual value of the property to the owner. *Crawford v. Delta Airlines, Inc.*, No. 02A01–9612–CV–00296, 1997 WL 576535, at **2–3 (Tenn.App. Sept. 18, 1997) (citing *Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d at 256). In either event, damages are calculated with reference to the date of the loss of the property, not the date of its acquisition or purchase by the owner. *Crawford v. Delta Airlines*, 1997 WL 576535, at *2; *MCI Telecomms.*, 1989 WL 19925, at *2. The burden of proving such damages is upon the plaintiff. *Crawford v. Delta Airlines*, 1997 WL 576535, at *3.

In the present case, Reid filed what purported to be an affidavit in which he opined that the actual value of the radio was $150 and that he had suffered additional damages of $100 per day for his loss of use and enjoyment of the radio. Reid's affidavit did not specify, however, whether the $150 value represented the purchase price of the radio, the value of the property at the time of the loss, or its value at the time Reid filed his affidavit. Moreover, Reid presented no evidence to substantiate his claim that the damages for his loss of use and enjoyment of the property totaled $100 per day.[7] In the absence of such proof, we conclude that Reid failed to carry his burden of proving damages for the loss of his personal property.[8]

As an aside, we question the validity of the affidavit filed by Reid because the record contains no evidence that the affidavit was properly sworn. *See State v. Keith*, 978 S.W.2d 861, 867–70 (Tenn.1998); *Moore v. Walwyn*, No. 01A01–9507–CV–00295, 1996 WL 17143, at **2–3 (Tenn. App. Jan. 19, 1996); *Sammons v. Collins*, No. 01A01–9009–CV–00325, 1991 WL 1056, at *1 (Tenn.App. Jan. 9, 1991). Specifically, the record contains no evidence that the

7. Inasmuch as Reid failed to meet his burden of proving damages in this case, we need not decide whether damages for loss of use and enjoyment constitute actual damages awardable under section 9–8–307(d) of the Tennessee Claims Commission Act.

8. The State has not appealed the Commissioner's decision to award Reid $50 based upon her estimate of the radio's value.

affidavit was signed under oath before an authorized person. Instead, the affidavit merely contains the following recitation:

> I, E.L. Reid # 203343, Claimant being first deposed under the oath of perjury and to the best of my knowledge do state the following to this Honorable Claims Commission under the Tennessee Rules of Court; ....

Inasmuch as the State has not challenged the validity of Reid's affidavit, we need not decide this issue. Regardless of whether the affidavit was properly executed, we conclude that Reid has failed to carry his burden of proving damages for the loss of his radio.

In his seventh issue, Reid complains that he was unable to prove the value of the radio because TDOC employees and officials unlawfully confiscated his personal records, which would have shown that the radio had a value of at least $150. Reid claims that the taking of his personal records constituted obstruction of justice and violated numerous provisions of the Tennessee Constitution.

[9] This issue is without merit. We first observe that the list of pretrial discovery items requested by Reid did not include any personal records allegedly in TDOC's possession. We also note that Reid did not need these records to prove the value of the radio because, as the owner of the property, Reid was competent to testify as to its value. *See Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d 250, 256 (Tenn.App.1980); *Crook v. Mid-South Transfer & Storage Co.*, 499 S.W.2d 255, 260 (Tenn.App.1973); *McKinnon v. Michaud*, 37 Tenn.App. 148, 260 S.W.2d 721, 726 (1953). As we previously discussed, Reid's affidavit failed to indicate whether the $150 value represented the purchase price of the radio, the value of the property at the time of the loss, or its value at the time Reid filed his affidavit. Thus, the evidentiary problem in this case was not that Reid failed to present documentation to support his claim, but that Reid failed to present any competent testimony of the property's value at the time of its loss.

In his tenth issue, Reid contends that he is entitled to additional compensation for the legal expenses he incurred in prosecuting his claim. Specifically, Reid seeks to be compensated for his postage and photocopying expenses, as well as for the time he spent performing legal research.

[10] We conclude that this issue also lacks merit. The claimed expenses did not constitute allowable discretionary costs. *See Duncan v. DeMoss*, 880 S.W.2d 388, 390 (Tenn.App.1994) (holding that allowable discretionary costs did not include attorney's fees or compensation for time spent in litigation); *see also* T.R.C.P. 54.04(2) (providing that allowable discretionary costs include court reporter expenses, expert witness fees, and guardian *ad litem* fees, but not travel expenses). Moreover, even if the claimed expenses did constitute allowable discretionary costs, the Commissioner was without authority to award these costs against the State. The Tennessee Claims Commission Act provides that the State will not be liable for "the costs of litigation other than court costs." T.C.A. § 9-8-307(d) (Supp.1997). Thus, the Act specifically prohibited the Commissioner from taxing discretionary costs against the State in this case. *Phillips v. Tennessee Technological Univ.*, 984 S.W.2d 217, 218 (Tenn.1998).

Although it is not clear, in his twelfth issue, Reid appears to argue that he was not adequately compensated by the Commissioner for the loss of his property. We believe that this argument has been addressed sufficiently elsewhere in this opinion, and we decline to address it further.

[11] Finally, in his thirteenth issue, Reid alleges that TDOC has changed its policy so that it no longer allows radios to be brought into the facility where Reid is incarcerated. On appeal, Reid contends that he has a vested right to have a new radio brought in to replace the one lost

through TDOC's negligence and, further, that TDOC acted illegally when it changed its policy so as to retroactively affect Reid's rights.

As framed, Reid's last issue constitutes a challenge to a TDOC policy governing its facilities and inmates. In *Baptist Hospital v. Tennessee Department of Health*, 982 S.W.2d 339, 341 (Tenn.1998), our supreme court held that the Claims Commission lacked subject matter jurisdiction to issue a declaratory order as to the validity or applicability of a State agency's regulation. Based upon this holding, we conclude that the Claims Commission likewise lacked subject matter jurisdiction to rule on the validity or applicability of the TDOC policy challenged by Reid in this case.

[12, 13] We further note that, even if the Claims Commission had jurisdiction to award the requested relief, Reid did not raise this issue until he filed his notice of appeal challenging the Commissioner's final order. As a general rule, appellate courts do not "consider issues not dealt with in the trial court and not properly developed in the proof." *Harlan v. Hardaway*, 796 S.W.2d 953, 957 (Tenn.App. 1990). If an issue "is not properly raised in the trial court, it will not be considered on appeal." *Id.* Inasmuch as Reid's last issue was neither timely raised below nor ruled upon by the Commissioner, the issue is not properly before this court for review.

The Commissioner's final order is affirmed. Costs of this appeal are taxed to Reid, for which execution may issue if necessary.

CRAWFORD, P.J., W.S., and LILLARD, J., concur.

KING OF CLUBS, INC., Plaintiff/Appellee,

v.

William L. GIBBONS, District Attorney General, Defendant/Appellant.

Court of Appeals of Tennessee, at Jackson.

June 17, 1999.

Application for Permission to Appeal Denied by Supreme Court Nov. 22, 1999.

District attorney filed abatement action in criminal court against business establishment, alleging business was a public nuisance. Business then filed lawsuit in the circuit court, seeking injunctive relief against district attorney. The Circuit Court, Shelby County, George H. Brown, Jr., J., issued order temporarily enjoining district attorney from seeking injunction against business. District attorney appealed. The Court of Appeals, Farmer, J., held that concurrent jurisdiction rule precluded the circuit court from entering an order that purported to enjoin the district attorney from proceeding against business in the criminal court.

Vacated and remanded.

1. Courts ⇐475(1)

When two courts have concurrent jurisdiction of a particular subject matter, that tribunal which first obtains jurisdiction retains it.

2. Courts ⇐476

The effect of the concurrent jurisdiction rule is to divest a court of jurisdiction when another court with concurrent subject matter jurisdiction has previously assumed jurisdiction of the case; in that event, the court attempting to exercise subsequent jurisdiction is acting without authority of law, and its judgments or orders are void and of no legal effect.

BAPTIST HOSPITAL; East Tennessee Children's Hospital; Erlanger Medical Center; Fort Sanders Regional Medical Center; Holston Valley Hospital and Medical Center; Johnson City Medical Center Hospital; Le Bonheur Children's Medical Center; Maury Regional Hospital; Methodist Hospitals of Memphis; Regional Medical Center of Memphis; Saint Mary's Medical Center; And Vanderbilt University Medical Center, Plaintiffs/Appellants,

v.

TENNESSEE DEPARTMENT OF HEALTH, and Tennessee Department of Finance and Administration, Defendants/Appellees.

Supreme Court of Tennessee.

Dec. 7, 1998.

Hospitals filed complaint with Claims Commission alleging that state had breached "reimbursement methodology clause" of provider agreements in light of federal legislation prohibiting day and dollar limits on medicaid reimbursement for health care provided to infants and children by hospitals serving low-income patients with special needs. The Claims Commission denied state's motion to dismiss. State appealed. The Court of Appeals reversed on ground that Commission lacked subject matter jurisdiction. Hospitals appealed. The Supreme Court, Holder, J., held that hospitals' challenge to medicaid reimbursements was based on claim asserting that state regulation violated federal law and thus fell within exclusive jurisdiction of Department of Health pursuant to Uniform Administrative Procedure Act (UAPA).

Affirmed as modified.

Social Security and Public Welfare ⇐241.115

Hospitals' challenge to Medicaid reimbursements paid by state under provider agreements was based on claim asserting that state Medicaid regulation violated federal law prohibiting day and dollar limits on Medicaid reimbursement for care for children and infants, rather than on claim for breach of contract as indicated in complaint, and thus fell within exclusive subject matter jurisdiction of Department of Health pursuant to Uniform Administrative Procedure Act (UAPA). Medicaid Act, § 1902(s)(2, 3), as amended, 42 U.S.C.A. § 1396a(s)(2, 3); T.C.A. § 4–5–223(a); Tenn. Comp. R. & Regs. title, 1200, ch. 13–5–.08.

William B. Hubbard, Nashville, Sanford E. Pitler, Elizabeth A. McFall, Seattle, Washington, for Claimant/Appellant.

John Knox Walkup, Attorney General and Reporter, Sue A. Sheldon, Assistant Attorney General, Nashville, for Respondent/Appellee.

OPINION

HOLDER, Justice.

We granted this appeal to determine whether the Tennessee claims commission has subject matter jurisdiction over the plaintiffs' challenge to certain Medicaid reimbursements paid to them by the State. Upon review, we hold that the Tennessee claims commission lacks subject matter jurisdiction over this case. Because the plaintiffs' challenge is based upon an assertion that a state Medicaid regulation is invalid under federal law, the Tennessee Department of Health was the agency with subject matter jurisdiction over this case pursuant to Tenn. Code Ann. § 4–5–223 of the Uniform Administrative Procedures Act ("UAPA").

BACKGROUND

The State entered into "Medical Assistance Participation Agreements (Medicaid—Title XIX Program) for Inpatient and Outpatient Hospital Services" ("provider agreements") with the plaintiffs ("hospitals") for the provision of health care services to Medicaid recipients. Those hospitals participating in the Medicaid program were reimbursed under a prospective payment methodology established in rules of the Department of Health.

Hospitals were reimbursed under this system from October 1, 1983, to December 31, 1993.[1]

Under the prospective payment methodology, each hospital was paid a per diem rate for Medicaid patients. There were two primary components to the per diem rate, an "operating component" and a "pass-through component." Each hospital's operating and pass-through components were calculated based upon financial data contained in the hospital's annual "cost report" filed with the State. Effective July 1, 1989, the Department of Health implemented Tenn. Comp. R. & Regs. ch. 1200–13–5–.08 which provided, in pertinent part, that after a Medicaid patient had been a hospital inpatient for twenty (20) days, the hospital's per diem rate would be reduced for each subsequent day (over 20) by reducing the "operating component" to 60%; this rule did not affect the pass-through component of the hospital's per diem rate.

In 1990, Congress passed legislation prohibiting states from imposing day and dollar limits on Medicaid reimbursement for health care provided to infants and children by hospitals serving a disproportionate share of low-income patients with special needs. 42 U.S.C. § 1396a(s)(2), (3) ("OBRA '90"). The effective date of this legislation was July 1, 1991.

On August 8, 1995, the hospitals filed a complaint with the claims commission alleging breach of contract. The complaint alleged that the State breached the "reimbursement methodology clause"[2] of the provider agreements. The hospitals argued that the "conflict clause"[3] found in the provider agreements caused OBRA '90 to amend the reimbursement methodology clause. The hospitals argued that the reduced payment provided for under Rule 1200–13–5–.08 for inpatient stays longer than twenty days breached the provider agreements by placing day and dollar limitations on services rendered to Medicaid-covered infants and children in violation of OBRA '90. The hospitals alleged that they are entitled to additional Medicaid reimbursement as a result.

The State filed a motion to dismiss arguing, in pertinent part, that the claims commission lacked subject matter jurisdiction. The State contended that the hospitals' claim was a challenge to the validity of a state Medicaid regulation and was not a breach of contract action. The State argued that only the Department of Health may adjudicate cases challenging the validity of a state Medicaid regulation.

The claims commission denied the State's motion to dismiss. The claims commission concluded that the hospitals' claim was for breach of contract and that the claims commission had subject matter jurisdiction over all breach of contract actions against the State. The State sought an interlocutory appeal, which was granted. The Court of Appeals reversed the claims commission holding that the provider agreements did not create a contractual obligation on the State. The appellate court therefore held that the claims commission lacked jurisdiction and dismissed the case.

ANALYSIS

The hospitals argue that this Medicaid reimbursement challenge is merely a breach of contract action. The claims commission generally has exclusive subject matter jurisdiction over all monetary claims against the State. Tenn.Code Ann. § 9–8–307. Accordingly, the hospitals argue that the claims

1. On January 1, 1994, Tennessee instituted the TennCare program, which made substantial changes in the provision of health care services to Medicaid recipients. Under TennCare, health care providers are no longer reimbursed under the prospective payment methodology at issue in this case; providers are now paid by managed care organizations rather than by the State. The plaintiffs' claims in this case are limited to the period prior to the implementation of the TennCare program.

2. The reimbursement methodology clause provided that "this facility: ... [a]grees to use the same method of reimbursement for Title XIX that is used for Title XVIII, Medicare."

3. The conflict clause provided: "If any part of this agreement is found to be in conflict with any Federal or State laws or regulations having equal weight of law, or if any part is placed in conflict by amendment of such laws, this agreement is so amended."

commission had subject matter jurisdiction in the case now before us. We disagree.

Federal law mandates that states designate a single state agency for administration of state Medicaid plans. 42 U.S.C. § 1396a(5). The Tennessee Department of Health was designated as the single state agency in charge of administering the Medicaid program during the period at issue in this case.[4] Tenn.Code Ann. §§ 71-5-101 *et seq.*

We have reviewed the hospitals' complaint and the entire record on appeal. The hospitals' case is premised upon the contention that Tenn. Comp. R. & Regs. ch. 1200-13-5-.08 is invalid because the rule violates OBRA '90. Accordingly, the hospitals' claim is properly classified as a challenge to the validity of Rule 1200-13-5-.08.

Claims challenging the validity of or applicability of a statute, rule, or order must be brought pursuant to the UAPA. *See* Tenn. Code Ann. § 4-5-223(a) ("Any affected person may petition an agency for a declaratory order as to the *validity* or applicability of a statute, *rule* or order within the primary jurisdiction of the agency") (emphasis added). The Department of Health is an "agency" under the UAPA. Rule 1200-13-5-.08 is a Department of Health rule. Moreover, the Department of Health was the single state agency in charge of administering the Medicaid program during the period in question. Accordingly, the hospitals' challenge to the validity of Rule 1200-13-5-.08 should have been brought before the Department of Health pursuant to the UAPA.

CONCLUSION

The hospitals' claim was based upon the invalidation of a state Medicaid regulation. We hold that the claims commission lacks subject matter jurisdiction to rule upon the validity of a state Medicaid regulation. Pursuant to the authorities cited above, the Department of Health was the agency with subject matter jurisdiction over the hospitals' claim.

The decision of the appellate court is affirmed as modified, and the hospitals' complaint is dismissed. Costs of this appeal shall be taxed against the plaintiff hospitals, for which execution may issue if necessary.

ANDERSON, C.J. BIRCH and BARKER, JJ.

DROWOTA, J., Not Participating

Jack Wayne BURSACK,
Plaintiff/Appellant,

v.

Lawrence D. WILSON,
Defendant/Appellee.

Court of Appeals of Tennessee,
Middle Section.

July 10, 1998.

Permission to Appeal Denied by
Supreme Court Dec. 7, 1998.

Former client brought legal malpractice action against attorney who represented him in a civil fraud action in which a default judgment was entered against client. The Circuit Court, Davidson County, Marietta H. Shipley, J., granted summary judgment for attorney. Client appealed. The Court of Appeals, Cain, J., held that: (1) client was obligated to present expert testimony to avoid summary judgment, and (2) appeal was frivolous.

Affirmed and remanded.

1. Judgment ⇐181(2)

When there does exist a dispute as to facts which are deemed material by the trial court or when there is uncertainty as to

4. As of January 1995, the Department of Finance & Administration was substituted for the Department of Health as the single state agency.