

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

FILED

FEB 03 2020

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

NANCY M. HAGENHOFF,)	
)	
Plaintiffs,)	
vs.)	Cause No. 18SL-CC04634
)	
MICHAEL SCHOENWALDER, D.O, et. al,)	Div.: 2
)	
Defendants.)	

ORDER

The Court has before it Defendants’ Amended Motion to Dismiss or, in the Alternative, for More Definite Statement. Plaintiff filed a four count petition against Defendants Michael Schoenwalder, D.O. and Michael Schoenwalder, D.O., L.L.C. alleging medical negligence (Count I), negligent misrepresentation (Count II), fraud (Count III), and violations of the Missouri Merchandising Practices Act (Count IV). Plaintiff’s claims arise out of the Defendants’ treatment of her medical condition, bilateral knee osteoarthritis. The Court addresses Defendants’ arguments as set out in the Motion.

1. Negligent Misrepresentation (Count II) and Fraud (Count III)

Defendants contend that Plaintiff’s common law claims of negligent misrepresentation and fraud are barred by §538.210(1) RSMo, which holds, in pertinent part “[a] statutory cause of action for damages against a health care provider for personal injury or death arising out of the rendering of or failure to render health care services is hereby created, replacing any such common law cause of action.”

Plaintiff's allegations of negligent misrepresentation (Count II) and fraud (Count III) are common law claims. In both counts, Plaintiff alleges damages for personal injury due to Defendants' rendering of health care services. Although Plaintiff sets out the cost of the services she claims Defendants induced her to incur as a result of their negligence or fraud, her prayer for damages primarily sounds in personal injury.

Plaintiff argues that her damages accrued prior to the effective date of the current version of §538.210(1) RSMo, which abrogated common law claims. However, a careful review of the prior version of the statute shows that the language set out above became effective in August 2015. Mo. Ann. Stat. § 538.210 (West), effective: August 28, 2015 to August 27, 2017. According to Plaintiff's petition, Defendant Michael Schoenwalder, D.O., did not suggest the treatment at issue until October 11, 2016. By that time, the legislature had abrogated common law claims.

Plaintiff further argues that the abrogation of common law claims by §538.210(1) RSMo is an unconstitutional denial of the right to trial by jury. However, the legislature, by enacting the statute barring common law claims of this nature, did not enact an arbitrary or unreasonable barrier to a remedy for a recognized injury. *Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. 2000), *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. 2006).

In her Counts II and III of her petition, Plaintiff appears to pray for both economic and non-economic damages. Economic damages under common law theories are not barred by §538.210(1) RSMo. Accordingly, Defendants' motion for more definite statement is granted, and Plaintiff must amend her Petition to plead her prayer for damages more specifically.

2. Missouri Merchandising Practices Act (Count IV)

Defendants contend that Plaintiff's claim for violations of the Missouri Merchandising Practices Act ("MMPA") is barred, as Defendants are regulated by the Department of Insurance, Financial Institutions and Professional Registration.

In §407.020.2 RSMo, an exception is made for "(2) Any *institution, company, or entity* that is subject to chartering, licensing, or regulation by the director of the department of commerce and insurance under chapter 354 or chapters 374 to 385,...". (Emphasis added). Although not clearly set out in the referenced statutory chapters, the Division of Professional Registration, which contains the Board of Registration for the Healing Arts, which licenses and regulates doctors of Osteopathy, such as Dr. Schoenwalder, is under the umbrella of the Department of Insurance formed in Chapter 374 RSMo¹.

Plaintiff points out that the exception pertains to "Any *institution, company, or entity*", and that Defendant Michael Schoenwalder, D.O., is none of these. Black's Law defines an "entity" as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners." ENTITY, Black's Law Dictionary (11th ed. 2019). Although the term has been used expansively in various contexts, the legislature, in the very same statute, describe the inappropriate conduct of a "person", yet did not extend the exception for any "persons" licensed or regulated by the Department of Insurance. §407.020.1 RSMo.

Further, while Defendant Michael Schoenwalder, D.O, L.L.C. is certainly an *institution, company, or entity*, it is unclear from the pleadings before the Court whether it is regulated by the Department of Insurance. As set out above, the relevant regulatory body is the Division of

¹Section 324.001 RSMo established the Division of Professional Registration, which oversees the Board of Registration for the Healing Arts, and was assigned to the Department of Insurance and Commerce pursuant to section 1 of the Omnibus State Reorganization Action of 1974 and Executive Order 06-04.

Professional Registration (Chapter 324 RSMo), which contains the Board of Registration for the Healing Arts (Chapter 334 RSMo). Chapter 324 and 334 pertain to licensing and regulating professional *persons*, not limited liability companies. Therefore, the Court cannot dismiss the MMPA claim against Defendant Michael Schoenwalder, D.O, L.L.C. based on the pleadings.

Defendants argue in the initial motion that Plaintiff's MMPA claim should be dismissed as it is an attempt to "elevate" a claim for medical malpractice. An MMPA claim is statutory, and therefore not barred by §538.210(1). However, under §407.025.1 of the MMPA, damages are limited to "ascertainable loss of money or property, real or personal...". See also *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 380 (Mo. Ct. App. 2005) (Members of class action barred from seeking personal injury damages in MMPA claims). Again, as in Counts II and III, Plaintiff appears to pray for both economic and non-economic damages. Plaintiff is hereby required to make her petition more definite with regard to the damages claimed.

3. Plaintiff's §538.210 Medical Malpractice Claim

Defendants' argue that Plaintiff has failed to state a claim for medical negligence. The Court finds that Plaintiff has plead sufficient facts meeting the elements of the cause of action, invoking the principles of substantive law, and which advise the Defendants of the claim adequately to prepare an answer.

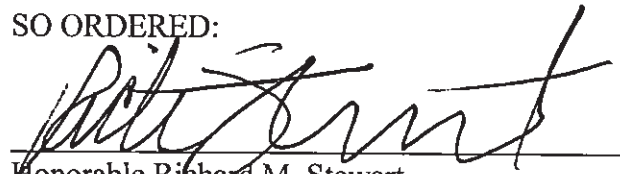
4. Punitive Damages

Defendants assert that Plaintiff has failed to properly plead the punitive damage standard set out in §538.210.8 RSMo. In giving all reasonable inferences to the allegations in the Petition, the Court finds that Plaintiff has alleged sufficient facts to constitute "willful, wanton and malicious conduct".

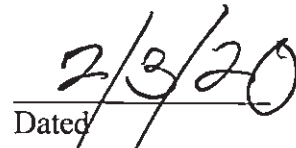
Conclusion

Defendants' Motion to Dismiss is denied on all counts. Defendants' Motion for More Definite Statement is granted with regard to Counts II, III and IV. Plaintiff is granted leave to amend her Petition within the next 14 days to more definitely plead her prayer for damages, as damages for personal injury are not allowed under said counts.

SO ORDERED:



Honorable Richard M. Stewart
Division 2
St. Louis County Circuit Court



Dated