

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC 92700

Alice Roberts, et al.,

Appellants,

vs.

BJC Health Systems d/b/a BJC Healthcare, et al.,

Respondents.

**SUBSTITUTE BRIEF OF RESPONDENT
SISTERS OF MERCY HEALTH SYSTEM**

SNR DENTON US LLP
Stephen J. O'Brien, #43977
One Metropolitan Square, Suite 3000
St. Louis, MO 63102
314.241.1800
314.259.5959 (fax)

*Attorneys for Respondent, Sisters of Mercy
Health System*

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This case involves claims of overcharged medical procedures, yet appellants present no evidence of anyone paying overcharges. Respondents have consistently contended that if overcharges were paid, it was by health plans, and that appellants suffered no injuries. To avoid federal court, appellants countered that health plans were not involved. Now faced with federal and state rulings that they suffered no injuries, they claim health plans are certainly involved. Their duplicitous arguments should not be tolerated.

STATEMENT OF FACTS

Appellants sue respondents in a purported class action involving numerous claims, all stemming from alleged overcharges in connection with medical treatment provided to appellants.¹ As appellants' petition was originally presented, respondents contended that health plans and insurance companies must be in the background as the potential payers of any alleged overcharge claims. So respondents removed the case to federal court under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461,

¹ Appellants and the courts collectively describe overcharges by "defendants," but there is no evidence that the hospital defendants overcharged anyone. Plaintiffs' expert did not review hospital bills. *See* Respondents' Supplemental Legal File ("RSLF") at 557-58. Likewise, he was unaware of Sisters of Mercy Health System ("Sisters of Mercy") submitting any bills to anyone. *Id.* at 555. Nevertheless, for present purposes, the distinction between the roles of the various defendants is not relevant. Regardless of any assumptions made about any defendants' conduct, there simply is no evidence of injury or damages.

which regulates “employee welfare benefit plans” that include benefits covering “sickness, accident, disability, death, or unemployment.” 29 U.S.C. § 1002(1).²

Respondents also asserted lack of standing because appellants (as opposed to their health plans) suffered no injuries.³

Rather than face federal ERISA defenses, appellants voluntarily dismissed their original petition and immediately re-filed in state court, this time specifically alleging that the plaintiffs (and potential class members) were “natural persons” only, and that insurance companies and health plans were not involved.⁴ Not trusting these bald statements, respondents again removed under ERISA.⁵ Appellants again sought remand, explicitly contending that health insurers were not involved, even as collateral sources.⁶

Without addressing the remand or the ERISA defenses, the federal court dismissed the claims for lack of injury and lack of standing.⁷ Because Sisters of Mercy’s standing motion was jurisdictional, brought under Fed. R. Civ. P. 12(b)(1) rather than Rule

² See *Roberts v. BJC Health Sys.*, 452 F.3d 737, 738 (8th Cir. 2006).

³ *Id.*

⁴ RSLF at 111-12 and Legal File (“LF”) at 23 and 48 (compared to RSLF 31); *see also* RSLF at 502 n.13.

⁵ See RSLF at 277.

⁶ *Id.* at 189 (“Plaintiffs’ claims do not seek to recover benefits under the terms of an ERISA plan...”).

⁷ LF 582-92 and *Roberts*, 452 F.3d at 738.

12(b)(6), the motion was not limited to the pleadings.⁸ Respondents submitted evidence and affidavits to establish lack of injury.⁹ Appellants then wholly failed to present any evidence of damages to the federal district court, and thus the court granted respondents' motions to dismiss.¹⁰ Given federal procedures, because the court dismissed the case on a jurisdictional issue, it was required to remand the case to state court as opposed to dismissing it outright.¹¹

⁸ *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635, 638 n.4 (8th Cir. 2003).

⁹ LF 587-90.

¹⁰ *Id.* at 590 (“Plaintiffs offer absolutely no support for their contention that they paid the alleged overcharges...”).

¹¹ 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded”). Sisters of Mercy has consistently maintained, in line with the federal court rulings, that the lack of injury is jurisdictional. As such, it presented a motion to dismiss under Mo. S. Ct. R. 55.27(a)(1). Because Sisters of Mercy presented a jurisdictional motion, rather than a motion to dismiss based on the pleadings, it was not limited to allegations in the pleadings. *See, e.g., Borges v. Missouri Pub. Entity Risk Mgmt. Fund (MOPERM)*, 358 S.W.3d 177, 183 (Mo. Ct. App. 2012) (implicitly recognizing standing arguments based on motions in which matters outside the pleadings are considered). Thus its motion is very much akin to a motion for summary judgment, the format followed by all other respondents. The practical distinction is in the final result—dismissal or entry of judgment.

On remand, and on an undisputed factual record, the state court came to the same conclusion as the federal district court—that appellants suffered no injuries, and certainly presented no evidence of damages.¹² The court of appeals agreed.

ARGUMENT

1. Appellants Are Not, And Have Not Been, Injured

The simple point is that, after eight years of litigation, appellants still argue that overcharges were billed to someone, but they have never presented any evidence that either an appellant or anyone else paid, or was liable for paying, an overcharge. The evidentiary record contains deposition testimony of plaintiffs and an expert,

Dr. Janevicius, as well as certain invoices or patient statements, but at no point have plaintiffs ever made the slightest attempt to present any explanation of what their damages really are, and thus that they are anything more than \$0. Plaintiffs themselves testified that they have not lost any money as a result of the claims alleged.¹³

Dr. Janevicius testified that he had no opinion about whether the appellants had suffered damages as a result of alleged overbilling.¹⁴ The “bills” submitted to the court, attached in appellants’ Substitute Appendix at A13-16, show total billings of \$0, with payments and adjustments made by worker’s compensation carriers. No overcharges have been identified on these documents, and there is no indication if overcharges were indeed paid,

¹² LF at 1262 (“... plaintiffs have presented no evidence showing that they have been harmed in reality.”)

¹³ *Id.* at 400, 405-406, and 414.

¹⁴ *Id.* at 231, 235-36 and 243.

or for instance, were part of some adjustment that was never paid. Thus, at a minimum, appellants failed to meet their evidentiary burdens under Mo. S. Ct. R. 74.04(c)(2).

Putting aside their evidentiary failings, appellants are caught in an endless Escher loop of their own making. If, as appellants now contend, health plans and insurance companies really are involved, then this case truly was subject to ERISA preemption defenses and belonged in federal court, where it was dismissed for lack of standing (remanded only because federal procedure required it). Appellants have never disagreed with, challenged, complained about, or sought to distinguish the federal court's decision in this case. In this circumstance, the state courts should simply recognize the federal decision and dismiss the lawsuit. If, on the other hand, health plans and insurance companies are not involved in the payment of the relevant claims, then even appellants must admit that the undisputed factual record establishes that they suffered no overcharges themselves and are not even potentially liable for any.¹⁵

¹⁵ As the Eighth Circuit recognized, under ERISA preemption doctrines, the case would have to proceed in federal court, and could not be litigated in state court. *Roberts*, 452 F.3d at 739. But the federal district court's jurisdictional ruling now keeps the case out of federal court too, leaving appellants with no forum. *Id.*

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 1258 words, excluding the cover, this certification and the signature block, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief, along with a copy of this brief, was sent through the Missouri eFiling System on this 26th day of September 2012 to:

S. Todd Hamby
 Sheila Greenbaum
 Capes, Sokol, Goodman & Sarachan, P.C.
 7701 Forsyth, 4th Floor
 St. Louis, MO 63105
Attorney for Appellants

Charles M. Kramer
 Reizman Berger, P.C.
 7700 Bonhomme, 7th Floor
 St. Louis, MO 63105
Attorney for Appellants

Michael A. Fisher
 The Stolar Partnership LLP
 911 Washington Ave, 7th Floor
 St. Louis, MO 63101
*Attorney for Respondent
 Missouri Baptist Medical Center*

Allen D. Allred
 Thompson Coburn LLP
 One US Bank Plaza
 St. Louis, MO 63101
*Attorney for Respondent
 St. John's Mercy Health System d/b/a St.
 John's Mercy Medical Centers*

Andrew Rothschild
 Lewis, Rice & Fingersh, L.C.
 500 N. Broadway Suite 2000
 St. Louis, MO 63102
*Attorney for Respondent
 Reconstructive & Microsurgery
 Associates, Inc.*

Paul N. Venker
 Williams Venker & Sanders LLC
 Bank of America Tower
 100 North Broadway, 21st Floor
 St. Louis, Missouri 63102
*Attorney for Respondent
 BJC Health Systems*

SNR Denton US LLP

By /s/ Stephen J. O'Brien
 Stephen J. O'Brien, #43977
 SNR Denton US LLP
 One Metropolitan Square, Suite 3000
 St. Louis, MO 63102
 314.241.1800
 314.259.5959 (fax)
Attorneys for Respondent, Sisters of Mercy Health System