

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE**

**IN RE  
EASTWOOD MEDICAL CENTER, L.P.,  
DEBTOR.**

**CASE NO. 94-28409B  
CHAPTER 11**

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**ORDER DENYING MOTION FILED BY GENE AND MELDA McKENZIE  
FOR RELIEF FROM AUTOMATIC STAY**

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The movants, Gene T. McKenzie, Sr. and Melda F. McKenzie filed their motion for relief from the automatic stay to allow them to proceed on behalf of their deceased son in a pending suit in the Circuit Court of Shelby County, Tennessee, cause number 51327-6 T.D. This suit is a personal injury cause of action alleging medical malpractice against several defendants. The debtor filed an objection to the requested relief, and the Court heard oral arguments for and against the motion on October 7, 1996. Subsequent to that hearing, counsel for the movants filed a letter with the Court, with copies served upon opposing counsel, in which letter the movants' attorney expanded upon his oral argument. No response to that letter has been filed.

This chapter 11 case is one in which the debtor obtained a confirmed plan of liquidation on February 15, 1996. The debtor's principal asset, a hospital in Memphis, Tennessee, has been sold pursuant to an order from this Court, and the Court recently approved a settlement of the debtor's remaining significant asset, a suit against an entity known as NPF. As a result of that settlement, there will be some funds available for distribution to creditors, but the debtor's counsel does not expect the distribution to reach the unsecured class in any significant amount. The movants in this present contested matter have not alleged that they would be anything more than unsecured creditors. The Court had earlier established a bar date of December 11, 1994 for the filing of claims against this estate. Apparently, no claim has been filed by these movants.

The motion and argument thereon present several interesting questions. For example, the movants argue, with no supporting proof, that they were somehow unintentionally misled into dismissing one defendant in the state court because of confusion over which entity was operating the Eastwood Hospital at the time of the alleged malpractice. The movants' counsel's letter alleges that there is a factual question concerning whether some entities transferred the Hospital but continued to use the Eastwood name so as to insulate the real party in interest from being sued. No proof was offered to support this allegation, and this Court does not need to decide that issue. However, this Court would observe that this chapter 11 case has been pending since 1994, has undergone much activity including a sale of the hospital, and this is the first time that anyone has alleged the possibility of deception in the use of the Eastwood name. It is undisputed that the movants' present counsel did not file the original malpractice suit and that this debtor was not named as a party to the suit until March, 1996. Notwithstanding the movants' arguments, this Court is not persuaded that there is a basis to infer that it was "impossible" for creditors such as these movants to learn the identity of the owner of the Eastwood Hospital at the time of the alleged malpractice. For example, a substantial number of pleadings exists in this case that concern the relationship between the debtor and other entities that held interests or security in the Eastwood Hospital. There is no indication that formal discovery has been conducted on this issue in the state action, and the movants' counsel's letter only refers to attempts to obtain information voluntarily from various attorneys and the Tennessee Secretary of State.<sup>1</sup>

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<sup>1</sup> Exhibit 1 to the debtor's Supplemental Objection is a copy of a letter dated August 23, 1994 from the Thomas law firm to the attorney for another defendant. That letter recites the

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basis for the Thomas firm's conclusion that the statute of limitations had run against this debtor.

Another issue presented in this motion is one involving the comparative negligence laws of the state of Tennessee, as enunciated by the Supreme Court of Tennessee. Apparently, the plaintiffs in the state suit named physicians and other medical providers as defendants. One of those defendants has filed an amended pleading alleging negligence on the part of this debtor. As a result, the plaintiffs want to protect themselves, or at least the plaintiffs' attorneys want to protect themselves, by amending their complaint in state court to name the debtor as a co-defendant. As the debtor was not named as a defendant before the applicable statute of limitations apparently ran, the debtor asserts that any amended complaint against it is untimely. It was represented to this Court that no law or judicial authority existed in Tennessee on some of the issues surrounding the untimely amendment of a complaint triggered by a co-defendant's intention to allege at trial that all or a portion of any negligence was attributable to a debtor in bankruptcy or to a party against whom the statute of limitations had run. Thus, there was some discussion at the oral hearing on this motion about this Court certifying to the Supreme Court of Tennessee certain questions of unsettled state law. TENN. SUPREME COURT R. 23. This Court has decided that certification to the Supreme Court is not necessary because the outcome of this motion may be resolved on other grounds.

Specifically, the automatic stay precludes the suit being amended to name the debtor as a co-defendant, and the issue then becomes whether cause has been shown to grant relief from that stay. The debtor's Supplemental Objection to the motion refers to the fact that the Thomas law firm that presently represents the movants also represents at least one other plaintiff in a pending medical malpractice suit that involves the debtor. As a exhibit to the Supplemental Objection, the debtor attached a copy of Notice of Bankruptcy dated October 20, 1994, from the debtor's attorney, filed in the Circuit Court in that other lawsuit, and served upon Al H. Thomas, attorney for the plaintiff in

that other suit. Thus, it is clear that from October 20, 1994, the Thomas law firm had actual knowledge of the filing of this bankruptcy. This motion for relief from the stay was not filed until September 10, 1996. This Court understands that the motion was motivated by a co-defendant's recently announced intention to place blame upon the debtor.<sup>2</sup> However, for purposes of the automatic stay, the movants have not explained how their attorneys' knowledge of the bankruptcy can be ignored. This Court does not intend to place blame upon the attorneys, and this Court understands that the plaintiffs' attorneys are seeking to protect their clients' interests.

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<sup>2</sup> The Court was advised at the hearing that an amended answer was filed by the co-defendant in February, 1996 and that within thirty days thereafter the movants filed their amended complaint naming the debtor. Of course, the very filing of an amended complaint naming the debtor is a technical violation of the automatic stay. 11 U.S.C. § 362(a).

However, it is meaningless to grant relief from the stay to allow an amended complaint against this debtor to proceed. This is a liquidation case. There is a limited amount of liquidated assets available for distribution. Substantial administrative and priority claims will receive the bulk of the distribution. The anticipated small percentage that may be available to unsecured creditors who filed timely claims will be dissipated needlessly if the stay is lifted and the debtor is required to pay counsel to defend the state court litigation.<sup>3</sup> In view of the movants' knowledge of the bankruptcy filing, which is imputed from their attorneys' knowledge, and their failure to file a claim in this case, it would be unfair to other creditors who did file claims timely to allow the movants to force the utilization of the debtor's limited funds for the defense of this particular state court litigation. Moreover, as unsecured creditors with a late claim in this case the movants could not benefit substantially, if at all, if they obtained a judgment against this debtor, because their claim would be subordinate to timely filed claims that are not expected to receive full payment. .

In so ruling, this Court is not passing upon any state law issue concerning the ability of co-defendants to allege that the debtor, albeit a nonparty to the state court suit, shared culpability under the comparative negligence laws of Tennessee. So long as no effort is being made to collect from the debtor or to otherwise pursue those actions that are prohibited by § 362(a) of the Bankruptcy Code, such allegations would not appear to violate the automatic stay. Whether such allegations or proof offered in a state court trial would be permissible under state law are issues that this Court does not need to decide nor should it decide. Moreover, the resolution of those comparative

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<sup>3</sup> It is important to note that the motion does not mention the availability of liability insurance to defend the debtor in the state court. Had the motion been based upon the plaintiff's goal of proceeding against the debtor only to the extent of available insurance, a totally different issue would have been presented than in the present motion, which indicates only that the debtor's assets would be put at risk.

negligence issues will have no impact upon this bankruptcy estate, as the automatic stay and discharge injunction that will become permanent protect the debtor from financial exposure to any liability.

IT IS THEREFORE ORDERED that the motion filed by Gene T. McKenzie, Sr. and Melda F. McKenzie for relief from the automatic stay to allow them to sue the debtor in the Circuit Court of Shelby County, Tennessee is DENIED.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

DATE: November 7, 1996

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