

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC 92700

ALICE ROBERTS, ET AL.,

Appellants,

vs.

BJC HEALTH SYSTEM D/B/A BJC HEALTHCARE, ET AL.,

Respondents.

**SUBSTITUTE BRIEF OF
RESPONDENT MISSOURI BAPTIST MEDICAL CENTER**

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STATEMENT OF FACTS

I. Introduction

Defendant/Respondent Missouri Baptist Medical Center (“Missouri Baptist”) considers the Statement of Facts contained in Plaintiffs/Appellants’ Brief to be deficient, in that it is incomplete, contains mischaracterizations of the facts, is argumentative, and provides new factual arguments that were not presented below to either the trial court or appeals court. Indeed, a good portion of Plaintiffs’ Statement of Facts, including, without limitation, that relating to the alleged conduct of Missouri Baptist, relies solely upon Plaintiffs’ unsworn and unsupported allegations of their Class Action Petition (“Petition”) (L.F. 23-91) that have never been admitted by Missouri Baptist in any responsive pleading. Missouri Baptist filed a motion to dismiss Plaintiffs’ Petition in lieu of an Answer. (S.L.F. 311-315). Missouri Baptist’s motion to dismiss had yet to be ruled upon and was mooted by the Circuit Court’s Memorandum, Order and Judgment (“Judgment”) of March 16, 2011, dismissing Plaintiffs’ Petition. (L.F. 1260-1266, Appendix (“App”) A1-A7). Accordingly, pursuant to Mo. Sup. Ct. R. 84.04(f), Missouri Baptist provides its own Statement of Facts.

All of Plaintiffs’ claims in their Petition arise out of their allegation that they were overcharged for medical services performed by Dr. Richard Coin, M.D. and his offices, Reconstructive and Microsurgery Associates (“RMA”) at Missouri Baptist and at Defendant St. John’s Mercy Medical Center (“St. John’s”). (L.F. 23-81, Petition). Plaintiffs seek to recover the amount of the alleged overpayments for themselves, and for the class of natural persons they seek to represent, as opposed to any payor insurers.

(L.F. 48, Petition). Plaintiffs seek such relief against Missouri Baptist and St. John’s, their respective parent affiliates, BJC Health System (“BJC”) and Sisters of Mercy Health System (“SOM”), and RMA. (L.F. 23-81, Petition). No class was ever certified nor did Plaintiffs ever file a motion or application to certify a class. (L.F. 1-22).

Plaintiffs’ Petition was removed by the Defendants to the United States District Court for the Eastern District of Missouri, where the District Court (Judge Hamilton) found that none of the Plaintiffs had sustained any injury in fact as a result of the alleged overcharges and, therefore, dismissed and remanded the action for lack of standing and lack of federal subject matter jurisdiction. (S.L.F. 216-219, Order; S.L.F. 220, Order of Remand).

After the case was remanded to the Circuit Court, and pursuant to the request of all the parties, including the Plaintiffs, the Circuit Court ordered that the parties proceed with “discovery limited to the issue of standing and named plaintiffs’ injury in fact”. The Circuit Court stated that it would then consider motions for summary judgment on that issue. (L.F. 471-472, Order, App. A8-A9).

Accordingly, at the conclusion of such discovery, on November 17, 2009, Missouri Baptist moved for summary judgment on Plaintiffs’ claims against it. (L.F. 251). On September 9, 2010, the Circuit Court entered a Memorandum and Order granting in part and denying in part Missouri Baptist’s motion for summary judgment and the other Defendants’ respective motions for summary judgment or motions to dismiss. (LF 1214 –1223). All of the parties, including Plaintiffs and Missouri Baptist, timely filed respective motions for the Circuit Court to reconsider and/or clarify its

Memorandum and Order. (L.F. 1224-1227; LF 1228-1231; L.F. 1232-1251, L.F. 1252-1258; S.L.F. 646-652)

On March 16, 2011, upon reconsideration, the Circuit Court entered its Judgment in favor of all Defendants and against Plaintiffs on all of Plaintiffs' claims. (L.F. 1260-1266; App. A1-A7). Finding that none of the Plaintiffs had sustained any damages or injury in fact, the Court dismissed Plaintiffs' Petition with prejudice. (L.F. 1266, Judgment, App. A1-A7). On Plaintiffs' appeal to the Court of Appeals for the Eastern District, the Court of Appeals affirmed the Circuit Court's Judgment, issuing an unpublished Memorandum pursuant to Rule 84.16(b) supplementing its Order affirming the Judgment. (App. A33-A40).

On June 28, 2012, the Court of Appeals denied Plaintiffs' Application for Transfer to this Court. On August 14, this Court granted Plaintiffs' Application for Transfer.

II. Neither the Roberts nor the Millsap Plaintiffs Were Treated at Missouri Baptist

There are four Plaintiffs – Alice Roberts, Christy and Tim Millsap (on behalf of their minor daughter Brittany Millsap) and Robert Hales.

Plaintiff Roberts admits that she was not treated at Missouri Baptist and that she did not sustain any damages as a result of any conduct of Missouri Baptist (L.F. 265, App. A22, Alice Roberts' Answer to Missouri Baptist's Second Set of Interrogatories, No. 6).

Plaintiffs Christy and Tim Millsap likewise admit that they and their daughter Brittany were not treated at Missouri Baptist and that they did not sustain any damages as a result of any conduct of Missouri Baptist (L.F. 276, App. A24, Christy Millsap's

Answer to Missouri Baptist's Second Set of Interrogatories, No. 6; L.F. 287, App. A26, Tim Millsap's Answer to Missouri Baptist's Second Set of Interrogatories, No. 6).

III. Only One of the Plaintiffs, Robert Hales, Was Treated at Missouri Baptist

The only Plaintiff treated at Missouri Baptist was Robert Hales. Hales was treated at Missouri Baptist on one occasion, on January 25, 2001. (L.F. 293, App. A11, Hales' Answers to Missouri Baptist's Second Set of Interrogatories, No. 2; L.F. 337-339, App. A15-A16, Deposition of Hales, p. 37:25-38:19, p. 39:4-6). Hales' single treatment at Missouri Baptist was for a work-related injury. (L.F. 324, 337-339, App. A14, A15-A16, Deposition of Hales, p. 24:4-24; 37:25-39:6). Hales had suffered a work-related injury to his middle and index fingers on his left hand. (L.F. 203, App. A14, Deposition of Hales p. 24:4-24). He went to Missouri Baptist on January 25, 2001, to have a pin removed from his left middle finger. (L.F. 207, App. A16, Deposition of Hales, p. 38:13-39:6). Missouri Baptist did not bill any charges to Hales for his treatment there. (L.F. 207, App. A16, Deposition of Hales, p. 39:7-5; L.F. 218, App. A19, Affidavit of Debra Wierciak, ¶ 2). Hales did not pay anything to Missouri Baptist for his treatment there. (L.F. 294, App. A11, Hales Answers to Missouri Baptist's Second Set of Interrogatories, No. 3; L.F. 207-209, App. A16-A17, A18, Deposition of Hales, p. 39:10-40:5, 41:24-42:2, 49:14-19; L.F. 218, App. A19, Affidavit of Debra Wierciak , ¶ 3).

All of the charges relating to Hales' treatment at Missouri Baptist were billed to Continental Western Insurance Company ("Continental Western"), the workers' compensation carrier for Hales' employer, Hemsath Concrete. (L.F. 294, App. A11, Hales' Answers to Missouri Baptist's Second Set of Interrogatories, No. 3; L.F. 207-209,

App. A16, A18, Deposition of Hales, p. 39:10-40:5, 49:14-24; L.F. 218, App. A19, Affidavit of Debra Wierciak, ¶ 2). Continental Western satisfied all of the charges billed in connection with Hale's treatment at Missouri Baptist. (L.F. 294, App. A11, Hales' Answers to Missouri Baptist's Second Set of Interrogatories, No 3; L.F. 207-209, App. A16, A18, Deposition of Hales, p. 39:10-40:5, 49:14-24; L.F. 218, App. A19, Affidavit of Debra Wierciak, ¶ 2).

Plaintiffs' expert, Dr. Janevicius, testified that he did not have any opinions as to whether any of the Plaintiffs, including Hales, suffered any financial damages as a result of the alleged overbilling for health care services. (L.F. 231, 235-36, 243, Deposition of Janevicius, pp. 43:12-44:11; 61:12-62:2; 91:2-19). Dr. Janevicius further testified that he had no opinion as to whether there was any billing by Missouri Baptist that was inappropriate in any way. (L.F. 235-236, 243, Deposition of Janevicius, p. 61:12-p.62:2; p.91:2-7; 11-19). Hales likewise testified that he is unaware of any misbilling or miscoding of any kind by Missouri Baptist in connection with the services performed for him. (L.F. 207, App. A16, Deposition of Hales, p. 40:17-23).

Hales is not bringing this suit on behalf of his employer or on behalf of any insurance company. (L.F. 48, Petition, ¶ 103; L.F. 209, App. 18, Deposition of Hales, p. 46:10-24).

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING MISSOURI BAPTIST'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFFS' PETITION AS TO MISSOURI BAPTIST BECAUSE THE UNCONTROVERTED FACTS CLEARLY DEMONSTRATE THAT NONE OF THE PLAINTIFFS SUSTAINED ANY DAMAGES OR INJURY IN FACT AS A RESULT OF ANY CONDUCT OF MISSOURI BAPTIST IN THAT: (I) OF THE PLAINTIFFS, ONLY HALES WAS TREATED AT MISSOURI BAPTIST, WHICH TREATMENT WAS FOR A WORK-RELATED INJURY; (II) NONE OF THE PLAINTIFFS, INCLUDING HALES, WAS BILLED OR PAID FOR ANY SERVICES PROVIDED BY MISSOURI BAPTIST; (III) BY STATUTORY LAW, HALES' EMPLOYER, NOT HALES, WAS RESPONSIBLE FOR THE PAYMENT OF HIS CARE AT MISSOURI BAPTIST AND HALES DID NOT INCUR ANY LIABILITY FOR THE CHARGES FOR SUCH HEALTH CARE; AND (IV) THE CHARGES OF MISSOURI BAPTIST FOR THE MEDICAL SERVICES PROVIDED BY IT TO HALES WERE SATISFIED BY HALES' EMPLOYER'S WORKERS' COMPENSATION INSURANCE CARRIER.

§287.140, et seq. R.S.Mo.

§287.290, R.S.Mo.

Fust v. Francois, 913 S.W.2d 38 (Mo. Ct. App. 1995)

Freeman Health System v. Wass, 124 S.W.3d 504 (Mo.App. S.D. 2004)

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING MISSOURI BAPTIST'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFFS' PETITION AS TO MISSOURI BAPTIST BECAUSE THE UNCONTROVERTED FACTS CLEARLY DEMONSTRATE THAT NONE OF THE PLAINTIFFS SUSTAINED ANY DAMAGES OR INJURY IN FACT AS A RESULT OF ANY CONDUCT OF MISSOURI BAPTIST IN THAT: (I) OF THE PLAINTIFFS, ONLY HALES WAS TREATED AT MISSOURI BAPTIST, WHICH TREATMENT WAS FOR A WORK-RELATED INJURY; (II) NONE OF THE PLAINTIFFS, INCLUDING HALES, WAS BILLED OR PAID FOR ANY SERVICES PROVIDED BY MISSOURI BAPTIST; (III) BY STATUTORY LAW, HALES' EMPLOYER, NOT HALES, WAS RESPONSIBLE FOR THE PAYMENT OF HIS CARE AT MISSOURI BAPTIST AND HALES DID NOT INCUR ANY LIABILITY FOR THE CHARGES FOR SUCH HEALTH CARE; AND (IV) THE CHARGES OF MISSOURI BAPTIST FOR THE MEDICAL SERVICES PROVIDED BY IT TO HALES WERE SATISFIED BY HALES' EMPLOYER'S WORKERS' COMPENSATION INSURANCE CARRIER.

A. Standard of Review

Appellate review of summary judgments is *de novo*. See ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). A defendant may establish its right to summary judgment by demonstrating “facts that negate *any one* of the claimant’s elements....” Fetick v. American Cyanamid Co., 38 S.W.3d 415, 418 (Mo. banc 2001) (quoting ITT Commercial Finance, 854 S.W.2d at 381) (emphasis in original).

When considering the appeal, the Court must take facts set out by the movant in affidavits or otherwise as true unless the non-movant contradicts such facts in its response to the motion for summary judgment. ITT Commercial Finance, 854 S.W.2d at 381. In its response, the non-movant, by affidavits, or as otherwise provided in Rule 74.04, must set forth specific facts showing that there is a genuine issue for trial. See Id. A “genuine issue” exists only where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. A “genuine issue” is a dispute that is real, not merely argumentative, imaginary or frivolous. Id. at 382; see also Dancin Development, L.L.C. v. NRT Missouri, Inc., 291 S.W.3d 739, 745 (Mo. App. E.D. 2009) (stating that, “[w]hile Appellant lists many facts which it believes are issues, it fails to identify any fact that is a genuine issue of material fact ...”).

Conclusory allegations and bare speculation are not sufficient to refute the evidence in the record. It is “not enough for an adverse party to show that a genuine issue of fact might exist, instead, it must be shown that a genuine issue of fact *does* exist.” Wilson v. Jackson, 823 S.W.2d 512, 513 (Mo. App. E.D. 1992) (emphasis in

original). Moreover, a “motion for summary judgment need not rest on unassailable proof and is not precluded by ‘the slightest doubt resting on a scintilla of evidence.’ Mere doubt and speculation do not create an issue for trial.” K-O Enterprises, Inc. v. O’Brien, 166 S.W.3d 122, 126-27 (Mo. App. E.D. 2005) (citing Martin v. City of Washington, 848 S.W.2d 487, 492 (Mo. banc 1993)).

B. Missouri Baptist Was Entitled to Summary Judgment on Roberts’ and Millsaps’ Claims Because Neither the Roberts nor the Millsaps Were Treated at Missouri Baptist and Neither Sustained any Damages or Injury in Fact as a Result of any Conduct of Missouri Baptist.

Three of the four Plaintiffs in this case, Alice Roberts and Tim and Christy Millsap, expressly admit that they (and the Millsap’s daughter Brittany) were not treated at Missouri Baptist and that they did not sustain any damages as a result of any conduct of Missouri Baptist. (L.F. 265, App. A22, Alice Roberts’ Answers to Missouri Baptist’s Second Set of Interrogatories, No. 6; L.F. 276, App. A24, Christy Millsap’s Answers to Missouri Baptist’s Second Set of Interrogatories, No. 6; L.F. 287, App. A26, Tim Millsap’s Answers to Missouri Baptist’s Second Set of Interrogatories, No. 6).

Accordingly, as the Roberts and Millsap Plaintiffs have conceded that they were not treated at Missouri Baptist, and that they sustained no damages as a result of any conduct of Missouri Baptist, it is clear that Missouri Baptist is entitled to judgment on their claims against it as a matter of law. The only remaining issue with respect to Missouri Baptist is whether Missouri Baptist is likewise entitled to judgment as a matter

of law on the claims asserted against it by Plaintiff Hales. The uncontroverted facts before this Court show that it is.

C. Missouri Baptist Was Entitled to Summary Judgment on Hales' Claims Because the Uncontroverted Facts Demonstrate that Hales Sustained no Damages or Injury in Fact as a Result of any Conduct of Missouri Baptist.

The only involvement of Missouri Baptist in this case concerns the charges for one treatment of Hales relating to a workplace injury for which Hales' employer was by law the responsible party. The charges were never billed to Hales. The charges were paid by Hales' employer's workers' compensation insurance company, Continental Western, and not by Hales or Hales' insurance company.

One of the elements of each of the causes of action asserted in this case by Hales against Missouri Baptist is that Hales must have sustained damage that was proximately caused by Missouri Baptist's alleged conduct. See, e.g., MLJ Investment, Inc. v. Reid, 905 S.W.2d 900, 901-02 (Mo. App. E.D. 1995); Kansas City Downtown Minority Development Corp. v. Corrigan Assoc. Ltd. Partnership, 868 S.W.2d 210, 218-19 (Mo. App. W.D. 1994); Ziglin v. Players MH, L.P., 36 S.W.3d 786, 790-91 (Mo. App. E.D. 2001); Koger v. Hartford Life Ins. Co., 28 S.W.3d 405, 411-413 (Mo. App. W.D. 2000); Fidelity Nat. Title Ins. Co. v. Tri-Lakes Title Co., Inc., 968 S.W.2d 727, 730 (Mo. App. S.D. 1998); Meadows v. Friedman RR Salvage Warehouse, Div. of Friedman Bros. Furniture Co., Inc., 655 S.W.2d 718, 720 (Mo. App. E.D. 1983); Mackey v. Mackey, 914 S.W.2d 48, 49 (Mo.App.W.D. 1996).

While Hales does not need to show the amount of his claimed damages with exact certainty, he must be able to show the fact of damages – also referred to as an injury in fact. Fust v. Francois, 913 S.W.2d 38 (Mo. Ct. App. 1995). See also, A.R.B. v. Elkin, 98 S.W.3d 99 (Mo. Ct. App. 2003).¹

Plaintiffs assert that this Court should reverse the Circuit Court’s Judgment because they claim the Judgment rests upon the fact that Plaintiffs did not pay the medical bills. (Plaintiffs’ Substitute Brief p. 15). The foundation of the Judgment was not so limited. The Circuit Court found that Plaintiffs sustained no damages or injury in fact under any theory. As Judge Dierker stated in the Judgment (L.F. 1260-1266, App. A1-A7):

Every single theory advanced by plaintiffs suffers from the same fallacy: plaintiffs have presented no evidence showing they have been harmed in reality. (p.3). ...[A] claim for breach of contract requires proof of damages. Plaintiffs have none. (p. 3). ...[A]n action for misrepresentation requires proof of damage...an action for negligent misrepresentation requires proof of pecuniary loss...Plaintiffs show none. (p. 4). ...[T]he Missouri Merchandising Practices Actpermits recovery only if the plaintiff has suffered ‘ascertainable loss of money or property’....nothing in the record suggests that plaintiffs did not receive what they bargained for....(p. 4). Here there has

¹ Plaintiffs recognize this principle at pages 20-21-of their original Brief to the Court of Appeals, citing both the Fust and Elkin cases.

been no injury to the Plaintiffs. (p. 5). Plaintiffs cannot prosecute this action because they have not been damaged. (p. 6)

Reviewing the matter de novo, and in the light most favorable to Plaintiffs, the Court of Appeals also determined that regardless of whether the issue is characterized as one of standing or as one of failure of proof of the element of damages, the “undisputed facts show that Plaintiffs did not suffer any alleged harm.” (App. A37). As for Plaintiffs’ claim that they “incurred” charges, even though they paid no medical bills, the Court of Appeals held that “[i]n the instant case, Plaintiffs were never exposed to ‘unconditional liability’ for the medical expenses at issue, and so even if there is significance to the difference between ‘incurred’ and ‘paid’ for standing or damages purposes, Plaintiffs neither incurred nor paid any of the allegedly inflated charges.” (App A39)

Indeed, as has now been found first by the United States District Court, then the Circuit Court, and most recently by the Court of Appeals, none of the Plaintiffs has sustained any damages or injury in fact or has standing to sue.²

² Furthermore, where the Plaintiffs cannot assert an action on behalf of themselves, as is the case here, they may not bring the action as representatives of a class. *See* Missouri Supreme Court Rule 52.08; Molumby v. Shapleigh Hardware Co., 395 S.W.2d 221 (Mo. App. E.D. 1965) (if plaintiffs have no rights to be litigated, they may not bring the action as representatives of a class).

1. Neither Hales nor Plaintiffs' Expert, Dr. Janevicius, Claim that there Was any Misbilling by Missouri Baptist Relating to the Treatment of Hales

Plaintiffs claim that their expert witness, Dr. Janevicius, testified that “[Defendants’] miscoding of medical procedures (including unbundling, upcoding and fabrication of procedures) resulted in improper, inappropriate and excessive charges to [Plaintiffs]” and that “[Defendants] had, in fact, improperly charged [Plaintiffs].” (Plaintiffs’ Substitute Brief p. 15).³ Plaintiffs claim that Dr. Janevicius “was unequivocal in his assessment that [Defendants] had, in fact, improperly charged [Plaintiffs]. (Plaintiffs’ Substitute Brief p. 15). However, the record clearly reflects that the testimony of Dr. Janevicius was not as Plaintiffs claim.

Quite to the contrary, as reflected in the following testimony, Dr. Janevicius expressed no opinion as to whether there was any billing of anyone by Missouri Baptist or St. John’s that was inappropriate in any way or that any of the Plaintiffs sustained any damages.

Q. And as you sit here today, you have no opinions about whether the hospital, either Missouri Baptist or St. John’s, billings for the

³ RMA’s and Coin’s guilty pleas in federal court referred to by Plaintiffs in their Statement of Facts did not involve any treatment of the Plaintiffs in this case nor were there any charges or claims against Missouri Baptist or any of the other Defendants herein with respect to any alleged conduct of RMA or Coin.

three patients, Roberts, Hales and Millsap, were inappropriate in any way, true?

A. That's correct.

(L.F. 243, Deposition of Janevicius p. 91:2-7).

Q. You are not expressing an opinion, are you, as to whether any of these individual plaintiffs, Roberts, Millsap or Hales has suffered any financial damages?

[objection to form by Plaintiffs' counsel]

A. That's correct.

(L.F.235-236, Deposition of Janevicius p. 61:21-62:2).

Q. You don't have any opinion as to whether any of Roberts, Hales or Millsap sustained any financial damages as a result of any of this up-coding or misbilling, do you?

A. I do not know if they did or not.

(L.F. 243, Deposition of Janevicius p. 91:15-19).

Like Plaintiffs' expert Dr. Janevicius, Hales also admitted that he is not aware of any misbilling or miscoding of any kind by Missouri Baptist.

Q: Are you aware of any miscoding or misbilling of any kind by Missouri Baptist in connection with any services performed for you?

A: No, I'm not.

Q: You're not aware of any miscoding –

A: No, I'm not.

Q: -- or misbilling, correct?

A: No.

(L.F. 207, App. A16, Deposition. of Hales, p. 40:17-23).

2. Hales Paid Nothing for his Treatment at Missouri Baptist

Robert Hales admits that he was treated at Missouri Baptist on only one occasion, on January 25, 2001; that his treatment at Missouri Baptist was for a work-related injury; that Missouri Baptist did not bill any charges to him for his treatment there; that he did not pay anything to Missouri Baptist for his treatment; and that all of the charges incurred with respect to his treatment at Missouri Baptist were billed to Continental Western, his employer's workers' compensation insurance carrier; and that Continental Western satisfied all of the charges incurred with respect to his treatment at Missouri Baptist. (L.F. 206-207, App. A15-A16, Deposition of Hales, p. 37:25-40:5).

Moreover, as a matter of law, Hales was not responsible for and incurred no liability for the payment of any of the services provided to him by Missouri Baptist for his work-related injury, and therefore, did not and could not sustain any damages or injury in fact as a result of any alleged misbilling by Missouri Baptist.

Hales' own testimony indicates that he understands this:

Q. You're trying to recover monies to put in your own pocket, correct?

A. No. I'm not seeking any, you know, money on my behalf.

(L.F. 209, App. A18, Deposition of Hales, p. 46:21-24).

3. Hales Incurred no Liability to Missouri Baptist

Hales attempts to circumvent his lack of damages and injury in fact by arguing that he “incurred” liability for his treatment at Missouri Baptist, notwithstanding the fact that the charges for the medical services provided to him by Missouri Baptist for his work-related injury were, by law, the responsibility of his employer and the fact that the charges were satisfied by his employer’s workers’ compensation insurance carrier. Hales argues that he incurred liability because he signed a standard pre-admission form agreement prior to admission, in which he authorized treatment by Missouri Baptist, guaranteed payment to Missouri Baptist, and assigned all applicable insurance benefits to Missouri Baptist. (Plaintiffs’ Substitute Brief p. 15).

Hales’ argument that he was the one that incurred the liability for his treatment at Missouri Baptist because he signed an admission form guaranteeing payment fails as a matter of Missouri statutory law. Hales’ treatment at Missouri Baptist was for a work-related injury. Under Missouri’s Workers’ Compensation Law, Hales did not and could not have incurred any liability for Missouri Baptist’s charges for the treatment of his work-related injury, regardless of any pre-admission guaranty that Hales may have signed. Pursuant to Missouri’s Workers’ Compensation Law, **Hales’ employer, rather than Hales**, was required to provide and pay for the health care needed to cure Hales’ work-related injury.

As stated in § 287.140(1), R.S.Mo (1998)⁴:

“In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment... as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury....

Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. . . .”

(emphasis added).

Further, Missouri Baptist was prohibited by law from billing Hales for the services it provided to him in connection with his work-related injury. As stated in § 287.140.13(1), R.S.Mo.:

No hospital, physician or other health care provider, other than a hospital, physician or health care provider selected by the employee at his own expense pursuant to subsection 1 of this section, **shall bill or attempt to collect any fee or any portion of a fee for services rendered to an employee due to a work-related injury** or report to any credit reporting agency any failure of the employee to make such payment, when an injury covered by this chapter has occurred and such hospital, physician

⁴ Although the statute was revised in 2005, those revisions did not change the relevant language as it existed in 2001, at the time of Hales’ work-related injury. *See* Mo. Ann. Stat. § 287.140 (West 1998).

or health care provider has received actual notice given in writing by the employee, the employer or the employer's insurer. (emphasis added).

To further protect the employee-patient from having a health care provider trying to pursue any collection against him, the same statute provides a cause of action to the employee-patient for actual damages, additional damages, costs and attorneys' fees under such circumstances. As stated in § 287.140.13(4), R.S.Mo.:

If a hospital, physician or other health care provider or a debt collector on behalf of such hospital, physician or other health care provider **pursues any action to collect from an employee** after such notice is properly given, **the employee shall have a cause of action against the hospital, physician or other health care provider for actual damages sustained plus up to one thousand dollars in additional damages, costs and reasonable attorney's fees.** (emphasis added).

In support of his argument that he incurred liability even though his employer was required by law to pay for his medical expenses and those expenses were satisfied by his employer's workers' compensation insurance carrier, Hales cites the cases of Berra v. Danter, 299 S.W. 3d 690 (Mo. Ct. App. 2009); Litton v. Kornbrust, 85 S.W.3d 110 (Mo. Ct. App. 2002); Next Day Motor Freight, Inc. v. Hirst, 950 S.W. 2d 676 (Mo. Ct. App. 1997); Burwick v. Wood, 959 S.W.2d 951 (Mo. Ct. App. 1998); Brown v. Van Noy, 879 S.W.2d 667 (Mo. Ct. App. 1994); and Wheeler ex rel. Wheeler v. Phenix, 335 S.W.3d 504 (Mo. Ct. App. 2011). (Plaintiffs' Substitute Brief 16-17). None of these cases

supports Hales' position. In fact, only one of these cases even involved medical expenses, and none of them involved a job-related injury governed by Missouri's workers' compensation laws.

Equally unavailing is Hales' citation to the case of Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504 (Mo. Banc 2012) and Section 287.140.13(3) of the Workers' Compensation Act for the proposition that if it is subsequently determined that the injury for which he was treated did not arise out of and occur within the scope of his employment, then Hales could be billed by Missouri Baptist. (Plaintiffs' Substitute Brief p. 29). The uncontroverted facts in this case established that Hales was treated for a work-related injury at Missouri Baptist on January 25, 2001. (L.F. 293, App. A11), Hales' Answers to Missouri Baptist's Second Set of Interrogatories, No. 2; L.F. 337-339, App. A15-A16, Deposition of Hales, p. 37:25-38:19, p. 39:4-6). As set forth by Plaintiffs themselves in their Statement of Facts: "Hales suffered a work-related injury when a power saw cut through his index and middle fingers on his left hand" for which he was treated five times at St. John's and one time at Missouri Baptist. (Plaintiffs' Substitute Brief p. 3). There is no doubt that Hales' treatment at Missouri Baptist was solely for a work-related injury.

Accordingly, notwithstanding Hales' signing of a pre-admission agreement, under the aforesaid statutory law of Missouri, Hales did not incur, and could not have incurred, any liability to Missouri Baptist for the services it provided to him for his work-related injury. It was Hales' employer, not Hales, who incurred the liability for the charges of Missouri Baptist. This explains why Missouri Baptist made no demand for payment

upon Hales and sent him no bill. Rather, pursuant to Missouri statute, payment for the services provided to Hales by Missouri Baptist was satisfied by his employers' workers' compensation insurance carrier and Hales paid nothing in connection therewith. Because Hales was not financially liable, and as a matter of law could not be financially liable, for his health care at Missouri Baptist, he was not damaged by any alleged overbilling.

The arguments of any of the other Plaintiffs concerning any claims not governed by the workers' compensation laws have no relevance or bearing on Hales' claim against Missouri Baptist.

4. The Collateral Source Doctrine Is not Applicable Here

Hales tries to avoid his lack of damages and injury in fact by invoking the collateral source doctrine, arguing that his employers' workers' compensation insurance carrier's payment of Missouri Baptist's charges for his treatment for his work-related injury was payment from a collateral source that cannot be considered with respect to whether Hales sustained any damages as a result of the alleged overbilling. However, well-settled Missouri law makes it clear that the collateral source doctrine has absolutely no applicability here, and cannot be used in the manner advanced by Hales in an effort to create damages where none exist.

The collateral source doctrine is a rule of evidence that limits when a defendant can introduce evidence at trial that a plaintiff's damages have already been paid by another source such as insurance. See Washington by Washington v. Barnes Hospital, 897 S.W.2d 611, 619 (Mo. banc 1995); Overton v. United States, 619 F.2d 1299 (8th Cir.

1980); Iseminger v. Holden, 544 S.W.2d 550 (Mo. 1976) (en banc); Kickham v. Carter, 335 S.W.2d 83 (Mo. 1960). *See also*, Hagar v. Wright Tire & Appliance Inc., 33 S.W.3d 605, 610 (Mo. App. W.D. 2000).⁵ In those instances when the collateral source doctrine is applicable, it allows recovery against a wrongdoer for the full amount of damages the wrongdoer has caused the injured party to sustain, even though the injured party is also compensated from a different source (typically an insurance company) that is “wholly independent” of the wrongdoer. Overton, *supra* at 1306. The collateral source doctrine does not, however, create damages where none exist.

Missouri Courts have articulated two rationales for applying the collateral source rule. *See Overton*, *supra* at 1306. First, the wrongdoer does not deserve to benefit from the fortuity that a plaintiff injured by the wrongdoer has received or will receive compensation from a source wholly independent of the wrongdoer. *Id.* at 1306. Second, a plaintiff injured by a wrongdoer may be allowed a double recovery where the collateral source was contracted for by the plaintiff himself out of proceeds that would otherwise have been available to him for other purposes. *Id.* at 1305. Neither rationale is present here.

⁵ Hales suggests the collateral source doctrine is also a part of the substantive law of damages. (Plaintiffs’ Substitute Brief, p. 20, fn. 7). For purposes of this matter, however, it is a distinction without a difference, as the doctrine simply does not apply in either case.

Hales did not contract or pay for any insurance which paid the cost of his treatment at Missouri Baptist. Hemsath Concrete, as Hales' employer, was required by statute to pay the cost of treatment for any work-related injury suffered by Hales or any other employee. Thus, it was Hales' employer, Hemsath Concrete, that contracted and paid for its workers' compensation insurance to cover its own statutorily mandated responsibility to pay for such treatment of work-related injuries sustained by its employees. Indeed, it would have been a direct violation of the Workers' Compensation Law for Hales to have been charged for such insurance. Section 287.290, R.S.Mo. provides "No part of the cost of such insurance shall be assessed against, collected from or paid by any employee."

Furthermore, assuming arguendo that Hales even had been the party that contracted and paid for his employer's workers' compensation insurance (which is not the case), the purpose of his employer's workers' compensation insurance policy was to insure against the cost of Hales' medical treatment, not to insure against potential overbilling. Hales' claim here, however, is not for the cost of his medical treatment for his work-related injury. Rather Hales' claim is for the amount of the alleged overcharge in connection with his medical treatment. No one, however, other than the person who paid any such alleged overbilling, would have the right to assert a claim for it.

Missouri Baptist is not, as suggested by Plaintiffs, a tortfeasor attempting to have any damages that an injured party has sustained reduced by proving that the injured party has benefitted by collateral payments on behalf of the injured person in violation of the collateral source rule. On the contrary, what Missouri Baptist has demonstrated is that if

indeed there was any overbilling by it (innocent or otherwise) for the services it provided to Hales (which Missouri Baptist denies), Hales was not the injured party. As discussed above, under Missouri's statutes Hales was not responsible or liable for any of the charges by Missouri Baptist for his care and could not even be a party to a billing dispute. His employer, by law, was the responsible party.

The uncontroverted facts show that the only one who would be the injured party with the direct claim for the alleged overbilling would be the person that paid the alleged overbilling. In this case that is Hale's employers' workers' compensation insurance carrier, Continental Western.

Significantly, Hales is not bringing this suit on behalf of Continental Western. Hales clearly acknowledged this in his testimony:

Q: You're not bringing your case on behalf of the insurance company?

A: No.

Q: Is that correct?

A: Correct.

Q: You're not trying to recover on behalf of the insurance company, are you?

A: No.

Q: Is that correct?

A: That's correct.

(L. F. 209, App. 18, Deposition of Hales, p. 46:11-22).

Likewise, the purported class Plaintiffs sought to represent in this case was limited to “**natural persons**” and **specifically excluded insurers**. (L.F. 48, Petition ¶103).

Plaintiffs’ collateral source argument would, if accepted, expose Missouri Baptist to double liability, assuming there were overcharges. Under Plaintiffs’ theory, Missouri Baptist could be sued by Hales and then subsequently sued by Continental Western. That’s absurd. Even when otherwise applicable, the collateral source doctrine never requires a wrongdoer to pay for the same loss more than once.

Not one of the cases relied upon by Plaintiffs supports the applicability of the collateral source doctrine here. In every single case cited by Plaintiffs where the collateral source doctrine was held to be applicable (and regardless of whether it entailed workers’ compensation benefits), **there was a plaintiff who, unlike Hales, had actually sustained physical or economic injuries as a result of the alleged conduct of the wrongdoer.**⁶

⁶ Missouri Baptist has examined every case cited by the Plaintiffs. There is not one that does not involve a plaintiff who actually sustained physical or economic injury. See, e.g., Iseminger v. Holden, 544 S.W.2d 550 (Mo. 1976) (Plaintiffs, husband and wife, suffered personal injuries when Defendant negligently caused her motor vehicle to strike the automobile in which Plaintiffs were riding); Kickham v. Carter, 335 S.W.2d 83 (Mo. 1960) (Plaintiff sustained a ruptured disc as a result of an automobile collision with Defendant in an intersection); Taylor v. Associated Electric Cooperative, Inc., 818 S.W.2d 669 (Mo. App. W.D. 1991) (Plaintiff sustained injuries to his legs when a

Plaintiffs have failed to sell their collateral source red-herring to any of the previous three courts that have considered the issue. As the Circuit Court stated in its Judgment: “The collateral source rule operates only when a plaintiff has suffered an

wooden walkway over steel pipes collapsed causing Plaintiff to fall and injure himself on the pipes when he was performing maintenance for Defendant); Washington by Washington v. Barnes Hospital, 897 S.W.2d 611 (Mo. 1995); (Plaintiff sustained permanent brain damage as a result of Defendants’ negligence in failing to timely diagnose Plaintiff’s mother’s placental abruption and failure to timely perform cesarean section); Womack v. Crescent Metal Products, Inc., 539 S.W.2d 481 (Mo. App. 1976) (Plaintiff’s right heel was injured and the Achilles’ tendon severed when a serving cart, manufactured by Defendant, with a sharp metal edge near the bottom was pushed against Plaintiff); Jim Toyne, Inc. v. Adams, 916 S.W.2d 381 (Mo. App. W.D. 1996) (Plaintiff incurred legal fees due to Defendants’ engaging in malicious prosecution of a lawsuit against Plaintiff); Douthet v. State Farm Mutual Automobile Insurance Co., 546 S.W.2d 156 (Mo. 1977) (Plaintiff’s uninsured motorist carrier failed to pay Plaintiff for personal injuries sustained by Plaintiff during an accident with an uninsured motorist); Protection Sprinkler Co. v. Lou Charno Studio, Inc., 888 S.W.2d 422 (Mo. App. W.D. 1994) (Plaintiff claimed contractual injuries and sought indemnification of attorneys’ fees and expenses it incurred in defending third party action filed against it when Defendant breached its agreement to release Plaintiff from any further liability in connection with a fire at Defendant’s place of business);

injury in fact, and then only to preclude the tortfeasor from reaping a benefit from the plaintiff's own actions to mitigate or protect against his losses. Here, there has been no injury to the plaintiffs. The collateral source rule is completely irrelevant." (L.F. 1264, App. p. A5, Judgment, p. 5).

When this case was before the United States District Court before its remand to the Circuit Court, Judge Hamilton likewise rejected Plaintiffs' argument that the collateral source doctrine can confer standing on any of Plaintiffs, stating in her Memorandum and Order: "Contrary to Plaintiffs' assertion, the Court finds no authority for the proposition that the [collateral source doctrine] may operate to confer standing on parties who have suffered no injury in fact." (S.L.F. 428).

And as the Court of Appeals states in its Memorandum at p. 8 (App. A40):

Finally, the collateral source rule is also inapplicable because Plaintiffs have not received a payment from a collateral source in mitigation of damages. The collateral source rule is a rule of evidence that 'prevents an alleged tortfeasor from attempting to introduce evidence at trial that the plaintiff's damages will be covered, in whole or in part, by the plaintiff's insurance.' Smith v. Shaw, 159 S.W.3d 830, 832 (Mo. Banc 2005). The rule expresses the policy that a 'wrongdoer should not benefit from the expenditures made by the injured party in procuring the insurance coverage.' Id. **Here, Plaintiffs had their various medical expenses paid for by third parties pursuant to insurance contracts. If those third parties were victims of a fraud perpetrated against them, the**

injury or harm does not transfer to Plaintiffs; it remains with the injured third parties. (emphasis added).

Quite simply, for all of the reasons discussed above, the collateral source rule has no applicability in this case, and is simply being asserted by the Plaintiffs in an effort to create an injury where none exists.

5. No Inadmissible Evidence Was Considered in the Granting of Summary Judgment

Plaintiffs argue that the Circuit Court relied on inadmissible collateral source payments in concluding that the Plaintiffs sustained no damages. (Plaintiffs' Substitute Brief pp. 27-28). Plaintiffs would have this Court hold that the collateral source doctrine precluded, as an evidentiary matter, the Circuit Court, as well as the Court of Appeals, from considering that Hales' employer's workers' compensation insurance carrier paid Missouri Baptist for the charges incurred relating to its treatment of Hales' work related injury at that hospital. Plaintiffs assert that such rule makes that evidence inadmissible and, therefore, could not be relied upon by the courts in adjudicating the summary judgment motions. (Plaintiffs' Substitute Brief pp. 27-28). Plaintiffs' argument fails.

As shown above, the payment by Hales' employer's workers' compensation carrier Western Continental was not a collateral source payment that redounds to the benefit of Hales. Hales, by virtue of the law, never had, and could not have, any responsibility for the amounts charged by Missouri Baptist for his treatment arising from his work related injury. As a matter of law, it was solely the obligation of his employer. The payment by Western Continental was not a payment reducing the liability of Hales.

He had no liability for the treatment in question. Consequently, the payment by Western Continental was not precluded from evidence by the collateral source doctrine.

With respect to the requirements of Rule 74.04, Hales does not and cannot dispute that such payment was made by Western Continental. That fact was established. It is not in dispute. It was admissible evidence established by affidavit that was properly considered by the Circuit Court and the Court of Appeals in determining whether the collateral source doctrine was applicable and whether Hales sustained any injury in fact. Consequently, the requirements of 74.04 governing summary judgment have been met and the courts below properly considered such evidence.

6. Hales Has No Ascertainable Loss under the Missouri Merchandising Practices Act

As found by the Circuit Court and Court of Appeals, Hales can prove no ascertainable loss under the Missouri Merchandising Practices Act. Hales' reliance on Plubell v. Merck & Co., Inc., 289 S.W.3d 707 (Mo. Ct. App. 2009), is misplaced. Unlike Hales, the plaintiffs in Plubell stated an objectively ascertainable loss under the benefit-of-the-bargain rule of damages because they were alleging that the drug Vioxx that had been purchased had undisclosed risks attached to it and was, therefore, worth less than what Merck had allegedly represented.

Hales' reliance on Carr-Davis v. Bristol-Meyers Squibb Co., No. 07-1098, 209 WL 5206122 (D.N.J. Dec. 30, 2009), and Breeden v. Hueser, 273 S.W.3d 1 (Mo.App. W.D. 2008) is equally misplaced. The Plaintiff in Carr-Davis asserted Bristol-Meyers had fraudulently marketed the drug Plavix in violation of the Missouri Merchandising Practices Act when it knew or should have known that the drug had a propensity to cause

serious and potentially life threatening side effects. The United States District Court in New Jersey considered Plubell and the requirements of the Missouri Merchandising Practices Act. The Court explained that even though Bristol-Meyers' misrepresentations did not have to be the cause of Plaintiff's Decedent taking the drug Plavix, in order to successfully present a claim under the Act the Plaintiff must plead that the Decedent purchased the drug and that he suffered an ascertainable loss as a result of misrepresentation. The Plaintiffs in Breeden (completely unlike Hales here) had paid for diluted vials of drugs in connection with a doctor's treatment of them and suffered an ascertainable economic loss as a result.

Freeman Health System v. Wass, 124 S.W.3d 504 (Mo.App. S.D. 2004), is a case remarkably similar to the instant one, and, as found by the Circuit Court and Court of Appeals, amply illustrates why none of the Plaintiffs have any ascertainable loss under the Missouri Merchandising Practices Act. In Freeman, the plaintiff health system sued the uninsured Wass for an unpaid bill. Wass counterclaimed under the Merchandising Practices Act and petitioned for class certification. He alleged he and other similarly situated uninsured patients were unfairly charged "a higher amount than the usual and customary charges for such goods and services...after falsely representing that the stated prices were the usual and customary values for such goods and services." Id. at 505.

Like the Plaintiffs here, Wass "did not remit any payment" for any of the services for which he claimed he was overcharged. Id. at 505. The trial court, therefore, dismissed the counterclaim and the petition for class action status. The Court of Appeals affirmed. The Court of Appeals ruled that the plaintiff must show that he "suffered an

ascertainable loss of money...[as] a prerequisite to recovery” under the Merchandising Practices Act. Id. at 507. Since the plaintiff had paid none of the alleged overcharges, he had not suffered “an ascertainable loss of money,” and his claim under the Merchandising Practices Act could not be sustained. Id. at 507. The Act gives a private cause of action ““only to one who purchases and suffers damage.”” Id. at 507 (quoting Jackson v. Charlie’s Chevrolet, Inc., 664 S.W.2d 675, 677 (Mo.App 1984)). The Appeals Court also rejected arguments that Wass might have to pay charges in the future or that he was entitled to any injunctive, or other, relief in the event of future overcharging. Id. at 508-509.

Plaintiffs’ reliance on Hoover v. Mercy Health, 2012 WL 2549485 (2012) (Plaintiffs’ Substitute Brief, p. 33) is misplaced. Hoover just further shows that Hales has no ascertainable loss. In Hoover, the Court of Appeals, in dismissing the plaintiff’s case, held that the plaintiff, who (unlike Hales) actually paid part of the bill for his medical services, could not prove that the amount he paid was more than the reasonable cost of the medical treatment he received, and thus, could not allege an ascertainable loss.

While Hales tries to argue that he paid for the medical services provided to him (Plaintiffs’ Substitute Brief p. 33), the uncontroverted facts show otherwise. As demonstrated above, Hales’ employer was required by law to pay for Hales’ medical services in connection with his work related injury and his employer satisfied that obligation. Missouri Baptist was not paid as a result of any assignment by Hales of any insurance benefits payable to Hales as claimed by Plaintiffs. (Plaintiffs’ Substitute Brief p. 33). Rather, payment for the services provided Hales by Missouri Baptist was made by

Hales' employer's workers' compensation insurance carrier to satisfy the employer's legal obligations.

As all of Hales' claims against Missouri Baptist are founded upon an alleged overbilling, not of Hales, but of Hales' employer's workers' compensation carrier, Continental Western - a billing which Hales did not pay any part of and for which Hales had no responsibility or liability to pay under the statutory law of Missouri - Hales cannot, as a matter of law, show any ascertainable loss under the Missouri Merchandising Practices Act or under any other theory.

7. Hales Has no Standing, Is not the Real Party in Interest, and Has no Claim to Assign or to which Anyone Is Subrogated

A plaintiff in the Circuit Court must establish standing to prosecute the action. Missouri Const. art. V § 14(a) gives the Circuit Courts jurisdiction over "all cases and matters," which requires that the plaintiff have standing, *i.e.*, "a personal stake arising from a threatened or actual injury." State ex rel. Williams v. Mauer, 722 S.W.2d 296, 298 (Mo. 1986) (en banc). In Missouri State Medical Association v. State, 256 S.W.3d 85, 87 (Mo. 2008), the Missouri Supreme Court addressed a plaintiff's standing to challenge a state statute. The Court held that it "has consistently required that plaintiffs have some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome."

The Plaintiffs' lack of any damages or injury in fact, as demonstrated by the uncontroverted facts discussed above, not only subjects Plaintiffs' claims against Missouri Baptist to summary judgment because damages and injury in fact are an

essential element of every one of their claims, but it also reveals Plaintiffs' lack of standing to pursue such claims.

Plaintiffs argue in their Substitute Brief (pp. 13-14) that Hales retains the legal title to the claim for the alleged overbilling, and that unless and until he assigns that claim to a health insurer, he is the real party in interest. However, Hales never had legal title to any claim. The obligation, by law, to pay for his treatment was that of his employer. Indeed § 287.140.4 of the Workers Compensation Law provides that “[t]he employee shall not be a party to a dispute over medical charges.” As Hales suffered no damages or injury in fact as a result of the alleged overbilling of which he complains, he simply has no claims for any alleged overbilling to assign to any health insurer or anyone else.

Plaintiffs' argument in their Substitute Brief that Hales' employer's insurance carrier has only equitable rights through subrogation, and that a claim has to be asserted in Hales' name is equally without substance because Hales has no claim to which any insurer can be subrogated.⁷

⁷ Plaintiffs' claim that they “are the ones who have the right, subject to subrogation, to pursue against the [Defendants] the legal claims resulting from [Defendants'] overcharges” (Plaintiffs' Substitute Brief p. 32) directly conflicts with the relief they seek in this case. As addressed earlier, Plaintiffs are not attempting to recover any monies on behalf of any insurance company payors and have explicitly excluded any such payors from the class of persons they seek to represent.

“The right of subrogation accrues to a person who has paid the debt or obligation for which another is primarily responsible.” Am. Nursing Res., Inc. v. Forrest T. Jones & Co., Inc., 812 S.W.2d 790, 794 (Mo. Ct. App. 1991). When Hales’ employer’s workers’ compensation insurance carrier paid the charges for the medical care that Hales received at Missouri Baptist, it did so on behalf of Hales’ employer – not Hales.

The doctrine of subrogation simply does not pertain here as recognized by both the Circuit Court and the Court of Appeals. As Judge Dierker aptly stated, “The purpose of subrogation is to prevent unjust enrichment, not to perpetrate it....Subrogation, like the collateral source rule, is irrelevant.” (L.F. 1264, App. A5, Judgment p. 5).⁸

To support Plaintiffs’ position would mean that if a payor insurer is incorrectly overbilled for any services provided to a patient and pays the bill, the provider could not remit a credit directly to the payor insurer, but would have to make remittance of the overcharge to the patient, even if the patient does not seek to recover the remittance on behalf of the payor insurer, but rather for himself. Neither the law nor logic supports this position.

⁸ The subrogation cases upon which Plaintiffs rely are all inapposite because, in each of those cases, the plaintiff sustained the injury for which compensation was being sought against the person responsible for the injury. Ruediger v. Kallmeyer Bros. Service, 501 S.W.2d 56 (Mo. Banc 1973); Kinney v. Schneider Nat. Carriers, Inc., 200 S.W.3d 607, 613-14 (Mo. Ct. App. 2006); Keisker v. Farmer, 90 S.W.3d 71 (Mo banc 2002). Here, Hales did not sustain any injury for any alleged overbilling.

For all of the reasons discussed above, if there were any overcharges by Missouri Baptist for services provided in connection with Hales' work-related injury (which such alleged overcharges Missouri Baptist denies), it would be the payor insurer of those charges (Hales' employer's workers compensation insurance carrier, Continental Western) that would hold legal title to the claim and who would be the real party in interest. Hales has no claim arising out of a harm he has not suffered.

CONCLUSION

Missouri Baptist submits that this case presents no novel questions of law and that the decisions of the Circuit Court and the Court of Appeals herein are not contrary to any previous decision of an appellate court of this state. The uncontroverted facts in this case clearly demonstrate that none of the Plaintiffs herein has suffered any damages or injury in fact as a result of any alleged conduct of Missouri Baptist nor has any standing to pursue the claims they have asserted against Missouri Baptist. Further, as no class was certified in this case and could not have been certified due to the Plaintiffs' lack of damages or injury in fact, the Judgment appealed from does not decide any potential claims of any persons other than the Plaintiffs herein.

Missouri Baptist respectfully submits that it is entitled to judgment on Plaintiffs' Petition as a matter of law, and that the Circuit Court's Judgment dismissing the Plaintiffs' Petition with prejudice should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned certifies that the foregoing Substitute Brief of Respondent Missouri Baptist Medical Center complies with Rule 84.06(b), was prepared using Microsoft Word, and contains 9551 words, excluding the cover page, signature block and Certificate of Service and Compliance. The Substitute Brief was electronically filed with the Clerk of the Court this 26th day of September, 2012, using the Missouri e-filing system, which sent notification of such filing to the following:

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