

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ET AL)	
)	No. SC90586
Plaintiffs/ Respondents,)	
)	
v.)	Appeal from Circuit Court of
)	St. Louis County, Div. 1
STEPHANIE SPILTON,)	Hon. Robert Cohen, presiding
)	Circuit Ct. No. 07SL-cc01122
Defendant/ Appellant.)	

REPLY BRIEF OF APPELLANT STEPHANIE SPILTON

SCHLUETER, MANDEL & MANDEL, L.L.P.
Alan S. Mandel, #29137
Michael J. Sudekum, #49738
1108 Olive Street, Fifth Floor
St. Louis, MO 63101
314-621-1701 (Telephone)
314-621-4800 (Facsimile)
Attorneys for Appellant

TABLE OF CONTENTS

Description	Page #
Table of Authorities _____	3
Argument _____	4
Conclusion _____	13
Certificate of Compliance _____	14
Certificate of Service _____	15

TABLE OF AUTHORITIES

Description	Page #
<u>Cases</u>	
<i>Cook County v. Chandler</i> , 538 U.S. 119, 131 (2003) _____	9
<i>Hays v. Hoffman</i> , 325 F.3d 982, 993 (8th Cir. 2003) _____	4, 5
<i>State ex rel. Ashcroft v. Church</i> , 644 S.W.2d 586 (Mo.App.E.D. 1984)_____	12
<i>State ex rel Nixon v. Consumer Auto. Res. Inc.</i> , 882 S.W.2d 717 (Mo.App.E.D. 1994) _____	12
<i>United States v. Mackby</i> , 261 F.3d 821 (9th Cir. 2001) _____	9
<u>Statutes</u>	
FCA §3730 _____	11
191.905 _____	all
644.076 _____	11
105.473 _____	11
196.1003 _____	11
<u>Other</u>	
http://www.crmc.org/docs/20061219_FRAUD_WRONGDOING_ REPORTING_WEBSITE_VERSION.pdf _____	12

ARGUMENT

Without waiving any of its allegations of error raised in her brief, Spilton states:

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANT SPILTON IN THAT THERE ARE GENUINE 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.

On appeal, Spilton contests whether under the summary judgment standard, there is substantial and competent evidence that she knowing violated the Medicaid Fraud statute for each and every instance alleged and second, whether the imposition of civil penalties under 191.905.12 was provided for under the statute.

First, in reply to suggestions raised in the Respondent’s brief concerning the first issue, as part of its argument that Plaintiffs did not produce substantial and competent evidence that Spilton knowingly violated the statute over 300 times, Spilton asserts that – even if taken as true - the words in the statement are not evidence of knowingly submitting 325 false claims. In *Hays v. Hoffman*, 325 F.3d 982, 993 (8th Cir. 2003), the court suggests as background in reviewing an award under the Federal Claims Act that “[i]n determining the number of false claims for which this statutory penalty should be assessed in a particular case, the Supreme Court has cautioned that “we are actually

construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms." In rejecting a similar analysis to the accounting employed by the district court because it is "laced with Excessive Fines Clause implications", the *Hays* court states, "[the government's analysis] produces a \$1,000,000 penalty (200 claims times \$5,000 per claim) that bears no rational relationship to the false claim misconduct..." *Hays* at 993. The court concluded that the FCA fines were properly assessed for each category of violations. *Id.* Likewise, in this case, there is not sufficient evidence of over 300 violations when the motion for summary judgment itself sought damages for 13 categories of violations. Under a similar analysis, at best, if these categories were proved knowingly, the civil penalties could be assessed per category.

Relating to the second point, Section 191.905 contains the following relevant provisions:

- “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 . . .
2. No person shall knowingly solicit or receive any remuneration . . .
3. No person shall knowingly offer or pay any remuneration . . .
5. Exceptions to the provisions of subsections 2 and 3 of this subsection shall be provided for as authorized in 42 U.S.C. Section 1320a-7b(3)(E) [the criminal penalties for acts involving Federal health care programs]. . .
7. A person who violates subsections 1 to 4 of this section is guilty of a class D felony upon his first conviction . . .

8. Any person who willfully prevents . . . the communication of information or records relating to a violation . . . is guilty of a class D felony.
9. Each separate false statement or false representation of a material fact proscribed by subsection 1 of this section or act proscribed by subsection 2 or 3 of this section shall constitute a separate offense and a separate violation of this section...
10. In a prosecution pursuant to subsection 1 of this section . . .
11. Any person convicted of a violation of this section, in addition to any fines, penalties or sentences imposed by law, shall be required to make restitution to the federal and state governments, in an amount at least equal to that unlawfully paid to or by the person, and shall be required to reimburse the reasonable costs attributable to the investigation and prosecution . . .
12. A person who violates subsections 1 to 4 of this section shall be liable for a civil penalty . . .
13. Upon conviction pursuant to this section . . .
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 . . . No civil action provided by this subsection shall be brought if restitution and civil penalties provided by subsections 10 and 11 of this section have been previously ordered against the person for the same cause of action.”

Of these provisions, the statute is silent on the subject of civil actions until subsection fourteen. The reasonable interpretation of the statute would find the provisions up to subsection thirteen apply to criminal prosecutions – something that did

not occur in this case. This conclusion is supported by the increased burden of “knowingly” as applied to criminal actions and the last sentence of the statute that provides not civil action shall be maintained if restitution and civil penalties have previously been ordered. Section 191.905.14. Therefore, plaintiffs are unable to maintain a claim for the civil penalties awarded by the trial court in a civil action and if any remedies are available to plaintiffs, they are those contained in subsection 14 as previously outlined.

As stated in Spilton’s brief, “the violations alleged by Plaintiffs would certainly qualify as ‘false statement or false representation of a material fact made or caused to be made by that person.’” Clarifying, Spilton concedes that the allegations contained in the Petition would fall under the allegations provided for institution of civil actions as contained in Section 191.905.14, not that they are in fact correct.

Thus, if the allegations are properly submissible and subject to proof, any damages would be limited to the damages provided in subsection fourteen, and not the treble damages and the civil penalties applicable in criminal cases.

Plaintiff’s position is that the statute allows for the imposition of treble damages and civil penalties apply to civil actions if the court determines a defendant acted with the requisite mental state of “knowingly.” This position goes straight to the heart of the vagueness of the statute, as discussed in Spilton’s Third Point, because the statute’s provisions are not in application so clear. Rather, the Act explicitly prohibits civil actions if the penalties have otherwise (i.e., in a criminal prosecution) been ordered. (“No civil

action provided by this subsection shall be brought if restitution and civil penalties provided by subsections 10 and 11 of this section have been previously ordered”).

Therefore, the entry of summary judgment against Spilton should be reversed.

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.

In her second point, Spilton asserts that the statute is defective because of “the assessment of civil penalties under the vague guidelines of Section 191.905.12.” (Brief at 28). The “vague guidelines” are inclusive of the range of penalties and result in an excessive imposition of penalties against Spilton.

Whether the issue is if the imposition of \$5,000.00 to \$10,000.00 per incident is excessive or the total sum of fines is excessive, the answer to each is the same. The average alleged overpayment by the Plaintiffs to Spilton is just under \$140.00; an amount that is more than 35 times the average overpayment violation and approximately 30 times greater when comparing against the total damages.

Whether constitutionally defective as to violate due process or excessive fine protections, the civil penalties of 191.905.12 (“not less than five thousand dollars and not more than ten thousand dollars for each separate act”) where “each statement . . . shall constitute a separate violation” fail to comport with the constitutional limitations placed on purely penal damage provisions, especially those imposed by the government. They are not – as Plaintiffs conclude – “proportionate to the gravity of the [alleged] offense.” (Respondent’s Brief at 41).

The Supreme Court of the United States has acknowledged that there is a punitive component to treble FCA damages. See *Cook County v. Chandler*, 538 U.S. 119, 131 (2003). Analogously, other courts have acknowledged that FCA penalties are also punitive, and subject to constitutional limitations. See, e.g., *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003); *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001), certiorari denied, 541 US 936 (2004) (civil sanctions are subject to Excessive Fines analysis).

Though not deciding the case on this issue, the Eighth Circuit in *Hays* agreed with the *Mackby* court that FCA penalties are punitive in nature and therefore fall within the reach of the Excessive Fines Clause. *Hays*, 325 F.3d at 992, noting *Mackby*, 261 F.3d 821, 829-31 (9th Cir.2001). The court also concluded that the calculation of penalties was “laced with Excessive Fines Clause implications.” *Id.*

Therefore, penalties under the Missouri Medicaid Fraud Act that result in damages in excess of thirty times the actual damages are in violation of Due Process and Excessive Fine protections afforded by the United States and Missouri constitution. As a result, the trial court’s judgment should 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.

In defense of the statute, Plaintiffs first assert the absence of factors in determining the range of penalties does not make the statute vague and relies upon *State ex rel Nixon v. Consumer Auto. Res. Inc.*, 882 S.W.2d 717, 722 (Mo.App.E.D. 1994) and *State ex rel. Ashcroft v. Church*, 644 S.W.2d 586, 589 (Mo.App.E.D. 1984) (The court is granted broad discretion to award penalties ... [A]ppellate court[s] [should] only interfere with the trial court's exercise of discretion where it has been manifestly abused. Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.”)(other citations omitted).

However, the defect asserted by plaintiff is not that the statute is unconstitutional because the judge has discretion, but rather for the range of penalties it prescribes throughout its provisions. If a comparison is made employing the exemplary statutes asserted by Plaintiffs, certain features are notably absent from the Medicaid Fraud Act. For example, Section 644.076 states “the commission or director may cause to have

instituted a civil action in any court of competent jurisdiction for the injunctive relief to prevent any such violation or further violation or for the assessment of a penalty **not to exceed ten thousand dollars** per day for each day, or part thereof, the violation occurred and continues to occur, or both, **as the court deems proper.**” (emphasis added). Further, Section 105.473 states “Any person who knowingly violates this subsection shall be subject to a civil penalty in an amount of **not more than ten thousand dollars** for each violation.” (emphasis added). Finally, Section 196.1003 states a court may impose a penalty. In these circumstances, the judge has discretion – a task that is certainly constitutional; however, in each that discretion is used to assess a penalty if warranted.

In its second defense of the statute, Plaintiffs take refuge in a federal mandate for states to employ penalties similar to the FCA as evidence of the Missouri Medicaid Fraud Statute’s soundness. Spilton cannot dispute that the federal government offered such a bonus to states; however, she can comment on the difference in clarity between the FCA and the Missouri Act. A striking example of the difference between the two statutes concerns one of the very issues in this case. In §3730, the FCA states, “If the Attorney General finds that a person has violated or is violating section 3729 [FCA], the Attorney General may bring a civil action under this section against the person.” In comparison, the Missouri statute lacks such a clear authorization under which section to proceed with civil actions. Rather, it contains one subsection that authorizes its use in civil actions and a host of other provisions to be applied in criminal cases. Without further direction, a statute is constitutionally vague.

An example - while certainly not authoritative - of the vague application of the statute can be found by a simple internet search of the statute. In an apparent employee manual, a Missouri hospital tells employees under a Section titled “**Missouri Anti-Fraud Laws Related to Health Care - Health Care Payment Fraud and Abuse (§§191.900 – 191.910 RSMo)**” that,

“The Missouri General Assembly has enacted statutes directed at prosecuting Medicaid fraud. The statutes carry both civil and criminal penalties. Because violation of the statutes can be criminal in nature, the element of intent is required. This is a higher standard than found in the two federal statutes [referring to Program Fraud Civil Remedies Act and The Federal False Claims Act] discussed, above, which require only that a person knew or should have known they were committing a violation. See http://www.crmc.org/docs/20061219_FRAUD_WRONGDOING_REPORTING_WEBSITE_VERSION.pdf.

If Plaintiffs are correct and all provisions of the statute can be enforced criminally and in civil actions, the statute’s provisions detail a procedure that seems to suggest otherwise and illustrate its constitutional defects.

CONCLUSION

In conclusion, the trial court's entry of summary judgment in favor of Plaintiffs and against Spilton should be reversed because (1) 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; Furthermore, the trial court's judgment for civil penalties should be reversed because (1) The imposition of civil penalties for more than 30 times the actual damages violates the constitutional limitations placed on the imposition of civil penalties that are essentially punitive damages; and, (2) section 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.

By: _____
SCHLUETER, MANDEL & MANDEL, LLP
Alan S. Mandel, No. 29137
Michael J. Sudekum, No. 49738
msudekum@1108law.com (e-mail)
1108 Olive Street, Fifth Floor
Saint Louis, Missouri 63101
314/ 621-1701 (Telephone)
314/ 621-4800 (Facsimile)
Attorneys for Appellant

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 10 pages, 2479 words and 209 lines.

The undersigned also certifies that the CD submitted with this Brief has been scanned for viruses and is virus-free.

By: _____
SCHLUETER, MANDEL & MANDEL, LLP
Alan S. Mandel, No. 29137
Michael J. Sudekum, No. 49738
msudekum@1108law.com (e-mail)
1108 Olive Street, Fifth Floor
Saint Louis, Missouri 63101
314/ 621-1701 (Telephone)
314/ 621-4800 (Facsimile)
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing and a CD containing a copy of the same was mailed first class postage prepaid via United States Mail to the following on this ____ day of March, 2010, to:

Jeremiah J. Morgan
Stephanie N. Gwillim
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102

Attorney for Respondents

By: _____
SCHLUETER, MANDEL & MANDEL, LLP
Alan S. Mandel, No. 21937
Michael J. Sudekum, No. 49738
msudekum@1108law.com (e-mail)
1108 Olive Street, Fifth Floor
Saint Louis, Missouri 63101
314/ 621-1701 (Telephone)
314/ 621-4800 (Facsimile)
Attorneys for Appellant