IN THE EASTERN DISTRICT COURT OF APPEALS
STATE OF MISSOURI

RICHARD HOOVER,

Appellant,

v.

MERCY HEALTH,
d/b/a MERCY HEALTH SYSTEM,
et al.,

Respondents.

Appeal No.: ED97495

92788

Appeal from the Circuit Court of the Twenty-First Judicial Circuit
St. Louis County

Cause No. 11SL-CC02597

The Honorable James R. Hartenbach
Division 14

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

On August 17, 2011, Appellant's Amended Petition was filed in the Circuit Court of St. Louis County. In his Amended Petition, Appellant alleged that Respondents' billing practices violate the Missouri Merchandising Practices Act, and that he sustained damages as a result thereof. The Amended Petition seeks both actual and punitive damages, and class action certification. Respondents filed a motion to dismiss Appellant's Amended Petition for failure to state a claim. On September 12, 2011, the trial court granted Respondents' motion to dismiss with prejudice, and a judgment was entered on November 2, 2011. Appellant filed a timely Notice of Appeal to this Court.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, in that it does not involve a challenge to the validity of a treaty or statute of the United States; a challenge to the validity of a statute or provision of the constitution of this state; the construction of the revenue laws of this state; the title to any state office; or a criminal case where the punishment is death as set forth in article V, section 3 of the Missouri Constitution. Jurisdiction is thus vested in the Missouri Court of Appeals, Eastern District pursuant to that portion of article V, section 3 of the Missouri Constitution that states "the court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court." Further, the Circuit Court of St. Louis County is within the territorial jurisdiction of this Court. Mo. Rev. Stat. §477.050 (2010).

STATEMENT OF FACTS

I. Factual Background

The Appellant, Richard Hoover, M.D., is a physician and a former Professor and Chairman of the Pathology Department of Saint Louis University School of Medicine.

Respondent St. John's Mercy Medical Center (now known as Mercy Hospital) is a hospital located in St. Louis County, Missouri that is owned and operated by Respondents Mercy Hospitals East Communities and/or Mercy Health. These entities are registered with the State of Missouri as non-profit corporations. These entities represent to the public, and the U.S. and Missouri governments, that they are charitable institutions, which are not operated directly or indirectly for the benefit of private interests, and do not aim to make a profit. Respondents therefore enjoy tax-exempt status, and represent to the public that they are guided by the Christian principles of providing benefits to the community and serving the poor.

On or about March 10, 2009, Appellant received surgical care and treatment at Respondent St. John's Mercy Medical Center. He underwent surgical removal of a cystic mass in his jaw and received dental implants due to progressive tooth loss caused by a life-long condition known as xerostomia (drymouth). Appellant paid his surgeon in advance for the cost of the dental implants and related bone grafting, which were goods and services that Appellant knew would not be covered by his health insurer. Appellant also received pre-approval from his health insurance carrier for payment of the costs of the medical procedure relating to the removal of the cystic mass from his jaw. Appellant's health insurance carrier initially made payment in the amount of $5,201.19

for the costs associated with the cystic mass removal, but later retracted that payment because Respondent St. John's Mercy Medical Center coded the treatment under the umbrella of "dental procedures."

Although Appellant had medical insurance coverage, his medical insurance carrier refused payment because it deemed the care and treatment to constitute "dental procedures." Appellant was therefore considered by Respondents to be, and billed as, an uninsured patient.

Following the surgical procedure, Appellant received a bill for services rendered at St. John's Mercy Medical Center in the amount of $17,337.29. The bill included charges for the dental implants and supplies for which Appellant had already paid in advance to his surgeon, and the charges for certain items had been "upcoded." After receiving the bill, Appellant attempted to bring various problems with the charges in the bill to the attention of Respondents' billing representatives, but Respondents failed to address Appellant's concerns, and turned the bill over to a collection agency, thereby threatening Appellant's credit rating.

In June, 2011, Appellant made payments totaling $5,300.00 towards the bill. Importantly, the amount paid by Appellant is more than the amount that Respondents would have accepted as payment in full from Appellant's insurer for the medical goods and services relating to the cystic mass removal, had the insurer not retracted payment, and is more than the amount which Appellant contends is the reasonable value of the services rendered.

II. Procedural Background

On June 27, 2011, Appellant filed a Petition in the Circuit Court of St. Louis County against Respondent Mercy Health, alleging that the billing practices of Respondent St. John's Mercy Medical Center violated the Missouri Merchandising Practices Act (hereinafter "MMPA"), Mo. Rev. Stat. §407.010, *et seq.* LF 3. Respondent Mercy Health thereafter filed a motion to dismiss, in which it alleged, among other things, that it had been improperly named as a defendant. LF 20. Accordingly, on August 17, 2011, Appellant filed a motion for leave to file an amended petition, in which he added Respondents Mercy Hospitals East Communities and St. John's Mercy Medical Center as additional defendants. LF 57. In his Amended Petition, Appellant alleged that Respondents Mercy Health and Mercy Hospitals East Communities owned, operated and did business as St. John's Mercy Medical Center, and that at all pertinent times, the Respondents were all part of the "St. John's Mercy Health System" and acted as the agents of one another. LF 65-66. Respondents thereafter filed their Motion to Dismiss the Amended Petition, and memorandum in support thereof, in which they alleged that Appellant failed to state a claim under the MMPA, failed to state a claim for punitive damages, and failed to state a claim against Respondent Mercy Health. LF 117 and 135, respectively. On September 12, 2011, the trial court granted the Respondents' motion to dismiss, and Judgment was entered on November 2, 2011. LF 153 and 161, respectively. Neither the order granting the motion to dismiss, nor the judgment, set forth the trial court's reasons for granting the motion.

POINTS RELIED ON

I. **THE TRIAL COURT ERRED IN DISMISSING COUNT I OF APPELLANT'S AMENDED PETITION BECAUSE APPELLANT SUFFICIENTLY ALLEGED A CLAIM AGAINST RESPONDENTS UNDER THE MISSOURI MERCHANDISING PRACTICES ACT, IN THAT APPELLANT ADEQUATELY ALLEGED THAT HE SUSTAINED AN ASCERTAINABLE LOSS OF MONEY AS A RESULT OF UNFAIR AND DECEPTIVE BILLING PRACTICES BY RESPONDENTS, AS RESPONDENTS CHARGED APPELLANT MORE THAN THE REASONABLE VALUE OF THE GOODS AND SERVICES RENDERED TO HIM.**

Allen v. Clarian Health Partners, Inc., 2011 WL 4829148 (Ind. App. Ct. October 12, 2011)

Heartland Health Systems, Inc. v. Chamberlin, 871 S.W.2d 8 (Mo. App. W.D. 1994)

Miller v. Horn, 254 S.W.3d 920 (Mo. App. W.D. 2008)

Quinn v. BJC Health System, Cause No. 22052-0821A, 2007 WL 7308622 (Mo. Cir. Ct. March 2, 2007)

Mo. Rev. Stat. §407.020 (2010)

Mo. Rev. Stat. §407.025 (2010)

17A Am. Jur. 2d Contracts §488

Restatement (Second) of Contracts §204

II. **THE TRIAL COURT ERRED IN DISMISSING COUNT II OF APPELLANT'S AMENDED PETITION BECAUSE APPELLANT SUFFICIENTLY ALLEGES A CLAIM FOR ACTUAL DAMAGES UNDER THE MISSOURI MERCHANDISING PRACTICES ACT IN COUNT I OF HIS AMENDED PETITION, AND HE COULD THEREFORE ASSERT A CLAIM FOR PUNITIVE DAMAGES ARISING OUT OF THE SAME CONDUCT, PURSUANT TO THE EXPRESS PROVISIONS OF THE MISSOURI MERCHANDISING PRACTICES ACT.**

Mo. Rev. Stat. §407.025 (2010)

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIMS AGAINST RESPONDENT MERCY HEALTH ON THE BASIS THAT IT WAS NOT A PROPER DEFENDANT BECAUSE APPELLANT SUFFICIENTLY ALLEGED A THEORY OF LIABILITY AGAINST RESPONDENT MERCY HEALTH ON THE BASIS OF RESPONDENT MERCY HEALTH'S OWN CONDUCT, SEPARATE AND APART FROM ANY RESPONDEAT SUPERIOR THEORY OF LIABILITY ARISING OUT OF AN AGENCY RELATIONSHIP WITH ANY OTHER RESPONDENT; THE TRIAL COURT FURTHER ABUSED ITS DISCRETION BY FAILING TO ALLOW APPELLANT TO FURTHER AMEND HIS PETITION TO ALLEGE THAT THE CHARGES AND BILLING PRACTICES OF RESPONDENT ST. JOHN'S MERCY MEDICAL CENTER ARE ESTABLISHED AND SET BY RESPONDENT MERCY HEALTH, AND REQUIRED BY RESPONDENT MERCY HEALTH TO BE UTILIZED AT ALL HOSPITALS WITHIN THE MERCY HEALTH SYSTEM.

Hoover v. Brundage-Bone Concrete Pumping, Inc., 193 S.W.3d 867 (Mo. App. S.D. 2006)

Ritter v. BJC Barnes Jewish Christian Health Systems, 987 S.W.2d 377 (Mo. App. E.D. 1999)

Sloan-Odum v. Wilkerson, 176 S.W.3d 723 (Mo. App. E.D. 2002)

Mo. R. Civ. P. 55.05

Mo. R. Civ. P. 55.33

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING COUNT I OF APPELLANT'S AMENDED PETITION BECAUSE APPELLANT SUFFICIENTLY ALLEGED A CLAIM AGAINST RESPONDENTS UNDER THE MISSOURI MERCHANDISING PRACTICES ACT, IN THAT APPELLANT ADEQUATELY ALLEGED THAT HE SUSTAINED AN ASCERTAINABLE LOSS OF MONEY AS A RESULT OF UNFAIR AND DECEPTIVE BILLING PRACTICES BY RESPONDENTS, AS RESPONDENTS CHARGED APPELLANT MORE THAN THE REASONABLE VALUE OF THE GOODS AND SERVICES RENDERED TO HIM.

A. Standard of Review.

An appellate court's review of a granting of a motion to dismiss is *de novo. Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 127 (Mo. App. E.D. 2009). If a trial court does not set out in its order the reasons for granting the motion to dismiss, an appellate court will presume that it did so for the reasons advanced in the motion to dismiss. *Chochorowski v. Home Depot U.S.A, Inc.*, 295 S.W.3d 194, 197 (Mo. App. E.D. 2009).

An appellate court is required to construe the petition favorably to the plaintiff and give him the benefit of every reasonable and fair intendment in view of the facts alleged, and if the plaintiff's "allegations invoke principles of substantive law which may entitle him to relief, the petition is not to be dismissed, and if the facts pleaded and the reasonable inferences to be drawn therefrom looked at most favorably from the plaintiff's standpoint show any ground for relief, the plaintiff has the right to proceed." *State ex rel. Sisters of Mary v. Campbell*, 511 S.W.2d 141, 145 (Mo. App. Ct. 1974)(overruled on

other grounds)(citing *Ingalls v. Neufeld*, 487 S.W.2d 52, 54 (Mo. App. Ct. 1972) and *Young v. Lucas Construction Co.*, 454 S.W.2d 638, 641 (Mo. App. Ct. 1970)).

"A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition." *Raster,* 280 S.W.3d at 128. An appellate court is not permitted to address the merits of the case or consider evidence outside the pleadings. *Id.* An appellate court does not attempt to weigh whether or not the alleged facts are credible or persuasive." *Id.* It merely reviews the petition to determine if the alleged facts meet the elements of a recognized cause of action. *Id.* If the petition asserts any set of facts that would, if proven, entitle the plaintiff to relief, the petition states a claim. *Id.*

B. The Missouri Merchandising Practices Act.

Pursuant to the MMPA:

> "The Act, use or employment . . . of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . is ...an unlawful practice."

Mo. Rev. Stat. §407.020.1.

The Act further provides that any person who purchases or leases merchandise primarily for personal, family or household purposes, and thereby suffers an ascertainable loss of money or property as a result of the use or employment by another person of a method, act or practice declared unlawful by §407.020, may bring a private civil action to recover actual and punitive damages. Mo. Rev. Stat. §407.025.1. Thus, in order to state a claim for a violation of the MMPA, a plaintiff is required to allege in his petition that he (1) purchased or leased merchandise from the defendant; (2) for personal, family, or

household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful by §407.020. *Chochorowski,* 295 S.W.3d at 198 (citing *Hess v. Chase Manhattan Bank, NA,* 220 S.W.3d 758, 773 (Mo. banc 2007)).

"The purpose of the MMPA is 'to preserve fundamental honesty, fair play and right dealings in public transactions.'" *Ullrich v. CADCO, Inc.*, 244 S.W.3d 772, 777 (Mo. App. E.D. 2008)(quoting *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. App. S.D. 2006)). The MMPA supplements the definition of common law fraud, eliminating the need to prove an intent to defraud or reliance. *Id.* at 777-778. The statutes and regulations of the MMPA "'paint in broad strokes to prevent evasion thereof due to overly meticulous definitions.'" *Id.* at 778 (quoting *Schuchmann,* 199 S.W.2d at 233).

C. Hospital Billing Practices and the "Chargemaster."

Hospital billing practices and the use of "chargemasters" to determine standard rates for hospital goods and services have come under increasing scrutiny during the last several years, particularly with respect to billing for hospital services that are not covered by insurance or government plans.

Many hospitals develop a list price of goods and services, often referred to as a "chargemaster." The chargemaster rates typically far exceed the costs of the services, and are developed in anticipation of accepting a much lower payment from the majority of payers. Medicare, Medicaid, managed care and insurance companies pay much less than the chargemaster rates, and the chargemaster rates are developed with these deep discounts in mind. One authority estimates that over 90% of payers for hospital services

pay amounts significantly less than the standard chargemaster rates. *"Overcharging the Uninsured in Hospitals: Shifting A Greater Share of Uncompensated Medical Care Costs to the Federal Government,"* McGratha, James, 26 Quinnipiac L. Rev. 173, 184 (2007). Furthermore, self-paying patients may pay up to four times more for the same hospital service than insured and Medicare patients pay, and self-paying patients pay on average three times more than Medicare patients. *Id.* at 183-184. Another authority reports that insurance companies pay about forty cents on the dollar of the chargemaster rates, and that uninsured patients are therefore charged 250% more than insured patients. *"Patients as Consumers: Courts, Contracts and the New Medical Marketplace,"* Halla, Mark A., 106 Mich. L. Rev. 643, 663 (2008).

Although the standard chargemaster rates are collected by hospitals less than ten percent of the time[1], non-profit hospitals, such as Respondents, frequently represent the amount of charity care they provide based upon the chargemaster rates. These representations regarding charity care result in state and federal funding, and preserve the hospitals' tax-exempt status. Hospitals increasingly inflate the chargemaster rates,

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[1] Some hospitals collect their chargemaster rates much less than ten percent of the time. For instance, BJC, the St. Louis area's largest health care provider, charges only two percent of its patients its full chargemaster rates. *Quinn v. BJC Health System,* Cause No. 22052-0821A, 2007 WL 7308622 at *7. Appellant has not yet been afforded the opportunity to discover the percentage of Respondents' patients that are charged their full chargemaster rates.

despite the expectation that such rates will never be collected the overwhelming majority of the time. Accordingly, such non-profit hospitals' representations regarding the amount of charity care they provide is vastly overstated.

In recent years, the reasonableness of hospitals' chargemaster rates has been questioned by the Medicare Payment Advisory Commission, and has been the subject of congressional hearings. In 2005, the Lewin Group conducted a study on behalf of the Medicare Payment Advisory Commission: "A Study of Hospital Charge Setting Practices." (Available at http://www.medpac.gov/documents/Dec05_Charge_setting.pdf.) With respect to the reasonableness of their own chargemaster rates, comments by various hospitals that participated in the study included:

> "With over 45,000 items in the charge master, the vast majority of items have no relation to anything, and certainly not to cost."
>
> "There is no rationality to the charge master..."
>
> "Charges have less and less meaning each year..."

Id. at p. 7.

In 2004, Dr. Gerard Anderson, Professor and Director of the Johns Hopkins School of Medicine's Center for Hospital Finance and Management, testified before a U.S. House of Representatives' subcommittee on the issue of hospital billing, stating: "self pay patients are currently being charged 2 to 4 times what people with health insurance coverage pay for hospital services. These are not market rates..." Testimony of Dr. Gerard Anderson before the House Energy and Commerce Committee, Subcommittee on Oversight and Investigations, "A Review of Hospital Billing and

Collection Practices," June 24, 2004. (Available at http://republicans.energycommerce.house.gov/108/hearings/06242004Hearing1299/Anderson2095.htm.) In his testimony, Dr. Anderson examined the evolution of hospital billing practices since the advent of insurance in 1929, followed by Medicare and later managed care, each of which rarely, if ever, pay a hospital's standard charges:

> Without the federal government, state governments, private insurers, or managed care plans paying full charges, the regulatory and market constraints on hospital charges were virtually eliminated. By 1990, the only people paying full charges were the millions of Americans without insurance, a few international visitors, and the few people with health savings accounts...these individuals had limited bargaining power and were asked to pay ever increasing prices. Effectively, there was market failure in this aspect of the hospital market. Without any market constraints, charges began increasing much faster than costs. In the mid 1980s charges were typically 25% above costs. Without any market constraints, it is now common for charges to be two to four times higher than costs. Most insurers, including Medicaid, Medicare, and private payors, pay costs plus/minus 15 percent.

It is because of this market failure that hospitals, such as Respondents, have been able in recent years to arbitrarily inflate their standard or chargemaster charges to levels that are well beyond reasonable, and bear little to no relation to the value of their services. The MMPA was enacted by the Missouri legislature to make unlawful precisely this type of price-gouging and deceptive behavior.

D. The allegations contained in Appellant's Amended Petition state a claim under the Missouri Merchandising Practices Act.

Appellant's Amended Petition sufficiently alleges a claim against Respondents under the MMPA, and the trial court therefore erred in dismissing the Amended Petition.

Appellant's Amended Petition alleges that he purchased merchandise from the Respondents, and it is undisputed that medical goods and services are "merchandise" for purposes of the MMPA. Paragraphs 40 and 41 of the Amended Petition allege that Appellant underwent medical care and treatment at Respondent St. John's Mercy Medical Center, for which he was billed by Respondents for the goods and services rendered. LF 73. Medical goods and services are recognized as "merchandise" for purposes of the MMPA, *Freeman Health System v. Wass,* 124 S.W.3d 504, 507 (Mo. App. S.D. 2004), and Respondents did not contend in their motion to dismiss that Appellant failed to sufficiently allege this element in his Amended Petition.

It is also undisputed that that Appellant purchased the merchandise for his personal purposes, and therefore the second element of an MMPA claim is also not at issue in this case.

Appellant's Amended Petition also sufficiently alleges the third element of an MMPA claim: that he suffered an ascertainable loss of money or property. Paragraph 46 of the Amended Petition states:

> "As a direct and proximate result of the conduct of the defendants, and each of them, plaintiff Richard Hoover, M.D. paid more for the goods sold and the services rendered than the reasonable value of the goods and services, and has sustained substantial and significant financial losses, and damage to his reputation."

LF 46.

It is Appellant's position that paying more than the reasonable value of goods and services pursuant to either a contract of adhesion, or a contract in which the price is not specified, is an ascertainable loss of money or property. It is also Appellant's position that damage to his reputation and to his credit are also ascertainable losses. Appellant's position is supported in the law. Appellant clearly alleged in Paragraph 46 that he sustained damage to his reputation, and that he paid more than the reasonable value for the goods and services rendered by Respondents. Respondents nevertheless contend that Appellant failed to properly plead this element.

Lastly, Appellant sufficiently alleged in his Amended Petition the fourth element of an MMPA claim: that the damages he sustained were a result of an act declared unlawful by §407.020. A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. It is therefore necessary that Appellant set forth the allegations of unfair business practices contained in Paragraphs 42-43 of his Amended Petition:

> 42. The bill for the medical goods and services issued by the defendants, and each of them, was false and fraudulent in that the charges were:
>
> a) established and set arbitrarily and capriciously, without regard to the reasonable value of the goods and services provided;
>
> b) artificial and inflated;
>
> c) exceeded the charges for the same goods and services sold to Medicare patients;
>
> d) exceeded the charges for the same goods and services sold to insured patients;

e) discriminatory and unfair;

f) predatory, and constitute price-gouging.

43. In issuing the bill for the medical goods and services rendered to plaintiff Richard Hoover, M.D. the defendants, and each of them, concealed and suppressed the facts that:

a) the charges were established and set arbitrarily and capriciously, without regard to the value of the services;

b) the charges were artificial and inflated;

c) the charges significantly exceeded the amount paid by Medicare for the same goods and services;

d) the charges significantly exceeded the "covered amount" paid by medical insurance companies for the same goods and services;

e) the charges were discriminatory and unfair;

f) the charges were predatory and constitute price gouging;

g) defendants utilize the "standard charge" to subsidize the cost of rendering the same goods and services to Medicare patients and/or patients with insurance coverage, and

h) defendants utilize the "standard charge" to shift the burden of community benefit it owes as a nonprofit corporation to tax-paying patients.

Furthermore, Paragraph 39 of the Amended Petition makes the following allegations regarding Respondents' billing practices:

39. The defendants, and each of them, use and employ fraud, deception, and false pretense, makes material misrepresentations, and conceal material facts in the sale of medical goods and services to the public in violation of Mo. Rev. Stat. §407.020.1, in that:

a) defendants require patients in need of medical care and treatment to enter into an express or implied contract that require the patient to pay unspecified, undocumented and undetermined charges as a condition for receiving medical goods and services – there is no arm's length transaction – it is a contract of adhesion;

b) defendants' "standard charge" for the medical goods and services they provide are established and set arbitrarily and capriciously, without regard to the reasonable value of the services provided;

c) defendants' "standard charge" for the medical goods and services they provide are significantly higher than the amount they accept from Medicare for the same goods and services;

d) defendants' "standard charge" for the medical goods and services they provide is significantly higher than the amount that they accept from medical insurance carriers, as a "covered amount," for the same goods and services;

e) defendants' charges for medical goods and services vary depending upon the person or entity paying for the goods and services, and their billing practices are therefore discriminatory and unfair;

f) the amount that defendants accept in satisfaction of their "standard charge" for medical goods and services is the best evidence of the reasonable value of these goods and services;

g) when defendants accept an amount of money from Medicare for a given piece of goods or service, that amount is the best evidence of the reasonable value of the given piece of goods or services,

h) when defendants accept a "covered amount" from a medical insurance carrier for a given piece of goods or service, that "covered amount" is the best evidence of the reasonable value of the goods and services;

i) defendants' artificial and inflated "standard charge" is both the highest charge, and the charge least likely to be paid by

their patients, and therefore exceeds the reasonable value of the goods and services;

j) because the defendants' "standard charge" is higher than the amount they accept from Medicare for a given good or service, and higher than the "covered amount" they accept from medical insurance carriers for the same good or service, the defendants' "standard charge" exceeds the reasonable value of the good or service;

k) defendants' "standard charges" are artificial and inflated;

l) defendants' "standard charges" are predatory and constitute price gouging;

m) defendants conceal and suppress the material fact that the "covered amount" paid by medical insurance carriers for goods and services is an amount which the medical insurance carriers determined to be the reasonable value of the goods and services;

n) defendants conceal and suppress the material fact that their "standard charge" exceeds the amount paid by Medicare and medical insurance carriers for the same goods and services;

o) defendants conceal and suppress the material fact that the defendants' "standard charge" varies depending upon who is paying for the goods and services;

p) defendants are paid their "standard charge" far less often than they are paid a lesser amount by Medicare or medical insurance carriers for the same goods and services, and defendants' "standard charge" therefore exceeds the fair and reasonable value of the services;

q) defendants utilize the "standard charge" to subsidize the cost of rendering the same goods and services to patients who enjoy Medicare coverage or medical insurance coverage;

r) defendants conceal and suppress the material fact that the defendants utilize the "standard charge" to subsidize the cost of rendering the same goods and services to patients who enjoy Medicare coverage or medical insurance coverage;

s) defendants conceal and suppress the material fact that by utilizing the "standard charge" to subsidize the cost of rendering the same goods and services to patients who enjoy Medicare coverage or medical insurance coverage, defendants shift the burden of community benefit they owe for their tax-exempt status to tax-paying patients.

The allegations contained in Paragraphs 39 and 42-43, *supra*, clearly allege acts declared unlawful by §407.020, and therefore meet the fourth element of an MMPA claim.

E. Ascertainable Loss.

Respondents essentially argue that Appellant did not sustain an ascertainable loss because: (1) Respondents are not required to charge a fair and reasonable amount for their goods and services, and (2) Appellant is required to pay Respondent St. John Mercy Medical Center's "standard charges" for the goods and services rendered, which is the amount he was billed, regardless of whether that amount is reasonable. LF 119-120. Respondents also contend that the amount that Appellant paid toward the balance claimed by Respondents is fair and reasonable, and therefore Appellant did not pay more than a fair and reasonable amount for the goods and services rendered. Respondents make this contention despite the fact that Respondents did not accept this as payment in full, and claim the balance due and owing.

Contrary to Respondents' contentions, the law clearly establishes that Respondents can only charge a fair and reasonable amount for the goods and services they sell to the public.

1. **Respondents' form agreement signed by Appellant did not specify a price, and Missouri law therefore requires Appellant to pay only the reasonable value of the goods and services rendered.**

Incredibly, Respondents take the position that Appellant does not have a right to be charged only a fair and reasonable amount for the goods and services he purchased. Respondents' position is contrary to well-settled principles of law. Because Appellant did not agree to pay any specified charges, he is required to pay only the *reasonable* value for the goods and services that were rendered:

> "Where a contract makes no statement as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services or property is recoverable."

17A Am. Jur. 2d Contracts §488.

The Restatement (Second) of Contracts further provides:

> "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

Restatement (Second) of Contracts §204.

In certifying a class action filed on behalf of uninsured patients against the area's largest healthcare provider, BJC, St. Louis City Circuit Court Judge David Mason relied upon §204 in holding that "[w]hen an agreement that a hospital patient signs that obligates the patient to pay the hospital's 'charges' or 'regular charges' fails to fix a price, courts have stated that a "reasonable price" would be implied." *Quinn v. BJC Health System,* Cause No. 22052-0821A, 2007 WL 7308622 at *6 (citing *Doe v. HCA*

Health Services of Tennessee, Inc., 46 S.W.3d 191 (Tenn. 2001) and *Payne v. Humana Hospital Orange Park,* 661 So.2d 1239 (Fl. 1995)).

"'Reasonableness' is an objective showing; merely presenting the bill is not sufficient evidence of reasonableness." *Tom's Agspray, LLC v. Cole,* 308 S.W.3d 255, 260 (Mo. App. W.D. 2010). Likewise, the fact that a price is the party's standard price for such a good or service is insufficient evidence of the reasonableness of a charge. *Id.* at 260-261. Thus, the fact that Respondents' charges may be their "standard" charges does not render Appellant's allegations as to reasonableness insufficient as a matter of law.

Respondents nevertheless argue that Appellant is required to pay Respondents' "chargemaster" rates because he signed an agreement to pay for services rendered by Respondent St. John's Mercy Medical Center. LF 119, 137. Again, where an agreement that a hospital requires its patients to sign obligates the patient to pay the hospital's "charges" or "regular charges" but fails to fix a price, an agreement to pay a "reasonable price" will be implied. *Quinn,* 2007 WL 7308622 at *6. Here, as alleged in the Amended Petition, the agreement that Appellant signed does just that – it obligates Appellant to pay St. John's "charges," but it fails to fix a price. Specifically, the standard form financial responsibility agreement that Appellant signed provides that in consideration of the services to be rendered, the patient agrees to pay St. John's "charges for those services rendered..." LF 123. The agreement does not fix a price, nor does it even reference Respondents' chargemaster rates; it also does not state that the charges have been pre-determined or are fixed. Accordingly, an agreement to pay a reasonable

charge must be implied by the Court. A reasonable charge is all that Respondents are entitled to be paid, and Appellant's Amended Petition clearly alleges that Respondents' standard, or chargemaster, rates are not reasonable.

In their motion to dismiss, Respondents further claimed that Appellant failed to allege sufficient facts in support of his allegation that its charges are not reasonable. However, Appellant's Amended Petition clearly avers facts which support his allegations that Respondents' charges are unreasonable. Appellant's Amended Petition Paragraph 39(b) alleges that Respondents' charges are unreasonable because they are inflated charges that are set arbitrarily and capriciously, and without regard to the reasonable value of the services provided. LF 71. Appellant's Amended Petition further alleges that Respondents' standard charges are unreasonable because they are significantly higher than the amounts accepted for the same goods and services from the vast majority of their patients who are covered by health insurance, or Medicare or Medicaid programs. LF 71-72. Appellant's Amended Petition also alleges that Respondents' standard charges are their highest charges and the least likely amount to be paid by their patients. LF 11.

Respondents contend that Appellant does not have a right to receive discounts simply because other patients receive contractual discounts. LF 146. Contrary to Respondents' assertions, Appellant does not claim that he is entitled to contractual "discounts." Appellant merely contends that because his contract does not fix a price, he is entitled to be charged a fair and reasonable amount for the services. The "discounts" (that are accepted by Respondents the overwhelming majority of the time) are merely evidence of what the reasonable value of those services is.

Appellant's allegations of reasonableness are similar to the arguments made by the plaintiffs and accepted by the court in *Quinn:*

> A 'reasonable' charge is 'the price usually and customarily paid for such services or like services at the time and in the locality where the services were rendered.' *Kinetic Energy Development Corp. v. Trigen Energy Corp.,* 22 S.W.3d 691, 697 (Mo. App. E.D. 1999). Plaintiffs argue that the 'price usually and customarily paid' is the amount collected from the majority of the patients... At the [defendant's] hospitals, only about two percent of patients are 'charged' the chargemaster rate...Since only a few percent pay the chargemaster rate, that rate would never be considered the 'price usually and customarily paid' ... 'Plaintiffs are challenging [defendant's] *across-the-board* decision to charge *all* of its uninsured patients rates 250% higher than the rates it effectively charges everyone else'...In determining reasonableness, Plaintiffs intend to use the rates for services as they appear in the applicable chargemaster and compare them to the 'price usually and customarily paid.' Plaintiffs define this usual and customary amount as that which is paid by the vast majority of the hospital's patients through insurance or government programs. Plaintiffs argue that 98% of the hospitals' billings and 99% of its revenues come from non-uninsured persons. Although the insureds are also 'charged' chargemaster rates, the hospital collects on average 42% of the chargemaster amount billed to these groups.

2007 WL 7308622 at *7-8.

In *Quinn,* the trial court agreed with the plaintiffs and found that a jury should decide whether the rates on the chargemaster were reasonable considering that the defendants in that case only collected or expected to collect on average 42% of the chargemaster amount. *Id.* at *8.

The Missouri Court of Appeals for the Western District has also held that the reasonable value of services "is the price customarily paid for such services at the time and locality in question," and that "[p]roof of reasonable value is not accomplished simply by reciting the bill or referring to the contract, or stating the 'standard price'" that

a party would usually charge for such service. *Miller v. Horn,* 254 S.W.3d 920, 925 (Mo. App. W.D. 2008). To be entitled to its charges, a party must present "evidence establishing the objective reasonableness" of the charges. *Id.*

Respondents' arguments in support of their motion to dismiss are strikingly similar to arguments that were recently rejected by the Court of Appeals of Indiana in *Allen v. Clarian Health Partners, Inc.*, 2011 WL 4829148 (Ind. App. Ct. October 12, 2011). In *Allen*, prior to medical services being rendered, the plaintiff patients signed standard form contracts drafted by Clarian, in which the patients agreed to pay their accounts, but the contract did not specify a price or fee schedule. *Id.* at *1. The contract specifically stated that the patients "guarantee[d] payment of the account." *Id.* Clarian later billed the patients in accordance with its chargemaster rates. *Id.* The patients sued, claiming that because no price was specified in the contract, they only agreed to pay reasonable charges for the services rendered. *Id.* at *1-2. The patients alleged that the chargemaster rates were unreasonable, and that if they had been insured, Clarian would have accepted "significantly less" as payment for the services. *Id.* Clarian argued that the account payment term specified in the contract obligated the patients to pay Clarian's chargemaster rates. *Id.* at *2. The Indiana Court of Appeals disagreed, finding that there was no reference to chargemaster rates contained within the contract, and therefore the law implies an agreement to pay a reasonable charge. *Id.* at *2-3.

In its opinion, the Indiana Court of Appeals primarily relied upon the well-established and traditional common law principle that where a contract fails to specify a charge, a reasonable charge will be implied. *Id.* at *3. Further, the court also relied upon

the fact that, under Indiana law, the proper measure of medical expenses is the "reasonable value" of such expenses, rather than the amount "billed" or the amount "paid." *Id.* (Under Missouri law, the "reasonable value" of medical expenses may likewise be found by the jury to be the amount billed, the amount paid, or some other amount altogether. Mo. Rev. Stat. §490.715; *Deck v. Teasley,* 322 S.W.3d 536 (Mo. banc 2010).) The court cited various authorities which all indicated that the value of medical services does not in fact correlate with the amounts charged by health care providers. 2011 WL 4829148 at *3. Accordingly, the court was unconvinced that the chargemaster rates represented the reasonable value of the medical services rendered by Clarian. *Id.*

Similarly, in *Doe v. BCA Health Services of Tennessee, Inc.* 46 S.W.3d 191 (Tenn. 2001), the Supreme Court of Tennessee found that a hospital's standard-form patient contract was unenforceable because the price term was indefinite. In *Doe,* the patient signed a standard form contract in which she agreed to be "financially responsible to the hospital for charges not covered by [insurance benefits]." *Id.* at 194. She later received a bill for services based upon the hospital's chargemaster rates. *Id.* Her insurance company paid approximately eighty percent of the charges, and the hospital sought to collect the balance from the patient. *Id.* at 194-195. The patient sued, claiming the chargemaster rates were unreasonable. *Id.* at 195. The hospital argued that the term "charges" as used in the contract was a definite price term because it referred to the hospital's chargemaster. *Id.* The Supreme Court of Tennessee disagreed, and held that the contract contained no express reference to a document or extrinsic facts by which the price was to be determined, the price term was indefinite and the contract was

unenforceable. *Id.* at 197. As such, the hospital was only entitled to the reasonable value of its services under a *quantum meruit* theory, which was not necessarily the amounts reflected in the chargemaster. *Id.* at 197-198.

In *Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.*, 832 A.2d 501 (Pa. Sup. Ct. 2003), the Superior Court of Pennsylvania also recognized that a hospital's chargemaster rates do not represent the reasonable value of medical services. *Temple* involved a dispute between a hospital and managed care company over reimbursement rates for care provided during a period of time when the two companies were between contracts. The hospital brought suit to recover the full amount of its chargemaster rate. The Superior Court of Pennsylvania found that the hospital was entitled only to a reasonable fee for its services, and that a reasonable fee is what people ordinarily pay for those services:

> Where, as here, there is no express agreement to pay, the law implies a promise to pay a reasonable fee for a health provider's services. *Eagle v. Snyder,* 412 Pa.Super. 557, 604 A.2d 253 (1992). Thus, in a situation such as this, the defendant should pay for what the services are ordinarily worth in the community. *Id.* Services are worth what people ordinarily pay for them. *Id.* Whether the amount charged is unconscionable and whether it shocks the conscience is irrelevant.
>
> While the Hospital's published rates for services may be the same or less than rates at other Philadelphia hospitals, the more important question is what healthcare providers **actually receive** for those services. As Mr. Lux [Hospital's CFO] readily admitted, the Hospital rarely recovers its published rates. Therefore, those rates cannot be considered the value of the benefit conferred because that is not what people in the community ordinarily pay for medical services.

> As noted, Mr. Lux testified that ninety-four percent of the time, the Temple University Health System received eighty percent or **less** of its full published charges. Healthcare's expert economist, Dr. Dobson, testified similarly. He stated that the Hospital was paid its full published charges in only one to three percent of its cases. Courts have also recognized this discrepancy between amounts billed and amounts received under Medicare. *See, e.g., Vencor Inc. v. National States Insurance Co.,* 303 F.3d 1024, 1029 n. 9 (9th Cir. 2002) ("It is worth noting that in a world in which patients are covered by Medicare and various other kinds of medical insurance schemes that negotiate rates with providers, providers' supposed ordinary or standard rates may be paid by a small minority of patients."). Dr. Dobson also testified that based on the Hospital's data, the full published charges in 1994 were approximately 172% of its actual costs, while in 1995 and 1996, the published rates were approximately 300% of its actual costs. In addition, Dr. Dobson testified that private payers typically paid 121% of the cost of hospital services in 1994, 119% in 1995, and 112% in 1996. Government payors generally pay less. Mr. Lux acknowledged that the Hospital had twelve contracts with commercial insurance companies and that **none** of those contracts provided for payment at published rates.

832 A.2d at 508-509. (emphasis in original.)

The court went on to hold that the hospital "is entitled to the reasonable value of its services, i.e., what people pay for those services, not what the Hospital receives in one to three percent of its cases." *Id.* at 509.

Plaintiff's allegations in this case are similar to the allegations made in *Temple*: the Respondents' standard, or chargemaster, rates are collected in only a very few percentage of cases; Respondents typically accept payments that are far below the

standard rates, and therefore the chargemaster rates do not represent the reasonable value of their services.

The United States District Court for the Southern District of Florida has also recognized that a plaintiff's allegations that hospital patients with insurance or government benefits pay far less than the hospital's standard rates support a claim that the hospital's standard rates are inflated and unreasonable. *Colomar v. Mercy Hospital, Inc.*, 461 F.Supp.2d 1265, 1271-1272 (U.S. Dist. Fl. S.D. 2006).

In their motion to dismiss, Respondents further argue that their chargemaster rates are standard charges that Appellant could have learned in advance if he had inquired. The allegations in Appellant's Amended Petition do not support this self-serving statement by Respondents. Furthermore, Respondents acknowledge in their own argument that the price for hospital services cannot be known prior to the time services are rendered, because it is unknown specifically what medical services will be required. LF 144-145. Moreover, there is no indication that the chargemaster rates were actually available to Appellant, because chargemaster rates are frequently kept confidential by hospitals. Finally, as stated above, Appellant's agreement with St. John's did not specify a price or even refer to any "chargemaster" rates. The chargemaster rates were not a part of the agreement, and the price term was not fixed. Accordingly, an agreement to pay the reasonable value of the goods and services must be implied.

2. Appellant's Amended Petition alleges that the agreement signed by Appellant was a contract of adhesion, and Missouri law therefore requires Appellant to pay only the reasonable value of the goods and services rendered.

Respondents' argument also fails to take into account that Appellant alleged in his Amended Petition at Paragraph 39(a) that the agreement entered into was a contract of adhesion, and not an arm's length transaction:

> defendants require patients in need of medical care and treatment to enter into an express or implied contract that require the patient to pay unspecified, undocumented and undetermined charges as a condition for receiving medical goods and services – there is no arm's length transaction – it is a contract of adhesion.

LF 71.

As recognized in *Quinn,* where there exists unequal bargaining power such that there is no true negotiation, a patient who has actual knowledge of a chargemaster rate may still be damaged if that rate is determined to be unreasonable. 2007 WL7308622 at *6. This is because a party to a contract of adhesion is not entitled to enforce an unreasonable term of the contract. *Swain v. Auto Services, Inc.,* 128 S.W.3d 103, 107 (Mo. App. E.D. 2003).

The Western District's opinion in *Heartland Health Systems, Inc. v. Chamberlin,* 871 S.W.2d 8 (Mo. App. W.D. 1994) is instructive. In *Heartland,* a patient and his mother were sued for an outstanding account relating to hospital services that were provided to the patient following an automobile collision. *Id.* at 10. The mother signed the financial responsibility contract at the ER, but claimed at trial that the contract was an unenforceable contract of adhesion. *Id.* at 10-11. The trial court entered judgment in favor of Heartland against the patient, but entered judgment in favor of the mother. *Id.* at

10. Both Heartland and the patient appealed. *Id.* The Western District upheld the judgment against the patient, and reversed the judgment in favor of the mother. *Id.* With respect to a contract of adhesion, the Western District recognized that "a party to a written contract is not bound by the terms of a contract of adhesion which are outside and beyond the reasonable expectations of the person signing the contract. The reasonable expectations of the parties are gathered not only by the words of the supposed contract, but by all the circumstances of the transaction." *Id.* at 10-11. The Western District found that the reasonable expectations of signing the contract for medical services would be an obligation to pay for the medical services. *Id.* at 11. Importantly, the court's opinion also acknowledged that the reasonable expectations of the parties would include charges that represent the *reasonable* value of the services. *Id.* The patient and his mother had the burden of challenging the necessity of the medical services and the reasonable value of those services, but did not do so at trial. *Id.* Because they failed to present any challenge to the necessity of the services and the reasonableness of the charges, and Heartland presented a prima facie case in support of its charges, the Western District found in favor of Heartland. *Id.* It is clear from the *Heartland* opinion that the price charged in a contract of adhesion must represent the reasonable value of the services rendered. The reasonableness of Respondents' charges in this case is precisely what Appellant's Amended Petition challenges. Appellant does not dispute that he must pay for the services rendered by Respondent. His claim is only that the charges for those services must be reasonable, and that the Respondents' "standard charges" are unreasonable. That is a valid claim under Missouri law, and his Amended Petition must therefore stand.

3. Even assuming Respondents' chargemaster rates are reasonable, Appellant's Amended Petition nevertheless states a claim pursuant to the Missouri Merchandising Practices Act.

In Paragraph 44 of the Amended Petition, Appellant alleges that:

> "The bill for the medical goods and services rendered to plaintiff Richard Hoover, M.D. included charges for goods and services which had already been paid to the surgeon."

LF 74.

On appellate *de novo* review, this allegation must be considered to be true. If Respondents billed Appellant for goods and services for which he had already paid, that is a deceptive and unfair practice under the MMPA, Mo. Rev. Stat. §407.010, *et seq.*, and the trial court abused its discretion by dismissing Appellant's Amended Petition for failure to state a claim.

Even if one were to accept that Respondents' "standard charges" are reasonable, it is ludicrous for Respondents to argue that charging for goods and services that have already been paid for, and were provided by a third party, is not a deception, fraud or unfair practice declared unlawful by §407.010 of the MMPA. In fact, Respondents do not contend in their motion to dismiss that Paragraph 44 of Appellant's Amended Petition does not sufficiently allege unlawful conduct. Clearly, the trial court erred in finding that this allegation does not meet the fourth element of an MMPA claim.

Furthermore, in Paragraph 45 of the Amended Petition, Appellant alleges that:

> "The bill for the medical goods and services rendered to plaintiff Richard Hoover, M.D. included charges which had been 'upcoded' to reflect the 'standard charge' for goods and services which were more expensive than the goods and services actually sold to plaintiff Richard Hoover, M.D."

LF 74.

On appellate *de novo* review, this allegation must be considered to be true. If Respondents "upcoded" certain goods and services, they "marked up" the price for the goods and services actually sold to the increased price of goods and services that were not actually sold to Appellant. This is a deceptive and unfair practice under the MMPA, and the trial court abused its discretion by dismissing Appellant's Amended Petition for failure to state a claim.

Even if one were to accept that Respondents' "standard charges" are reasonable, it is inconceivable for Respondents to argue that "upcoding" goods and services in an effort to charge a patient or his insurance company a higher amount for a service that was not in fact rendered is not a deception, fraud or unfair practice declared unlawful by §407.010 of the MMPA. Such conduct is patently fraudulent. Respondents cannot make a good faith argument that charging a patient for a service that was not provided or a good that was not sold is not a fraudulent and deceptive practice. In fact, Respondents do not contend in their motion to dismiss that Paragraph 45 of Appellant's Amended Petition does not sufficiently allege unlawful conduct. Clearly, the trial court erred in finding that this allegation does not meet the fourth element of an MMPA claim.

Accordingly, the trial court's Judgment must be reversed and the case remanded for further proceedings.

II. THE TRIAL COURT ERRED IN DISMISSING COUNT II OF APPELLANT'S AMENDED PETITION WITH PREJUDICE, BECAUSE APPELLANT SUFFICIENTLY ALLEGED A CLAIM FOR ACTUAL DAMAGES UNDER THE MISSOURI MERCHANDISING PRACTICES ACT IN COUNT I OF HIS AMENDED PETITION, AND HE COULD THEREFORE ASSERT A CLAIM FOR PUNITIVE DAMAGES ARISING OUT OF THE SAME CONDUCT, PURSUANT TO THE EXPRESS PROVISIONS OF THE MISSOURI MERCHANDISING PRACTICES ACT.

A. Standard of Review.

The standard of review applicable to Point II is the same standard that is applicable to Point I, and Appellant therefore hereby adopts and incorporates by reference the standard of review as set forth in Point I, *supra.*

B. Count II of Appellant's Amended Petition adequately states a claim for punitive damages.

In their motion to dismiss, Respondents also sought dismissal of Appellant's claim for punitive damages based solely upon the principle that a claim for punitive damages must fail if the underlying cause of action fails. Respondents argued that because Appellant failed to state a claim under the MMPA, his claim for punitive damages had to be dismissed. LF 151 (citing *Misischia v. St. John's Mercy Medical Center,* 30 S.W.3d 848, 866 (Mo. App. E.D. 2000) and *Kelly v. State Farm Mut. Auto. Ins. Co.,* 218 S.W.3d 517, 526 (Mo. App. W.D. 2007)). It is presumed that the trial court dismissed Appellant's punitive damages claim for the reason advanced by Respondents. *Chochorowski,* 295 S.W.3d at 197.

However, because Appellant's Amended Petition sufficiently alleges a claim under the MMPA for the reasons set forth above in Point I, his claim for punitive

damages must stand. Respondents did not challenge the sufficiency of the allegations contained in the claim for punitive damages, and Mo. Rev. Stat. §407.025 clearly provides that a person who sustains an ascertainable loss of money or property as a result of the employment of an act or practice declared unlawful by the MMPA can seek punitive damages in a private civil action. The trial court therefore erred in dismissing Count II of Appellant's Amended Petition. Appellant therefore requests that the Judgment entered by the trial court be reversed and the cause be remanded.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIMS AGAINST RESPONDENT MERCY HEALTH ON THE BASIS THAT IT WAS NOT A PROPER DEFENDANT BECAUSE APPELLANT SUFFICIENTLY ALLEGED A THEORY OF LIABILITY AGAINST RESPONDENT MERCY HEALTH ON THE BASIS OF RESPONDENT MERCY HEALTH'S OWN CONDUCT, SEPARATE AND APART FROM ANY RESPONDEAT SUPERIOR THEORY OF LIABILITY ARISING OUT OF AN AGENCY RELATIONSHIP WITH ANY OTHER RESPONDENT; THE TRIAL COURT FURTHER ABUSED ITS DISCRETION BY FAILING TO ALLOW APPELLANT TO AMEND HIS PETITION TO ALLEGE THAT THE CHARGES AND BILLING PRACTICES OF RESPONDENT ST. JOHN'S MERCY MEDICAL CENTER ARE ESTABLISHED AND SET BY RESPONDENT MERCY HEALTH, AND REQUIRED BY RESPONDENT MERCY HEALTH TO BE UTILIZED AT ALL HOSPITALS WITHIN THE MERCY HEALTH SYSTEM.

A. Standard of Review.

The standard of review applicable to Point III is the same standard that is applicable to Point I, and Appellant therefore hereby adopts and incorporates by reference the standard of review as set forth in Point I, *supra.*

B. Respondent Mercy Health is a proper defendant.

In their motion to dismiss, Respondents also sought dismissal of Mercy Health as a defendant because Respondent St. John's Mercy Medical Center is a separate company from Respondent Mercy Health. LF 151. Respondents argued that Appellant's agency allegations are insufficient to hold Respondent Mercy Health vicariously liable for the conduct of Respondent St. John's mercy Medical Center. Again, it is presumed that the trial court dismissed Appellant's claim against Respondent Mercy Health for the reason advanced by Respondents. *Chochorowski,* 295 S.W.3d at 197.

Rule 55.05 of the Missouri Rules of Civil Procedure requires that Appellant's claim contain a short and plain statement of the facts showing that he is entitled to relief. Mo. R. Civ. P. 55.05. Appellant's allegations against Respondent Mercy Health do just that. As noted in Respondents' argument, Appellant's Amended Petition alleges in Paragraph 15 that the Respondents acted as the agents, servants and employees of each other, and within the course and scope of that agency and employment. LF 66, 151. Paragraphs 10 and 13 of the Amended Petition further allege that Respondent Mercy Health owns and operates the hospital where Appellant was treated, and that Respondents Mercy Hospital East Communities and St. John's Mercy Medical Center are a part of the Mercy Health System, which is owned and operated by Respondent Mercy Health. LF 65-66. Such allegations are a sufficient basis upon which a claim can be asserted against Respondent Mercy Health for the conduct of Respondents Mercy Hospital East Communities and St. John's Mercy Medical Center. Appellant has not made mere conclusory allegations of agency, but has alleged that Respondent Mercy Health *operated*

the hospital which treated and fraudulently billed Appellant. Allegations of such conduct on behalf of Respondent Mercy Health are sufficient. *Ritter v. BJC Barnes Jewish Christian Health Systems,* 987 S.W.2d 377, 384 (Mo. App. E.D. 1999)(holding that although a parent corporation is not ordinarily liable for the acts of its subsidiary, it can be liable where it controls or influences the practice or business policy at issue to perpetuate a fraud).

Furthermore, Appellant's Amended Petition does not allege liability solely upon a theory of agency. Appellant's Amended Petition also alleges that Respondent Mercy Health owns and operates Respondent St. John's Mercy Medical Center (Paragraph 10), that Respondent Mercy Health issued the bill for services rendered to Appellant (Paragraph 41), and that Respondent Mercy Health committed violations of the MMPA (Paragraphs 39, 42-45). Appellant's Amended Petition clearly states a claim against Respondent Mercy Health. "A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition." *Raster,* 280 S.W.3d at 128. An appellate court is not permitted to address the merits of the case or consider evidence outside the pleadings. *Id.* Although Respondent Mercy Health may dispute Appellant's allegations of liability against it, the question at this stage is merely whether Appellant's petition adequately states a claim against it. Appellant's Amended Petition clearly states a claim against Respondent Mercy Health, and the trial court therefore erred in dismissing Respondent Mercy Health from the lawsuit. The trial court's judgment should therefore be reversed and the cause remanded.

Furthermore, in the event that this Court agrees that Appellant's allegations against Respondent Mercy Health are insufficient as alleged, Appellant requests that the Court reverse the trial court's dismissal with prejudice so that Appellant may amend his petition to sufficiently allege a claim against Respondent Mercy Health. For instance, Appellant argued to the trial court that the billing practices established and set at St. John's Mercy Medical Center were established and set by Respodnent Mercy Health, and are utilized by all of the hospitals in the health care system owned and operated by Respondent Mercy Health, including St. John's Mercy Medical Center (now known as Mercy Hospital). If the Court believes such an allegation must be more specifically alleged in his claim against Respondent Mercy Health, Appellant respectfully requests the opportunity to re-plead his claim accordingly.

Missouri Rule of Civil Procedure Rule 55.33 provides that leave to amend a pleading shall be freely given when justice requires. Mo. R. Civ. P. 55.33. "It is an abuse of discretion to not grant such leave when justice so requires." *Sloan-Odum v. Wilkerson,* 176 S.W.3d 723, 725 (Mo. App. E.D. 2002). Courts are to consider the hardship to the party seeking to leave to amend, the reasons for failure to include the matter in the original pleadings, and the injustice to the nonmoving party should leave to amend be granted. *Id.* Clearly, if the allegations against Respondent Mercy Health are insufficient, justice requires that Appellant be permitted to amend his claims, as a denial of such leave would result in obvious hardship to Appellant as his claims for relief against Respondent Mercy Health relief would be extinguished. Furthermore, this case never moved beyond the pleading stage into discovery, and Respondents had not even

filed an Answer to Appellant's Amended Petition. Therefore, no injustice to Respondent Mercy Health will result as a result of the "delay" in failing to include any necessary allegations in the Amended Petition.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant respectfully requests this Honorable Court reverse the Judgment entered by the trial court on November 2, 2011, and remand this matter to the trial court for further proceedings.

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE

As the attorney of record for Appellant, I hereby certify that the Appellant's Brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b); and
3. Contains 10,221 words as determined by the software application Microsoft Word for Windows.

Further, the undersigned hereby certifies that the ~~disk~~ e-mail submitted with this Brief has been scanned for viruses and is virus-free.

Paul J. Passanante, #25266

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing, and a disk containing the same, were mailed, via U.S. Postal Service, first class postage prepaid, this 13th day of February, 2012, to:

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APPENDIX

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Richard Hoover	)	September 12, 2011
Plaintiff	)	
	)	Cause No. 11SL-CC02597
vs	)	Division No. 14
	)	
Mercy Health	)	
Defendant	)	

Defendant's Motion to Dismiss heretofore called, argued and submitted is hereby sustained. Costs taxed against Plaintiff.

cc: Paul Passanante
Allen Allred

FILED
DIV. SEP 12 2011 14
JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

SO ORDERED:

James R. Hartenbach
Judge, Division 14

14

IN THE CIRCUIT COURT
OF ST. LOUIS COUNTY
STATE OF MISSOURI

RICHARD HOOVER,

Plaintiff,

v.

MERCY HEALTH,

Defendant.

Cause No.: 11SL-CC02597

Division: 14

JUDGMENT

Defendant's Motion to Dismiss heretofore called, argued and submitted is hereby sustained. Costs taxed against Plaintiff.

cc: Paul Passanante
Allen Allred

SO ORDERED:

Judge Richard C. Bresnahan

Div 18 for 14

Vernon's Annotated Missouri Statutes
Title XXVI. Trade and Commerce (Refs & Annos)
Chapter 407. Merchandising Practices (Refs & Annos)

V.A.M.S. 407.010

407.010. Definitions

Currentness

As used in sections 407.010 to 407.130, the following words and terms mean:

(1) **"Advertisement"**, the attempt by publication, dissemination, solicitation, circulation, or any other means to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in any merchandise;

(2) **"Documentary material"**, the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated;

(3) **"Examination of documentary material"**, the inspection, study, or copying of such material, and the taking of testimony under oath or acknowledgment in respect to any documentary material or copy thereof;

(4) **"Merchandise"**, any objects, wares, goods, commodities, intangibles, real estate or services;

(5) **"Person"**, any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

(6) **"Sale"**, any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit;

(7) **"Trade"** or **"commerce"**, the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated. The terms "trade" and "commerce" include any trade or commerce directly or indirectly affecting the people of this state.

Credits

(L.1967, p. 607, § 1. Amended by L.1973, H.B. No. 55, p. 452, § 1; L.1986, S.B. No. 685, § A, eff. May. 1, 1986.)

Notes of Decisions (42)

Statutes and Constitution are current through the end of the 2011 First Extraordinary Session of the 96th General Assembly.

End of Document

Vernon's Annotated Missouri Statutes
Title XXVI. Trade and Commerce (Refs & Annos)
Chapter 407. Merchandising Practices (Refs & Annos)

V.A.M.S. 407.020

407.020. Unlawful practices, penalty--exceptions

Currentness

1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri of the fact that the attorney general has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

2. Nothing contained in this section shall apply to:

(1) The owner or publisher of any newspaper, magazine, publication or printed matter wherein such advertisement appears, or the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser; or

(2) Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance, financial institutions and professional registration under chapter 354, RSMo, or chapters 374 to 385, RSMo, the director of the division of credit unions under chapter 370, RSMo, or director of the division of finance under chapters 361 to 369, RSMo, or chapter 371, RSMo, unless such directors specifically authorize the attorney general to implement the powers of this chapter or such powers are provided to either the attorney general or a private citizen by statute.

3. Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class D felony.

4. It shall be the duty of each prosecuting attorney and circuit attorney in their respective jurisdictions to commence any criminal actions under this section, and the attorney general shall have concurrent original jurisdiction to commence such criminal actions throughout the state where such violations have occurred.

5. It shall be an unlawful practice for any long-term care facility, as defined in section 660.600, RSMo, except a facility which is a residential care facility or an assisted living facility, as defined in section 198.006, RSMo, which makes, either orally or in writing, representation to residents, prospective residents, their families or representatives regarding the quality of care provided, or systems or methods utilized for assurance or maintenance of standards of care to refuse to provide copies of documents which reflect the facility's evaluation of the quality of care, except that the facility may remove information that would allow identification of any resident. If the facility is requested to provide any copies, a reasonable amount, as

established by departmental rule, may be charged.

6. Any long-term care facility, as defined in section 660.600, RSMo, which commits an unlawful practice under this section shall be liable for damages in a civil action of up to one thousand dollars for each violation, and attorney's fees and costs incurred by a prevailing plaintiff, as allowed by the circuit court.

Credits

(L.1967, p. 607, § 2. Amended by L.1973, H.B. No. 55, p. 452, § 1; L.1985, H.B. Nos. 96, 346 & 470, § 1, eff. May 31, 1985; L.1986, S.B. No. 685, § A, eff. May 1, 1986; L.1992, S.B. No. 705, § A; L.1994, H.B. No. 1165, § A, eff. July 6, 1994; L.1995, H.B. No. 409, § A; L.2000, S.B. No. 763, § A; L.2008, S.B. No. 788, § A.)

Notes of Decisions (176)

Statutes and Constitution are current through the end of the 2011 First Extraordinary Session of the 96th General Assembly.

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Vernon's Annotated Missouri Statutes
Title XXVI. Trade and Commerce (Refs & Annos)
Chapter 407. Merchandising Practices (Refs & Annos)

V.A.M.S. 407.025

407.025. Civil action to recover damages--class actions authorized, when--procedure

Currentness

1. Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.

2. Persons entitled to bring an action pursuant to subsection 1 of this section may, if the unlawful method, act or practice has caused similar injury to numerous other persons, institute an action as representative or representatives of a class against one or more defendants as representatives of a class, and the petition shall allege such facts as will show that these persons or the named defendants specifically named and served with process have been fairly chosen and adequately and fairly represent the whole class, to recover damages as provided for in subsection 1 of this section. The plaintiff shall be required to prove such allegations, unless all of the members of the class have entered their appearance, and it shall not be sufficient to prove such facts by the admission or admissions of the defendants who have entered their appearance. In any action brought pursuant to this section, the court may in its discretion order, in addition to damages, injunction or other equitable relief and reasonable attorney's fees.

3. An action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 to the extent such state rule is not inconsistent with the federal rule if:

(1) The class is so numerous that joinder of all members is impracticable;

(2) There are questions of law or fact common to the class;

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) The representative parties will fairly and adequately protect the interests of the class; and, in addition

(5) The prosecution of separate action by or against individual members of the class would create a risk of:

(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(6) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(7) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) The difficulties likely to be encountered in the management of a class action.

4. (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order pursuant to this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained pursuant to subdivision (7) of subsection 3 of this section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(a) The court will exclude such member from the class if such member so requests by a specified date;

(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

(c) Any member who does request exclusion may, if such member desires, enter an appearance through such member's counsel.

(3) The judgment in an action maintained as a class action pursuant to subdivision (5) of subsection 3 of this section or subdivision (6) of subsection 3 of this section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action pursuant to subdivision (7) of subsection 3 of this section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (2) of this subsection was directed, and who have requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed

and applied accordingly.

5. In the conduct of actions to which this section applies, the court may make appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) Imposing conditions on the representative parties or on intervenors;

(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) Dealing with similar procedural matters.

6. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

7. Upon commencement of any action brought pursuant to subsection 1 of this section, the plaintiff or plaintiffs shall inform the clerk of the court in which such action is brought, on forms to be provided by such clerk, that the action is brought pursuant to this section. The clerk of the court shall forthwith inform the attorney general of the commencement of such action, together with a copy of the complaint or other initial pleading, and, upon entry of any judgment or decree in the action, the clerk shall mail a copy of such judgment or decree to the attorney general.

8. Any permanent injunction, judgment or order of the court made pursuant to section 407.100 shall be prima facie evidence in an action brought pursuant to[1] this section that the respondent used or employed a method, act or practice declared unlawful by section 407.020.

Credits

(L.1973, H.B. No. 55, p. 452, § 1. Amended by L.1985, H.B. Nos. 96, 346 & 470, § 1, eff. May 31, 1985; L.1999, S.B. Nos. 1, 92, 111, 129 & 222, § A; L.2000, H.B. No. 1509, § A.)

Notes of Decisions (113)

Statutes and Constitution are current through the end of the 2011 First Extraordinary Session of the 96th General Assembly.

Footnotes

1 **Revisor's note:** Word "to" does not appear in original rolls.

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Vernon's Annotated Missouri Statutes
Title XXXIII. Evidence and Legal Advertisements
Chapter 490. Evidence (Refs & Annos)

V.A.M.S. 490.715

490.715. Damages paid by defendant prior to trial may be introduced but is waiver of credit against judgment--evidence of medical treatment rendered permitted, when (collateral source rule modified)

Currentness

1. No evidence of collateral sources shall be admissible other than such evidence provided for in this section.

2. If prior to trial a defendant or his or her insurer or authorized representative, or any combination of them, pays all or any part of a plaintiff's special damages, the defendant may introduce evidence that some other person other than the plaintiff has paid those amounts. The evidence shall not identify any person having made such payments.

3. If a defendant introduces evidence described in subsection 2 of this section, such introduction shall constitute a waiver of any right to a credit against a judgment pursuant to section 490.710.

4. This section does not require the exclusion of evidence admissible for another proper purpose.

5. (1) Parties may introduce evidence of the value of the medical treatment rendered to a party that was reasonable, necessary, and a proximate result of the negligence of any party.

(2) In determining the value of the medical treatment rendered, there shall be a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to:

(a) The medical bills incurred by a party;

(b) The amount actually paid for medical treatment rendered to a party;

(c) The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.

Notwithstanding the foregoing, no evidence of collateral sources shall be made known to the jury in presenting the evidence of the value of the medical treatment rendered.

Credits

(L.1987, H.B. No. 700, § 38, eff. July 1, 1987. Amended by L.2005, H.B. No. 393, § A.)

Notes of Decisions (13)

Statutes and Constitution are current through the end of the 2011 First Extraordinary Session of the 96th General Assembly.

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Vernon's Annotated Missouri Rules
Supreme Court Rules
Rules of Civil Procedure
Part I. Rules Governing Civil Procedure in the Circuit Courts
Rule 55. Pleadings and Motions (Refs & Annos)

Supreme Court Rule 55.05

55.05. Pleading Setting Forth Claims for Relief Shall Contain What

Currentness

A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader claims to be entitled. An initial pleading filed in the family court division of the circuit court shall have attached thereto a certificate stating whether any other case involving any party to the action or any child of such party has been filed in the family court division and, if so, the certificate shall identify to the extent known by style and case number every other case in the family court division, whether pending or previously adjudicated, involving any such party or child. If a recovery of money be demanded, the amount shall be stated, except that in actions for damages based upon an alleged tort, no dollar amount shall be included in the demand except to determine the proper jurisdictional authority, but the prayer shall be for such damages as are fair and reasonable. A party may argue at trial that a specific amount of damages should be awarded even though the prayer is for a fair and reasonable amount. Relief in the alternative or of several different types may be demanded.

Credits

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended Laws 1976, p. 837, § 1; May 22, 1987, eff. Jan. 1, 1988, with notation that amendment may be followed after July 1, 1987; June 1, 1993, eff. Jan. 1, 1994; March 22, 1994, eff. Jan. 1, 1995.)

Notes of Decisions (141)

Current with amendments received through 3/15/2011

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Vernon's Annotated Missouri Rules
Supreme Court Rules
Rules of Civil Procedure
Part I. Rules Governing Civil Procedure in the Circuit Courts
Rule 55. Pleadings and Motions (Refs & Annos)

Supreme Court Rule 55.33

55.33. Amended and Supplemental Pleadings

Currentness

(a) Amendments. A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Credits

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended June 24, 1986, eff. Jan. 1, 1987; Dec. 1, 1986, eff. Jan. 1, 1987; June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994.)

Notes of Decisions (666)

Current with amendments received through 3/15/2011

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