SC90586

IN THE SUPREME COURT OF MISSOURI

STEPHANIE SPILTON,

Appellant-Defendant,

vs.

STATE OF MISSOURI, et al.,

Respondents-Plaintiffs.

Appeal from the St. Louis County Circuit Court
The Honorable Robert S. Cohen, Circuit Judge

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITY

OTHER AUTHORITIES

STATEMENT OF FACTS

A. Medicaid Relies on the Basic Honesty and Integrity of Providers.

The Missouri Medicaid program relies on the basic honesty and integrity of providers to deliver the agreed services in a manner consistent with the requirements of the program. (LF 13). Due to the high volume of submitted claims, the Missouri Medicaid program is set up as a post-payment review system in which only a sample of claims are reviewed after payment has been made to the provider. (LF 13). The purpose of the sampling is not only to verify the accuracy of the claims reviewed, but also to serve as an appropriate safeguard designed to test program compliance. (LF 13). Post-payment review, however, is not intended to replace the expectation of provider honesty and integrity. (LF 13).

The Missouri legislature delegated to the Missouri Department of Social Services the authority to manage the Medical Assistance Program (a.k.a. Medicaid). (LF 11). At all times relevant to this action, the State of Missouri, through its Department of Social Services (DSS), and its Division of Medical Services (DMS) (collectively "Plaintiffs"), now known as the MO HealthNet

Division, has administered the Medicaid program for indigent and low-income persons in Missouri as provided in § 208.201, RSMo.[1/] (LF 11-12).

B. Spilton Agreed to Abide by Medicaid Rules and Regulations.

Stephanie Spilton ("Defendant"), a Licensed Clinical Social Worker in the State of Missouri since December 1991, (LF 89), signed and submitted to DMS a 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 in January 2001. (LF 89, 1993-1999). DMS accepted Spilton's application to become a Medicaid provider of "professional counselor, psychology, and/or social worker services." (LF 90). DMS assigned Spilton a unique Medicaid provider number by which she could submit claims for reimbursement to Medicaid. (LF 1869). Spilton was the only individual who claimed to provide services under her assigned provider number. (LF 16).

As a Medicaid provider, Spilton signed an agreement to abide by certain rules. (LF 16). Enrolled providers are required to submit medical claims for

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[1/] All references to the Missouri Revised Statutes are to the 2009 Cumulative Supplement unless otherwise noted.

reimbursement. (LF 12). Spilton agreed to specifically identify the Medicaid beneficiary receiving the service, the type of service provided, the number of units of service provided, the service date, the specific times of service, and the total charge for all units of each type of service the provider claims was rendered. (LF 13). Spilton was expected to take reasonable measures to review claims for accuracy, duplication, and other errors. (LF 13).

In accordance with the Title XIX Participation Agreement for professional counselor, psychology, and/or social worker services entered into by Spilton on January 1, 2001, Spilton agreed that, upon acceptance of her enrollment, the Missouri Medicaid manuals, bulletins, rules, regulations, and amendments "shall govern and control" delivery of services. (LF 16, 90, 1995). Spilton further agreed she would comply with the rules and regulations required by 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 Medicaid recipients and to retain those records for five years. (LF 16, 90, 1995). Spilton also agreed that she was not entitled to any reimbursement if she failed to comply. (LF 90, 1995).

Under the Missouri Medicaid program, certain covered psychology and counseling services, including "Family Therapy Without Patient Present," require prior authorization if the provider is to be reimbursed by Medicaid for

providing the service. (LF 13). These services may not begin until they have been authorized by the state medical consultant. (LF 14). Prior authorization is used to assure the most effective and appropriate use of available resources and to determine the medical necessity of the service. (LF 14).

C. Investigation Revealed Knowing Violations and False Claims.

Spilton came under investigation of the Missouri Attorney General's Medicaid Fraud Control Unit in 2005. The Medicaid Fraud Control Unit's investigation revealed that from January 1, 2004 to December 1, 2004, Spilton submitted 325 false claims, averaging 6.8 false submissions per week – nearly one false claim per day, every day. (*See* A4-A8).

Spilton filed false claims pursuant to various schemes. Investigation revealed that Spilton submitted various false claims to Medicaid for services she did not provide. (LF 17, 94-103, 1846, 1857). For example, Spilton commonly gave her biller her counseling schedule, but did not indicate which sessions had been cancelled or had otherwise not occurred, resulting in the submission of false claims to Medicaid. (LF 17, 1862). Additionally, Spilton billed Medicaid for providing "in-home" services to recipients; however, the recipients had moved residences and never received such services. (LF 17, 2228).

Even on the occasions that Spilton did see recipients, Spilton did not provide services for the requisite amount of time necessary, as defined by

Medicaid. (LF 103). Additionally, Spilton often failed to indicate the length of time she spent providing service (*see, e.g.,* LF 405-07), and commonly failed to make or retain adequate documentation for services allegedly provided. (LF 17, 91).

Ultimately, Spilton admitted to fabricating progress notes and treatment records in response to the Medicaid Fraud Control Unit's subpoena. (A21, LF 17-18, 109). Spilton's admissions are corroborated by the fact that many of the false progress notes and treatment records include various errors and misstatements. (LF 18). For example, investigators found:

- Notes indicating multiple services with completely or partially overlapping times, (LF 110);
- Notes misidentifying female clients as "him" or "he," (*see, e.g.,* LF 408, 410); and
- Detailed progress notes for recipients whom Spilton later admitted in writing and in interviews that she never saw, (A9, A15-A16, A20).

Spilton knowingly submitted false claims and then fabricated patient records to cover up her illegal behavior.

D. Spilton Confessed to Illegal Behavior.

"*I am responsible for illegal activities…*" begins Spilton's handwritten and signed statement to the Medicaid Fraud Control Unit investigators. (A9, LF 87-88). Spilton met with Medicaid Fraud Control Unit investigators at the

Missouri Attorney General's Office in St. Louis, Missouri. (LF 87-88). There, the investigators interviewed Spilton. (A15, A19). During the interview, Spilton confessed to various illegal acts. (*See* A9-A13, A14-A18, A19-A22).

Specifically, Spilton admitted that she violated Medicaid requirements and knowingly submitted false claims to Medicaid. Spilton confessed to having never provided individual therapy to numerous recipients for which she had submitted claims including: C.A.H., D.S.B., B.C., and T.O.[2/] (A20). When Spilton did "provide" individual therapy, she admitted that she did not do so for the full time required by Medicaid rules and regulations. (LF 103-109, A20). Spilton also admitted that she submitted, or caused to be submitted, claims to Medicaid for non-qualifying, individual therapy for numerous recipients including: C.D.H., K.H., S.H., T.B., D.B., K.B., and W.B. (A20).

Spilton also acknowledged that she knew that services conducted with the parent, but not aimed at helping the children, were not "Family Therapy with Patient Present" and could not be billed to Medicaid. (A21). Nonetheless, Spilton conducted therapy sessions with K.C. – mother of B.C., W.B., A.B., D.B., T.B., K.B., and D.S.B. – but the children were not present. (A20). Spilton also submitted, or caused to be submitted, claims for "Family Therapy with Patient

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[2/] Names have been removed throughout in order to prevent disclosure of protected and confidential health information pursuant to federal and state law.

Present" for C.A.H., S.H., and G.O., when the children were not present. (A21). Spilton later admitted to fabricating records in an attempt to corroborate the claims submitted in 2004 to Medicaid, in response to the Medicaid Fraud Control Unit's subpoena served in April 2006. (A21).

After the interview, Spilton freely and willingly wrote a true and accurate statement outlining her fraudulent conduct. (A9-A13). Spilton's written confession confirmed the Medicaid Fraud Control Unit's evidence. Spilton admitted that, "*I have billed for seeing a client individually, when in fact, I did not see (i.e. provide treatment to) the client.*" (A9). Spilton confessed that, "*[t]here were instances when I worked individually with the parent(s) and the client/child was not in the session,*" in violation of Medicaid rules. (A9). Spilton revealed that she, "*did not request permission/authorization from Medicaid to see the parent individually,*" and she was "*aware [she] did not follow required procedure for such treatment.*" (A10). Spilton also stated that, *"I accept full responsibility."* (A11).

E. Procedural History.

In 2005, the Missouri Attorney General's Medicaid Fraud Control Unit began investigating Spilton's billing practices. In 2007, Spilton provided both oral and written confessions detailing her illegal behavior. (A9-A13, A14-A18, A19-A22). Yet, in October of 2008, Spilton returned her responses to Plaintiffs' First Request for Admissions, asserting that, "Defendant invokes Fifth

Amendment privilege and protections guaranteed by U.S. Constitution" regarding the admissions she made to Medicaid Fraud Control Unit investigators in her oral and written confessions. (LF 87-112, 1866-93).

On July 15, 2009, the Circuit Court of St. Louis County issued summary judgment in favor of Plaintiffs and against Defendant Spilton, finding that Spilton knowingly violated § 191.905.1, RSMo, and awarding $45,385.00 in actual damages based on uncontroverted facts. (A1). The judge also awarded treble damages of $136,155.00 and a $5,000 civil penalty for each of Spilton's 325 violations of § 191.905.1, RSMo, pursuant to § 191.905.12, RSMo, totaling $1,806,540.00 in recovery. (A2). The court reduced the judgment entered by $55,000.00 pursuant to a settlement agreement entered into by Defendants Moskowitz and Spilton's corporation, On-Site Counseling, Inc., reducing the total judgment against Spilton to $1,751,540.00. (A2-A3). Spilton filed an appeal in the Missouri Court of Appeals, Eastern District, and the appeal was transferred to this Court based on its exclusive jurisdiction to address Spilton's constitutional challenge to § 191.905.12, RSMo.

SUMMARY OF THE ARGUMENT

It is uncontroverted that Stephanie Spilton confessed to fraudulent billing practices. Her handwritten and signed statement to the Attorney General's Medicaid Fraud Control Unit declares that, "*I am responsible for illegal activities*." (A9). This is not a case of a single accidental false billing. This is a case where Spilton defrauded the government 325 times over a 335-day period (from January 1, 2004 to December 1, 2004), averaging approximately 6.8 false claims per week. (*See* LF 127, A1-A8). In other words, on average, Spilton broke the law virtually every single day, including weekends and holidays. Spilton admitted to committing fraud, both in an oral confession and a handwritten statement.

The trial court's grant of summary judgment in favor of Plaintiffs and against Defendant Spilton was appropriate. There are no genuine issues of material fact, and Plaintiffs are entitled to judgment as a matter of law. Spilton contends on appeal that Plaintiffs failed to present competent evidence that Spilton acted "knowingly" when she made or caused to be made false statements or false representations of material fact in order to receive health care payments. In fact, Plaintiffs presented overwhelming evidence demonstrating that Spilton acted with knowledge, including both written and oral confessions, indicating that Spilton had actual knowledge that she was submitting claims for services that she did not perform and for services that Spilton knew did not

comport with Medicaid rules and regulations. Because Spilton knowingly violated § 191.905.1, RSMo, Plaintiffs are entitled to recover civil penalties pursuant to § 191.905.12, RSMo.

Finding that her defenses against summary judgment fall short, Spilton makes unsupported claims regarding the constitutionality of § 191.905.12, RSMo. First, Spilton assumes that the civil penalties imposed by § 191.905.12, RSMo, are punitive damages – which they are not – and bases each of her constitutional claims on this faulty assumption. (Appellant's Brief pp. 26-33). Then, Spilton ignores controlling authority from both the United States Supreme Court and this Court, improperly arguing that the civil penalties awarded in this case are grossly excessive based solely upon the ratio of actual damages to penalties awarded. (Appellant's Brief p. 30). Finally, Spilton asserts that § 191.905.12, RSMo, is vague, and without any basis or support in fact or law. (Appellant's Brief p. 33). Spilton's unsupported discussion regarding the constitutionality of § 191.905.12, RSMo, fails to carry her heavy burden to demonstrate that the statute "clearly contravenes" any constitutional provision.

The civil penalties found in § 191.905.12, RSMo, are constitutionally sound pursuant to traditional rules of statutory interpretation and age-old reliance on judicial discretion in implementing the law. Additionally, the United States Supreme Court's sliding scale analysis in *Vill. of Hoffman Estates v.*

Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982), adopted by the this Court in *State ex rel. Nixon v. Telco Directory Publ'g,* 863 S.W.2d 596, 600 (Mo. banc 1993), which demonstrates § 191.905.12, RSMo, does not inhibit Spilton's constitutional rights and is not vague. Further, over half of the states and the federal government have implemented false claims acts with penalty provisions allowing for civil penalties greater than or equal to those found in § 191.905.12, RSMo. Finally, Spilton fails to demonstrate that the civil penalty provision in § 191.905.12, RSMo, runs afoul of constitutional prohibitions against excessive fines. Accordingly, the judgment of the trial court should be affirmed.

ARGUMENT

Standard of Review

A. Summary Judgment.

When an appellate court reviews a summary judgment the court looks to the entire record to determine if there is an issue of material fact and whether the moving party was entitled to judgment as a matter of law. *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 446 (Mo. banc 1994). On an appeal from summary judgment, "the Court will review the record in the light most favorable to the party against whom judgment was entered." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993).

The Court's review of a grant of summary judgment is *de novo. Id*. The propriety of summary judgment is purely an issue of law. *Id*. Questions of law are matters reserved for the independent judgment of the reviewing court. *Dial*, 871 S.W.2d at 446. When viewed in light of the above standard, there are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law. Therefore, the trial court's judgment should be affirmed.

B. Constitutional Challenges to State Statutes.

The standard of review for a constitutional challenge to a statute is *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). "A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision."

State v. Stokely, 842 S.W.2d 77, 79 (Mo. banc 1992). If it is at all feasible to do so, statutes must be interpreted to be consistent with both the state and federal constitutions. *Id.* Any doubts concerning the constitutionality of a statute will be resolved in favor of validity. *Id.* One who attacks a statute claiming it violates the constitution "bears an extremely heavy burden." *Linton v. Mo. Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999). The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations. *Franklin County*, 269 S.W.3d at 29. Spilton has failed to carry her burden to show that § 191.905.12, RSMo, clearly contravenes any constitutional provision. Therefore, this Court should find § 191.905.12, RSMo, constitutional.

I. The Trial Court Correctly Granted Summary Judgment Because the Uncontroverted Facts Establish That Spilton Knowingly Made False Claims. – Responding to Appellant's Point I.

A. Uncontroverted Evidence Establishes Spilton Knowingly Made False Claims.

To establish Spilton's liability for violating § 191.905.1, RSMo, ("Medicaid Fraud"), Plaintiffs must establish the following elements: (1) Spilton was a health care provider as defined by § 191.900.7, RSMo, (2) who made a representation, (3) which was false, and (4) material, (5) which was made for the purpose of receiving a health care payment as defined by § 191.900.6, RSMo, and (6) Spilton acted knowingly with respect to the facts and conduct above. *State v. Barnes,* 245 S.W.3d, 885, 890-91 (Mo. App. E.D. 2008). Spilton does not dispute any of the elements except that she "knowingly" violated § 191.905.1, RSMo. Section 191.900.8, RSMo, defines "knowing" and "knowingly" to mean that a person:

(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.

In this case, Spilton intended to act in violation of the law and had actual knowledge that statements she made or caused to be made to Medicaid were false and illegal. By Spilton's own written and oral confessions and by other uncontroverted facts, between January 1, 2004 and December 1, 2004, Spilton did not provide covered or qualifying Medicaid services to Medicaid recipients. (A9-A13, A14-A18, A19-A22). There is no dispute that Spilton submitted, or caused to be submitted, claims for reimbursement representing that she had provided those services, knowing such claims were false. (A9-A13, A15-A17, A20-A21, LF 87-88). Spilton freely admitted the following to investigators in the Medicaid Fraud Control Unit:

- **Spilton submitted claims for providing therapy to patients she never saw.**
  - Spilton never provided individual therapy to numerous recipients including C.A.H., D.B., B.C., and T.O., (A20), but submitted claims that she did (*see* LF 2339-60).
- **Spilton knowingly did not follow Medicaid rules.**
  - When Spilton did "provide" individual therapy in 2004, she did not provide it for the full time required by Medicaid rules and regulations. (A20).

- Spilton submitted claims for non-qualifying individual therapy for recipients, including C.D.H., K.H., S.H., T.B., D.B., K.B., and W.B. (A20).
- Spilton submitted claims for "Family Therapy with Patient Present" for numerous children, including B.C., W.B., A.B., D.B., T.B., K.B., D.S.B., C.A.H., S.H., and G.O., for therapy sessions which took place when the children were not present. (A20-A21).
- Spilton admitted that services conducted with the parent but not aimed at helping the children were not "Family Therapy with Patient Present" and could not be billed to Medicaid; nonetheless, Spilton submitted claim for these services. (A21).
- Spilton admitted to investigators that she should have requested prior authorization from Medicaid to bill "Family Therapy Without Patient Present," but never did so. (A21).

▪ **Spilton falsified records in an attempt to cover up her illegal behavior.**

- Spilton fabricated records in response to the Medicaid Fraud Control Unit subpoena served in April 2006 in order to corroborate the false claims submitted to Medicaid in 2004. (A21).

In addition to Spilton's oral confession, Spilton also put her confession in writing. In her handwritten confession dated March 15, 2007, Spilton admitted

to knowingly defrauding the Medicaid program, stating that, "*I am aware I did not follow required procedure for such treatment* [family therapy with patient present]." (A10). Additionally, Spilton also stated that, "*I am responsible for illegal activities. . . Specifically, I have billed for seeing a client individually, when, in fact, I did not see (i.e. provide treatment to) the client*." (A9). Spilton concluded her written confession by stating, "*I accept full responsibility*." (A11).

Spilton's oral and written confessions were confirmed by her response to Plaintiffs' discovery. In discovery, Spilton invoked the protections of the Fifth Amendment and did not deny that she knowingly submitted, or caused to be submitted, false and fraudulent claims to Medicaid. (LF 87-112, 1866-93). Under both Missouri and federal law, an adverse inference may be used against the party claiming the privilege against self-incrimination in a civil case. *See Johnson v. Mo. Bd. of Nursing Adm'rs,* 130 S.W.3d 619, 629 (Mo. App. W.D. 2004); *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976) (stating that, "the [Fifth] Amendment does not preclude the [adverse] inference where the privilege is claimed by a party to a civil cause").

Although Spilton acknowledges an adverse inference applies to her, she argues that "judgment may not be based on that silence alone, without requiring the plaintiff to present a prima facie case." (Appellant's Brief p. 22) (citing *Johnson,* 130 S.W.3d at 632). Surely Spilton recognizes that the negative inference is the least of what Plaintiffs are relying on; Spilton *confessed* to

knowingly submitting false claims, not once but *twice*. (A9-A13, A14-A18, A19-A22). The uncontroverted facts and Spilton's confessions are more than enough to establish a prima facie case. (*See* A1-A3, A9-A13, A14-A18, A19-A22, LF 87-112). The negative inference from Spilton's invocation of the privilege against self-incrimination simply adds to an already substantial amount of evidence proving that Spilton knowingly engaged in Medicaid fraud.

Missouri courts permit fraud to "be inferred and shown by circumstantial evidence." *Farr v. Hoesch,* 745 S.W.2d 830, 832 (Mo. App. E.D. 1988). Spilton claims that circumstantial evidence is insufficient to prove a claim of Medicaid fraud. (Appellant's Brief p. 23). This is wholly unfounded. By its very nature, fraud is concealed, "seldom capable of direct proof," and must be inferred. *See Allison v. Mildred,* 307 S.W.2d 447, 453 (Mo. 1957). Additionally, the Medicaid fraud statute, § 191.905.10, RSMo, specifically allows for the consideration of circumstantial evidence, stating that, "[i]n a prosecution pursuant to subsection 1 of this section,[3/] circumstantial evidence may be presented to demonstrate that

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[3/] Black's Law Dictionary (8th ed. 2004) defines "prosecute" to mean, "[t]o commence and carry out a legal action." This definition, together with *Farr,* 745 S.W.2d at 832, allowing circumstantial evidence in fraud cases, and *Allison,* 307 S.W.2d at 453, shows that the legislature intended circumstantial evidence to be admissible in both civil and criminal prosecutions under § 191.905.1, RSMo.

a false statement or claim was knowingly made."

In this case, the facts are uncontroverted that Medicaid reimbursed Spilton for claims submitted for services which were never provided. Both direct and indirect evidence shows that Spilton knowingly submitted, or caused to be submitted, false claims to Medicaid for reimbursement in violation of § 191.905.1, RSMo.

B. Plaintiffs Are Entitled to Civil Penalties Pursuant to § 191.905.12, RSMo, Because Spilton Knowingly Made False Claims.

Section 191.905, RSMo, allows for the imposition of penalties under subsection 12 and subsection 14. In deciding which penalty provision to apply, the court must first look to whether the defendant acted knowingly. *See* § 191.905.12, RSMo; § 191.905.1-3, RSMo. Where a plaintiff meets a heightened requirement and demonstrates that a defendant *knowingly* violated § 191.905.1-3, RSMo, the defendant is subject to the statute's more stringent penalties under subsection 12 and must be assessed a civil penalty of between $5,000 to $10,000 per false claim. *See* § 191.905.12, RSMo. A defendant need not act knowingly to fall under the purview of § 191.905.14, RSMo.

Section 191.905.12, RSMo, states that, "*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." (emphasis added). In contrast, § 191.905.14, RSMo, states that, "[t]he 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 legislature limits the applicability of § 191.905.12, RSMo, and consequently the more severe penalties, to individuals who have violated subsections 1 to 3 – those defendants who have acted "knowingly."[4/] Section 191.905.14, RSMo, allows a civil action when *any person* makes a false representation of a material fact and receives a health care payment. Section 191.905.14, RSMo, *does not* require a violation of § 191.905.1, RSMo, and *does not* require the health care provider to make the false statement knowingly. While Spilton argues that the language in § 191.905.14, RSMo, ("the attorney general may bring a civil action") requires that § 191.905.14, RSMo, supply the exclusive remedy in civil claims, (Appellant's Brief p. 24), the determination

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4/ *See* § 191.905.1, RSMo (stating that "[n]o health care provider shall *knowingly* make or cause to be made a false statement"); § 191.905.2, RSMo (stating that "[n]o person shall *knowingly* solicit or receive any remuneration"); and § 191.905.3, RSMo (stating that "[n]o person shall *knowingly* offer to pay any remuneration...").

regarding which subsection to prosecute under is not contingent upon the nature of the charge (*e.g.* civil or criminal), but instead hinges upon whether Spilton acted "knowingly." In this case, Plaintiffs have shown by competent evidence, including both a written and oral confession, that Spilton knowingly violated § 191.905.1, RSMo. Thus, the trial court appropriately imposed civil penalties mandated by § 191.905.12, RSMo.

Spilton is correct in that, "the violations alleged by Plaintiffs would certainly qualify as a false statement or false representation of material fact made or caused to be made by that person," actionable under § 191.905.14, RSMo. (Appellant's Brief p. 26). However, because Plaintiffs have proven that Spilton acted "knowingly," Plaintiffs appropriately sought the more severe civil penalties and treble damages under § 191.905.12, RSMo.

Additionally, Plaintiffs agree with Spilton in her assessment that the court in *State v. Barnes,* 245 S.W.3d 885 (Mo. App. E.D. 2008)[5/] demonstrated that "civil penalties [under § 191.905.12, RSMo,] are proper in criminal cases." (Appellant's Brief p. 25). However, simply because a trial court issued civil penalties in a criminal case does not mean that it is not appropriate to award

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[5/] On appeal, the court in *Barnes* declined to address the propriety of the trial court's award of civil penalties in a criminal case, as the issue was not preserved. *Barnes,* 245 S.W.3d at 896.

civil penalties in a civil case. Because the determination of whether or not to assess penalties under § 191.905.12, RSMo, hinges upon the mental state of the defendant – not the existence of a criminal case – civil penalties are appropriately awarded in either a civil or a criminal context where a defendant acted "knowingly."

Plaintiffs have proven by uncontroverted evidence, including both oral and written confessions from Spilton that she acted "knowingly." Thus, the civil penalties assessed against Spilton pursuant to § 191.905.12, RSMo, should be affirmed.

II. The Trial Court Correctly Assessed Civil Penalties Pursuant to § 191.905.12, RSMo, Because Spilton Failed to Demonstrate the Statute Clearly Contravenes Any Constitutional Provision.

"A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Stokely,* 842 S.W.2d at 79. If it is at all feasible to do so, statutes must be interpreted to be consistent with both the state and federal constitutions. *Id.* Any doubts concerning the constitutionality of a statute will be resolved in favor of validity. *Id*. One who attacks a statute claiming it violates the constitution "bears an extremely heavy burden." *Linton v. Mo. Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999). The person challenging the validity of the statute has the

burden of proving the act clearly and undoubtedly violates the constitutional limitations. *Franklin County*, 269 S.W.3d at 29.

A. The Civil Penalties Under § 191.905.12, RSMo, Are Not Vague. – Responding to Appellant's Point III.

The Due Process Clause of the Fourteenth Amendment prohibits vague state laws. *State ex rel. Nixon v. Telco Directory Publ'g,* 863 S.W.2d 596, 600 (Mo. banc 1993). A statute may be deemed vague for one of two reasons: (1) on its face, the statute lacks notice, as it is "so unclear that people of common intelligence must necessarily guess at its meaning;" or (2) the statute does not have sufficient guidance "as to avoid arbitrary and discriminatory applications." *Stokely,* 842 S.W.2d at 80-81.

1. Section 191.905.12, RSMo, is facially unambiguous and must be construed in accordance with its plain meaning.

In determining whether a statute is vague, the court should look to rules of statutory interpretation. Statutory interpretation is used to ascertain the legislature's intent from the language used and to give effect to that intent. *See Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986). Where the language of a statute is clear and unambiguous on its face, courts construe the language according to its plain and ordinary meaning. *Id.*

Here, the language of § 191.905.12, RSMo, is clear on its face, and thus the

court should construe the language according to its plain and ordinary meaning. Section 191.905.12, RSMo, states that, "[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." The statute demands the judge impose a civil penalty, but gives the judge discretion as to the size of the civil penalty within the statutorily limited range. While the statute does not list factors as to how the court determines the size of the penalty within that range, Spilton cites no authority suggesting that such factors are constitutionally necessary, failing to meet her heavy burden. Thus, based on the plain and ordinary meaning of § 191.905.12, RSMo, judges *must* impose a penalty of at least $5,000, and *may*, in their discretion, impose a penalty not to exceed $10,000 per false claim.

2. Section 191.905.12, RSMo, is not vague simply because it allows for judicial discretion in imposing civil penalties.

The constitutional issue in this case is not whether the judge abused his discretion in awarding civil penalties under § 191.905.12, RSMo, but whether allowing the judge to have a range of discretion is constitutionally permissible. Case law and various statutory provisions allowing such discretion make clear

that imposition of civil penalties for statutory violations is within the discretion of the trial court. *See, e.g., State ex rel. Nixon v. Consumer Auto. Res., Inc.,* 882 S.W.2d 717, 722 (Mo. App. E.D. 1994); *State ex rel. Ashcroft v. Church,* 644 S.W.2d 586, 589 (Mo. App. E.D. 1984).

While the judge does have a range of discretion as to the amount of civil penalty imposed, in this case Spilton was assessed the *minimum* statutory penalty and she does not argue that the penalties were arbitrarily or discriminatorily imposed. Further, there is nothing vague about how many times a penalty will be imposed against a defendant. Spilton claims that a defendant is entitled to fair notice of the severity of the penalty that may be imposed. (Appellant's Brief p. 33). The statute does, in fact, provide such notice. While the range of punishment may range from $5,000 to $10,000 per violation, defendants have complete control over how many times a penalty will be assessed against them. If a health care provider never knowingly submits a false claim, he or she will never incur a civil penalty. If a health care provider knowingly submits one false claim, he or she will be assessed only one civil penalty under the statute. Here, Spilton knowingly submitted 325 false claims, and thus she was assessed 325 civil penalties – there is nothing vague about that.

Judges are tasked on a daily basis with exercising prudent discretion on a variety of issues. In fact, various other Missouri statutes leave the trial court

with discretion in the assessment of civil penalties, often giving the trial court more discretion than that found in § 191.905.12, RSMo. For example:

- **Section 644.076.1, RSMo**, addressing water pollution, gives the judge a $10,000 range of discretion in imposing civil penalties;
- **Section 105.473, RSMo**, addressing registration of lobbyists, states that "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;"
- **Section 196.1003, RSMo**, addressing tobacco settlement agreements, allows a court to impose a civil penalty not to exceed five (5) percent of the amount improperly withheld from escrow per day of the violation, not to exceed 100 percent of the original amount improperly withheld.

Contrary to Spilton's argument that a range of civil penalties is unconstitutionally vague, both Missouri and federal law routinely allow judges to make discretionary decisions as to the assessment of civil penalties. The legislature intended for the court to have discretion to impose a range of civil penalties in Medicaid fraud cases. Thus, statutory ranges of civil penalties are constitutionally permissible.

3. Civil penalties in § 191.905.12, RSMo, are consistent with the federal False Claims Act and over 25 states false claims acts.

The federal False Claims Act (FCA) is one of the federal government's primary weapons to fight fraud against the government. The False Claims Act was first drafted in 1863, and allowed – in 1863 – for a $2,000 civil penalty for every false claim submitted to the United States.[6/] James B. Helmer, Jr. and Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation,* 18 OHIO N. U. L. REV. 35, 45-6 (1991-1992) (citing 31 U.S.C. § 3729 (1982)). In 1986, recognizing that these penalties had become outdated and no longer served as a strong enough deterrent, Congress amended the FCA and increased the civil penalty provisions to a range of $5,000 to $10,000 per violation. *See* 31 U.S.C. § 3729; Helmer and Neff, at 46. Today, the Missouri Medicaid fraud statute tracks the language of the federal False Claims Act, codified at 31 U.S.C. § 3729. The federal False Claims Act, 31 U.S.C. § 3729(a)(1), states in part that:

6/ Note that a $2,000 penalty in 1863 is roughly equivalent to a $25,000 penalty in 2004, as calculated using the GDP deflator. The GDP deflator is an index number that represents the "average price" of all the goods and services

> Any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . .

Section 191.905.12, RSMo, enacted in 1994, tracks the FCA's language, stating that,

> A person who violates subsection 1 . . . of this section [requiring that a defendant knowingly make or cause to be made a false statement or fraudulent representation of a material fact in order to receive a health care payment] shall be liable for a civil penalty of not less than five thousand dollars and not more than ten

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produced in the economy. Changes in the deflator are a broad measure of inflation. *See* Samuel H. Williamson, *Measuring Worth,* http://www.measuringworth.com; *see also*, National Aeronautics and Space Administration, *Gross Domestic Product Deflator Inflation Calculator*, http://cost.jsc.nasa.gov/inflateGDP.html (showing that $2,000 in 1940 – the furthest date back the calculator calculates – is worth over $21,000 in 2004).

> thousand dollars for each separate act in violation of such subsections . . . .

While various provisions of the FCA have been challenged over its long history, no challenge has ever claimed that its penalty provision is unconstitutionally vague.

Furthermore, the federal government encourages states to enact penalty provisions exactly like those found in § 191.905.12, RSMo. As enacted by § 6031 of the Deficit Reduction Act of 2005, § 1909 of the Social Security Act (Act) provides a financial incentive for states to enact false claims acts that establish liability to the state for the submission of false or fraudulent claims to the state's Medicaid program. For a state to receive the financial incentive, the Act requires, *inter alia,* that state false claims acts contain penalty provisions not less than $5,000 to $10,000 per violation. *See* 71 Fed. Reg. 48552 (Aug. 21, 2006). To date, over half of the states have enacted false claims acts with civil penalty provisions allowing for penalty provisions of at least $5,000 to $10,000 per violation.

4. Section 191.905.12, RSMo, is not vague pursuant to the "sliding scale analysis" adopted by this court.

The United States Supreme Court established a sliding scale for measuring statutes against the Due Process Clause in *Vill. of Hoffman Estates*

v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982), which was adopted by the Supreme Court of Missouri in *Telco Directory Publ'g,* 863 S.W.2d at 600. Under the "sliding scale analysis," the most important factor courts look to in assessing the constitutional demands of the law is whether the law "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates,* 455 U.S. at 498-99; *Telco Directory Publ'g,* 863 S.W.2d at 600. Additionally, courts are generally more tolerant of statutes imposing civil rather than criminal penalties, as "the consequences of imprecision are qualitatively less severe." *Id.* Finally, the court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his or her conduct is proscribed. *Id.*

The "sliding scale analysis" provides guidance in assessing the clarity that the constitution demands of § 191.905.12, RSMo, and demonstrates that the statute is not impermissibly vague. Spilton does not claim that § 191.905.12, RSMo, inhibits the exercise of any of her constitutionally protected rights. Surely Spilton does not believe that the sanctions found in § 191.905.12, RSMo, impermissibly inhibit her "constitutional right" to file false claims against Missouri Medicaid. Further, Plaintiffs in this case are not seeking criminal sanctions, only civil penalties under § 191.905.12, RSMo, lessening the constitutional demands for specificity. Finally, § 191.905.1 and § 191.905.12, RSMo, have scienter requirements, demanding a showing that the defendant

acted "knowingly," lowering constitutional demands for specificity. Accordingly, § 191.905.12, RSMo, is not impermissibly vague and comports with constitutional requirements of due process.

B. The Civil Penalties Under § 191.905.12, RSMo, Are Not Excessive. – Responding to Appellant's Points II.

1. Civil penalties are not punitive damages.

Spilton inappropriately assumes that the civil monetary penalties under § 191.905.12, RSMo, are punitive damages. Black's Law Dictionary (8th ed. 2004) defines "punitive damages" as "damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif., damages assessed by way of penalizing the wrongdoer and making an example to others..." Black's Law Dictionary (8th ed. 2004) defines "civil penalty" as, "a fine assessed for violation of a statute or regulation." While civil penalties and punitive damages may potentially serve a common purpose, to punish wrongdoing, they are not one and the same. *See U.S. v. Balistrieri,* 981 F.2d 916, 936 (7th Cir. 1992). The civil penalties authorized by § 191.905.12, RSMo, are not "effectively punitive damages" as contended by Spilton.[7/] (Appellant's

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[7/] Spilton's argument that civil penalties are punitive damages is unsupported; however, even if the State had been awarded punitive damages in this case, the amount is not unconstitutionally excessive. Spilton ignores

Brief p. 33).

Punitive damages are never mandatorily imposed, but are "always

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controlling authority from both United States Supreme Court and this Court on the issue, which has "rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *See BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574-75 (1999); *Werremeyer v. K.C. Auto Salvage Co., Inc.*, 134 S.W.3d 633, 635 (Mo. banc 2004).

Spilton improperly argues that the civil penalties awarded in this case are grossly excessive based solely upon the ratio of actual damages to penalties awarded. (Appellant's Brief p. 30). In fact, both Missouri courts and the United States Supreme Court have upheld punitive damages awards reaching double and triple digit ratios as comporting with due process. *See Weaver v. African Methodist Episcopal Church, Inc.,* 54 S.W.3d 575, 589 (Mo. App. W.D. 2001) (upholding a 66:1 punitive damages to actual damages ratio); *Krysa v. Payne,* 176 S.W.3d 150, 163 (Mo. App. W.D. 2005) (affirming a punitive damages award with a 27:1 ratio); and *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443, 459-60 (1993), (affirming a 526:1 ratio where the defendant's misconduct was a part of a large pattern of outrageous conduct and the harm likely to result from defendant's misconduct was much larger).

discretionary." *Balistrieri,* 981 F.2d at 936. "[Punitive] damages are not a matter of right in any case but rest in the discretion of the jury." *Coats v. News Corp.,* 197 S.W.2d 958, 963 (Mo. 1946). Juries have discretion as to the "giving or withholding of punitive damages, as well as the amount thereof." *Simmons v. Jones,* 361 S.W.2d 860, 865 (Mo. App. 1962). Unlike punitive damage awards which are never mandatorily imposed, § 191.905.12, RSMo, mandates that a person in violation of subsections 1 to 3 "*shall* be liable" for a civil penalty. Additionally, while punitive damages may be decided by the jury, civil penalties in this case are imposed by the court.

While judges and juries have discretion in awarding punitive damages, civil penalties prove to be more restrictive on judicial discretion. The discretion traditionally accorded to juries in assessing the amount of punitive damages is not at work under § 191.905.12, RSMo. The civil penalties mandated under § 191.905.12, RSMo, allow for only a $5,000 range of discretion and allow for nowhere near the discretion left to decision makers in punitive damage cases. The only discretion in an award of civil penalties under § 191.905.12, RSMo, is in the hands of the judge who must fix the civil penalties within the $5,000 to $10,000 range.

Finally, civil penalties are not punitive damages, as demonstrated by the fact that the United States Supreme Court uses civil penalty awards as a benchmark in determining the appropriateness of punitive damage awards. The

Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996) stated that the third prong in determining whether the amount of a punitive award has crossed the line and is unconstitutionally excessive is to consider, "the difference between the punitive damages award by the jury and the civil penalties authorized or imposed in comparable cases." The inclusion of a comparison of civil penalties and punitive damages awards effectively dispels any assertion that civil penalties and punitive damages are one in the same.

Because the civil penalties imposed by § 191.905.12, RSMo, are mandatory, may not be imposed by a jury, limit judicial discretion, and are used as a benchmark for the appropriateness of punitive damage awards, the civil penalties are not punitive damages in theory or practice.

2. The civil penalties are not unconstitutionally excessive.

Both the Missouri and United States constitutions prohibit the imposition of "excessive fines." 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,* 920 F.Supp. 1035, 1044 (Mo. App. E.D. 1996), *aff'd,* 111 F.3d 135 (8th Cir. 1997).

"Punishment within statutory limits cannot as a matter of law be held cruel and unusual under Excessive Fines Clause when the statute authorizing the punishment is not invalid and when the punishment imposed is within the

range prescribed by the legislature." *State v. Polley,* 2 S.W.3d 887, 894 (Mo. App. W.D. 1999). Only when a punishment within statutory limits is "so disproportionate as to shock the moral sense of all reasonable men" does the statute violate the constitution. *Id.* (citing *State v. Trader Bobs, Inc.,* 768 S.W.2d 183, 188 (Mo. App. E.D. 1989)). Spilton has not met this standard.

Spilton does not argue that the range of penalty described in §191.905.12, RSMo, is constitutionally excessive. She only argues that the penalty assessed against her, though within the permissible range of penalties described in §191.905.12, RSMo, is excessive.[8/] "Whether the penalties as provided in [a statute] are unreasonable *as applied to [a] defendant* is beyond the court's authority to determine." *Mo. Pub. Serv. Comm'n v. Hurricane Deck Holding Co.*, WD70299 *9 (Mo. App. W.D. Feb. 9, 2010) (citing *State v. Davis*, 830 S.W.2d

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[8/] Spilton states, *"[t]he imposition of $1,625,000.00 in civil penalties* – as essentially punitive damages – are grossly excessive. . ." (Appellant's Brief p. 30). Additionally, Spilton states that, "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."" (Appellant's Brief p. 31). Spilton only argues that the penalties as assessed against her are excessive and does not argue that the range of penalties in §191.905.12, RSMo, are constitutionally excessive.

27, 31 (Mo. App. S.D. 1992)). As long as "constitutional limitations are not exceeded, the amount of the penalty is within the discretion of the legislature." *Hurricane Deck Holding Co.*, WD70299 at *9 (citing *McLaurin v. Frisella Moving & Storage Co.*, 355 S.W.2d 360, 364 (Mo. App. 1962). As the penalty assessed against Spilton is within the range permitted by statute and is, in fact, the lowest amount permitted by the statute, the penalty assessed by the trial court is not "so disproportionate as to shock the moral sense of all reasonable men." *Hurricane Deck Holding Co.*, WD70299 at *9 (citing *Polley* 2 S.W.3d at 894).

Should this court find that Spilton appropriately pled that the *range of penalties* is constitutionally excessive, Spilton's argument still fails. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *U.S. v. Bajakajian*, 524 U.S. 321, 334 (1998). In determining proportionality, a court need not limit itself to a comparison of the fine amount to the proven offense, but may also consider the particular facts of the case, the character of the defendant, and the harm caused by the offense. *Id.* at 338-40.

In *U.S. v. Bajakajian,* the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of the currency out of the country forfeit all of the currency

involved (totaling $357,144). *Id.* at 325-6. The Court looked to the harm caused by the defendant's violation of the statute, noting that, "the harm that [defendant] caused was . . . minimal. There was no fraud on the [government] and respondent caused no loss to the public. . . Had his crime gone undetected, the Government would have been deprived only of the information that [U.S. currency] had left the country." *Id.* at 339. The Court ultimately held that forfeiture in this particular case violated the Excessive Fines Clause because the amount forfeited was "grossly disproportionate to the gravity of defendant's offense." *Id.* at 334.

In this case, the civil penalties are proportionate to the gravity of the offense. Unlike *Bajakajian*, where the harm was minimal (no actual damages) and the court found entire forfeiture unconstitutionally excessive, here the court found over $45,000 in actual damages and imposed only the statutory minimum civil penalty per violation. (A2). Also unlike *Bajakajian*, where there was neither fraud on the government nor loss to the public, here there was both a significant fraud on the government (over $45,000) and immeasurable loss to the public through the erosion of public confidence in the Medicaid system and loss of program integrity. Considering the facts as a whole, including Spilton's knowing submission of nearly one false claim per day for eleven months, on average, and her shameless submission of fabricated patient records, the circuit court undoubtedly assessed a civil penalty proportionate to Spilton's offense.

As discussed in section (A)(2) *supra,* defendants have complete control over how many times a penalty will be assessed against them based entirely on how many times they knowingly submit a false claim. Thus, the constitutionality of the civil penalties allowed under § 191.905.12, RSMo, should be assessed on a *per-claim basis*.[9/] The relevant inquiry is whether a $5,000 to $10,000 penalty for knowingly submitting a false claim to the government is excessive. As demonstrated by the long history of the federal FCA and over half of the states in the country adopting similar provisions, $5,000 to $10,000 is not an excessive civil penalty for knowingly defrauding the government.

Unless civil penalties are significant enough to deter providers from submitting false claims, the statute loses its deterrent effect. Civil penalties should not be so low as to allow providers to factor in "getting caught" into their cost of doing business. In this case, the civil penalties assessed against Spilton were appropriate due to her intentional submissions of hundreds of false claims, her repeated failures to follow mandatory Medicaid provider rules, and her brazen attempt to cover it all up. Accordingly, the court should find § 191.905.12, RSMo, constitutional and affirm the trial court's grant of summary

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9/ Should this Court adopt Spilton's *aggregate* approach to this issue, looking only to the final assessment of $1,625,000 in civil penalties, it would encourage the precise behavior the statute aims to prevent.

judgment.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment in favor of the Plaintiffs and against Defendant Stephanie Spilton.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b)-(c)

The undersigned hereby certifies that on this 18th day of February 2010, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 8,428 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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