

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

FILED

JAN 24 2009

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

JAMES KLOTZ and)
MARY KLOTZ)
)
Plaintiffs,)
)
vs.)
)
ST. ANTHONY'S MEDICAL)
CENTER, et al.)
)
Defendants.)

Cause No. 2106CC-04826

Division 13

ORDER / JUDGMENT

This matter is before the Court on Defendants St. Anthony's Medical Center, Dr. Michael Shapiro's, and Metro Heart Group of St. Louis, Inc.'s Motions for verdict reduction pursuant to revised Section 538.210, Mo. Rev. Stat. (2008), and for establishment of a schedule for installment payments of Plaintiffs' future damages pursuant to Section 539.220 Mo. Rev. Stat. (2008). The Motions were called, heard and taken under submission. The Court, having heard the arguments of counsel, having read the memoranda and case law submitted, and being now fully advised, enters the following Order/Judgment.

FACTUAL BACKGROUND

This is a medical negligence case tried by jury July 21, 2008 through July 30, 2008. The claim against Defendant St. Anthony's Medical Center ("SAMC") was submitted to the jury under instruction 7, which required an assessment of fault to SAMC if the jury believed SAMC "failed to timely remove the IV placed by the ambulance personnel." The claim against Defendants Dr. Shapiro and Metro Heart Group ("MHG")

was submitted to the jury under instruction 9, which required an assessment of fault against Dr. Shapiro and MHG if the jury believed either that Dr. Shapiro “failed to properly treat the right wrist symptoms in connection with the placement of the permanent pacemaker, or, failed to inform James Klotz of an added risk of infection due to the right wrist signs and symptoms before implanting the permanent pacemaker.”

The jury returned its verdict on July 30, 2008, assessing 33% fault to Defendant SAMC, and 67% fault to Defendants Dr. Shapiro and MHG. Plaintiff James Klotz’s total damages were assessed by the jury at \$2,067,000.00 allocated as follows: Past Economic damages of \$760,000.00; Past Non-Economic damages of \$488,000.00; Future Medical damages of \$525,000.00; Future Economic damages of \$22,000.00 and Future Non-Economic damages of \$272,000.00. Plaintiff Mary Klotz’s total damages were assessed by the jury at \$513,000.00 allocated as follows: Past Economic Damages of \$184,000.00; Past Non-Economic Damages of \$211,000.00 and Future Non-Economic of \$118,000.00.

This Court must decide whether to apply the revised version of the statutes at issue to one, all or none of the Defendants.

PROCEDURAL HISTORY

James Klotz’s cause of action accrued in March 2004 when he was hospitalized. Mary Klotz’s separate cause of action for loss of consortium accrued at that time as well. Cause number 2104CC-005342 was filed by James Klotz on December 14, 2004 against Defendant SAMC. On April 28, 2005, James Klotz amended his petition to include Mary Klotz for loss of consortium. On August 28, 2005, House Bill 393 took effect to revise Sections 538.210 and 538.220 Mo. Rev. Stat. On December 2, 2005, cause number

2104CC-005342 was voluntarily dismissed without prejudice. The Petition under which the case was tried was filed on December 4, 2006 against SAMC and amended March 1, 2007 to include Dr. Shapiro and MHG.¹

LEGAL STANDARD

In 2005, the Missouri Legislature passed comprehensive tort reform that places strict limits on a plaintiff's recovery in a medical malpractice action. The 2005 legislation, pursuant to Section 538.305 Mo. Rev. Stat. states, "The provisions of this act....shall apply to all causes of action filed after August 28, 2005."

ANALYSIS

The main questions presented by this Motion are whether the revised statutes apply to limit plaintiffs' recovery and whether the revised statutes are constitutional. For the reasons stated below, the Court finds the revised versions apply to Defendants Dr. Shapiro and MHG but not to Defendant SAMC. The Court also finds the statutes constitutional.

I. The revised version of Section 538.210 Mo. Rev. Stat. applies to Defendants Shapiro and MHG.

The statutory provisions on which all Defendants rely to urge reduction and modification of the jury's verdicts apply only to "causes of action filed after August 28, 2005. Section 538.305 Mo. Rev. Stat.

¹ An intervening petition was filed on March 14, 2006 with cause number 06CC-001066. That petition was filed by James and Mary Klotz against Dr. Shapiro, Metro Heart Group, Dr. Kenneth Stein and St. Anthony's Hospital. That petition has no bearing on the Court's analysis.

In State ex rel. Burns v Whittington, 219 S.W.3d 224 (Mo. banc 2007), the Missouri Supreme Court addressed the meaning of revised Section 538.305 Mo. Rev. Stat. as it applies to venue. In Burns, Plaintiff filed his personal injury suit prior to the enactment of the revised statutes. After the deadline, Plaintiff died and Relator amended the petition alleging wrongful death. Defendant sought to apply the new venue provision arguing that wrongful death was a new cause of action. The Court found for Relator. The Court stated, "Cause of action has been defined as a group of operative facts giving rise to one or more bases for suing. Id. at 225. "A cause of action remains the same even though additional or different theories of evidence or law might be advanced to support it." Id. Therefore, the amended petition did not constitute a new cause of action. However, the court was careful to include the fact that no additional defendants. Id.

In Linthicum, the court held that courts are required to assess the propriety of a chosen venue each time a defendant is joined in a lawsuit, whether by original or amended petition. Id. Reexamining venue each time a plaintiff brings a defendant into a lawsuit protects all parties equally and gives effect to the legislature's intent in enacting the venue statutes. Id.

In this situation, the amended statute applies to damages instead of venue. However, both venue and damages invoke principles of fairness and equality between parties. Resolving the holdings of these cases indicates that, in order to protect both parties equally, and to give effect to the legislative intent to cap non-economic damages in causes of action filed after August 28, 2005, the defendant must have notice of the claim before the deadline. Essentially, including an effective date suggests that the legislature intended to provide potential defendants and plaintiffs with certainty and

notice as to whether their damages will be subject to the newly amended statute placing a cap on non-economic damages.

As in Burns where the amended petition filed after the effective date did not constitute a new cause of action, James and Mary Klotz' petition against SAMC is based upon the same operative facts and SAMC remains a defendant. Unlike Linthicum, where a new defendant was added after the effective date of the new statute and had no prior notice, here, SAMC knew that it could be liable for uncapped non-economic damages. Although the first petition was dismissed without prejudice, SAMC was on notice that the petition could be filed again. Accordingly, the new statute does not apply to SAMC.

Since Linthicum requires reconsideration each time a defendant is added, and Dr. Shapiro and MHG were first added in March 2006, the revised statute applies. Unlike Burns, where the defendant had notice of both the cause of action and venue before the amended statute was enacted, here, the defendant did not receive notice of the cause of action until after the revised statute had come into effect.

The Court has struggled with the use of the word 'filed' rather than 'accrued.' By using the word 'filed,' the legislature ensured that parties be given formal notice that a claim would be made under a particular statute. SAMC had such notice. Therefore, the Court concludes that the purpose and safeguard of notice has been met in reference to SAMC. By the same reasoning, the safeguard of the statute has not been met as to Defendants Shapiro and MHG. Thus, the new statute applies to them.

II. Section 538.305 Mo. Rev. Stat. (2008) is constitutional retrospective legislation.

Plaintiffs argue that the revised statutes are inapplicable because they are unconstitutional. Plaintiffs assert several constitutional arguments including that the revised statutes are retrospective legislation.

The Missouri Constitution states, “..no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.” Mo. Const. Art. I, § 13. An exception to this rule is when a statute is procedural only and does not affect any substantive rights of the parties. State ex rel. St. Louis-San Francisco Ry. Co. v. Buder, 515 S.W.2d 409, 410 (Mo. banc 1974). “Those rights which are substantive and which therefore cannot be applied retrospectively are regularly defined as those which ‘take away or impair vested rights acquired under existing laws...’” Id. The question is whether imposing a cap on non-economic damages affects a substantive right.

Although this is an issue of first impression under this statute, it is not the first time an amended statute has been applied to past transactions affecting a party’s right to recover. In Buder, the Court found that a change in the statutory ceiling altered the rights and liabilities of the parties by subjecting them to a different set of legal effects than those in place at the time of the act of negligence. Id. at 411. The Court refused to apply the new law retrospectively. Similarly, in Stillwell v. Universal Construction Co., 922 S.W.2d 448 (Mo. App. W.D. 1996), the court held that an amended statute could not be applied retrospectively. In that case, the amended statute increased the monetary limit of an employer’s liability for burial expenses for work-related death. Id. The court found the increase affected the substantive rights of the employer because the employer possessed a vested right under the statute that its liability for burial expenses could not

exceed a certain amount. *Id.* at 456. Although Buder and Stillwell involve monetary caps that were removed and this situation involves the imposition of a monetary cap, the analysis remains the same. The legislature altered the substantive right to receive or to pay pecuniary damages during the life of the cause of action.

However, Buder contains a caveat that is central to our analysis. Buder held, "...an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, *without cogent reasons*, thereafter be subject to a different set of effects..." *Id.* at 411 emphasis added. In this case, the legislature enacted the revised statutes in response to a perceived health care crisis. Since Missouri Courts previously determined that the earlier caps on non-economic damages were "enacted to maintain the integrity of health care for all Missourians," this Court is bound by that finding. *See, Cook v. Newman*, 142 S.W.3d 880 (Mo.Ct. App. 2004); Adams By & Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904 (Mo. banc 1992), *cert. denied*, 506 U.S. 991, 113 S.Ct. 511, 121 L.Ed.2d 446 (1992); Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560, 570 (Mo.App. E.D. 2002).

Pursuant to the above reasoning, this Court finds it cannot declare the revised statutes unconstitutional. All other constitutional arguments not specifically mentioned have been considered and DENIED.

Damages

Defendants request payment of future damages in installments and reduced to present value pursuant to Section 538.220.2 Mo. Rev. Stat. (2008). The statute governs payment of damages. The current version states in pertinent part:

At the request of any party...the court shall include in the judgment a requirement that future damages be paid **in whole or in part** [emphasis

added] in periodic installment payments if the total award of damages in the action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments shall specify a future medical periodic payment schedule, which shall include the recipient, the amount of each payment, the interval between payments, and the number of payments. The duration of the future medical payment schedule shall be for a period of time equal to the life expectancy of the person to whom such services were rendered...based solely on the evidence...presented by the plaintiff at trial.

Pursuant to the above reasoning, this statute governs the award of damages to Plaintiffs James and Mary Klotz from Defendants Shapiro and MHG. Based on the evidence presented at trial, Plaintiff James Klotz's life expectancy is 13 years. Therefore, part of the jury's award of future medical payments from Defendants Shapiro and MHG shall be divided into 13 payments.

Defendant SAMC is subject to the prior version of Section 538.220.2 Mo. Rev. Stat. Under that statute, the future damages are to be paid "in whole or in part" in installments. The Court finds that 13 periodic payments shall apply to Defendant SAMC as well as set forth below.

Defendants also request the Court to reduce the value of future damages to present dollars pursuant to Section 538.215.2 Mo. Rev. Stat. The statute states in pertinent part, "All future damages which are itemized...shall be expressed by the trier of fact at present value." Defendants argue the Court failed to instruct the jury to reduce the future damages to present value. This Court utilized the Missouri Approved Instructions. Those instructions are presumed correct. Neither party presented expert testimony on the present value of damages. Accordingly, the Court has no basis upon which to reduce the verdict. Defendants' request is DENIED.

JUDGMENT

On the claim of Plaintiff James Klotz for personal injury against St. Anthony's Medical Center, judgment is hereby entered in favor of James Klotz for the sum of \$682,110.00. The sum includes the following amounts:

Past economic damages:	\$250,800.00
Past non-economic damages:	\$161,040.00
Future medical damages:	\$173,250.00
Future economic damages:	\$7,260.00
Future non-economic damages:	\$89,760.00
SUM:	\$682,110.00

James Klotz is entitled to \$411,840.00, for past damages, payable immediately with simple interest to run from the date of judgment at the rate of 4% per annum. For the future damages, the Court is exercising its discretion to award only "part" of future damages subject to installments and finds that due to the severity of the injuries and for ease of accounting, the Court awards \$101,270 of the future damages up front, for a total of \$513,110 payable immediately. The remaining future damages of \$169,000 are payable in 13 payments on each yearly anniversary of this Judgment, starting in 2009, at the rate of \$13,000.00, plus simple interest to run from the date of judgment at the rate of 4% per annum until the date of each installment payment.

On the claim of Plaintiff Mary Klotz for damages due to injury to her husband against St. Anthony's Medical Center, judgment is hereby entered in favor of Mary Klotz for the sum of \$169,290.00. The sum includes the following amounts:

Past economic damages:	\$60,720.00
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Past non-economic damages:	\$69,630.00
Future non-economic damages:	\$38,940.00
SUM:	\$169,290.00

Mary Klotz is entitled to \$130,350, for past damages, payable immediately with simple interest to run from the date of judgment at the rate of 4% per annum. For the future damages, the Court is exercising its discretion to award only "part" of future damages subject to installments and finds that due to the severity of the injuries and for ease of accounting, the Court awards \$6,439.94 of future damages up front, for a total of \$136,789.94 payable immediately. The remaining future damages of \$32,500.06 are payable in 13 payments on each yearly anniversary of this Judgment, starting in 2009, at the rate of \$2,500.00, plus simple interest to run from the date of judgment at the rate of 4% per annum until the date of each installment payment.

On the claim of Plaintiff James Klotz for personal injury against Dr. Michael Shapiro and Metro Heart Group of St. Louis, Inc., judgment is hereby entered in favor of James Klotz and against Dr. Michael Shapiro and Metro Heart Group of St. Louis Inc., jointly and severally, for the sum of \$1,110,190.00. The sum includes the following amounts:

Past economic damages:	\$509,200.00
Past non-economic damages:	\$234,500.00
Future medical damages:	\$351,750.00
Future economic damages:	\$14,740.00
Future non-economic damages:	\$0 (due to cap)
SUM:	\$1,110,190.00


Past and future non-economic damages have been capped at \$234,500 (67 percent of \$350,000) to reflect the jury's assessment of fault between the parties.

James Klotz is entitled to \$743,700.00, for past damages, payable immediately with simple interest to run from the date of judgment at the rate of 4% per annum. For the future damages, the Court is exercising its discretion to award only "part" of future damages subject to installments and find that due to the severity of the injuries and for ease of accounting, the Court awards \$106,490 .00 of the future medical damages up front, for a total of \$850,190.00 payable immediately. The remaining future damages of \$260,000.00 are payable in 13 payments on each yearly anniversary of this judgment, starting in 2009, at the rate of \$20,000.00, plus simple interest to run from the date of judgment at the rate of 4% per annum until the date of each installment payment.

On the claim of Plaintiff Mary Klotz for damages due to injury to her husband against Defendants Dr. Michael Shapiro and Metro Heart Group of St. Louis, Inc., judgment is hereby entered in favor of Mary Klotz and against Dr. Michael Shapiro and Metro Heart Group of St. Louis Inc., jointly and severally, for the sum of \$123,280.00 for past economic damages, payable immediately with simple interest to run from the date of judgment at the rate of 4% per annum. All other categories of damages are \$0 as reduced by the cap.

SO ORDERED:

1/22/09
Date


Barbara Wallace, Judge

CC: Mary Coffey
Louis M. Bograd
Andre M. Mura
James Hennelly
J. Thaddeus Eckenrode