IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
EASTERN DIVISION

FILED
DEC 18 2009
LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI, ET AL	)	
	)	Appeal No. ED93471
Plaintiff/ Respondent,	)	
	)	90586
v.	)	Appeal from Circuit Court of
	)	St. Louis County, Div. 1
STEPHANIE SPILTON,	)	Hon. Robert Cohen, presiding
	)	Circuit Ct. No. 07SL-cc01122
Defendant/ Appellant.	)	

BRIEF OF APPELLANT STEPHANIE SPILTON

FILED
DEC 30 2009
Thomas F. Simon
CLERK, SUPREME COURT

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JURISDICTIONAL STATEMENT

Defendant Appellant Stephanie Spilton appeals from a judgment of the trial court that was entered against her and in favor of plaintiffs, State of Missouri, et al. The court entered judgment on Plaintiffs' motion for summary judgment finding that Spilton violated Section 191.905, R.S.Mo. Spilton timely filed her Notice of Appeal with respect to the judgment.

The issues on appeal concern the propriety of the summary judgment as a matter of law and whether genuine issues of material fact are in dispute and whether the amount of civil penalties entered violates the United States and Missouri Constitution. As a result, this appeal is within the general appellate

jurisdiction of the Missouri Court of Appeals, Article V, Section 3, Constitution of Missouri, as amended 1982.[1]

STATEMENT OF FACTS

Background of Parties

Since 1991, Appellant/ Defendant Stephanie Spilton has been a licensed Clinical Social Worker in the State of Missouri. LF 2045. She is an employee and shareholder, with her spouse, Gerard J. Moskowitz, of On-Site Counseling, Inc. ("OSC"). LF 1904, 1935 p 31, 2028 p 31. In her capacity, Spilton provided assessment, treatment and evaluation of treatment to clients. Spilton also handled marketing for OSC. LF 2037 p 5.

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[1] The Missouri Supreme Court has exclusive jurisdiction of cases involving the constitutionality of a state law. Art. V. § 3, Mo. Const. *See* State v. Ralls, 1999 W.L. 382906 (Mo.App. 1999). Appellate courts have no jurisdiction to decide the constitutionality of the statuary scheme. Were it necessary that the constitutionality of the Section 191.905 as premised in Point Three, this court should transfer this case to the Missouri Supreme Court. However, courts should refrain from deciding constitutional issues when the case can be resolved without reaching those issues. State ex rel. Williams v. Marsh, 626 S.W.2d 223, 227 (Mo.banc 1982). Here, the resolution of Points One and Two would negate the need to determine constitutional issues.

In 2001, Spilton submitted to Department of Medical Services (DMS) a signed Medicaid Provider Enrollment Application, Missouri Medicaid Provider Questionnaire, Title XIX Participation Agreement for Professional Counselor, Psychology, and/or Social Worker Services and the required supporting documentation in order to enroll as a Missouri Medicaid program provider (collectively "enrollment application"). LF 1895, 1935 p 32, 2028 p 31 and 2046 p 2, 10. DMS accepted Spilton's application to become a Medicaid provider of professional counselor, psychology, and/or social worker services. LF 1866, p A11, 1895, 2046 p 2, 33. In accordance with the Title XIX Participation Agreement, Spilton agreed that the Missouri Title XIX Medicaid manuals, bulletins, rules, regulations and amendments "shall govern and control" delivery of services and that she would comply with the Medicaid manual, bulletins, rules, and regulations as required by DMS and the United States Department of Health and Human Services in the delivery of services and in submitting claims for payment, including maintaining fiscal and medical records to fully disclose services rendered to Title XIX Medicaid recipients and to retain those records for five (5) years. Spilton also agreed that she was not entitled to any reimbursement if she failed to comply. LF 1866 p A9c, 10c, 1895, 1935 p 32, 2028 p 31 and 2046 p 2, 10. Spilton was assigned a unique individual Medicaid provider number of 498924034. LF 2046, p 2, 33; 1866 p A11. For services allegedly provided between January

2004 and December 2004, claims were submitted to Medicaid for Medicaid provider number, 498924034. LF. 2028, p 36.

Conduct Alleged by Plaintiffs

For services allegedly provided between January 2004 and December 2004, claims were submitted to Medicaid using Spilton's provider number. LF 2339, 2037, p 4, 2046 p 2, 21. In 2004, the State of Missouri deposited $55,883.00 into an OSC account. LF 2037, p 4.

The Plaintiffs allege that Spilton in 2004 submitted the following false claims:

(A) Spilton submitted, or caused to be submitted, claims to Medicaid representing services which were never provided. LF 2411.

(B) Spilton submitted, or caused to be submitted claims representing that Spilton provided therapy to a patient but none of those services were provided. LF 1851, p 8/ 1856 p 7/ 2046 p 2, 16, 21/ 2218 p 27-32; 34-37/ 2228/ 2339-2411.

(C) Spilton submitted, or caused to be submitted, claims representing that Spilton provided Individual Therapy (CPT Code: 90806) to 12 minors in two separate families but none of those services were provided. LF 1851 p 8, 10/ 1856 p 7, 9/ 2046 p 2, 16, 21/ 2218 p 27-32; 34-37/ 2236 p 3/ 2339-2411/ 2240 p 2-3.

(D) Spilton met with a patient's family, once a week, for five (5) weeks but Spilton also submitted, or caused to be submitted, claims representing that

Spilton provided therapy in addition to those within the five week period but none of those services outside the five week period were provided. LF 2046 p 2, 21/ 2218 p27-37/ 2240 p 4/ 2339-2411.

(E) Spilton submitted, or caused to be submitted, claims representing that Spilton provided Individual Therapy (CPT Code: 90806) and/or Family Therapy with Patient Present (CPT Code: 90847) to a patient, but none of those services were provided. LF 2046 p 2, 21/ 2218 p 29-32, 24-5, 37/ 2241/ 2339-2411.

(F) Spilton visited the above patient's home as few as two times and perhaps up to four or five times and provided therapy to minors patients in the household, but Spilton also submitted, or caused to be submitted, claims representing that Spilton provided therapy in addition to those "two times and perhaps up to four or five times" but none of those services billed outside those times were provided. Id.

(G) Spilton submitted, or caused to be submitted, claims representing that Spilton provided Psychiatric Diagnostic Interview Examination (CPT Code: 90801), Individual Therapy (CPT Code: 90806) and/or Family Therapy with Patient Present (CPT Code: 90847) to a minor, but none of those services were provided. LF 2046 p 2, 21/ 2218 p 28, 24-5, 37/ 2243/ 2339-2411.

(H) Spilton provided therapy 10 to 11 times to a minor in the above household, but Spilton also submitted, or caused to be submitted claims to

Medicaid representing that Spilton provided therapy in addition to the "10 to 11 times" but none of those services were provided. Id.

(I) Spilton provided no therapy to a minor in July, two sessions in August, one in September, one or two in October and none in November, but Spilton also submitted, or caused to be submitted, claims to Medicaid representing that Spilton provided therapy in addition to those times but none of those services other than two sessions in August, one in September, one or two in October were provided. LF 2046, p2/ 2218 p 27-32; 34-37/ 2228/ 2339-2411.

(J) Spilton submitted, or caused to be submitted, claims representing that Spilton provided Individual Therapy (CPT Code: 90806) to seven (7) minors, but none of those services were provided in a manner which qualified those claims for reimbursement consistent with Medicaid program rules. LF 1851 p 10/ 1856 p 9/ 2046 p 16/ 2218 p 27-37/ 2339-2411.

(K) Spilton conducted sessions with a mother but submitted, or caused to be submitted, claims representing that Spilton provided Family Therapy with Patient Present (CPT Code: 90847) to minor children when, in fact, the children were not present. LF 1851 p 11/ 1856 p 10/ 2046 p 16/ 2218 p 27-37/ 2236 p 4/ 2339-2411.

(L) Spilton stated that she knew that therapy conducted with the parent and not aimed at helping the children was not "Family Therapy with Patient

Present" (CPT Code: 90847) and cannot be billed to Medicaid. LF 1851 p 14/ 1856 p 13/ 1886 a 54/ 2395. To provide "Family Therapy" without the child patient present, Spilton should have requested prior authorization from Medicaid to bill "Family Therapy without Patient Present" (CPT Code: 90846). LF 1851, p 15/ 1856 p 14/ 2046 p 24.

(M) Spilton came to a family house "no more than 4 or 5 times" to provide therapy to six resident minors, but Spilton also submitted, or caused to be submitted claims representing that she provided therapy in addition to the "4 or 5 times" but none of those services were provided. LF 2043/ 2218 p 27-32, 34-5, 37.2339-2450.

(N) Spilton submitted, or caused to be submitted, claims for Family Therapy with Patient Present (CPT Code: 90847) for two minors when, in fact, the children were not present. LF 1851, p 12. 1856 p 11/ 2046 p 16/ 2218 p 34-7/ 2339-2450.

(O) Spilton submitted, or caused to be submitted, claims for Family Therapy with Patient Present (CPT Code: 90847) for a minor for therapy which took place when, in fact, the minor was not present. LF 1851, p 13/ 1856 p 12/ 2218 p 34-7/ 2339, 2395, 2401, 2411.

(P) Spilton admitted to Medicaid Fraud investigators that the patient records which she provided to the MFCU and which allegedly corroborated the

claims submitted in 2004 had been created in response to the MFCU subpoena served in April 2006. LF 1851, 17/ 1856 p 16/ 1 in Volume 3/ 2339.

(Q) Spilton submitted, or caused to be submitted, claims representing services were provided, but failed to produce records which support that such services were actually provided. LF 2218 p 26, 37/ 2339, 2411.

(R) Spilton submitted, or caused to be submitted, claims representing two (or more) services were allegedly provided at the same time (i.e., 2:00 – 3:00 pm). LF 2218, p. 27, 37/ 2339/ 2411/ 2362.

(S) Spilton submitted, or caused to be submitted, claims representing services were allegedly provided with overlapping begin and end times. LF 2218 p 28, 37/ 2339, 2365, 2411.

(T) Spilton submitted, or caused to be submitted, claims representing services were provided back-to-back, which were actually claims for services for two different recipients at two different locations when no or inadequate travel time existed. LF 2218 p 29-32, 37/ 2339, 2369/ 2411.

(U) Spilton submitted, or caused to be submitted, claims representing services which were allegedly provided when the recipient was at school. LF 2218, p 33, 37/ 2334, 2339, 2375, 2411/ 2451/ 2461/ 2468/ 2475/ 2482/ 2490.

In total, Plaintiffs allege Spilton committed 325 separate acts or violations of Section 191.905, R.S.Mo. LF 266 (Volume Two).

Spilton has asserted Fifth Amendment Privilege to each of the above allegations. LF 193-217 (Vol. Two). 1866. Additionally, she has asserted the Spousal Privilege to various allegations. Id.

The Investigation by Plaintiffs

The State of Missouri, by an agent of the Attorney General, delivered a subpoena to Spilton on or about April 21, 2006. LF 1851, 2245. Spilton responded to the Medicaid Fraud Control Unit, and documents were delivered which she represented to be patient records for all the Medicaid recipients referenced in the subpoena. LF 1870. Plaintiffs allege that, on March 15, 2007, Spilton hand-wrote and signed a statement to Medicaid Fraud Control Unit (MFCU) investigators. LF 1846, 1851 p 6/ 1856 p 5. On March 15, 2007, Spilton met with MFCU investigators, Melinda Ochoa and Robert L. Hyder II. LF 1846/ 1851 p 4/ 1856 p 3/ 1866 p 30.

Procedural History

Plaintiffs filed their Petition against Defendants Spilton, Moskowitz and OSC. Defendants timely answered and filed an Amended Answer. LF 2-3 (Vol. One). In her Answer, Spilton denied each and every alleged violation and raised Affirmative Defenses that plaintiffs failed to state a claim and that the penalties and provisions of Section 191.905 violate the due process clauses in the United

States and Missouri Constitutions and the Excessive Fines prohibition of the Eighth Amendment. LF 73-4.

Plaintiffs filed their Motion for Summary Judgment on all counts against all defendants. LF 85a (Vol One). The claims against OSC and Moskowitz were resolved by settlement that provided an offset to any damages found against Spilton. LF 229. After briefing by the parties, the Court entered judgment in favor of Plaintiffs and against Spilton under Section 191.905 for actual damages in the amount of $45, 385.00, treble damages in the amount of $136,155.00 and civil penalties in the amount of $1,625,000.00. LF 244.

This appeal followed. LF 253.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANT SPILTON IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND PLAINTIFFS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE (A) THEY DID NOT PRESENT SUBSTANTIAL AND COMPETENT EVIDENCE THAT SPILTON "KNOWINGLY" VIOLATED SECTION 191.905 AND (B) THEY ARE NOT ENTITLED TO CIVIL PENALTIES PURSUANT TO SECTION 191.905.12.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANT SPILTON FOR CIVIL PENALTIES IN THE AMOUNT OF $1,625,000.00 IN THAT THE PENALTIES VIOLATE 8TH AMENDMENT EXCESSIVE FINES PROHIBITION AND 5TH AND 14TH DUE PROCESS AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE THE PENALTIES ARE GROSSLY EXCESSIVE AND SHOCK THE MORAL SENSE OF ALL REASONABLE PERSONS IN COMPARISON TO ACTUAL DAMAGES.

III. THE TRIAL COURT ERRED IN APPLYING SECTION 191.905 IN THAT THE STATUTE VIOLATES 5TH AND 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE ART. 1 SECTION 10 DUE PROCESS CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE SECTION 191.905.12 IS IMPERMISSABLY VAGUE AND SUBJECT TO INCONSISTENT AS APPLICATION.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANT SPILTON IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND PLAINTIFFS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE (A) THEY DID NOT PRESENT SUBSTANTIAL AND COMPETENT EVIDENCE THAT SPILTON "KNOWINGLY" VIOLATED SECTION 191.905 AND (B) THEY ARE NOT ENTITLED TO CIVIL PENALTIES PURSUANT TO SECTION 191.905.12.

ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371 (Mo. banc 1993).

Johnson v. Missouri Bd of Nursing, 130 S.W.3d 619 (Mo.App. 2004)

State v. Barnes, 245 S.W.3d 885 (Mo. App. 2008),

A. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c). On appeal of a summary judgment, this court should review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Finance v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). A

genuine issue of fact exists where the record contains competent evidence that two plausible but contradictory accounts of essential facts exist. *Id.*, at 382. The propriety of summary judgment is purely an issue of law which this court should review de novo on the record submitted and the law. *Id* at 376.

B. Argument

Although Plaintiffs filed a four count Petition against Defendant Spilton, the trial court's judgment solely concerns Count One – Medicaid Fraud under Section 191.905, R.S.Mo. For the reasons demonstrated below, Plaintiffs are not entitled to summary judgment; further, in the alternative, if summary judgment was appropriate, Plaintiff is only entitled to judgment of double the amount of overpayment by Medicaid (the actual damages) or $90,770.00 minus the offset for the settlement as agreed upon by the parties.

1. Plaintiff has not established Defendant "Knowingly" violated 191.905.

Despite the assertions of Plaintiffs, there are genuine disputes of material fact and Plaintiff is not entitled to judgment as a matter of law because there are disputes whether Spilton "knowingly" violated Section 191.905. In the absence of such evidence, there is no burden shift to Spilton as the non-movant and summary judgment is improper. *ITT*, supra at 376.

The Medicaid Fraud Statute, Section 191.905, in relevant part, states,

"1. No health care provider shall **knowingly** make or cause to be made a false statement or false representation of a material fact in order to receive a health care payment, including but not limited to:

(1) **Knowingly** presenting … claim for a health care payment that falsely represents that the health care … was medically necessary, …

(2) **Knowingly** concealing the occurrence of any event affecting an initial or continued right … to have a health care payment made …;

(3) **Knowingly** concealing or failing to disclose any information with the intent to obtain a health care payment …, or to obtain a health care payment in an amount greater than that which the health care provider … is entitled;

(4) **Knowingly** presenting a claim … that falsely indicates that any particular health care was provided to a person or persons, if in fact health care of lesser value than that described in the claim was provided. (emphasis added.).

Additionally, Section 191.900 defines "knowingly" as

"(8) "Knowing" and "knowingly", that a person, with respect to information:

(a) Has actual knowledge of the information;

(b) Acts in deliberate ignorance of the truth or falsity of the information; or

(c) Acts in reckless disregard of the truth or falsity of the information. Use of the terms knowing or knowingly shall be construed to include the term "intentionally", which means that a person, with respect to information, intended to act in violation of the law."

The assertion that Plaintiffs have established Spilton knowingly violated Section 191.905 is premised on three categories of evidence: (1) the alleged confession, (2) an adverse inference resultant from Spilton's assertion of privilege, and (3) affidavits from Plaintiffs' investigators, patients/ guardians of patients and school officials.

The adverse inference should be addressed first and foremost. In *Johnson v. Missouri Bd of Nursing*, 130 S.W.3d 619 (Mo.App. 2004), the appellate court identified that "although a negative inference **may** be drawn from a litigant's assertion of the Fifth Amendment privilege, **it is not required to be drawn."** *Id.* at 628-9. (emphasis added.)

Additionally, the court notes, "**It seems clear that there cannot be a general rule that a claim of privilege as to an allegation is to be treated as an admission of it.**" *Id.* at 628-9. (citations omitted) (emphasis added).

Further illustrating this concept, the court notes, "[a] party seeking the benefit of a negative Fifth Amendment inference in a civil case must, therefore, make an affirmative showing to support its right to judgment and cannot rely exclusively upon the other party's refusal to testify. Thus, ... 'judgment may not be based on that silence alone, without requiring the plaintiff to present a *prima facie* case.'" Id. (Citations omitted).

In their numerous allegations of improper claims, Plaintiffs rely upon the adverse inference of the asserted privilege to support the admission of a fact in contradiction to the principles cited above. *Johnson* demonstrates that – standing alone – the inference does not support a judgment.

Next, a substantial reliance in claiming that Spilton "knowingly" violated Section 191.905 is placed on the alleged "confession" of Spilton. LF 1846. Without a waiver of her asserted Fifth Amendment Privilege, if this court were to treat the statement as true and inquire whether Spilton's confession constitutes prima facie evidence of knowingly violating Section 191.905.12, a closer examination of the statement highlights that it does not specifically mention particular violations, but rather contains general statements of wrongdoing. However, the statement also contains explanations of treatment rationales surrounding the services rendered by Spilton. LF 1847. Again, in isolation, the words in the statement are not evidence of knowingly submitting 325 false claims.

The third category of evidence, including the affidavits of recipients and state employees supporting the allegations – even if true – may corroborate Plaintiffs allegations, but fall short in establishing evidence of Spilton's knowledge or intent.

Under *ITT,* a movant must establish the absence of genuine fact as to all elements of its claim to prevail. Here, the evidence – most of it circumstantial – does not entitle Plaintiffs to judgment as a matter of law because the element that Spilton knowingly undertook the alleged Medicaid Fraud is not satisfied. Further, while evidence of this nature is permissible under 191.905.10 in a criminal "prosecution" of Medicaid fraud claims, the statute does not contemplate its use in a civil case. As a result, the evidence does not establish as a matter of law that the Defendant knowingly or "intended" to submit false claims (*See* 191.900(8)) and is therefore insufficient to support summary judgment.

2. If Plaintiff knowingly violated 191.905, Plaintiffs' Damages in a Civil Action Are Defined by 191.905.12.

Alternatively, if the Plaintiffs are entitled to judgment, the trial court miscalculated the damages available in a civil case. The relevant portions of 191.905 state,

> "12. A person who violates subsections 1 to 3 of this section shall be liable for a civil penalty of not less than five thousand dollars and not

more than ten thousand dollars for each separate act in violation of such subsections, plus three times the amount of damages which the state and federal government sustained because of the act of that person, ..." and,

"14. The attorney general may bring a civil action against any person who shall receive a health care payment as a result of a false statement or false representation of a material fact made or caused to be made by that person. The person shall be liable for up to double the amount of all payments received by that person based upon the false statement or false representation of a material fact, and the reasonable costs attributable to the prosecution of the civil action. ... No civil action provided by this subsection shall be brought if restitution and civil penalties provided by subsections 11 and 12 of this section have been previously ordered against the person for the same cause of action.

The trial court entered a judgment for civil penalties pursuant to 191.905.12 in the amount of $5,000.00 per alleged violation. LF 244. However, when the statute is read as a whole, the plain reading demonstrates that subsection 12 is not applicable to civil claims. Rather, Section 191.905.14 contains the statutory power for and the appropriate remedy to bring a civil action. ("The Attorney General may bring a civil action ... double the amount of all payments ..."). In fact, that is

exactly what the Attorney General did by bringing this action. Therefore, even if the evidence presented entitles plaintiffs to judgment as a matter of law, the plaintiffs are only entitled damages in subsection 14 in contrast to the civil penalties of subsection 12.

"Although one might wish that the legislature had drafted its statutes with the absolute uniformity, clarity, and precision of an English grammar teacher, [courts do not] require that the legislature draft its statutes with that degree of precision. Instead, the primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. *Wolff Shoe Co. v. Director of Revenue,* 762 S.W.2d 29, 31 (Mo. banc 1988). The construction of statutes is not to hyper-technical, but instead is to be "reasonable and logical and [to] give meaning to the statutes." *State ex rel. Rhodes v. Crouch,* 621 S.W.2d 47, 49 (Mo. banc 1981).

In *State v. Barnes*, 245 S.W.3d 885 (Mo. App. 2008), a criminal case concerning a conviction under 191.905 and imposition of civil penalties, the court did not consider "whether the trial court was permitted to assess damages doubling the amount of restitution awarded along with civil penalties in the amount of $5,000 per count per defendant." Id. at 896. *Barnes* demonstrates the civil penalties are proper in criminal cases, not actions by the Attorney General.

Here, the violations alleged by Plaintiffs would certainly qualify as "a false statement or false representation of a material fact made or caused to be made by that person." Section 191.905.14.

As a result, the plain and logical reading of the 191.905 the damages outlined in 191.905.12 to criminal prosecutions and the damages provided in 191.905.14 to civil actions. By including the different measures of damages for each, the legislature is presumed to act rationally. This interpretation is further demonstrated by subsection 14 where the statute notes that no civil action may be pursued if the criminal case civil penalties of subsection 12 have been previously awarded. By its own provisions, the legislature is specifically differentiating the two actions. To find otherwise would demonstrate the vagueness of the statute because there would be opposing views of the damages available and therefore subject the statute to constitutional claims of defect. *See Point Three, infra.* As such, if summary judgment is proper, the damages are limited to those provided in 191.905.14 and subject to the offset for prior settlements per the agreement of the parties as applied by the trial court in its judgment.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANT SPILTON FOR CIVIL PENALTIES IN THE AMOUNT OF $1,625,000.00 IN THAT THE PENALTIES VIOLATE 8TH AMENDMENT EXCESSIVE

FINES PROHIBITION AND 5TH AND 14TH DUE PROCESS AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE THE PENALTIES ARE GROSSLY EXCESSIVE AND SHOCK THE MORAL SENSE OF ALL REASONABLE PERSONS IN COMPARISON TO ACTUAL DAMAGES.

Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748 (Mo. App., 2008)

State Farm Mutual Automobile Insurance Co. v. Campbell, supra, at 425

A. Standard of Review

When a jury awards punitive damages, the appellate court reviews the award to ensure it is not an abuse of discretion. On appellate review, an abuse of discretion is established when the punitive damage award is so disproportionate to the factors relevant to the size of the award that it reveals improper motives or a clear absence of the honest exercise of judgment. In other words, the amount of punitive damages must somehow be related to the wrongful act and the actual or potential injury resulting therefrom, although there is no fixed mathematical relation between the amount of actual damages and the amount of punitive damages awarded. Only when the amount is manifestly unjust will appellate courts interfere with or reduce the size of a verdict. A case-by-case analysis is utilized to evaluate punitive damages awards.

When reviewing the constitutionality of the imposition of punitive damages, the Supreme Court holds that an appellate court's review is de novo." Liability for punitive damages and imposition thereof "invokes moral condemnation of reprehensible conduct." *Id.* Given this, the constitutionality of such punishment in a given case is reviewed de novo. See *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 810-811 (Mo. App., 2008) (citations and quotations omitted).

B. Constitutionality of Civil Penalties

Even if the assessment of civil penalties under Section 191.905.12 are proper in a civil action, the summary judgment was improvidently granted in that the assessment of civil penalties under the vague guidelines of Section 191.905.12 constitute essentially punitive damages subject to constitutional due process standards and must be reasonably related to the plaintiff's harm.

The Fourteenth Amendment to the United States Constitution and Due Process Clause of the Missouri Constitution place substantive and procedural due process protections relating to punitive damages. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."). Punitive damages are awarded in addition to actual damages in order to "punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Punitive*

Damages & Due Process: Trying to Keep Up with the United States Supreme Court after Philip Morris USA v. Williams, Schaeffer Tyler, C., Vol 73 Missouri Law Review, 627, 633, (2008), citing RESTATEMENT (SECOND) OF TORTS § 908 (1979).

The Supreme Court has long made clear that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Phillip Morris v Williams*, 127 S.Ct 1057 (2007), at page 5. *BMW of North America, Inc. v. Gore*, 517 U. S. 559, 568 (1996). (other citations omitted). However, punitive damages are subject to Constitutional limitations "in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" See *Phillip Morris, supra,* at page 5. See *Honda Motor Co. v. Oberg*, 512 U. S. 415, 432 (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U. S. 424, 443 (2001) (review must be de novo); *BMW*, supra, at 574–585 (excessiveness decision depends upon the reprehensibility of the defendant's conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions "authorized or imposed incomparable cases"); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 US 408, at 425 (2003) (excessiveness more likely where ratio

exceeds single digits). Missouri employs a similar analysis in examining this issue. *Smith,* supra at 811.

Here, Plaintiffs were repaid the amount it claimed was overpaid to OSC as a result of the settlement or by virtue of the court order. LF 229. The civil penalties are purely punitive in nature.

In *State Farm*, supra, at 88-9, the Court added to its analysis of the guideposts articulated in *Gore*, supra, stating, "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." Id. at 424-26, 438 (finding in this case that "there is a presumption against an award that has a 145-to-1 ratio"). See also *Missouri Law Review,* supra at 183.

Civil penalties are punitive in nature. *Farmland Industries, Inc. v. Republic Insurance Co.*, 941 S.W.2d at 510-11.

The imposition of $1,625,000.00 in civil penalties – as essentially punitive damages – are grossly excessive. These penalties total over thirty (30) times the actual damages awarded by the trial court. In light of the constitutional standards, these penalties violate the due process protections afforded by both the Missouri and United States Constitution.

Further, the United States and Missouri Constitutions both provide that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. Amend. VIII; MO Const. art. I, § 21.

The term "fine" as used in the Excessive Fines Clause, denotes payment extracted by the government and payable to the government. *Lilley v. State of Missouri*, 920 F.Supp. 1035, 1044 (E.D.Mo 1994), aff'd, 111 F.2d 135 (8th Cir. 1997).

A punishment within the statutory limits is not cruel and unusual unless it is so disproportionate as to shock the moral sense of all reasonable men. *State v. Trader Bobs, Inc.*, 768 S.W.2d 183, 188 (Mo.App.E.D. 1989).

Even if the court correctly determined that Spilton violated the statute, the imposition of fines ranging from $5,000 per incident to $10,000 per incident when the total damages are approximately $45,000.00 is "so disproportionate as to shock the moral sense of all reasonable men." While the courts have upheld $500 per incident violations (see *State v. Polley*, 2 S.W.3d 887 (Mo. App.W.D., 1999)), in this case, the per violation penalty is over 30 times greater than the actual damages. The number is more excessive when considering the imposition of $5,000.00 penalty per violation where the individual overpayment averages just under $140.00 is more than 35 times the average overpayment violation.

Here, the award of these penalties violates the Constitutional due process protections afforded preceding the imposition of punitive damages and the case must be reversed.

III. THE TRIAL COURT ERRED IN APPLYING SECTION 191.905 IN THAT THE STATUTE VIOLATES 5TH AND 14TH AMENDMENT OF THE

UNITED STATES CONSTITUTION AND THE ART. 1 SECTION 10 DUE PROCESS CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE SECTION 191.905.12 IS IMPERMISSABLY VAGUE AND SUBJECT TO INCONSISTENT AS APPLICATION.

State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596 (Mo., 1993)

A. Standard of Review

The standard of review for constitutional challenges to a statute is de novo. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003). This court should invalidate a statute if it clearly and undoubtly contravenes the constitution and plainly and palpably affronts fundamental law embodied therein. *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo.banc 1999).

B. The assessment of civil penalties in Section 191.905.12 is vague and in violation of Due Process Protections in the Missouri and US Constitutions.

The prohibition against vague state laws arises from the Due Process Clause of the Fourteenth Amendment. The vagueness doctrine has two distinct bases. First, it is unfair to apply a law to a person who could not have determined in advance what conduct the law permitted and prohibited. Persons cannot fairly be required to obey a law so unclear in its terms that it provides no notice of its scope. Second, a vague law provides no standard to guide or restrict enforcement officials. The law must provide some guidance for enforcement officials and courts

to lessen the possibility of arbitrary and discriminatory enforcement. *State ex rel. Nixon v. Telco Directory Pub.*, 863 S.W.2d 596, 600 (Mo., 1993) citing, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499, 102 S.Ct. 1186, 1193-94, 71 L.Ed.2d 362 (1982), (establishes a sliding scale for measuring statutes against the due process clause.)

The question is whether the provisions of Section 191.905.12 provide sufficient guidance to prevent the arbitrary enforcement of their provisions. Subsection 12 authorizes the imposition of civil penalties – effectively punitive damages – in a range from $5,000.00 to $10,000.00 without the identification of one factor that would provide some guidance in selecting the low or high end of the range.

The Supreme Court instructs, "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose.'" *Philip Morris,* at 1062 (quoting *Gore*, 517 U.S. at 574). Here, Section 191.905.12 deprives defendants of such notice.

In the absence of clarity, the statute is vague and constitutionally defective and this matter should be reversed for the relief necessary to comply with this Court's order.

CONCLUSION

In conclusion, the trial court's entry of summary judgment in favor of Plaintiffs and against Spilton should be reversed because there are genuine issues of material fact in dispute and summary judgment is not proper as a matter of law in that (a) in that the Plaintiffs established Spilton knowingly submitted false claims; or alternatively, the damages were improperly assessed under 191.905.12; (b) The imposition of civil penalties for more than 30 times the actual damages violates the constitutional limitations of punitive damages; and, (c) 191.905 is unconstitutional in that its provisions are inconsistent and vague in contradiction to the Missouri and United States Constitution.

Therefore, Defendant Spilton respectfully requests that this Honorable Court reverse the trial court's judgment in favor of Defendant and against Plaintiff and remand this matter for further proceedings.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the page limitations prescribed in the Missouri Rules and local rules of this court in that it contains 29 pages, 5,839 words and 596 lines.

The undersigned also certifies that the CD submitted with this Brief has been scanned for viruses.

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