SD 29799

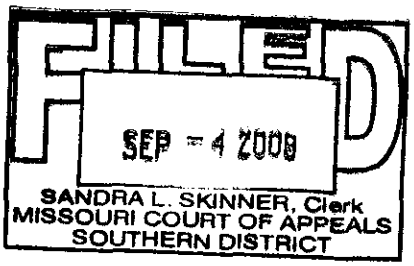
IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

90628

EDITH C. DECK,
Plaintiff/Appellant

v.

DELMAR TEASLEY,
Defendant/Respondent.



Appeal from the Circuit Court of Greene County, Missouri
The Honorable Michael J. Cordonnier, Judge
Greene County Circuit Court No. 31106CC4970

APPELLANT'S BRIEF
AND
APPENDIX TO APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This appeal presents two questions: (1) whether the Circuit Court of Greene County, Missouri, The Honorable Michael J. Cordonnier (hereinafter referred to as the "trial court") erred by finding the value of plaintiff's past medical damages was the amount Medicare and her supplemental insurance paid; and (2) whether the trial court erred in sustaining respondent's objection to testimony from appellant's expert regarding future medical treatment.

Section 512.020 RSMo. provides, in relevant part, that "Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his or her appeal to a court having appellate jurisdiction from any: . . . (5) final judgment in the case." The judgment entered by the trial court on April 1, 2009, disposed of all claims and issues in the case. See Legal File (hereinafter abbreviated "L.F.") at 64. Further, the judgment is set forth in a formal written document denominated "Judgment," as required by Mo.R.Civ.P. 74.01. Appellant timely filed her Notice of Appeal and Civil Case Information Form and paid the prescribed docket fee on May 11, 2009. L.F. at 9, 94-99. Appellant is aggrieved by the final judgment of the trial court, and has timely taken the proper steps to secure appellate review of the judgment.

The Missouri Court of Appeals, Southern District, has jurisdiction to hear this appeal. This appeal does involve, in part, the validity of a statute of Missouri. However, the court

could decide the matter without reaching those issues. *Jackson County Board of Election Commissioners v. Paluka*, 13 S.W.3d 684, 689 (Mo. App. 2000). Therefore, this appeal is not one in which the Missouri Supreme Court has exclusive appellate jurisdiction. Mo. Const. Art. V § 3. The court likewise has jurisdiction among the Courts of Appeals because Greene County is within the territorial jurisdiction of the Missouri Court of Appeals, Southern District. RSMo. §477.060.

STATEMENT OF FACTS

Introductory Facts

This case involves an automobile wreck on May 29, 2003, near the intersection of Kansas Expressway and Sunshine Street in Springfield, Missouri. L.F. at 11; See also Transcript (hereinafter abbreviated "Tr"). P. 112 Line 7-11. Respondent Delmar Teasley was driving his vehicle southbound on Kansas Expressway and noticed a large yellow truck pulling what he thought to be an electromagnet picking up debris on the roadway. Tr. P. 118 Lines 7-16. Respondent glanced at the traffic in front of him which was backed up at a stop on southbound Kansas. Tr. P. 118 Line 25 – P. 119 Line 11. Respondent thought that the traffic was moving. Tr. P. 119 Line 12 – P. 120 Line 12. Mr. Teasley realized to late that traffic was not moving and was unable to stop, hitting the rear of a vehicle operated by Lynn Small. Tr. P. 119 Line 7 – P. 120 Line 16. Due to the force of the impact, Lynn Small's vehicle was forced into the rear of the vehicle operated by Appellant Edith Deck. The force of the impact was significant enough to cause Ms. Deck's vehicle to collide with the rear of the vehicle in front of her. Tr. P. 120 Line 18 – P. 121 Line 10.

On December 8, 2006, appellant filed her Petition against respondent for his negligence in causing the collision, seeking to recover the damages she sustained in the collision, including past and future medical expenses. L.F. at 12. The case proceeded to a two day jury trial on March 30, 2009 and March 31, 2009. L.F. at 9; Tr. ii-iii. The jury on March 31st, returned a verdict of $42,500.00 for Ms. Deck. Tr. 376; L.F. 64-65.

Facts Relevant to Point I, II, III and IV

As a result of the May 29, 2003 automobile accident, appellant sustained injuries to her right arm and shoulder, chest, and left arm. Tr. P. 141 Line 24 – 142 Line 2; P. 143 Line 11 – 144 Line 6; P. 222 line 22-23. Appellant underwent medical treatment following her accident which included an arthroscopic surgery of her right shoulder, the installation of a pain pump on her right shoulder, physical therapy and follow-up care. Tr. P. 142 Line 25 – P. 148 Line 23; P. 206 Line 24 – P. 208 Line 13. As a result of this medical treatment, appellant incurred $27,991.30 in medical bills. Tr. P. 38 Lines 15 – 20; P. 261 Lines 8 – 9; P. 263 Lines 6 – 17; L.F. at 15 - 35. Appellant was a Medicare recipient and most of her medical bills were paid by Medicare. See T.R. 56 - 59. While the amount of her bills incurred was $27,991.30, the reduced amount reimbursed for these expenses totaled $9,904.28. Id.

On March 12, 2009, respondent filed his *Motion to Determine the Value of Medical Treatment Rendered.* L.F. at 15. On March 26, 2009, appellant filed her *Suggestions in Opposition to Defendant's Motion to Determine the Value of Medical Treatment Pursuant to § 490.715 RSMo.* L.F. at 18. Thereafter, the trial court heard evidence and argument on *Respondent's Motion to Determine the Value of Medical Treatment Rendered.* L.F. at 9; Tr. P. ii. At the evidentiary hearing the court heard testimony from St. John's Health System customer care supervisor Mr. Michael Bell, St. John's Physicians and Clinics reimbursement specialist Ms. Janie Mitchell, and health care consultant Mr. Gary Wayne Smith. Tr. P. 3 -

55.

On examination by counsel for respondent, Mr. Bell provided testimony that Medicare reimbursed St. John's Health System for the treatment provided to appellant at amounts significantly less than the total amount of the bills. Tr. P. 7 Line 9 – P. 8 Line 12; Tr. P. 11 Line 15 – P. 12 Line 14. On cross examination, Mr. Bell testified that the total charges reflected on the St. John's Health System bills were customary, reasonable and necessary. Tr. P. 9 Line 1 – 18. He confirmed that when St. John's Health System attempts to collect an outstanding medical bill, it seeks the value of the services rendered, which is the full amount of the bill, not what Medicare paid or would pay. Tr. P. 9 Line 19 – P. 10 Line 15. Mr. Bell also admitted:

Q. Does the payments made by Medicare satisfy these bills, is that a representation of the value of the services rendered?

A. No.

Mr. McGinnis: I would object, Your Honor, that calls for a legal conclusion and outside the ambit of this witness's area of testimony.

The Court: The Objection is sustained. The value of the services is something I'm deciding today. You may collect all the facts from this witness, Mr. Molloy.

Mr. Molloy: Okay.

Q. (By Mr. Molloy) The amount billed, is that what St. John's says its services

are worth?

A. Yes.

Tr. P. 17 Line 23 – P. 18 Line 13.

The second witness, Ms. Janie Mitchell, also testified as to the amount of money reimbursed by Medicare and supplemental insurance. Tr. P. 20 Line 23 – P. 23 Line 12. On cross examination, Ms. Mitchell testified that the total amounts billed by St. John's Physicians and Clinics was customary for the Springfield area, and were fair and reasonable for the services provided. Tr. P. 29 Line 9 – P. 30 Line 3. Further, Ms. Mitchell admitted that when St. John's Physicians and Clinics attempts to collect an outstanding bill, it seeks the full value, not what Medicare or Medicaid would reimburse. Tr. P. 30 Line 7 – 11. Ms. Mitchell confirmed that the actual face value of the bill is what St. John's Physicians and Clinics says its goods and services are worth. Tr. P. 31 Line 1 – 4. Upon questioning by the court, Ms. Mitchell testified that St. John's Physicians and Clinics accepts an amount less than the total billed when Medicare pays a bill. Tr. P. 35 Line 4 – Line 20.

The court also heard testimony from appellant's witness, Gary Wayne Smith. Mr. Smith worked as an executive vice president at Cox Hospital in Springfield, Missouri for twenty five (25) years and testified that his education and experience caused him to become knowledgeable about Medicare reimbursements and hospital billing practices in the Springfield, Missouri area. Tr. P. 40 Line 16 – P. 42 Line 22. Mr. Smith offered a number of opinions regarding the value of appellant's medical treatment, all of which were stated

within a reasonable degree of professional certainty. Tr. P. 52 Line 25 – P. 53 Line 3. Mr. Smith testified that Medicare dictates what a health care provider must accept to satisfy its bill. Tr. P. 43 Line 10 – P. 44 Line 3. The amount reimbursed by Medicare does not even cover the health care provider's cost of doing business. Tr. P. 45 Line 1 – 14. If a health care provider's business was paid at Medicare rates, the provider would go out of business "because it does not recover costs." Id.

Based upon the fact that Medicare reimbursement does not even cover the minimum costs of providing medical service, Mr. Smith testified it does not represent the value of the goods or services provided. Mr. Smith explained that the amount reimbursed by Medicare does not take into account the amount of time the provider spends with a patient, the number of staff members that attend to a patient, the hospital's costs, or the level of care and attention that the patient receives. Tr. P. 46 Line 6 – 17. In an offer of proof, Mr. Smith indicated that because of this, the value of the medical care rendered to a patient is represented by the amount of the actual bill, and not the percentage of that bill Medicare decides to reimburse. Tr. P. 47, Line 4-16. Finally, Mr. Smith reviewed Ms. Deck's medical bills and found that the total amounts billed were customary, fair and reasonable. Tr. P. 52 Line 7 – 24.

After considering the above testimony, the court determined that the value of the past damages for medical bills suffered by plaintiff was the amount actually paid by Medicare, $9,904.28. Tr. P. 59 Line 10 – P. 61 Line . The court therefore precluded plaintiff from offering evidence of the amount of the medical bills which she incurred in treatment of her

injuries. TR P. 59, Line 10-20.

At trial, appellant again requested the court allow the jury to consider the amount of her medical expenses. Appellant provided the court an offer of proof from her expert, Dr. Shane Bennoch. TR. P.260 line7-16. Dr. Bennoch is a medical doctor who practices in Springfield. TR. P. 195 Line 1-4. After his medical education, training, and fellowships, he moved to Springfield in 1974 and began practicing at Cox Hospital where he worked for twenty (20) years. TR P. 196 Line 9 - P. 197 Line 4. Dr. Bennoch is also a life care planner who projects necessary medical care, and is certified by multiple organizations. TR. P. 198 Line 15 - p. 199 Line 13. Dr. Bennoch also served as the medical director for Cox Emergency Department from 1975 to 1991. Dr. Bennoch testified that the full amount of appellant's medical bills, $27,991.30, were fair, reasonable and necessary. Tr. P. 260 Line 22 – P. 261 Line 9.

Based upon a foundational objection, appellant then made further inquiry of Dr. Bennoch who identified that he is a certified life care planner, which requires knowledge about the reasonableness of medical bills. TR P. 262 Line 16-20. Based upon this certification, and his many years of practice Dr. Bennoch testified he has become knowledgeable about the fair value of bills, and that based upon this knowledge the amount billed to Ms. Deck for her care were both fair and reasonable. TR. P. 262 Line 16 - P. 263 Line 23.

Dr. Bennoch was thereafter specifically asked about Exhibit 10-A, the medical

expenses as limited by the court's determination of the past medical damages. TR. P. 266 Line 17 - P. 267 Line 6. Dr. Bennoch provided testimony that the amount determined by the trial court did not represent the value of the services provided to appellant. TR. P. 267 Line 3-19. The reimbursement set by Medicare does not represent the value of the services provided, and Medicare has never represented that its set rates represent the value of the services. T.R. P. 267 Line 7- 19.

The court again refused to allow the jury to determined based on the evidence plaintiff's past medical damages, instead limiting the amount to that which had been paid by Medicare, any supplemental insurance, or which were still outstanding. TR. P. 264 Line 8 to P. 265 Line 16.

Facts Relevant to Point V

During appellant's testimony, she confirmed that the pain in her shoulder has "gotten worse." Tr. P. 166 Line 17 – 24. During appellant's direct examination of Dr. Shane Bennoch, appellant inquired as to Dr. Bennoch's opinion regarding appellant's need for future medical treatment. Dr. Bennoch testified that he would recommend a repeat MRI of appellant's right shoulder. Tr. P. 228 Line 16 – P. 229 Line 9. Dr. Bennoch further testified that if the repeat MRI showed further deterioration and that appellant's shoulder was getting increasingly worse, then a "much more extensive debridement of the labrum," probably including "debridement of the bone," would be called for. Tr. P. 229 Line 13 – 18. Dr. Bennoch noted that Ms. Deck "does not have normal range of motion of her arm and

shoulder, and she does not have the same strength in that shoulder, and she has ongoing pain, and has difficulty if - - she can't sleep on it, for example." Tr. P. 231 Line 11 - 15. Dr. Bennoch confirmed that Ms. Deck's injuries are permanent, progressive and are not going to get any better. Tr. P. 232 Line 14 – 22; P. 257 Line 14 – 19.

While Dr. Bennoch testified that he could not say with certainty that appellant would need an additional surgery, he could testify if the repeat MRI showed further changes to the shoulder, the possibility of further shoulder surgery would become a certainty. Tr. P. 231 Line 2 – 8. When appellant attempted to identify for the jury the reasonable value of this future surgery, defendant objected on the grounds of speculation. TR. P. 230 Line 9-19. Appellant argued that Missouri law allows future medical treatment conditioned upon the outcome of care, holding such evidence is admissible. The trial court sustained the objection, holding that absent expert testimony the appellant would need the surgery within a reasonable degree of medical certainty, it would not be relevant. TR p. 230 Line 23- P. 231 Line 1.

Appellant made an offer of proof with respect to appellant's need for future medical treatment and the cost of the future medical treatment. Tr. P. 267 Line 20 – P. 269 Line 23. Dr. Bennoch testified that if the MRI showed further deterioration of appellant's shoulder and if appellant becomes less functional and experiences increased pain, then she would be more likely to need an additional surgery. Tr. P. 267 Line 20 – P. 268 Line 14. Additionally, Dr. Bennoch testified that if appellant's symptoms are getting worse that she would need

physical therapy and additional doctors' visits and may need pain medicine, anti-inflammatories and surgery. Tr. P. 268 Line 15 – 23. Dr. Bennoch testified that the potential surgery would cost at least $15,000.00. Tr. P. 268 Line 24 – P. 269 Line 7. Dr. Bennoch confirmed that appellant would also require four to six weeks of physical therapy at a cost of $750.00 per week. Tr. P. 269 Line 15 – 23. After the conclusion of this additional testimony, appellant again offered the testimony regarding future care, which the court again rejected. TR. P. 273 Line 3-15.

POINTS RELIED ON

POINT I

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received, because appellant rebutted the presumption in R.S.Mo. § 490.715 that the dollar amount necessary to satisfy the obligation to her health care providers constitutes the value of the medical treatment rendered, in that appellant presented uncontroverted evidence that the reasonable value of her medical treatment was the amount billed for said treatment, rather than the amount actually paid.

§490.715 RSMo.

Kellogg v. Murphy, 164 S.W.2d 285 (Mo. 1942)

Mercantile Bank v. Vilkins, 712 S.W.2d 1 (Mo. App. 1986)

State ex rel Nixon v. Smith, 280 S.W.3d 761, 767 (Mo. App. W.D. 2009).

POINT II

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received, because the trial court misapplied R.S.Mo. § 490.715, in that the trial court misinterpreted R.S.Mo. § 490.715 as creating an irrebuttable presumption that the reasonable value of medical treatment is the amount paid for said treatment.

§490.715 RSMo.

Blaske v. Smith & Entzeroth, 821 S.W.2d 822, 838-839 (Mo. banc 1992)

State ex rel. Cook v. Saynes, 713 S.W.2d 258, 261-62 (Mo. 1986)

Vlandis v. Kline, 412 U.S. 441, 454, 93 S.Ct. 2230, 2237 (1973)

POINT III

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received because, in doing so, the trial court relied on R.S.Mo. § 490.715, which is unconstitutional in that it violates appellant's right to trial by jury guaranteed in Article I, Section 22(a) of the Missouri Constitution by permitting the trial court to make factual determinations as to damages which are determinations reserved for the jury.

Mo. Const. Art. I, §22(a)

Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296 (1935)

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 118 S.Ct. 1279 (1998)

State ex rel Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

POINT IV

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received because, in doing so, the trial court relied on R.S.Mo. § 490.715, which is unconstitutional in that it stems from a legislative bill that violates Article III, Section 23 of the Missouri constitution, which requires every bill to contain a single subject which is clearly expressed in its title.

Mo. Const. Art. III, §23

Carmack v. Director, Mo. Dept. Of Agr., 945 S.W.2d 956 (Mo. banc 1997)

Hammerschmidt v. Boone County, 277 S.W.2d 98, 101 (Mo. banc 1994)

St. Louis Healthcare Network v. State, 968 S.W.2d 145 (Mo. banc 1998)

POINT V

The trial court erred in excluding expert testimony pertaining to appellant's possible future medical condition and treatment because such evidence is clearly admissible under Missouri law, in that it assists the trier of fact in evaluating the nature and extent of appellant's injuries.

Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281 (Mo. banc 1984)

Bynote v. National Supermarkets, Inc., 891 S.W.2d 117 (Mo. banc 1995)

Swartz v. Gale Webb Transportation Co., 215 S.W.3d 127 (Mo. banc 2007)

ARGUMENT

POINT I

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received, because appellant rebutted the presumption in R.S.Mo. §490.715 that the dollar amount necessary to satisfy the obligation to her health care providers constitutes the value of the medical treatment rendered, in that appellant presented uncontroverted evidence that the reasonable value of her medical treatment was the amount billed for said treatment, rather than the amount actually paid.

§490.715 RSMo.

Kellogg v. Murphy, 164 S.W.2d 285 (Mo. 1942)

Mercantile Bank v. Vilkins, 712 S.W.2d 1 (Mo. App. 1986)

State ex rel Nixon v. Smith, 280 S.W.3d 761, 767 (Mo. App. W.D. 2009).

A. STANDARD OF REVIEW

The trial court's decisions on evidence are judged under the abuse of discretion standard, which may be shown by either a ruling which is against the logic of the circumstances, or which is arbitrary or unreasonable. *Bank of American, N.A. v. Stevens*, 83 S.W.3d 47, 53 (Mo. App. S.D. 2002).

B. ARGUMENT

One well recognized category of damages in a personal injury case is that of past medical expenses. To recover damages for medical expenses, plaintiff must show that the charges were reasonable and necessary. *Brown v. Van Noy*, 879 S.W.2d 667, 676 (Mo. App. W.D. 1994). "Generally, the bills themselves are considered sufficient evidence of the reasonable value and necessity for the services." *Long v. Mo. Delta Med. Center*, 33 S.W.3d 629, 639 (Mo. App. S.D. 2000) (citing a string of Missouri cases), abrogated on other grounds by *State Board of Registration for Healing Arts v. McDonaugh*, 123 S.W.3d 146 (Mo. banc 2003).

R.S.Mo. § 490.715 was amended in 2005 by House Bill 393. Please see Appendix, Exhibit E. This statute confirms the right of a appellant to "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." R.S.Mo. § 490.715.5(1). Missouri law therefore now affirmatively mandates by statute the common law rule that the court allow such evidence before the jury. The statute goes on to state:

> 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.

R.S.Mo. § 490.715.5(2). Please see Appendix, Exhibit E.

A presumption itself is not evidence. *Kellogg v. Murphy*, 164 S.W.2d 285 (Mo. 1942); *State ex rel. Christian v. Lawry*, 405 S.W.2d 729 (Mo. App. 1966). Rather, a presumption simply shifts the burden to plaintiff to introduce some evidence rebutting it. *Id.* It has long been held by Missouri Courts that once contrary evidence is introduced, the presumption disappears. *Union Electric v. Brown*, 783 S.W.2d 409, 411 (Mo. App. 1989); *Forbis v. Forbis*, 274 S.W.2d 800, 807 (Mo. App. 1955). The fact is then determined "as if no presumption has ever been in effect". *Costello v. Miranda*, 137 S.W.3d 498, 500-501 (Mo. App. E.D. 2004). See also *J.D. v. M.D.*, 453 S.W.2d 661, 663 (Mo. App. 1970)(Holding that upon the introduction of such evidence, the fact once presumed is to be determined "from the evidence as if no presumption had ever been operative in the case"; *Mercantile Bank v. Vilkins*, 712 S.W.2d 1, 3 (Mo. App. 1986) (citing *Terminal Warehouses of St. Joseph, Inc. v. Reiners*, 371 S.W.2d 311, 316 (Mo. 1963)).

The evidence necessary to rebut a presumption is "that which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inference[s] which can be drawn from it." *Catroppa v. Metal Building Supply, Inc.*, 267 S.W.3d 812, 817 (Mo. App. S.D. 2008). Accord *Farmers and Merchants Insurance Co. v. Harris*, 814 S.W.2d 332, 334 (Mo. App. 1991). Once such evidence has been introduced, the presumption is rebutted, and the outcome of the issue is to be determined on the evidence alone without the aid or hindrance of the presumption. *Sowders v. St. Louis*, 104 S.W. 1122 (Mo. 1907).

The legislature, when it enacted the revision to R.S.Mo. § 490.715 and included that it was a rebuttable presumption, is presumed to know the existing case law as to what a rebuttable presumption means in the law. Please see e.g. *Scruggs v. Scruggs*, 161 S.W.3d 383 (Mo. App. W.D. 2005); *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346 (Mo. Banc 2001)(Legislature is presumed to know the state of the law when it enacts a new statute). When interpreting the legislative intent of this provision, the court must therefore "presume that the legislature acted with knowledge of any prior judicial constructions of the term." *Hoffman v. Van Pak Corp.*, 16 S.W.3d 684, 688 (Mo. App. E.D. 2000). Having employed a term with a well defined judicial meaning, "[i]t will be understood that the General Assembly intended to employ that meaning." *State ex rel Nixon v. Smith*, 280 S.W.3d 761, 767 (Mo. App. W.D. 2009).

Further, the legislative history of the bill shows that the amount for the treatment was not intended to be the determining factor in damage suffered by an injured party. Legislative intent may be ascertained by reference to the history of the bill. Please see e.g. *Trout v. State*, 231 S.W.3d 140, 147 (Mo. banc 2007). One way to do so is to track the bill and the changes made to it before passage. *Id.* House Bill 393 as first introduced on January 31, 2005, initially would have amended R.S.Mo. § 490.715.5 to read:

> Parties may introduce evidence of the amount actually paid for medical treatment rendered to a party that was reasonable, necessary, and the proximate result of the negligence of any party. No party may introduce

> evidence of billing for an amount in excess of the amount actually paid for such medical treatment for which payment was made, and if no payment was made, then a party may only introduce evidence of the amount necessary to satisfy the financial obligation remaining to the health care provider.

Please see Appendix, Exhibit I.

The decision to have the amount paid for medical care be the amount of damages was thus considered by the legislature, and ultimately rejected. Instead, the bill that was ultimately passed and signed into law, did not have this language. Instead, the amount actually paid is now a rebuttable presumption. The fact the legislature amended the bill is further evidence that the intent was to adopt the well-understood meaning of the term rebuttable presumption. *Hoffman v. Van Pak Corp.*, 16 S.W.3d 684, 688 (Mo. Ap. E.D. 2000).

The question thus becomes, did respondent offer evidence to rebut the presumption that the value of medical treatment is the amount necessary to satisfy the financial obligation to the health care provider? If so, under the express terms of the statute, it was error to exclude this evidence of reasonable and necessary treatment.

Mr. Christopher Bell of St. John's Health System and Ms. Janie Mitchell of St. John's Physicians and Clinics both testified that the amounts billed were customary, fair and reasonable. Tr. P. 9 Line 11 – 18; P. 29 Line 9 – P. 30 Line 3. Mr. Bell confirmed that the value of the services rendered is the full amount billed, and not the reduced amount that

Medicare would reimburse for such services. TR. P. 9, Line 19 - P. 10 Line 15.[1] Instead, St. John's considers the amount billed to be what the services rendered are actually worth. TR. P. 18 Lines 11-13. Ms. Mitchell likewise testified that the value of the services rendered was the full amount billed, and not what Medicare would reimburse. TR. P. 30 Lines 7-11. She also confessed that St. John's Physicians and Clinics considers the amount billed to be

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[1] In fact, Mr. Bell admitted that the amounts accepted from Medicare in satisfaction of appellant's bills is not a representation of the value of appellant's medical treatment. Tr. P. 17 Line 23 – P. 18 Line 1. Subsequent to witness Bell's answer to the "value" question, respondent objected on the basis that the question called for a legal conclusion and the objection was sustained. Tr. P. 18 Line 2 – 9. However, respondent elicited testimony from Mr. Bell that he was the Customer Care Supervisor for St. John's, that he handled charity, billing and collections for St. John's, that he was familiar with how payments from patients, insurance companies and Medicare are recorded, and was a witness called by respondent in a hearing to determine the "value" of appellant's medical treatment. Tr. P. 3 Line 22 – P. 5 Line 12. As such, in light of witness Bell's knowledge, skill and experience, he was qualified to speak to the value of the treatment rendered by St. John's. Please see e.g. R.S.Mo. § 490.065.2 (Testimony by expert is not objectionable on basis it embraces the ultimate issue to be decided by the trier of fact) Appendix Exhibit J; *Doe v. McFarlane*, 207 S.W.3d 52, 64 (Mo. App. E.D. 2006).

the value of the services they provide to the patient. TR. P. 31 Lines 1-4.

Appellant also offered the testimony of expert Gary Wayne Smith. Mr. Smith was the Executive Vice President of Cox Hospital in Springfield for twenty five (25) years, who had significant knowledge about hospital billing and Medicare reimbursement rates. TR. P. 40 Line 16 - P.42 Line 22. Mr. Smith confirmed that Ms. Deck's medical bills were customary, fair and reasonable for the services provided. TR. P. 52 Lines 7-24. Mr. Smith testified that the Medicare rate or reimbursement is not the value of medical bills, but instead what a health care provider is required to accept by the government. TR. P. 43 Line 10- P. 44 Line 3. Under general industry standards, the amount reimbursed by Medicare does not even pay overhead. TR. P. 45 Lines 1-14. If health care providers were to accept Medicare rates for all of their services, they would go out of business because such rates do not even cover the costs of doing business. Id.

Medicare rates are thus not the value of services rendered because they do not consider the amount of time spent by a provider with a patient, the number of staff who treat a patient, the hospitals costs of doing business, or the level of care and attention required for that patient. TR. P. 46 Lines 6-17. In an offer of proof, Mr. Smith also confirmed that the value of the medical care rendered is represented by the amount actually billed, and not the percentage of the bill which Medicare decides to reimburse. TR. P. 47 Lines 4-16.

The only other evidence of value was offered by appellant's expert, Dr. Bennoch at trial. In an offer of proof, Dr. Bennoch confirmed that the amount billed for the care

provided was both fair and reasonable. TR. P. 262 Line 16 - P. 263 Line 23. Dr. Bennoch was specifically asked about Exhibit 10-A, the medical expenses limited by the court's determination of the value of past medical damages. Tr. P. 266 Line 17 - P. 267 Line 6. Dr. Bennoch's testimony confirmed that the amount determined by the trial court did not represent the value of the medical services provided to Appellant. Tr. P. 267 Lines 3-19.

The above evidence is substantial evidence that the value of the health care services provided to appellant was the amount billed by the provider, and not the reduced Medicare reimbursement rate. This testimony rebutted the presumption that the value of appellant's medical expenses was equivalent to the reduced amount the health care providers were required to accept from Medicare. Having been rebutted, the presumption vanishes. *Union Electric v. Brown*, 783 S.W.2d 409, 411 (Mo. App. 1989); *Forbis v. Forbis*, 274 S.W.2d 800, 807 (Mo. App. 1955). The fact is then determined "as if no presumption has ever been in effect." *Costello v. Miranda*, 137 S.W.3d 498, 500-501 (Mo. App. S.D. 2004).

With the presumption gone, the only evidence of the actual value of the services was that offered by appellant set forth above. Respondent offered **no** testimony that the Medicare rate was determined based upon the actual value of the services provided, that it bore any relation to the actual value of the care, or any other evidence as to value. Instead, they simply offered evidence that identified the reduced amount the treaters accepted pursuant to Medicare reimbursement rates.

If a health care provider does not even recover its cost of doing business when it

accepts Medicare rates, how can the amount reimbursed by Medicare represent value? If the amount reimbursed by Medicare does not account for the time and attention devoted to a patient, how can the reimbursement represent value? The answer is it cannot. Respondent did not even attempt to address the issue of value, but instead focused solely on what was paid. The uncontested evidence in this case, including from the two witnesses called by respondent, was that the value of the services provided was set out in the amount billed, and not the reduced payments the health care providers were forced to accept by Medicare. The presumption that the amount paid was the value of the services provided vanished once the evidence of actual value was presented. The court therefore was left solely with the uncontested evidence that the full bills were the value of the services. The court's decision to disregard this evidence was contrary to the express terms of the statute. The decision to withhold from the jury the actual value of the medical damages sustained by plaintiff resulted in the prejudicial exclusion of $18,000.00 in plaintiff's damages.

POINT II

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received, because the trial court misapplied R.S.Mo. §490.715, in that the trial court misinterpreted R.S.Mo. §490.715 as creating an irrebuttable presumption that the reasonable value of medical treatment is the amount paid for said treatment.

§490.715 RSMo.

Blaske v. Smith & Entzeroth, 821 S.W.2d 822, 838-839 (Mo. banc 1992)

State ex rel. Cook v. Saynes, 713 S.W.2d 258, 261-62 (Mo. 1986)

Vlandis v. Kline, 412 U.S. 441, 454, 93 S.Ct. 2230, 2237 (1973)

A. Standard of Review

"Statutory interpretation is purely a question of law, which [appellate courts] determine de novo." *Cline v. Teasdale*, 142 S.W.3d 215, 222 (Mo. App. W.D. 2004).

B. Argument

In making a determination as to the value of the past medical damages suffered by the plaintiff, the trial court held that evidence of value could not come from the person or entity which actually provided the services. Specifically, the court ruled "we cannot turn over to the health care providers the ability to govern the estimate of what a Plaintiff's damages are." Tr. P. 60 Lines 9 – 12. The court therefore refused to consider the evidence offered, and

created an unrebuttable presumption that the amount paid is the value of the plaintiff's past medical damages. This is inconsistent with the statute, and Missouri case authority.

First, the express language of the statute states the very first piece of evidence which is to be considered by the court in determining the value of the past medical damages are:

(a) The medical bills incurred by a party;

R.S.Mo. § 490.715.(2)(a).

The trial court, however, failed to consider the amount of the medical bills incurred by plaintiff. Instead, it held it would be improper to consider this statutory category of evidence, and the testimony of the witnesses called by the defendant that these bills represented the actual value of the medical expenses at issue. The court's decision disregarded this specific statutory evidence. It did so apparently based upon a policy decision that the health care providers cannot be trusted or considered when submitting their bills or providing testimony. This policy, however, is directly contrary to the statute which lists such evidence as the first evidence which should be considered. Having failed to follow the specific dictate of the statute, the court erred. Please see e.g. *Garza v. Valley Crest Landscape Maintenance, Inc.*, 224 S.W.3d 61, 64 (Mo. App. E.D. 2007)(Court must give effect to terms of statute as written); *Straight v. Straight*, 195 S.W.3d 461, 467 (Mo. App. W.D. 2006)(Same).

The court's interpretation created an unrebuttable presumption that the amount paid is the value of the medical services provided. The language of the statute, however, creates

a rebuttable presumption, which plaintiff rebutted with overwhelming evidence. The evidence was that the amount reimbursed by Medicare is in no manner indicative of the value of the treatment rendered. Medicare reimbursements do not take into account the level of care provided, the amount of time spent with a patient and do not even cover the health care provider's cost. The uncontested evidence therefore was that the reduced rate Medicare mandates a hospital or health care provider must accept is not the value of the medical care provided. As respondent relied solely on evidence showing how much was paid on these bills, they failed to offer any evidence of value.

However, the court disregarded the evidence and ruled that it could not allow the medical providers to set the value of their services. Instead, the court held that the amount Medicare reimbursed must be found to be the value of the services. Pursuant to the court's reasoning, if Medicare makes a reimbursement, that is the end of the inquiry because the Medicare reimbursement amount will be the measure of a plaintiff's damages. This interpretation ignores the plain language of the statute that the amount paid is only a rebuttable presumption, and instead created an irrebuttable presumption.[2]

R.S.Mo. § 490.715.5(2) states, "There shall be a **rebuttable presumption** that the

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[2] As set forth above, the legislature considered a non rebuttable presumption regarding the value of medical services, but rejected this standard before passage. The court's interpretation thus attempts to adopt a statute which was specifically considered and rejected.

dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered." (emphasis added). Additionally, R.S.Mo. § 490.715.5(2) states that the court may determine the value of medical treatment rendered based on additional evidence, **including** the medical bills incurred by a party. R.S.Mo. § 490.715.5(2)(a)(emphasis added). The trial court's interpretation of the statute ignores the plain language of the statute stating that a "rebuttable presumption" is created and that the court may determine the value of the treatment rendered based on additional evidence. Therefore, the trial court's interpretation of the statute denied appellant a fair opportunity to repel the presumption.

This is not only contrary to the terms of the statute, but would also create a constitutional infirmity in the statute. Citizens of Missouri are guaranteed due process under Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution. Please see Appendix, Exhibits K and L. Under both, "the fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner." *Jamison v. State Department of Social Services*, 218 S.W.3d 399, 405 (Mo. banc 2007).

To ensure this basic protection, the hearing must not be stacked to a pre determined conclusion before it begins. "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial

determination of issues involving life, liberty or property." *State ex rel. Cook v. Saynes,* 713 SW2d 258, 261-62 (Mo. banc 1986) (quoting *Western & Atlantic Railroad v. Henderson,* 279 U.S. 639, 642 (1929)). In *State ex rel Cook,* the court held that the statute passed constitutional muster because the presumption was rebuttable. *Id.* at 262. The court noted multiple opinions from the United States Supreme Court which have held irrebuttable presumptions to be a violation of due process. *Id.*, citing *Vlandis v. Kline*, 412 U.S. 441, 454, 93 S.Ct. 2230, 2237 (1973)(Irrebuttable presumption regarding residence violated due process); *U.S. Department of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832 (1973)(Irrebuttable presumption of food stamp eligibility violated due process); *Cleveland Board of Education v. LaFluer*, 414 U.S. 632, 94 S.Ct. 791 (1974)(Irrebuttable presumption regarding amount of time required for pregnancy leave violated due process); *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974)(Setting out Supreme Court precedent holding irrebuttable presumption denies due process of law).

R.S.Mo. § 490.715.5, as interpreted by the trial court, barred appellant from claiming medical expenses in excess of the amount paid by Medicare. This application of the statute denied appellant a fair opportunity to rebut the presumption by presenting evidence as to the value of appellant's medical expenses above what Medicare paid. Applying R.S.Mo. § 490.715 as the trial court did would violate the right to due process of law guaranteed by Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution.

The interpretation of the statute adopted by the trial court would also result in the statute being unreasonably vague, another violation of the due process clause. Under both the due process clause of the Missouri Constitution and the United States Constitution, a statute may be void for vagueness if it fails to set forth sufficient standards to ensure enforcement of the law is not arbitrary or discriminatory. *U-Haul Co. Of Eastern Missouri, Inc. v. City of St. Louis*, 855 S.W.2d 424, 426-427 (Mo. App. E.D. 1993). If the statute is thus left to the vagaries of human responses, it is void for vagueness. *City of Festus v. Werner*, 656 S.W.2d 286, 287 (Mo. App. 1983). If the statute does not set forth a way in which to rebut what it calls a rebuttable presumption, it would not have the necessary standards to ensure it was not applied arbitrarily, and would thus be void for vagueness. *Id.*[3]

It is a well-settled canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-839 (Mo. banc 1992). "Court[s] should avoid interpretations that would render a statute unconstitutional." *Abmeyer v. State Tax Commission*, 959 S.W.2d 800, 806 (Mo. 1998). The interpretation accorded the statute by the trial court is thus not only inconsistent with the text of the statute, but would also make it unconstitutional. The

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[3] One Circuit Court has already held the statute unconstitutional for this reason. Please see Judgment in *Vickery v. Glosemeyer*, Appendix, Exhibit M.

Court interpreted the statute incorrectly, which requires reversal.

POINT III

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received because, in doing so, the trial court relied on R.S.Mo. §490.715, which is unconstitutional in that it violates appellant's right to trial by jury guaranteed in Article I, Section 22(a) of the Missouri Constitution by permitting the trial court to make factual determinations as to damages which are determinations reserved for the jury.

Mo. Const. Art. I, §22(a)

Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296 (1935)

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 118 S.Ct. 1279 (1998)

State ex rel Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

A. Standard of Review

"The standard of review for constitutional challenges to a statute is de novo." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

Right to Trial by Jury

When the United States declared its independence from Britain, one of the grievances identified was "for depriving us in many cases, of the benefit of Trial by Jury." *Parklane*

Hosiery Co., Inc. v. Shore, 439 U.S. 322, 340-341, 99 S.Ct. 645, 656-657 (1979). "Indeed, the right to trial by jury was probably the only one universally secured by the first American state constitutions." *Id.* To ensure this fundamental right in the Federal Constitution, the founding fathers included the right to trial by jury in the Bill of Rights, setting forth in the Seventh Amendment to the United States Constitution "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Please see Appendix, Exhibit N.

This right to trial by jury has been a fundamental right guaranteed to all Missouri citizens from the earliest days. When the area which would become Missouri was purchased from France, the Missouri Territorial Laws provided for the right to trial by jury. *State ex rel Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003). When Missouri became a state, it enshrined this guarantee in its constitution. The first Missouri Constitution passed in 1820 provided "that the right of trial by jury shall remain inviolate." Article XIII, Sec. 8. Please see also *State ex rel Diehl* at 84-85 (Mo. banc 2003). Similarly, the 1875 Constitution continued this absolute right to a trial by jury. *State ex rel Diehl* at 84-85. Article I, Section 22(a) of the current Missouri Constitution continues this mandate, stating that "the right of trial by jury as heretofore enjoyed shall remain inviolate." Please see Appendix, Exhibit F.

In interpreting this fundamental right, The Missouri Supreme Court has indicated the right of trial by jury is broader in the Missouri Constitution than that expressed in the Seventh Amendment to the United States Constitution. Please see *State ex rel Diehl* at 84.

The use of the words:

> remain inviolate is a more emphatic statement of the right than the simply stated guarantee written some 30 years earlier as the Seventh Amendment to the United States Constitution that 'the right of trial by jury shall be preserved...'

Id.

Missouri thus has "an extremely strong public policy in favor of the right to trial by jury." *State ex rel M.D.K. v. Dolan*, 968 S.W.2d 740, 746 fn4 (Mo. App. E.d. 1998), citing *Atteberry v. Attebery*, 507 S.W.2d 87, 93 (Mo. App. 1974). "Hardly any right is more firmly rooted in our law and trial by jury should be jealously guarded by the courts and any curtailment should be scrutinized with the utmost care." *Id.* If a matter involves a common law claim for legal damages, the right to trial by jury is "beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as existing at common law." *State ex rel St. Louis K & N.W. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. 1896); *Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. 1980)(Same). For factual elements historically to be decided by the jury, "the jury trial right is to remain inviolate," and cannot be reached by the legislature no matter what type of statute they attempt to pass. *State ex rel Diehl v. O'Malley*, 95 S.W.3d 82, 85, 92 (Mo. banc 2003). Under Missouri law, if it involves an issue of fact on a legal claim, the Constitution requires it be decided by the jury. *In re Grading of Independence & Westport Road, Kansas City*, 141 S.W. 1103, 1106-1107 (Mo.

1911).

The Missouri Constitution thus requires the jury decide all factual matter which were to be decided by a jury under the common law at the time of the enactment of the 1820 Constitution. *State ex rel Diehl* at 84-85. Commentators have universally noted that the right to trial by jury has included the right to have a jury determine the amount of damages. See e.g. *Charles T. McCormick, Handbook on the Law of Damages 24 (1935)* ("The amount of damages . . . from the beginning of trial by jury, was a 'fact' to be found by jurors"); 3 W. Blackstone, Commentaries 397 (Ascertainment of the "quantum of damages sustained by [the plaintiff] . . . is a matter that cannot be done without the intervention of a jury"). Blackstone further noted that if the jury found for the plaintiff on liability, the jurors next "assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought." *Id.* at 1339.

Missouri court's have likewise held that the amount of damages is a factual matter to be decided by the jury. In *Steinberg v. Gebhardt*, 41 Mo. 519 (1867), the Missouri Supreme Court held under Missouri law it was within the "province" of the jury to determine the amount of damages sustained. *Id.* Similarly, the court in *Peeler v. McMillan,* 91 Mo. App. 310 (Mo. App. 1902) confirmed that the extent of damages was a matter for the jury.

Missouri courts have consistently followed this rule. In *Chapman v. New Mac Electric Cooperative, Inc.*, 260 S.W.3d 890 (Mo. App. S.D. 2008) this court held a trial court improperly interfered with the jury's fact finding function of awarding damages. The court

started by stating as a first principle that the assessment of damages is a jury function. *Id.* at 894-895. The trial court, however, reduced the amount of damages found by the jury in "an attempt to make an evidentiary ruling by way of a reduction of damages." *Id.* at 895-896. This court ruled to do so was error, as the trial court had no authority to interfere in the juries fact finding role on the amount of damages sustained. *Id.* at 896. Please see also *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 588 (Mo. App. W.D. 2002)("In addition the amount of damages to be awarded to a plaintiff is primarily within the province of the jury"); *Shobe v. Kelly*, 279 S.W.3d 203, 212 (Mo. App. W.D. 2009)(Same).

Under the less protective Seventh Amendment, the United States Supreme Court in *Dimick v. Schiedt* found that trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick*, 293 U.S. 474, 486, 55 S.Ct. 296, 301 (1935). The court held that at the time the right to trial by jury was enacted, "in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the court should not alter it." *Id.* at 480, 298 (citing Mayne's Treatise on Damage, 571 (9th ed. 1856)). The *Dimick* court thus held that the assessment of the amount of damages was solely a matter for jury resolution under the Seventh Amendment to the United States Constitution. *Id.*

This absolute right to have a jury of one's peers determine the amount of damages was more recently addressed by the United States Supreme Court in *Feltner v. Columbia Pictures*

Television, Inc., 523 U.S. 340, 118 S.Ct. 1279 (1998). In *Feltner*, the current Chief Justice, John Roberts, while in private practice, appealed the trial court's denial of a jury trial on the amount of damages in a federal copyright case. *Id.* The United States Supreme Court reversed and remanded the case finding that the right to a trial by jury includes the right to have the jury assess the amount of any damages. *Id.* at 352-55, 1286-1288.

In *Feltner*, the court held there is "overwhelming evidence that the consistent practice at common law was for juries to award damages." *Id.* at 353, 1287, citing to numerous cases from the 1700s. "The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages." *Id.* (emphasis original). It has therefore "long been recognized that by the law the jury are judges of the damages." *Id.* (citing *Lord Townshend v. Hughes*, 2 Mod. 150, 151; 86 Eng. Rep. 994, 994-95 (C.P. 1677)). A jury, therefore, must determine the amount of damages "in order to preserve the substance of the common law right of trial by jury." *Id.* at 355, 1288.

R.S.Mo. § 490.715 infringes on the long-established right to have a jury of one's peers determine the amount of a plaintiff's damages. Instead of the jury, R.S.Mo. § 490.715 sets forth a procedure where the trial court makes a factual determination as to the amount of the plaintiff's medical expense damages, outside of the presence of the jury. The court, instead of the jury, hears evidence on the plaintiff's medical care, and makes a factual determination of the value of these services. The determination of the value of a plaintiff's medical damages is removed from the jury's consideration and decided by the court. R.S.Mo. §

490.715.5(2). ("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 . . . .") This factual damage determination made by the court does not involve a simple mathematical calculation. Rather, the judge is charged with the task of determining the "value" of the medical treatment rendered to plaintiff. Id. The statute, therefore, expressly attempts to take a fact finding function regarding damages out of the hands of the jury, and place it with the trial court.

In this case, all of the testimony confirmed that the fair value of the medical damages suffered by plaintiff was not the amount paid by Medicare. Instead, it was the amount billed by the health care provider. Defendant's witnesses Mr. Bell and Ms. Mitchell confirmed this. So to did plaintiff's expert Mr. Smith, the former Executive Vice President of Cox Hospital. The jury, however, was not allowed to determine the factual issue of past medical damages, despite this testimony.

This restriction of the jury's right to make factual determinations can also be seen by the exclusion of Dr. Bennoch's testimony at trial. During an offer of proof, appellant offered into evidence her medical expenses in the amount of $27,991.30. Tr. P. 260 – 267. Dr. Bennoch testified that the total charges incurred by appellant, $27,991.30, were fair and reasonable. Tr. P. 261 Line 6 – 9. He also testified that the charges incurred were necessary to treat appellant and, without incurring the charges, appellant would have gotten much worse. Tr. P. 263 Line 21 – P. 264 Line 1. Dr. Bennoch was qualified as an expert to opine

as to the reasonableness of appellant's medical bills. Tr. P. 263 Line 15 – 17. Despite this, the court excluded from the jury the ability to determine the amount of plaintiff's past medical damages based upon the evidence. It is for the jury, and not the court to resolve any disputed facts regarding the value of past medical damages.

The attempt to remove the determination of a plaintiff's damages from the jury and transferring this fact finding role to the judge violates the right to a trial by jury guaranteed by Article I, Section 22(a) of the Missouri Constitution. The "value" of medical treatment involved in the determination of a plaintiff's medical damages is clearly an issue of fact to be determined by a jury, not a judge. The right to trial by jury is "beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as existing at common law." *State ex rel St. Louis K & N.W. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. 1896); *Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. 1980)(Same); *State ex rel Diehl v. O'Malley*, 95 S.W.3d 82, 85, 92 (Mo. banc 2003)(Same). The court's refusal to allow the jury to determine the value of appellant's past medical damages was therefore error under the Missouri Constitution.

POINT IV

The trial court erred in ruling that appellant's claim for past medical expenses was limited to the amount actually paid for the medical treatment she received because, in doing so, the trial court relied on R.S.Mo. §490.715, which is unconstitutional in that it stems from a legislative bill that violates Article III, Section 23 of the Missouri constitution, which requires every bill to contain a single subject which is clearly expressed in its title.

Mo. Const. Art. III, §23

Carmack v. Director, Mo. Dept. Of Agr., 945 S.W.2d 956 (Mo. banc 1997)

Hammerschmidt v. Boone County, 277 S.W.2d 98, 101 (Mo. banc 1994)

St. Louis Healthcare Network v. State, 968 S.W.2d 145 (Mo. banc 1998)

A. Standard of Review

"The standard of review for constitutional challenges to a statute is de novo." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

As set forth above, R.S.Mo. 490.715 substantively violates the Missouri Constitution by attempting to have the court make factual determinations reserved for the jury. The bill which enacted this statute violates another provision of the Missouri Constitution on both procedural and substantive grounds, by failing to have a single, clear subject. Rather than

have a single subject, House Bill 393 repealed nineteen (19) different statutory sections dealing with a myriad of different subjects, from appellate bonds, to venue. It also enacted twenty-three (23) new provisions on a veritable cornucopia of topics. Having failed to comply with the constitutional mandate that a bill have only one subject, clearly identified, it must be stricken.

Article III Section 23 of the Missouri Constitution provides: "[n]o bill shall contain more than one subject which shall be clearly expressed in its title . . ." Please see Appendix, Exhibit G. This provision imposes two distinct procedural limitations when the General Assembly attempts to pass any legislation: (1) A bill cannot contain more than one subject (single subject requirement); and (2) the subject of the bill must be clearly expressed in its title (clear title requirement). *Carmack v. Director, Mo Dept. of Agr.*, 945 S.W.2d 956, 959 (Mo. banc 1997). A similar provision has been part of every Missouri Constitution since 1865. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101 (Mo. banc 1994). Its terms are mandatory, and not directory. *Id.* at 102.

This constitutional prohibition serves several vital functions. First, it "facilitates orderly legislative procedures," allowing a bill to be more readily understood and intelligently discussed. *Hammerschmidt* at 101. It also serves to prohibit the practice of logrolling, or combining multiple amendments or revisions which could not pass on their own merits individually. *Id.* This requirement of a single, clear subject has been called "one of the great equalizers in backroom politics," which serves as "a hurdle that prevents

legislators from hijacking the legislative process by attaching an unrelated provision to a proposed bill." Knoll, Alexander R., *Tipping Point: Missouri Single Subject Provision*, Missouri Law Review, Fall 2007.

This constitutional provision also serves to prevent surprise in the legislative process, by ensuring a clever legislator does not insert unrelated amendments to the body of pending bills. *Hammerschmidt* at 102. It further ensures the electorate is fairly apprised of the laws their representatives are proposing and enacting. *Id.* The single subject and clear title rule thus allows the people an opportunity to be heard on the matter at issue. *Id.* Finally, since the governor cannot line item veto general legislation, it prevents the legislature from forcing the governor into signing provisions with conflicting merits. *Id.*

The question is then whether House Bill 393, the bill which enacted Revised 490.715 involved a single, clear subject. Even a cursory review of the bill shows it does not meet either of these two mandatory requirements. Section R.S.Mo. § 490.715 was one of twenty-three (23) new sections, which replaced nineteen repealed sections, contained in House Bill 393. The title of House Bill 393 was: "AN ACT to repeal sections 355.176, 408.040, 490.715, 508.010, 508.040, 508.070, 508.120, 510.263, 510.340, 516.105, 537.035, 537.067, 537.090, 538.205, 538.210, 538.220, 538.225, 538.230, and 538.300, R.S.Mo., and to enact in lieu thereof twenty-three new sections relating to claims for damages and the payment thereof." Please see Appendix, Exhibit H.

The new sections included statutory provisions on items with chapter titles ranging

from Not-for-Profit Corporations (R.S.Mo. § 355.176) to Appeals and Appellate Procedure for Bonds (R.S.Mo. §512.099). The bill changes the law on interest (R.S.Mo. § 408.040), evidence (R.S. Mo. §490.715 the amendment at issue) and § 537.090 (setting forth a rebuttable presumption regarding the value of deceased individuals), venue (R.S.Mo. § 508.010), discovery (R.S.Mo. § 510.263), the statute of limitations for certain claims (R.S.Mo. § 516.105), and joint and several liability (R.S.Mo. § 537.067). It includes changes to Missouri's privilege laws (R.S.Mo. § 537.035 regarding Peer Review of medical treatment), and contains a grant of immunity for negligence (R.S.Mo. § 538.228). It even includes an amendment regarding how expression of sympathy or "benevolent gestures" should be treated (R.S.Mo. § 538.229.1). Please see Appendix, Exhibit H.

The various sections and chapters of H.B. 393 address multiple, disparate areas. For instance, 355.176, a section on service and venue of not-for-profit corporations, has absolutely nothing to do with the express subject of the bill, damages and the payment thereof. Interestingly, this same statute was a section in House Substitute for Senate Bill 768 (HSSB 768) which was enacted into law in 1996. It was declared to be unconstitutional as violating Article III, Section 23, in its entirety, on the grounds that the narrative portion of the bill's title, indicating that it related to "certain incorporated and non-incorporated entities" was too broad and too amorphous to identify a single subject, and that the statute section numbers to be repealed as listed in title of the bill did not sufficiently relate to a single type of entity for the title to satisfy the clear title requirement. See *St. Louis HealthCare Network v. State*, 968 S.W.2d 145 (Mo. banc 1998). Grafting this section into House Bill 393 creates

constitutional issues for the same reasons.

In *St. Louis Health Care Network*, the Supreme Court found a "clear title" violation in a bill entitled "relating to certain incorporated and non-incorporated entities" under the rationale that "the title . . . could describe any legislation that effects, in any way, business, charities, civic organizations, governments, and government agencies," or, in other words, "most, if not all, legislation passed by the General Assembly." *Id.* at 148. The court held that a title cannot be so general as to obscure the contents of the act, because to condone such a bill would "render the single subject mandate meaningless." *Id.* at 147. If it is too broad or to amorphous to readily identify the single subject at issue, it violates the clear mandate of the Constitution. *Id.* The court held that the title could deal with any number of things, and was thus too broad. *Id.* at 147-148. The court concluded this problem existed even if it limited the scope of entities to non profit corporations only. *Id.,* citing *Camack* at 960 (Holding term "economic development" was to broad and amorphous).

The same rationale applies here. The title of HB 393 is so broad and amorphous in scope that it fails to give notice of its content, which effectively renders the "single subject" requirement meaningless and obscures the actual subject of the legislation. Please see also *Home Builders of Greater St. Louis v. State,* 75 S.W.3d 267 (Mo. banc 2002), where the court held that a bill entitled "relating to property ownership" was overbroad on the same grounds. *Id* at 272.

Despite the overbreadth of the subject of the bill, it does not even clearly stay within

these overbroad confines.[4] The subject claims for damages and payment thereof does not cover the separate title of Appeals and Appellate Procedure as it relates to bonds. It also does not cover changes to Missouri's law of privilege. In *Hammerschmidt*, the title of the bill stated it was repealing eight statutory provisions relating to elections, and enacting eleven new sections "relating to the same subject." Id. at 100, 103. The court held the title indicated the single subject was to amend laws relating to elections. *Id.* at 103. The bill itself, however, included provisions on not just elections, but also to authorize a county to adopt a county constitution. *Id.* The fact that the provision required an election for voter approval did not make it a statute dealing with elections. *Id.* Instead, this statutory provision's purpose was to authorize a new form of county government, which did not conform to the constitutional mandate that it involve a single, clear title. *Id.*

Similarly, the court in *Carmack v. Director, Mo Dept. of Agr.*, 945 S.W.2d 956, 959 (Mo. banc 1997) dealt with a bill entitled "Relating to Economic Development." The court held this title violated the single subject requirement insofar as it amended the rate of compensation paid to owners of livestock slaughterhouses by the state veterinarian. The reasoning was that five of the six changes in the law related to programs administered by the Department of Economic Development, which was determined to be the core subject. The

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[4] If the court should find that the 20 plus changes to multiple titles relate to the subject of the bill, that would be additional evidence of the fact it is overbroad and amorphous. Please see *Home Builders Association of Greater St. Louis* at 270, fn1.

state veterinarian was an employee of the Department of Agriculture, instead of the Department of Economic Development. Because the section addressed a different subject than the primary core subject of the bill, it was determined to violate Article III, Section 23. *Id.* at 961.

The *Carmack* court held that one clear way to determine whether a bill violates the "one subject" rule, is to review what categories the various amendments fall under. *Id.* at 960. The Missouri Statutes are divided into different categories, or titles. Please see Appendix, Exhibit O. The subject of the Bill is supposed to be "claims for damages and the payment thereof." Title XXXVI, "Statutory Actions and Torts" is the Title of the Missouri Code within which claims for damages and payment are encompassed. This Title covers Chapters 521 to 538 of the Missouri Statutes. Eleven of the statutory changes contained in House Bill 393 do fall within this range. The statute at question (490.715), however, does not. Instead, it is contained in Title XXXIII, Evidence and Legal Advertisements.

The same is true of several other of the statutes altered by this bill, including R.S.Mo. § 355.176 which falls under the Title dealing with "Corporations, Associations and Partnerships." Please see Title XXXIII. Likewise, R.S. Mo. § 408.040 which is amended by House Bill 393 is found under Title XXVI, "Trade and Commerce." Multiple of the other changes to the law are found in yet another title, Title XXXV, "Civil Procedure and Limitations." More than half of the amendments contained in House Bill 393 do not relate to the subject of the bill according to the Statutory Scheme of Missouri, including the specific

provision challenged here. Having addressed more than one subject in the bill, it violates section 23 of the Constitution. *Carmack* at 961.

House Bill 393 violates both the clear title rule, and the single subject rule of Article III, section 23 of the Missouri Constitution. Its failure to have a clear single subject as required, mandates it be invalidated. *Home Builders Association of Greater St. Louis v. State*, 75 S.W.3d 267, 271-272 (Mo. banc 2002).

POINT V

The trial court erred in excluding expert testimony pertaining to appellant's possible future medical condition and treatment because such evidence is clearly admissible under Missouri law, in that it assists the trier of fact in evaluating the nature and extent of appellant's injuries.

Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281 (Mo. banc 1984)

Bynote v. National Supermarkets, Inc., 891 S.W.2d 117 (Mo. banc 1995)

Swartz v. Gale Webb Transportation Co., 215 S.W.3d 127 (Mo. banc 2007)

A. Standard of Review

The admission or exclusion of expert evidence is reviewed for an abuse of discretion. *Swartz v. Gale Webb Transportation Co.*, 215 S.W.3d 127, 129-130 (Mo. banc 2007).

B. Argument

Expert testimony regarding the probability of future medical treatment or surgery, and the potential cost of such treatment, has a long and well established history under Missouri law. Missouri courts have been unanimous that such evidence is properly submitted to the jury. This is to ensure the "well-settled rule" that a plaintiff is entitled to full compensation for all injuries caused by the defendant's neglect. *Swartz v. Gale Webb Transportation Co.*, 215 S.W.3d 127, 131 (Mo. banc 2007). If the plaintiff has suffered an increased risk of possible future consequences, Missouri courts have long held that such testimony is

admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur. *Id.* at 131. The trial court's exclusion of the evidence of the possible future consequences of the injury to Ms. Deck was thus error.

Ms. Deck suffered a shoulder injury in the wreck. During her testimony, she confirmed that the pain in her shoulder had "gotten worse." Tr. P. 166 Line 17 – 24. During direct examination Dr. Shane Bennoch was asked about possible future medical care or treatment Ms. Deck might require. Dr. Bennoch testified that he would recommend a repeat MRI of appellant's right shoulder. Tr. P. 228 Line 16 – P. 229 Line 9. Dr. Bennoch confirmed that if Ms. Deck's shoulder was getting worse, and the repeat MRI showed further deterioration, then a "much more extensive debridement of the labrum," probably including "debridement of the bone" would be called for. Tr. P. 229 Line 13 – 18. Additionally, Dr. Bennoch advised that appellant's injuries are permanent, progressive and are not going to get any better. Tr. P. 232 Line 14 – 22; P. 257 Line 14 – 19.

Dr. Bennoch confirmed that while he could not say with certainty that appellant would need an additional surgery, he could testify if repeat MRI showed further changes to the shoulder, the possibility of further shoulder surgery would become a certainty. Tr. P. 231 Line 2 – 8. When appellant attempted to identify for the jury the reasonable value of this future surgery, defendant objected on the grounds of speculation. TR. P. 230 Line 9-19. Appellant argued that Missouri law allows future medical treatment conditioned upon the

outcome of care, and thus such evidence is admissible. The trial court sustained the objection, holding that absent expert testimony the appellant would need the surgery within a reasonable degree of medical certainty, it would not be relevant. TR p. 230 Line 23- P. 231 Line 1.

Appellant made an additional offer of proof with respect to appellant's need for future medical treatment and the cost of the future medical treatment. Tr. P. 267 Line 20 – P. 9 Line 23. Dr. Bennoch again confirmed the increased risk of additional surgery. Tr. P. 267 Line 20 – P. 268 Line 14. Additionally, Dr. Bennoch testified that if appellant's symptoms are getting worse that she would need physical therapy and additional doctor visits and may need pain medicine, anti-inflammatories and surgery. Tr. P. 268 Line 15 – 23. Dr. Bennoch testified that this potential surgery would cost at least $15,000.00. Tr. P. 268 Line 24 – P. 269 Line 7. Dr. Bennoch also advised that appellant would further require four to six weeks of physical therapy at a cost of $750.00 per week. Tr. P. 269 Line 15 – 23. After the conclusion of this additional offer of proof, appellant again offered and sought permission of the court to admit the testimony regarding future care, which the court again denied. TR. P. 273 Line 3-15.

Dr. Bennoch's testimony that Ms. Deck was at an increased risk for future surgery and medical care was admissible. "Missouri courts have long held that such testimony is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur." *Swartz v. Gale Webb*

Transportation Co., 215 S.W.3d 127, 131 (Mo. banc 2007). This includes the introduction of evidence regarding the cost of such possible future surgery. *Id.* The trial court's exclusion was therefore error.

In *Swartz*, the two medical experts testified that the plaintiff had a risk of future surgery. *Id.* at 130. Neither doctor could testify the surgery was more likely than not to be required. One of the doctor's admitted that whether in fact the plaintiff would actually require the surgery "was speculation on his part and could not be stated with a reasonable degree of medical certainty." *Id.* the other expert testified that the risk of one complication was only five percent for any danger, and even more attenuated for any significant risk. *Id.* Over defendant's objection, the trial court admitted testimony about the chance of future complications, as well as the cost of surgery should the plaintiff in fact require it. *Id.* at 129-130.

In affirming the introduction of this evidence, the court held a risk of possible future surgery or possible future complications "is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur." *Id.* at 131. This is not just the rule in Missouri, but in numerous states. *Id.* at 132. The fact a person has some future risk of additional surgeries, or could suffer possible future consequences from an injury "makes it a worse injury" than one that has a lesser chance of future consequences, or one which has fully healed. *Id.* at 132-133. That the injury "brings with it this increased risk of future injury is information the

jury should have in the difficult task of trying to give plaintiff's condition a dollar value." *Id.* at 133. Such testimony properly establishes the nature and extent of a plaintiff's injuries, and is therefore admissible, despite the fact it cannot be said it will occur with reasonable certainty. *Id.* The jury is therefore entitled to consider the estimated cost of any contingent surgery or care. *Id.* at 131.

Dr. Bennoch testified that he could not say with certainty that appellant would need an additional surgery, but if the repeat MRI showed further changes to the shoulder, the possibility of a further shoulder surgery would become a certainty. Tr. P. 231 Line 2 – 8. Just as in *Swartz*, plaintiff's experts testified that there was a possibility, short of a reasonable certainty, that plaintiff would need a future surgery. Similar to *Swartz*, plaintiff did not seek to recover the costs of an additional surgery because the surgery was not reasonably certain to occur. Rather, plaintiff sought the admission of testimony regarding the possibility of a future certainty in order to demonstrate the nature, value and extent of her injury. Under the Supreme Court's most recent pronouncement, such evidence was admissible to establish the nature and extent of Ms. Deck's injury. *Swartz* at 133.

The court in *Breeding v. Dodson Trailer Repairs, Inc.*, 679 S.W.2d 281 (Mo. banc 1984) made a similar ruling, holding evidence of possible future consequences, depending upon how the injury progressed, is admissible. In *Breeding*, the plaintiff's expert testified the condition was permanent, and would not get better. *Id.* at 283. The doctor recommended conservative treatment at that time, and not surgery. *Id.* If this conservative treatment

worked, the doctor testified the plaintiff would not need any further care. *Id.* However, if the condition got worse, plaintiff would require surgery. *Id.* The doctor was then allowed to provide the cost of the future surgery to the jury, over the objection of defendant that it was speculative, because it wasn't shown that it would be more likely than not required. *Id.*

The defendant appealed and the Supreme Court rejected the exact argument made by respondent below, holding that testimony about a possible medical alternative faced by the plaintiff was admissible. The fact the surgery might not be required if the condition did not progress did not make it speculative or conjecture. *Id.* at 284. "Inasmuch as the jury was entitled to consider the possible need for surgery, **the estimated cost was also appropriate for its consideration**." *Id.*, emphasis added.

Just as in *Breeding*, Dr. Bennoch testified that appellant's injuries are permanent, progressive and are not going to get any better. Tr. P. 232 Line 14 – 22; P. 257 Line 14 – 19. Similar to *Breeding*, Dr. Bennoch recommended more conservative treatment be attempted prior to an additional surgery. It was only if the symptoms got worse that he indicate the additional treatment would be necessary. Tr. P. 268 Line 15 – 23. Here, unlike in *Breeding*, there was actual testimony that the condition had gotten worse. Tr. P. 166 Line 17 – 24. The evidence in this case was thus even more compelling for admission than that in *Breeding*.

Another case holding such testimony is relevant and admissible is *Bynote v. National Supermarkets, Inc.*, 891 S.W.2d 117, 125 (Mo. banc 1995). In *Bynote,* the court rejected a similar "speculation" objection to testimony about the risk of future surgery, where the

doctor could not say for sure if or when the surgery would be required. *Id.* at 125. The Supreme Court held the fact the risk of future surgery depended upon the results of more conservative treatment did not render the evidence of this future risk inadmissible. *Id.*

Other cases requiring admission of such evidence include *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 447-448 (Mo. banc 1998) where the court held it is not improper for expert witnesses to provide testimony on things that are only possible, as such testimony is helpful. The court held testimony from a medical doctor that the witness might possibly need surgery in the future, but would not recommend it at the present, was not inadmissible as speculative. *Id.* Similarly, in *Stephens v. Guffey*, 409 S.W.2d 62, 69-70 (Mo. 1966) the court held testimony that a patient might have a certain condition, and if so the costs of future surgery to correct it if shown by testing, was not speculative or inadmissible. Instead, the court held "it was related to correction of a condition which, in the least positive view of the doctor, was suggested to be or could be a condition from which plaintiff was suffering as a result of the accident." *Id.* at 70. That is certainly true of the evidence excluded here by the court.

The testimony of Dr. Bennoch more than met the requirement of Missouri law that possible future complications caused by the current condition suffered by plaintiff are admissible. Appellant should have been permitted to submit to the jury evidence regarding the possibility and costs of a future shoulder surgery and other medical treatment. The trial court's exclusion of this evidence deprived appellant of the opportunity to fully address the

nature, value and extent of her shoulder injury.

CONCLUSION

The trial court erred in ruling that appellant was only entitled to submit to the jury medical expenses in the amount of $9,904.28 instead of the full amount incurred, $27,991.30. Despite appellant rebutting the presumption in R.S.Mo.§ 490.715.5 and despite respondent having failed to offer any evidence as to the value of appellant's medical treatment, the trial court denied appellant the opportunity to offer the full amount of her medical expenses to the jury. Thus, the trial court either erred in finding that the presumption was not rebutted or misinterpreted R.S.Mo. § 490.715.5 to create an irrebuttable presumption.

Should the court decide the trial court did not err in application or interpretation of the statute, it must reverse on the basis the statute is unconstitutional. Primarily, the statute attempts to take a question of fact, the value of past medical damages, and have the court determine this matter outside the presence of the jury. The amount of damages suffered by plaintiff, however, are matters which are solely entrusted to the jury under the Missouri Constitution. The legislature, no matter what its feelings or grounds, cannot remove this fact finding inquiry from the jury. House Bill 393 (2005) which enacted the revision to R.S.Mo. 490.715 also violates the single clear title provision of the Missouri Constitution. This provision is in place to prevent exactly the kind of lumping of various statutory provision as occurred in House Bill 393.

Finally, on remand, the court should instruct the trial court upon retrial to allow

evidence of possible future medical conditions under well established Missouri law.

For all of the above stated reasons, appellant requests the court reverse and remand for a new trial in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate paper copies, and one true and accurate CD-ROM of the foregoing *Appellant's Brief*, along with this *Certificate of Service* and the *Appendix to Appellant's Brief*,, were delivered via **U.S. Mail** this 4th day of September, 2009, to:

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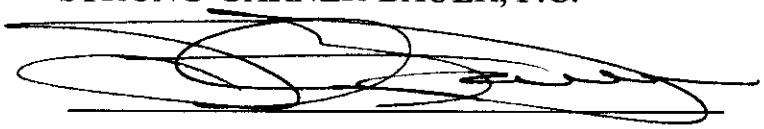

MO.R.CIV.P. 84.06(c) AND (g) CERTIFICATE

The undersigned hereby certifies that the foregoing *Appellant's Brief* complies with the limitations contained in Mo.R.Civ.P. 84.05(b). There are 14,935 words in the foregoing brief, according to the Word Perfect tool count Corel Word Perfect for Windows, the word processing software used to prepare the foregoing brief. The one paper original and ten paper copies of the foregoing brief and one copy of the brief on a CD-ROM shall be filed in the Missouri Court of Appeals, Southern District. In addition, two paper copies plus one copy of the brief on a CD-ROM has been served on the attorney named in the Certificate of Service which appears on the page immediately preceding. The CD-ROM filed in the Court and the CD-ROM served on the attorney have been scanned for viruses and those disks are virus-free.

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