

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

2010 DEC 21 AM 11:15
CIRCUIT CLERK
MARILYN A. BEECHER

DONALD JOHNSON,)
ALISA SAMPLES, and)
LORI DENISON)
)
Plaintiffs,)
vs.)
)
JOHN CHRISTOPHER EAGON, MD,)
Et al.)
)
Defendants.)

Cause No. 1022-CC-11358
Division No. 1

**PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES
AND FOR MORE DEFINITE STATEMENT DIRECTED TO ALL DEFENDANTS**

COME NOW Plaintiffs, by and through undersigned counsel, and for their Motion to Strike Defendants' Affirmative Defenses states as follows:

1. Defendants have plead reliance on the benefits of the provisions of Chapters 537 and 538, R.S.Mo., as amended by House Bill 393 on August 28, 2005; additionally, Defendants have plead an affirmative defense pertaining to the value of medical bills relying on the provisions of §490.715. See Defendants' Affirmative Defenses.

2. The said affirmative defenses must be stricken as House Bill 393 is unconstitutional as a whole and, in the alternative, specific provisions are unconstitutional, specifically, §538.210 R.S.Mo. limiting non-economic damages for the following stated reasons.

I. THE CAP ON NON-ECONOMIC DAMAGES IN §538.210, MO. REV. STAT. (2008), AS AMENDED BY H.B. 393, VIOLATES NUMEROUS PROVISIONS OF THE MISSOURI CONSTITUTION.

3. Amended §538.210 R.S.Mo. does not withstand constitutional scrutiny because the legislature lacked any rational basis for adopting the revised cap in that it violates:

- (1) Equal Protection, art. I, §2 of the Missouri Constitution;
- (2) Separation of Powers, art. II, §1 of the Missouri Constitution;
- (3) Right to a Trial by Jury, art. I, §22(a) of the Missouri Constitution;
- (4) Single Subject Mandate of art. III, §23 of the Missouri Constitution;
- (5) Due Process Clause, art. I, §10 of the Missouri Constitution; and
- (6) Prohibition Special Legislation, art. III, §40 of the Missouri Constitution.

4. In *Klotz v. St Anthony's Medical Center*, 311 S.W.3d 752 (Mo 2010), the cap on non-economic damages was part of the appeal, however, the *Klotz* appeal was resolved when the court ruled that there was not retroactive application of HB 393 to the *Klotz* Plaintiff, therefore, the constitutional issues were not directly addressed.

5. However, two of the Supreme Court Justices, Justice Wolff and Justice Tietelman wrote concurring opinions in *Klotz* and discussed the unconstitutionality of HB 393 as follows:

"I write separately to emphasize that the caps on non-economic damages imposed by section 538.210 also violate the constitutional guarantee of equal protection under article I, section 2 of the Missouri Constitution." - Justice Tietelman, Klotz, 311 SW 3d at 782

"[T]he legislation, section 538.210, retains the common law action but displaces the finding of the juries with a legislated limitation on damages. [...] This legislated interference impairs the right of trial by jury "as heretofore enjoyed." As such, the right to trial by jury does not "remain inviolate." It is, in fact, violated."

- Justice Wolff, Klotz, 311 SW 3d at 780

(1) Equal Protection, art. I, §2 of the Missouri Constitution

6. R.S.Mo. §538.210 violates the equal protection clause of the Missouri Constitution, article I, §2, in that the revised cap on non-economic damages in malpractice actions arbitrarily and irrationally discriminates against, *inter alia*, all victims

of medical malpractice, severely injured victims of medical malpractice, victims of medical malpractice who have been injured by multiple health care providers or multiple acts of malpractice, the spouses of severely injured victims of malpractice, and women, racial and ethnic minorities, children, the elderly, and the poor—all of whom receive a higher proportion of tort damages in the form of non-economic damages, even though the General Assembly knew that the revised cap is not even rationally related to a legitimate state interest—let alone meeting the legal standards for intermediate or strict scrutiny—because there was no malpractice liability crisis in Missouri, malpractice liability insurance premiums were neither high by historic standards nor increasing due to increased tort liability, and the number of health care providers in Missouri had been steadily increasing.

Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503 (Mo. banc 1991).

Ferdon ex. Petrucelli v. Wis. Patients Comp. Fund, 701 N.W.2d 440 (Wisc. 2005).

Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

MO. CONST. art. I, §2.

(2) Separation of Powers, art. II, § 1 of the Missouri Constitution

7. R.S.Mo. §538.210 violates the constitutional separation of powers prescribed by article II, §1 of the Missouri Constitution, in that the statutory cap on non-economic damages invades the traditional judicial function of assessing, on a case-by-case basis, whether a jury’s damages award is excessive or inadequate and against the weight of the evidence and supersedes that judicial power with a fixed “legislative remittitur” which takes no account of the facts in a particular case.

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000).

Kyger v. Koerper, 207 S.W.2d 46 (Mo. banc 1946).

Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

MO. CONST. art. II, §1.

(3) Right to a Trial by Jury, art. I, §22(a) of the Missouri Constitution

8. R.S.Mo. §538.210 violates the right to trial by jury which is guaranteed by article I, §22(a) of the Missouri Constitution, in that, as understood at common law, that right encompasses the substantive right to have the plaintiff's damages determined by the jury, the jury here determined that the plaintiffs' non-economic injuries merited an award of damages in excess of the revised cap, and amended §538.210 thereby prevented the jury's award from having its full and intended effect.

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003).

Lee v. Conran, 111 S.W. 1151 (1908).

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).

Lakin v. Senco Products, Inc., 987 P.2d 463 (Or. 1999).

MO. CONST. art. I, §22(a).

(4) Single Subject Mandate of art. III, §23 of the Missouri Constitution

9. The legislation that amended §538.210, unconstitutionally violates the clear title and single subject requirements of article III, §23 of the Missouri Constitution, in that the title of H.B. 393, "An Act . . . relating to claims for damages and the payment thereof," is so general and amorphous that it could describe much of the legislation enacted by the General Assembly and

obscures rather than clarifies the contents of the act and also in that certain statutory sections referenced in the title to H.B. 393 apply to civil actions beyond claims for damages.

Home Builders Ass'n v. State, 75 S.W.3d 267 (Mo. banc 2002).

St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. banc 1998).

Jackson County Sports Complex Auth. v. State, 226 S.W.3d 156 (Mo. banc 2007).

MO. CONST. art. III, §23.

(5) Due Process Clause, art. I, §10 of the Missouri Constitution

10. R.S.Mo. §538.210 violates the due process clause of the Missouri Constitution, article I, §10, in that— as the General Assembly knew—the revised cap on non-economic damages in malpractice actions was wholly irrational because there was no malpractice liability crisis in Missouri, malpractice liability insurance premiums were neither high by historic standards nor increasing due to increased tort liability, and the number of health care providers in Missouri had been steadily increasing and also in that the revised cap on non-economic damages interferes with the ability of malpractice victims who suffer primarily non-economic injury to obtain counsel to represent them in violation of their fundamental right to be represented by counsel.

Magerstadt v. LaForge, 303 S.W.2d 130 (Mo. 1957)

Spitcaufsky v. Hatten, 182 S.W.2d 86 (Mo. 1944), *overruled on other grounds by*

Dir. of Dep't of Revenue v. Parcels of Land Encumbered with Delinquent

Tax Liens, 555 S.W.2d 293 (Mo. banc 1977).

MO. CONST. art. I, §10.

(6) Prohibition against Special Legislation, art. III, § 40 of the Missouri Constitution

11. R.S.Mo. §538.210 violates the prohibition against special legislation in article III, § 40 of the Missouri Constitution, in that the revised cap on non-economic damages in malpractice actions arbitrarily and irrationally grants special legislative protection to health care providers, including those who, *inter alia*, severely injure their patients, commit multiple acts of malpractice against their patients, severely injure married patients, or commit malpractice against women racial and ethnic minorities, children, the elderly and the poor, even though the General Assembly knew that the revised cap is not rationally related to a legitimate state interest because there was no malpractice liability crisis in Missouri, malpractice liability insurance premiums were neither high by historic standards nor increasing due to increased tort liability, and the number of health care providers in Missouri had been steadily increasing.

Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

MO. CONST. art. III, §40(6) and (30).

WHEREFORE, Plaintiff pray: that this court Strike the Defendants affirmative defenses based on HB 393 and for whatever other relief this court deems just and proper.

II. RSMO. 490.715.1 IS UNCONSTITUTIONAL

12. The provisions of R.S.Mo. §490.715.1 regarding the value of medical treatment have been applied differently by Judges and courts throughout Missouri. This is a testament to the degree that the statute is ambiguous, vague, and thus unconstitutional. In *Deck v. Teasley*, No. SC 90628 (Mo Banc 2010), the Missouri Supreme Court held that §490.715 created a

rebuttable presumption regarding the value of medical bills, but did not decide whether the section passed constitution muster.

13. On August 13, 2009, St Louis Circuit Court Judge Goldman held that the statute is unconstitutionally vague stating “**§490.715.4 R.S.Mo. has a vague methodology that clearly and undoubtedly violates the substantive due process provisions of U.S Const.-Amend 14 and MO Const. Art. I, §10[.]**” (emphasis added) See *Vickery v. Glosemeyer*, Case # 08SL-CC00824, St Louis County Division 12.

14. Additionally, R.S.Mo. §490.715 violates both the right of a plaintiff citizen of Missouri to have a jury determine the fact issues in a case of law, and provisions for separation of powers between the judiciary and legislature. As provided in Article I, Sec. 22a, “the right of trial by jury as heretofore enjoyed shall remain inviolate...”

15. Article II, Sec. 1 provides: “The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others.” The determination of fact is a function of the judiciary, and cannot be usurped by the legislature. Nor can the legislature dictate to the judicial branch how it is to determine facts. The issue at hand is the determination of fact as to the value of medical services.

16. Prior to the Constitution’s enactment, the common law provided for determination of fact issues by a jury, and of law issues by a judge. After adoption of the Constitution, the same system has been followed and is mandated.

17. Additionally, R.S.Mo. §490.715 violates the Equal Protection Clause of the Missouri Constitution in Article I, Section 2, and the Equal Protection Clause of the 14th Amendment of the United States Constitution because it classifies the value of the medical services rendered according to the status of the Plaintiff including whether that person: has health insurance; the type of insurance and the degree and level of payment; whether the person is uninsured and if the hospital wrote off of as charity or otherwise reduced the charges arbitrarily for charitable reasons; or if the person is on government aid. There is no legitimate state interest or rational basis for said classification and, therefore, it does not pass constitutional scrutiny as required for this type of legislation. The statute creates different “values” for the same services for differently situated people and sometimes solely based upon how well the person insulated themselves from exposure to self owed medical bills.

18. Such an application of this statute would also violate the due process rights of the Plaintiff under Article I, §10, of the Missouri Constitution and under the 14th Amendment of the United States Constitution in that it deprives the Plaintiff’s right to property by conferring a benefit upon the Defendant tortfeasor at the Plaintiff’s expense and allows for a contracted-for and paid-for benefit of the Plaintiff to be taken away without due process. Specifically, Plaintiff has essentially pre-paid for their medical services in that they have been paying premiums for their health insurance for years and the benefit inures to the tortfeasor. To take the benefits of those payments away from Plaintiff and provide them instead to the Defendant is unconstitutional and the law is simply a statute passed by the Missouri legislature to reduce payouts by insurance companies which were actuarially accounted for in setting the premiums.

19. R.S.Mo. §490.715.1 alters parts of the common law methods of trial, such as the collateral source rule, and as such creates a violation of due process and equal protection because

it creates inequities in the system as it grants defendants and their insurers a benefit while still shielding the jury from knowledge of the possible subrogation, reimbursement, and other rights against Plaintiff's recovery.

20. One reading of the *Deck* decision is that the application of R.S.Mo. §490.715.1, allows the admission of both bill paid and bills charged without an explanation of the two numbers in order to protect the collateral source rule. Such trial evidence creates a roving commission for the jury, because when the jury receives Instruction MAI 4.01, the jury will have absolutely no idea, or evidentiary support, for the appropriate amount to award the plaintiff so that the plaintiff can be "fairly and justly compensate[d]", see *Brooks v. SSM Healthcare*, 73 SW 3d 686 (MO CT APP SD 2002).

WHEREFORE, Plaintiff pray that this court Strike the Defendants affirmative defenses based on §490.715 and H.B 393, and for whatever other relief this court deems just and proper.

III. MOTION FOR MORE DEFINITE

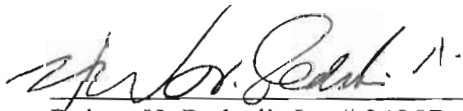
21. This is a wrongful death case for medical malpractice. Therefore, both §537.080 et. Seq. (Wrongful Death Act) and §538.210 et. Seq. (Tort Actions Based on Improper Health Care) apply to this case.

22. Based upon Defendant's answer, it cannot be determined which categories of Plaintiff's alleged damages that Defendant's seeks to impose the caps on non-economic damages.

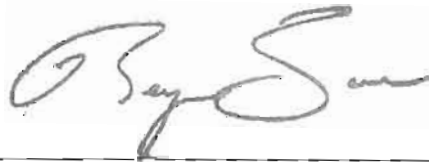
23. It is Plaintiff's assertion that the caps on non-economic damages do not apply to loss of: services, comfort, companionship, instruction, guidance, counsel, or training, as these are either "economic damages" or not "non-economic damages." Defendant should be ordered to make more definite the answer.

24. Defendants' affirmative defenses fail to allege sufficient facts upon which it bases its assertion of affirmative defense, thereby preventing Plaintiff from being able to prepare for trial and to meet those assertions. Defendant should be ordered to make more definite and state the facts upon which it bases its assertions of affirmative defenses including but not limited to the statute of limitations and their assertion that the petition does not state a claim.

WHEREFORE, Plaintiff prays that this Court Order Defendants to amend their affirmative defenses to more specifically assert: their claim of HB 393 stating which categories of Plaintiff's alleged damages that Defendant's claim the caps on non-economic damages apply; to state facts upon which they base their other affirmative defenses as stated above; and to state all facts upon which they base any and all defenses and any further relief that the Court deems just and proper.



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CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the above was sent via US Mail/e-mail on 12.21.2010 to the following:

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