

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI

FILED
OCT 05 2009

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

SOHRAB DEVITRE,)
)
Appellant,)
)
VS.)
)
THE ORTHOPEDIC CENTER)
OF ST. LOUIS, LLC)
)
AND)
)
MITCHELL B. ROTMAN, M.D.)
)
Respondents.)

Appeal No. ED93366 90835

FILED

JUN 2 2010

Thomas F. Simon
CLERK, SUPREME COURT

APPEAL FROM THE
CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSOURI
CAUSE NO. 09SL-CC01641
THE HONORABLE STEVEN H. GOLDMAN, JUDGE

BRIEF OF APPELLANT

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SCANNED

INDEX

	Page
TABLE OF CASES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	3
POINTS AND AUTHORITIES	7
ARGUMENT.....	8
CONCLUSION	10
CERTIFICATE OF SERVICE AND OTHER CERTIFICATIONS	11
INDEX OF APPENDIX (Appendix filed as separate document).....	14

TABLE OF CASES

CASES CITED	BRIEF PAGE NUMBER WHERE LOCATED
1. <i>Meekins vs. St. Johns Regional Health Center, Inc.</i> 149 S.W.2d 525 (Mo.App.S.D. 2004)	8, 9
2. STATUTES	
§538.025 5	3
§538.210 1 2	3, 4
§538.215 1	4
§538.220 1	4
§538.225 1	4

JURISDICTIONAL STATEMENT

This Appeal arises from an action brought by Appellant Sohrab Devitre against Respondents The Orthopedic Center of St. Louis, LLC and Mitchell B. Rotman, M.D. seeking money damages for injuries sustained as a result of being battered during an IME examination by Respondent Rotman that Appellant was directed to attend as part of the defense of an automobile injury case where Appellant was the Plaintiff. Appellant tape recorded the independent medical examination which confirmed that Respondent Rotman battered and injured Appellant during the course of that independent medical examination (LF9-29)(A 67-87). Suit was filed against Respondent Rotman and his group for assault and battery in which Appellant pleaded he was not a patient of Dr. Rotman (LF 5-29)(A 63-87). Respondents' attorney filed Defendants' Answer and admitted that Appellant was not a patient of Dr. Rotman, however, pleaded the medical malpractice statutes limiting Appellant's damages and requiring Appellant to get an expert (LF 30-40) (A 88-90).

Appellant filed a Motion to Strike Respondents' Defenses of An Intent to Rely Upon the Benefits of Chapters 537 and 538 RSMo., for the Reason that Appellant was Never a Patient of Respondents' The Orthopedic Center of St. Louis and /or Mitchell B. Rotman, M.D. (LF 42-96) (A 2-56)

The matter was heard before the Honorable Steven H. Goldman, in the Circuit Court of St. Louis County on July 20, 2009 at which time Judge Goldman denied Plaintiff's Motion to Strike Defendant's defenses of Chapters 537 & 538 and since Appellant did not have his affidavit timely filed as to a malpractice cause of action Judge Goldman dismissed the case with prejudice at Appellant's costs. (LF 103) (A 1).

Plaintiff filed this appeal on July 21, 2009 (LF 104).

As such, this Appeal is within the general appellate jurisdiction of this Court because it does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this State or the title to any state office, nor is it a case in which the punishment of death has been imposed. As provided in Article V, Section 3, Constitution of Missouri, as amended 1970 and §477.050 RSMo. 1994, The Missouri Court of Appeals, Eastern District, has jurisdiction to review the judgment entered herein.

STATEMENT OF FACTS

The issues before this Court are whether the Trial Judge committed reversible error in overruling Appellant's Motion to Strike Defendants' defense of an Intent to Rely Upon the Benefits of Chapters 537 and 538 RSMo. for the reason that Plaintiff was never a patient of Defendants and never received any "HealthCare Services" from Defendants (LF 42-96)(a 2-56) and thereafter sustained Defendants' Motion to Dismiss Plaintiff's Petition with prejudice for Plaintiff's failure to file a health care affidavit (LF 103) (A 1).

Section 538.025 (5) provides the following:

“(5) “Health care services”, any services that a health care provider renders to a patient in the ordinary course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized. Professional services shall include, but are not limited to, transfer to a patient of goods or services incidental or pursuant to the practice of the health care provider's profession or in furtherance of the purposes for which an institutional health care provider is organized;” (Emphasis Supplied)

Section 538.210 RSMo. 1. states the following:

“In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants.” (Emphasis Supplied)

Section 538.210 RSMo. 2. (2) states the following:

“Who is a defendant in a lawsuit brought against a health care provider under this chapter, or who is a defendant in any lawsuit that arises out of the rendering of or the failure to render health care services.” (Emphasis Supplied)

Section 538.215. 1. provides the following:

“In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, any damages found shall be itemized by the trier of fact as follows...” (Emphasis Supplied)

Section 538.220 1. provides the following:

“In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, past damages shall be payable in a lump sum.” (Emphasis Supplied)

Section 538.225 1. provides the following:

“In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, the plaintiff or the plaintiff’s attorney shall file an affidavit with the court” (Emphasis Supplied)

On August 21, 2006 Defendants were hired by an automobile liability insurance company defense attorney to perform what was identified as an independent medical examination on Plaintiff which Plaintiff was compelled to go to under the Missouri Rules of Civil Procedure (LF 6) (A 64).

Plaintiff tape recorded that examination on August 21, 2006 a transcription of which was attached to Plaintiff's Petition marked Exhibit A (LF 6, 9-29).

Plaintiff's Petition stated:

“3. That at no time was Plaintiff Sohrab Devitre ever a patient of Defendants” (LF 6) (A 64)

and Defendant Rotman admitted that in paragraph 3 of his Answer to Plaintiff's Petition (LF 30) (A 88).

Plaintiff's Petition stated:

“4. That at no time did Plaintiff ever seek any medical treatment whatsoever of any nature from Defendants” (LF 6) (A 64)

and Defendant Rotman in his Answer in paragraph 3 admitted that allegation (LF 30) (A 88).

Defendant Rotman in his Answer to Plaintiff's Petition pleaded in paragraph 21 that Defendant Rotman intended to rely upon Chapters 537 and 538 including but not limited to §538.210 1, 2, 3, 4, 5, 6, (LF 33-35) and §538.215 1., 2., 3. (LF 35) (A 93) and §538.220 1., 2., 5., (LF 35-LF 37) (A 93-95) and §538.225 1., 2., 3., 4., 5., 6., 7. (LF 37 - 38) (A 95-96).

Plaintiff filed Plaintiff's Motion to Strike Defendant Mitchell B. Rotman, M.D. Defenses of an Intent to Rely Upon the Benefits of Chapters 537 and 538 R.S.Mo., for

the Reasons that Plaintiff was Never a Patient of Defendants the Orthopedic Center of St. Louis, LLC and/or Mitchell B. Rotman, M.D. (LF 42 – LF 96) (A 2-56).

Defendant Filed a Motion to Dismiss for Failure to File the Health Care Affidavit Pursuant to §538.225 (LF 97 – 99) (A 57-59) to which Plaintiff's Reply was filed (LF 100 – 102) (A 60-62).

On July 20, 2009 the Court's Final Judgment ruled:

1. Plaintiff's Motion to Strike Defendant Rotman's Defenses of an Intent to Rely Upon the Benefits of Chapters 537 and 538 for the Reason that Plaintiff Was Never a Patient of Defendants was denied.
2. Motion of Defendants Mitchell B. Rotman, M.D. and the Orthopedic Center of St. Louis, LLC to Dismiss for Failure to File Health Care Affidavit was sustained with prejudice (LF 103) (A 1).

Plaintiff then timely filed his Notice of Appeal to this Court on July 21, 2009 (LF 104)

POINTS RELIED ON

I.

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE, PREJUDICIAL ERROR IN DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S RELIANCE ON CHAPTERS 537 AND 538 RSMo. WHEN APPELLANT WAS NOT A PATIENT OF DEFENDANT ROTMAN BUT WAS ONLY SEEN FOR AN INDEPENDENT MEDICAL EXAMINATION AND THE COURT FURTHER ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE PREJUDICIAL ERROR WHEN IT DISMISSED PLAINTIFF'S PETITION WITH PREJUDICE BECAUSE PLAINTIFF HAD NOT FILED A HEALTH CARE AFFIDAVIT WITHIN THE TIME PRESCRIBED BY THE STATUTE.

1. *Meekins vs. St. Johns Regional Health Center, Inc.*
149 S.W.2d 525 (Mo.App.S.D. 2004)

2. STATUTES – RSMo:

§538.025 5

§538.210 1 2

§538.215 1

§538.220 1

§538.225 1

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE, PREJUDICIAL ERROR IN DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S RELIANCE ON CHAPTERS 537 AND 538 RSMo. WHEN APPELLANT WAS NOT A PATIENT OF DEFENDANT ROTMAN BUT WAS ONLY SEEN FOR AN INDEPENDENT MEDICAL EXAMINATION AND THE COURT FURTHER ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE PREJUDICIAL ERROR WHEN IT DISMISSED PLAINTIFF'S PETITION WITH PREJUDICE BECAUSE PLAINTIFF HAD NOT FILED A HEALTH CARE AFFIDAVIT WITHIN THE TIME PRESCRIBED BY THE STATUTE.

Plaintiff was only seen by Defendant Rotman on August 21, 2006 for an independent medical examination (LF 5-29) (A 63-87).

At no time was Plaintiff ever a patient of Defendants (LF 6, LF 30) (A 64, A 88).

Plaintiff never sought any medical treatment whatsoever of any nature from Defendants (LF 6, LF 30) (A64, A 88).

Since the malpractice statute in Chapters 537 and 538 RSMo. apply ONLY TO "HEALTH CARE SERVICES" under §538.025 (5) that are rendered to a patient there is no way that an INDEPENDENT MEDICAL EXAMINATION results in health care services being provided to a litigant.

The Case of *Meekins vs. St. Johns Regional Health Center, Inc.*, 149 S.W.2d 525 (Mo.App.S.D. 2004) involved a plaintiff from whom was collected a specimen after which the defendant performed a drug screen test on that specimen and the toxicology report was positive of illegal drugs. *Meekins* sued because she was terminated by her employer for having taken illegal drugs. Defendant *St. John's* argued that it was performing a health care service and, pursuant to §538.225 RSMo. 2000 she was required

to have filed a health care affidavit within ninety (90) days of filing her Petition and since she did not do that the case should be dismissed without prejudice.

The Court held:

“[11] The question of whether in the situation before us St. John’s was a health care provider and the drug screen test was a health care service has not been directly answered in a Missouri case. Missouri cases have stated, however, that a physician/patient relationship is essential to a medical malpractice claim. *Millard v. Corrado*, 14 S.W.3d 42, 49 (Mo.App 1999). Therefore, absent that physician/patient relationship, a medical malpractice claim must fail. *Id.*”

The Court further held:

“[13][14] The analyses of the Connecticut and Louisiana cases fit well with the principles stated in the Missouri cases. Therefore, we determine that a drug screen test performed by a hospital is not a health care service if such is not performed within the confines of a physician/patient relationship. Although a medical malpractice negligence claim would not exist in that situation, a general negligence claim may.”

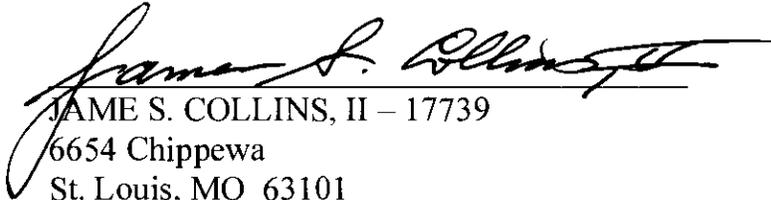
Here Appellant Sohrab Devitre was never in a physician/patient relationship with Respondents. Respondents never charged Appellant for the IME on 8/21/06. Respondents never treated Appellant on 8/21/06.

CONCLUSION

WHEREFORE, for the foregoing reasons and authorities in support thereof, Appellant Sohrab Devitre asks that this Court reverse the ruling of the Honorable Steven H. Goldman made on July 20, 2009 and sustain Plaintiff's Motion that Chapters 537 and 538 RSMo. do not apply to this case and for such further relief as this Court deems just and proper.

Respectfully submitted,

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MITCHELL B. ROTMAN, M.D.)	
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Respondent.)	

CERTIFICATE FILING APPELLANT'S BRIEF

**CERTIFICATION THAT BRIEF COMPLIES WITH THE PAGE LIMITS OF
RULE 360**

CERTIFICATION OF NUMBER OF WORDS IN BRIEF

**CERTIFICATE PER RULE 361 THAT APPELLANT IS FILING A DISK WITH
THE COURT AND SENDING ONE TO DEFENSE ATTORNEY**

AND

CERTIFICATION THAT THE DISK HAS BEEN VIRUS SCANNED

I CERTIFICATE OF SERVICE OF THE BRIEF

COMES NOW, Appellant Sohrab Devitre by and through his attorneys The Law Offices of James S. Collins, II and certifies that copies of the following documents were mailed, postage prepaid to Mr. David I. Hares, Attorney for Respondents at Law, 7700 Bonhomme Ave., Suite 530, St. Louis, MO 63105.

II. CERTIFICATION THAT BRIEF COMPLIES WITH THE PAGE LIMITS OF RULE 360.

COMES NOW Appellant Sohrab Devitre by and through his attorneys The Law Offices of James S. Collins, II and certifies that certifies that the attached Brief complies with the page limits of Rule 360. Appellant's Brief does not exceed the 50 page page limit set out by the Court.

III. CERTIFICATION OF NUMBER OF WORDS IN BRIEF

COMES NOW Appellant Sohrab Devitre by and through his attorneys The Law Offices of James S. Collins, II and certifies that this Brief is typed on the computer program Microsoft Works with Times New Roman print and that the word count on the computer program sets the number of words in this document as 2,473.

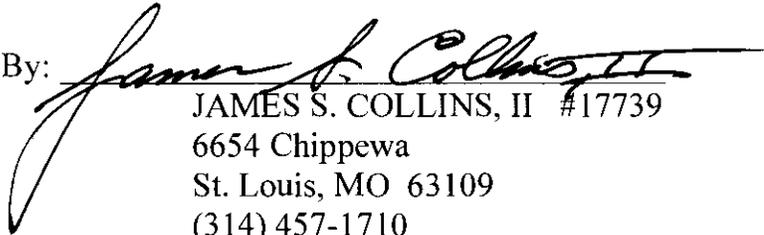
IV. CERTIFICATION PER RULE 361 THAT APPELLANTS IS FILING A DISC WITH THE COURT AND SENDING ONE TO DEFENSE ATTORNEY.

COMES NOW Appellant Sohrab Devitre by and through his attorneys The Law Offices of James S. Collins, II and certifies that a true and accurate copy of Appellant's Brief is attached on a disc per rule 361.

V. CERTIFICATION THAT THE DISK HAS BEEN VIRUS SCANNED.

COMES NOW, Appellant Sohrab Devitre, by and through his attorneys The Law Offices of James S. Collins, II and certifies that the attached disk containing Appellant's Brief has been scanned for viruses and is free of viruses.

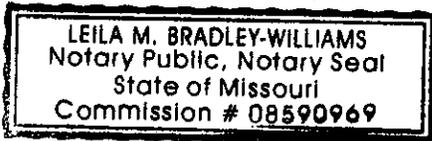
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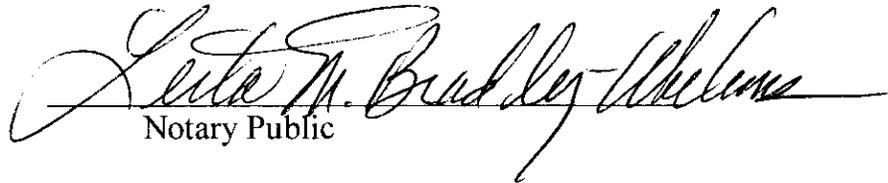
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Subscribed and sworn to before me this 5th day of October, 2009.

Expires: 7/1/12




Notary Public

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INDEX OF APPENDIX TO BRIEF OF APPELLANT

Court’s Final Judgment (LF 103).....	A-1
Plaintiff’s Motion to Strike Defendant Mitchell B. Rotman, M.D. Defenses of an Intent to Rely Upon the Benefits of Chapters 537 and 538 R.S.Mo., for the Reason that Plaintiff was Never A Patient of Defendant’s The Orthopedic Center of St. Louis, LLC and/or Dr. Mitchell B. Rotman, M.D (LF 42).....	A-2
Motion of Defendants Rotman to Dismiss for Failure to file Health Care Affidavit (LF 97)	A-57
Appellant’s Reply to Motion of Defendants Rotman to Dismiss for Failure to file Health Care Affidavit (LF 100)	A-60
Appellant's Petition (LF 5)	A-63
Respondents' Answer (LF 30).....	A-88