19-227-cv
Razmzan v. United States

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

AUGUST TERM 2019
No. 19-227

AISHA AGYIN,
Plaintiff,

v.

SHAHRAM RAZMZAN,
Defendant-Appellant,

UNITED STATES OF AMERICA,
*Appellee.**

On Appeal from the United States District Court
for the Southern District of New York

ARGUED: FEBRUARY 4, 2020
DECIDED: JANUARY 26, 2021

Before: POOLER, LYNCH, and MENASHI, *Circuit Judges*.

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* The Clerk of Court is directed to amend the caption as set forth above.

After he was sued for medical malpractice in state court, Dr. Shahram Razmzan removed the case to federal court and moved to substitute the United States as the defendant in his place. Razmzan argued that the alleged malpractice occurred within the scope of his employment at a federally deemed community health center, entitling him to immunity and the substitution of the United States as the defendant under the Federally Supported Health Centers Assistance Act ("FSHCAA"), 42 U.S.C. § 233(g)-(n).

The U.S. District Court for the Southern District of New York (Karas, J.) disagreed in part. It concluded that some of the alleged malpractice occurred outside the scope of Razmzan's employment because he had billed for some of his services privately, in contravention of the Federal Tort Claims Act Health Center Policy Manual (the "FTCA Manual"), and that he was therefore not covered by the FSHCAA implementing regulation, 42 C.F.R. § 6.6. The district court denied substitution of the United States as to that conduct and remanded the case in part to state court. Razmzan appealed.

The government argues that we lack jurisdiction to entertain this appeal because Razmzan appealed from an unreviewable remand order. Pursuant to 28 U.S.C. § 1447(d), remand orders are unreviewable except in cases that were originally removed under 28 U.S.C. § 1442 or § 1443. Because Razmzan removed this case under § 1442, we are not barred from reviewing the district court's remand order. As to the merits of the appeal, we conclude that Razmzan was acting within the scope of his employment under the relevant law—New York law—for the acts for which he billed privately. The FTCA Manual is not entitled to deference to the extent that it provides otherwise. Accordingly, we **REVERSE** the district court's order in

part and **REMAND** for further proceedings consistent with this opinion.

MATTHEW S. FREEDUS, Feldesman Tucker Leifer Fidell LLP, Washington, DC (Jonay F. Holkins and David A. Bender, *on the brief*), *for Defendant-Appellant*.

BENJAMIN H. TORRANCE, Assistant United States Attorney (Jennifer C. Simon, Assistant United States Attorney, *on the brief*), *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY, *for Appellee*.

MENASHI, *Circuit Judge*:

In 2016, Aisha Agyin sued Dr. Shahram Razmzan in state court for medical malpractice related to his delivery of her stillborn child. At the time of the alleged malpractice, Razmzan was an employee of Hudson River Health Care, Inc. ("HRHCare"), a "deemed" community health center pursuant to the Federally Supported Health Centers Assistance Act ("FSHCAA"), 42 U.S.C. § 233(g)-(n). Under the FSHCAA, federally deemed community health centers and their employees are immune from malpractice suits for acts or omissions that occur within the scope of their employment. Based on this immunity, Razmzan removed the action to the U.S. District Court for the Southern District of New York and filed a motion to substitute the United States as the defendant.

After the case was removed, the government argued that Razmzan was not entitled to immunity and substitution because he

acted outside the scope of his employment when he billed for his services privately, in contravention of the Federal Tort Claims Act Health Center Policy Manual (the "FTCA Manual"), removing him from coverage under 42 C.F.R. § 6.6. The district court (Karas, J.) agreed with the government in part, denied substitution of the United States with respect to the conduct for which Razmzan billed privately, and remanded part of the case to state court. Razmzan appealed.

Under 28 U.S.C. § 1447(d), we lack jurisdiction to review a remand order unless the case was removed under 28 U.S.C. § 1442 or § 1443. The government argues that we lack jurisdiction because Razmzan did not remove this case under either section. We disagree. Razmzan invoked 28 U.S.C. § 1442(a)(1) in his notice of removal and adequately pleaded the required elements, giving us appellate jurisdiction over the question of whether removal was proper. Because, on reviewing that question, we conclude that removal was proper, we have jurisdiction to review the underlying merits of the district court's remand order.

As to the merits, we conclude that Razmzan acted within the scope of his employment when performing the services for which he billed privately. Under 42 U.S.C. § 233, Razmzan's scope of employment is determined by the "law of the place"—here, the law of the State of New York. Under New York law, Razmzan acted within the scope of his employment for these services because he acted in furtherance of his employment contract with HRHCare and to benefit HRHCare. To the extent the FTCA Manual provides otherwise, it is not entitled to deference. Because we conclude that Razmzan acted within the scope of his employment for the services for which he billed privately, we reverse the district court's order in part and remand for further proceedings consistent with this opinion.

BACKGROUND

Razmzan is an experienced obstetrician and gynecologist who served as a part-time employee for HRHCare. During the relevant period, HRHCare was a federally deemed community health center, receiving federal grant funds under Section 330 of the Public Health Service Act, 42 U.S.C. § 254b. In 2010, HRHCare hired Razmzan to serve as the medical director of its Park Care site in Yonkers, New York. Razmzan's employment contract stated that his "responsibilities … include[d] the care of HRHCare's hospitalized and outpatient Ob-Gyn patients in [HRHCare's] Yonkers, NY offices" and that he would "manage HRHCare's patients when they require hospitalization." Supp. App'x 30. As compensation for his services, Razmzan was to receive an annual salary of $165,000 but, in addition, was "responsible for"—and entitled to—"all hospital billing and collections" for services he provided at hospitals. *Id*. at 31.

In his notice of removal, Razmzan alleged that his employment agreement with HRHCare was designed to "compensate him directly through a salary with respect to his outpatient services to HRHCare patients and indirectly by allowing him to bill and collect payment for the inpatient services he rendered to HRHCare patients … at the hospital." *Id*. at 9. According to Razmzan, "[t]his arrangement was designed to benefit HRHCare" because HRHCare "could not afford to pay Dr. Razmzan, given his level and years of experience, on a salaried basis for his outpatient *and* inpatient services," so "[b]y designing an agreement that effectively assigned the revenue HRHCare would have otherwise received to Dr. Razmzan for inpatient services to its patients, HRHCare benefited by securing a highly experienced OBGYN to serve its patients without having to commit itself to a fixed salary that would adequately compensate

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