IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2008 Session

COOKEVILLE REGIONAL MEDICAL CENTER AUTHORITY v. CARDIAC ANESTHESIA SERVICES, PLLC, ET AL.

Appeal from the Chancery Court for Putnam County
No. 06-063 Ronald Thurman, Chancellor

No. M2007-02561-COA-R3-CV - Filed November 24, 2009

At the summary judgment phase, the trial court found that a hospital wrongfully terminated its contract with a physician group. A jury determined the physician group was entitled to recover damages arising from the Hospital's breach. Among the issues raised on appeal is whether the trial court erred in finding that the contract did not contain a fee splitting arrangement in violation of Tenn. Code Ann. § 63-6-225. Finding that the contract contained an agreement to split physician's fees prohibited by Tenn. Code Ann. § 63-6-225, we find the contract to be unenforceable. Accordingly, we reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., and RICHARD H. DINKINS, JJ., joined.

Clarence James Gideon, Jr., Brian P. Manookian, Thomas Anderton Wiseman, III, Nashville, Tennessee, for the appellants, Cardiac Anesthesia Services, PLLC and Cardiac Anesthesia Services, P.C.

Andrée Sophia Blumstein, Samuel P. Funk, Nashville, Tennessee; Thomas Michael O'Mara, Cookeville, Tennessee, for the appellee, Cookeville Regional Medical Center Authority.

OPINION

While not the sole issue on appeal, we have concluded that the determinative issue is whether the contract between the hospital and the physician group contains an unlawful division of fees by physicians prohibited by Tenn. Code Ann. § 63-6-225 and is, thus, unenforceable.

In December of 2001, Cardiac Anesthesia Services, PLLC, ("CAS")[1] entered into a contract with the Cookeville Regional Medical Center Authority ("the Hospital") to provide cardiac anesthesia services for three (3) years. The parties apparently performed under this agreement for three (3) years without incident. Thereafter, the parties entered into the contract at issue, effective on February 1, 2005 ("Contract") for a three (3) year term with two (2) one-year options to renew. After seven (7) months, on August 31, 2005, the Hospital terminated the Contract with CAS allegedly due to breach of the Contract by CAS.

The Hospital sued CAS in June of 2006, and CAS counterclaimed, with both parties seeking to recover for breach of the Contract. Several disputes were resolved by the trial court in the summary judgment phase of the proceedings. First, in October of 2006, the trial court granted partial summary judgment to CAS finding that CAS did not breach the Contract and, as a result, the termination of the Contract by the Hospital was wrongful. Second, in January of 2007 the trial court denied the Hospital's motion to find the Contract void as a violation of Tenn. Code Ann. § 63-6-225. Therefore, at the summary judgment phase the trial court found the Contract to be enforceable and that the Hospital was liable to CAS for wrongful termination.

As for the damages available to CAS, the trial court found that attorneys' fees were not available to CAS and that the Hospital was liable to CAS for damages only during its three year term and not for any option period. The sole issue remaining between the parties was the amount of lost profit due CAS resulting from the Hospital's wrongful termination.

The issue of the amount of damages was tried before a jury in October of 2007. The disputed damage issues concentrated on the lost profit of CAS. On the issue of CAS's lost net profits as a result of the wrongful termination, the jury awarded CAS $1,396,730 and rejected the Hospital's claim that breach by CAS entitled Hospital to a set-off. Accordingly, on October 16, 2007, the trial court entered judgment against the Hospital for $1,396,730.

The Hospital appeals and claims first that the trial court erred in finding the Contract enforceable and not in violation of Tenn. Code Ann. § 63-6-225. In addition, the Hospital argues the trial court erred when it found CAS had not breached the Contract. Finally, the Hospital alleges several errors arising in the amount of damages awarded CAS. CAS also appeals and argues that the trial court erred in its denial of attorneys' fees and its finding that CAS could not recover lost profits for the two option years.

I. Rules of Construction For Contracts And Statutes

In order to determine whether the Contract has provisions that violate the fee splitting prohibition of Tenn. Code Ann. § 63-6-225, it is necessary to construe both the Contract and the statute. The applicable standards of review and rules of construction are strikingly similar since it

[1] CAS is a Tennessee professional limited liability company under Tenn. Code Ann. § 48-249-1101 *et seq*. Cardiac Anesthesia Services, P.C. apparently is a party to this case due to an assignment from CAS.

is the court's goal to ascertain the intent of the parties to the contract and to ascertain the intent of the legislature in the statute. The process of ascertaining intent, in both situations, begins with the language actually used.

A. Contract Construction

The question of interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc*, 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, the trial court's interpretation of a contractual document is not entitled to a presumption of correctness on appeal. *Allstate Insurance Company v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). This court must review the document ourselves and make our own determination regarding its meaning and legal import. *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

Our review is governed by well-settled principles. "The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The court's role in resolving disputes regarding the interpretation of a contract is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used. *Allstate Ins. Co.*, 195 S.W.3d at 611; *Staubach Retail Services - Southeast LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 526 (Tenn. 2005); *Guiliano*, 995 S.W.2d at 95; *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth Inc*., 521 S.W.2d 578, 580 (Tenn. 1975).

In construing the contract, the court is to determine whether the language is ambiguous. *Allstate Ins. Co.*, 195 S.W.3d at 611; *Planters Gin Co.*, 78 S.W.3d at 890. If the language in the contract is clear and unambiguous, then the "literal meaning controls the outcome of the dispute." *Allstate Ins. Co.*, 195 S.W.3d at 611; *City of Cookeville, Tn. v. Cookeville Regional Med. Ctr.*, 126 S.W.3d 897, 903 (Tenn. 2004); *Planters Gin Co.*, 78 S.W.3d at 890. "A contract term is not ambiguous merely because the parties to the contract may interpret the term in different ways." *Staubach*, 160 S.W.3d at 526.

B. Statutory Construction

Construction of a statute is also a question of law which appellate courts review *de novo*, without a presumption of correctness of the trial court's findings. *Barge v. Sadler*, 70 S.W.3d 683, 686 (Tenn. 2002); *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn. 2000); *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 802 (Tenn. 2000); *Exxonmobil Oil Corp. v. Metro. Gov't. of Nashville and Davidson County*, 246 S.W.3d 31, 35 (Tenn. Ct. App. 2005).

The primary rule of statutory construction is "to ascertain and give effect to the intention and purpose of the legislature." *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000); *Carson Creek Vacation Resorts, Inc. v. Dept. of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); *Exxonmobil*, 246 S.W.3d at 35; *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). To

determine legislative intent or purpose, one must look to the natural and ordinary meaning of the language used in the statute itself. We must examine any provision within the context of the entire statute and in light of its over-arching purpose and the goals it serves. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000); *Cohen v. Cohen*, 937 S.W.2d 823, 828 (Tenn. 1996); *Exxonmobil*, 246 S.W.3d at 35; *T.R. Mills Contractors, Inc. v. WRH Enterprises,* LLC, 93 S.W.3d 861, 867 (Tenn. Ct. App. 2002). The statute should be read "without any forced or subtle construction which would extend or limit its meaning." *Nat'l Gas Distributors, Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991). As our Supreme Court has said, "[w]e must seek a reasonable construction in light of the purposes, objectives, and spirit of the statute based on good sound reasoning." *Scott v. Ashland Healthcare Center, Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001) (citing *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995)).

Courts are also instructed to "give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975); *In re Estate of Dobbins*, 987 S.W.2d 30, 34 (Tenn. Ct. App. 1998). Courts must presume that the General Assembly selected these words deliberately, *Tenn. Manufactured Housing Ass'n. v. Metro. Gov't.*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990), and that the use of these words conveys some intent and carries meaning and purpose. *Tennessee Growers, Inc. v. King,* 682 S.W.2d 203, 205 (Tenn. 1984); *Clark v. Crow,* 37 S.W.3d 919, 922 (Tenn. Ct. App. 2000).

When construing statutes that are part of a statutory scheme, we are also directed to look to the context of the particular provision. Our Supreme Court has made the following observation:

> When statutory provisions are, as in this case, enacted as part of a larger Act, 'we examine the entire Act with a view to arrive at the true intention of each section and the effect to be given, if possible, to the entire Act and every section thereof. Where different sections are apparently in conflict we must harmonize them, if practicable, and lean in favor of a construction which will render every word operative.'

Hill, 31 S.W.3d at 238 (quoting *Bible & Godwin Constr. Co. v. Faener Corp.*, 504 S.W.2d 370, 371 (Tenn. 1974)).

II. THE CONTRACT

The Contract has two primary tenets upon which all other obligations rely. First, in Section 1.2(a), CAS is obligated to provide anaesthesia services for patients of physicians who possess cardiothoracic surgery privileges at the Hospital.[2] Second, while not an express obligation of Hospital, it is a predicate understanding of the parties that any cardiac anesthesia provided at the

[2] This obligation is, of course, conditional upon ethical and professional standards of conduct.

Hospital will be performed by CAS.[3] This predicate understanding is set out in the Contract recitals as follows:

> Cardiac Anesthesia Services is the usual and customary pre-operative, operative, and postoperative anesthesia services, including evaluation, diagnosis, and management, delivered to patients who are also attended by any physician possessing Cardiothoracic surgery privileges at Hospital.
>
> Cardiac Anesthesia Program is the continuing development of cardiac anesthesia and/or anesthesia services rendered, or expected to be rendered, to patients attended by any physician possessing cardiothoracic surgery privileges at Hospital. Currently, Hospital is in need of the services of two (2) full-time cardiac anesthesiologists.

The Hospital is obligated in Section 2.1 to provide CAS with appropriate equipment for the delivery of anesthesia care. Consequently, it is understood that the cardiac anesthesia services available at the Hospital will be delivered by CAS and that CAS is obligated by the Contract to provide those services.

The financial arrangement between the parties is clear yet convoluted. In effect, CAS assigns to the Hospital all of the fees it collects for its services and, in exchange, the Hospital agrees to pay CAS a monthly fee. In Section 1.5, CAS agrees to "remit" all of the gross fees CAS collects from its patients and the patients' insurance carriers to the Hospital. This includes all fees collected for services performed in the Hospital and in Putnam County. CAS, however, may retain 20% of their gross fees as compensation for their collection efforts. Section 1.5, of the Contract entitled "Collections" provides as follows in pertinent part:

> For the services rendered by CAS Physicians and/or other of its health care providers in Hospital and/or Putnam County, Tennessee, CAS will ensure that within thirty (30) days from the date of such service, each patient's primary and secondary medical insurance carrier, including Medicare and/or TennCare and/or each patient, will be billed, as may be legally and/or contractually appropriate. **Upon receipt of such gross collections, CAS will, by the 15th day of the next month, remit the same to Hospital less twenty percent (20%) of gross collections, which is in full and fair compensation to CAS for its billing and aggressive collection efforts.** This assumes, however, that CAS has used its best efforts to obtain and has obtained provider numbers from applicable insurance carriers including Medicare and TennCare MCO's. Aggressive collection efforts includes, but is not limited to, multiple re-billings to primary and secondary insurance providers and/or patients, consultation with attorneys in third-party liability cases. (emphasis added).

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[3] The Hospital does not obligate itself to use CAS for their services since the Hospital does not make decisions about the selection of physicians.

Consequently, under the Contract, CAS is to forward all the gross fees it collects for services rendered either at the Hospital or in Putnam County to the Hospital, less an amount for CAS's collection efforts. Under Section 2.3, CAS is paid a monthly amount by the Hospital starting at $70,833 per month in the first year of the Contract.[4] In other words, CAS is obligated to perform the service, aggressively collect the fee, and "remit" the fee to the Hospital. In turn, CAS receives a set monthly amount.[5] Section 5.4 makes the financial terms of the Contract "highly confidential."

III. THE STATUTE PROHIBITING FEE SPLITTING

The Hospital argues the provision in Section 1.5 that requires CAS to pay the Hospital 80% of its collected gross fees violates Tenn. Code Ann. § 63-6-225. Since the Contract contains a provision allegedly in violation of the statute, then the Hospital argues the Contract itself is unenforceable and, consequently, CAS is unable to recover for its breach.

Tenn. Code Ann. § 63-6-225 provides as follows:

> (a) It is an offense for any licensed physician or surgeon to divide or to agree to divide any fee or compensation of any sort received or charged in the practice of medicine or surgery with any person, without the knowledge and consent of the person paying the fee or compensation, or against whom the fee may be charged.
>
> (b) The provisions of this section do not prohibit a physician from compensating any independent contractor that provides goods or services to the physician on the basis of a percentage of the physician's fees generated in the practice of medicine. The percentage paid must be reasonably related to the value of the goods or services provided. Payments by physicians in return for referrals are prohibited.
>
> (c) A violation of this section is a Class B misdemeanor.

Tenn. Code Ann. § 63-6-226 authorizes a treble damage recovery for violation of the fee splitting prohibition of Tenn. Code Ann. § 63-6-225.

IV. ANALYSIS

A. Interpretation Of Section 1.5 in Contract and Statute

Looking at the "usual, natural, and ordinary meaning of the language" used in Section 1.5 of the Contract, it is clear that CAS agreed to pay the Hospital all collected fees, less 20%

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[4] For the second year the amount is $72,583 and $74,386 for the third and any optional years.

[5] As a general rule, hospitals currently are prohibited by Tenn. Code Ann. § 63-6-204(f)(6)(A) and § 68-11-205(b)(6) from employing anesthesiologists, unless it is a research hospital. The Contract at issue here provides in Section 5.2 that the CAS physicians are independent contractors and not employees.

representing the cost of collection. So, CAS agreed to give the Hospital 80% of the fees its doctors receive for professional services to patients. It is clear and no one disputes that in Section 1.5 CAS has agreed to split their fee with the Hospital. The real question is whether this fee splitting arrangement is prohibited by Tenn. Code Annotated § 63-6-225.

Like Section 1.5 of the Contract, Tenn. Code Ann. § 63-6-225(a) is quite clear. Under subsection (a), a licensed physician may not divide his or her fee or even agree to divide a fee with any person. The statute contains only two exceptions to this prohibition. First, subsection (a) provides that a physician may split the fee with another *if* there is consent by the patient or payor. In other words, so long as all parties to the transaction agree, then subsection (a) does not prohibit fee splitting.[6] Second, under subsection (b) a fee may be split to pay for goods or services *if* the amount is reasonably related to the value of those goods or services. It is clear neither exception applies here. First, far from obtaining the proper consent from the patient, the parties to the Contract agreed in Section 5.4 that their financial arrangement was "highly confidential." As for the exception in subsection (b), CAS does not argue the fee was reasonably related to goods or services provided by the Hospital, since it is clear on its face that there is no relationship between the fee arrangement and the cost of goods or services provided to CAS. Consequently, neither statutory exception is applicable.

As with contract construction, in construing statutes we must "look to the natural and ordinary meaning of the language" used in the statute itself. The statute clearly prohibits a physician from splitting a fee with any person. Consequently, under the ordinary language of Tenn. Code Ann. § 63-6-225, the agreement to split fees in Section 1.5 is prohibited by the statute.[7] If a contract is prohibited by statute, then it cannot be enforced. *Mascari v. Raines,* 415 S.W.2d 874, 876 (Tenn. 1967); *Kirkpatrick v. Tipton*, 670 S.W.2d 224, 226 n.4 (Tenn. Ct. App. 1984).

> When contracts are prohibited by statute, the prohibition is sometimes expressed, and at others implied. Whenever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract; and when a contract is prohibited, whether expressly or by implication, it is illegal, and cannot be enforced. Of this there is no doubt.

Mascari, 415 S.W.2d at 876 (quoting *Perkins v. Watson, Trustee*, 61 Tenn. 173 (1872); *Stevenson v. Ewing*, 87 Tenn. 46, 9 S.W. 230 (1888)).

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[6] While fee splitting may not be prohibited by statute with the proper consents, it may nevertheless be prohibited by ethical or professional standards.

[7] Finding this arrangement is "prohibited" by Tenn. Code Ann. § 63-6-225 is not tantamount to finding that any party committed a misdemeanor or is liable under Tenn. Code Ann. § 63-6-226. Those are different issues requiring, among other things, different standards of proof.

B. Arguments Raised By CAS To Support Enforceability

CAS makes several arguments in support of the validity of Section 1.5. Each argument will be addressed separately.

1. Tenn. Code Ann. § 63-6-225 Applies Only to Licensed Physicians

First, CAS argues that Tenn. Code Ann. § 63-6-225 applies only to "licensed physicians" and, since CAS is not a physician, then the statute has no applicability to the Contract. It is true that CAS is not a licensed physician and may or may not be subject to the criminal sanction of Tenn. Code Ann. § 63-6-225. It is not true, however, that Tenn. Code Ann. § 63-6-225 has no applicability to the Contract. The statutory prohibition is applicable to the Contract since the physicians in CAS are agreeing to split their fees in a way that is prohibited in the statute. In other words, in order for CAS to comply with its contractual obligation to remit all collected fees to the Hospital, the licensed physicians who generated the fees must agree. Furthermore, under Tenn. Code Ann. § 48-249-1130 a limited liability company cannot be used to "affect the . . . application of any law pertaining to standards of professional conduct." The language in Section 1.5 is clear and unadorned; 80% of all gross collections for services rendered by CAS physicians are to be "remitted to the Hospital." That is prohibited by Tenn. Code Ann. § 63-6-225(a).[8] To hold that the fee-splitting statute does not apply to physician group like CAS would, in essence, rob the statute of its effectiveness in preventing the evils the legislature sought to avoid.

2. Tenn. Code Ann. § 63-6-225(a) Applies Only To Prohibit Referrals

Second, CAS seems to argue that Tenn. Code Ann. § 63-6-225 should apply only if some nefarious scheme is detected, *i.e.*, the fee is split in exchange for a referral. The statute's prohibition is not in any way conditioned upon preventing splitting fees for referrals. Therefore, the purpose of the fee splitting is not relevant to the applicability of the statute.

In 1995, the Attorney General reiterated its opinion that the provision now designated as subdivision (a) prohibited payment to a third party of "gross collections generated by the physician or professional corporation." This opinion also concluded that the provision at issue was not limited to referral situations.

> In Chapter 110, Public Acts of 1917, the General Assembly of the State of Tennessee enacted what is presently known as T.C.A. § 63–6–225. The wording of § 63–6–225 has remained essentially the same since it was first codified in the Code of 1932, § 11358. T.C.A. § 63–6–225 prohibits any division of fees or any agreement "to divide

[8] CAS also appears to peripherally argue that the Hospital is not a person within the meaning of Tenn. Code Ann. § 63-6-225. However, Tenn. Code Ann. § 1-3-105, providing definitions for use in the Code, defines "person" in subsection 19 to include "corporation, firm, company or association." Tenn. Code Ann. § 39-11-106(27) defines "person" when used in a criminal statute to include a legal entity.

any fee or compensation of any sort received or charged in the practice of medicine or surgery with any person, without the knowledge and consent of the person paying the fee ...". Due to the age of the statute (originally passed in 1917, last amended in 1932), no legislative history is available. Our research reveals, however, that historically, referral fee or fee splitting statutes were intended to prevent three abuses: ordering unnecessary services, increasing charges for needed services, and influencing with profit considerations the decision of where best to refer a patient. Factors such as the intimacy of the physician-patient relationship, the fact that medical care is a technical process which frustrates consumer knowledge, and the fact that concern for health often makes price a secondary consideration, encourage deference to physician decisions concerning treatment. The Legislature's use of the language ". . . without the knowledge and consent of the person paying the fee . . ." in T.C.A. § 63–6–225 indicates its concern that patients have full knowledge regarding any financial considerations which may influence the physician's treatment recommendation. This language ensures that the patient's best interests are given primary consideration and thereby protects the public welfare.

While we recognize that some other jurisdictions have chosen to adopt narrow interpretations of their fee-splitting statutes "to prohibit fee splitting for patient referrals in the traditional sense", we doubt that a Tennessee court would so construe T.C.A. § 63–6–225. Most significantly, the language of T.C.A. § 63–6–225, on its face, contains no "patient referral" limitation. We previously recognized in Opinion U94–191 that this is a more broadly-stated prohibition than that contained in other chapters of Title 63 relating to other health care professions. These other statutes were enacted subsequent to the enactment of T.C.A. § 63–6–225 and prohibit fee-splitting only to facilitate patient referrals. [Tenn. Code Ann. §§ 63-13-207(a)(10) (later amended), 63-8-120(a)(14), 63-5-124(a)(11), and 63-4-114(6).] Thus, we must presume the Legislature had knowledge of T.C.A. § 63–6–225 and chose not to amend this statute when it enacted the other provisions relating to other health care professions besides physicians and surgeons. Tennessee law compels us to assume that the Legislature used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and purpose. The existence of these other statutes is conclusive evidence that the Legislature knows how to limit the application of fee-splitting prohibitions to the patient referral context when it chooses to do so. The absence of any such limitation in T.C.A. § 63–6–225 is, we think, strong evidence of the Legislature's intent that this statute is not limited to the situation where a physician divides his or her fee with someone who has made a referral to the physician.

The Attorney General's conclusion is even further supported by the fact that the legislature subsequently amended Tenn. Code Ann. § 63-6-225 in 1995 to add subsection (b), yet left subsection (a) unaltered. The legislature was certainly aware of the referral issue since it was addressed in subsection (b).

Furthermore, limiting subsection (a) to apply only to referrals would have the effect of rendering it meaningless or superfluous, given the language in subsection (b). Subsection (b) prohibits payments of any kind for referrals, not just fee splitting. If we construed subsection (a) to be limited to referrals, then the enactment of subsection (b) rendered subsection (a) meaningless. As discussed earlier, we are to give every word and sentence in a statute effect since it is presumed the legislature intended to give them meaning and purpose. Consequently, even if the statutory language were not clear, we cannot imply a referral limitation for subsection (a) because to do so would render that provision meaningless since subsection (b) prohibits payments for referrals.

Additionally, the Contract at issue in this case has the effect of a physician group agreeing to assign their fees to the Hospital and, in exchange, the Hospital arranges for the group to be, as a practical matter, the sole or prominent provider of such services. If this is true then this would have the effect of triggering one of the dangers referenced by the Attorney General's Opinion: namely, allowing *financial arrangements* between hospitals and physician groups to determine as a practical matter who treats a patient without the knowledge or consent of the patient or payor.[9] Nevertheless, whatever the purpose, the point is that the statutory provision simply and clearly prohibits physicians from splitting their fees without permission, except to pay for goods or services.[10]

3. Hospital Estopped To Raise Enforceability

Next, CAS argues that the Hospital's behavior somehow alters the applicability of the statute. First, CAS maintains that the Hospital should be estopped from raising illegality of the Contract since CAS had no knowledge of the potential illegality and CAS relied on the Hospital. This is not a situation where facts known only to the Hospital would reveal the prohibited nature of the conduct. The Contract provisions were known to both parties, and the statute was readily ascertainable. Secondly, CAS argues that since the Hospital continued to use the prohibited provision in other contracts then "[t]his repeated conduct by [Hospital] is compelling evidence that the language in the [Contract] is not illegal." Repeating prohibited behavior or selectively asserting nonenforceability, however, does not remove the statutory prohibition. Contracts that are prohibited by statute may not be enforced by the courts. *Mascari*, 415 S.W.2d at 876. Therefore, this court cannot and will not enforce the agreement herein.

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[9] While the financial arrangement of the parties clearly rests on the Hospital receiving the collected fees from CAS and CAS agreeing to "aggressively" collect the fees, it is interesting to note that nowhere is there reference to the setting of the fee itself.

[10] While there was no fact finding on this issue at the summary judgment stage, it would place form over substance to fail to note that while Hospital does not technically refer patients to CAS, setting up CAS as the usual and customary anaesthesiologist by virtue of this Contract is the functional equivalent of the Hospital referring patients to CAS and receiving 80% of the fees in return. Since there were no facts found on this issue, we are not, of course, relying on this rationale in our conclusion.

4. Unexpected Result

Finally, CAS argues that a finding that this provision violates Tenn. Code Ann. § 63-6-225 would have an unexpected and significant impact on arrangements between hospitals and physicians across the state. First, it should be noted that the possibility that Tenn. Code Ann. § 63-6-225 means what it says has been clear since at least 1995 when the Tennessee Attorney General issued his opinion. Second, the result reached in this opinion is not based on any ambiguity in the Contract or statute, but instead on their plain meaning. Arguments about the effect of legislative enactments should be addressed to the legislature and not the courts. Finally, this arrangement would not be prohibited if appropriate consent is obtained. Here the parties specified in the Contract that the financial arrangement was "highly confidential." Another way to view this matter is that the arrangement is not prohibited as long as it does not violate subsection (b) of the statute, and so long as all parties to the arrangement concur, including the patient/payor.

V. CONCLUSION

The trial court is reversed because the Contract is unenforceable. The matter is remanded to the trial court for a dismissal of the parties' claims against another for breach of the unenforceable Contract. The costs of appeal are taxed against Cardiac Anesthesia Services, PLLC, and Cardiac Anesthesia Services, P.C., for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.