



Select Committee on Efficiency in Government

62nd Montana Legislature

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TO: Select Committee on Efficiency in Government

FROM: David Niss, Staff Attorney

RE: Update of Legal Review of Certain Proposed Changes to Medicaid Laws

DATE: April 4, 2012

I Introduction

On January 5, 2012, the Select Committee on Efficiency in Government (Committee) was provided with a written legal memorandum concerning the constitutionality of tort reform. As that memorandum noted, however, "tort reform" could mean many different things and it would take a specific proposal to be able to make any estimate of the constitutionality of the proposal. At that time the specifics of proposal number 11 were that it would "offer medical liability protections to health care providers who serve Medicaid patients" and included a list of bills that the 2011 Legislature considered but did not pass. Since the January 5 memorandum was written, a specific proposal has been made, and it is the purpose of this memorandum to analyze the constitutionality of that proposal.

II Discussion

There is now a proposal¹ before the Committee for a 5-year pilot program in which, as only part of the proposal, the burden of proof of a Medicaid recipient alleging medical malpractice would be increased from the current burden ("substantial evidence") to "clear and convincing evidence." Therefore, during the term of the pilot project,² one Medicaid recipient would have

¹Mr. Mike Foster, the Regional Director of Advocacy for St. Vincent Healthcare, made the proposal, which was sent to the Committee by e-mail on January 27, 2012, and was later supplemented by an e-mail from Mr. Foster to a Committee research analyst on January 31, 2012.

²The increased burden of proof would most likely apply to medical negligence that occurred during the term of the pilot project, even though the discovery of the negligence and any resulting legal action might not occur until after the 5-year term of the project had ended.

one burden of proof applied to that plaintiff's medical malpractice action while another recipient would have a different standard applied to the same injury for the same cause of action, resulting, perhaps, in recovery of damages for medical negligence by one plaintiff and denial of the same damages to the other plaintiff.

Unquestionably, the proposal before the Committee could result in different treatment of different plaintiffs' causes of action for potentially the exact same injury, meaning that an issue exists whether the plaintiff for whom recovery would be denied would be denied equal protection of the law pursuant to Article II, section 4, of the Montana Constitution and the Fourteenth Amendment to the United States Constitution. In either a Fourteenth Amendment or Article II, section 4, analysis, the constitutionality of a statute is presumed³ and is usually tested by a standard requiring that the law be rationally related to a lawful government purpose. However, when a suspect class, such as a racial minority, or a fundamental right is involved, the standard becomes the more exacting "compelling state interest" standard. Wiser v. St.,⁴ City of Cleburne v. Cleburne Living Center,⁵ and N.B. v. Sybinski.⁶ Clearly, no suspect class such as race, ethnicity, or gender is involved with the proposal before the Committee, so it must be determined whether a fundamental right is involved to determine whether the more exacting standard of compelling state interest applies. The logical choices of a fundamental right are the right of access to the courts, the right to full legal redress under Article II, section 16, of the Montana Constitution, and the right to due process of law under Article II, section 17, of the Montana Constitution and the analogous federal provision in the Fifth Amendment to the U.S. Constitution. Courts considering the creation of pilot programs have held that the Equal Protection Clause of the U.S. Constitution should not prevent states from experimenting in the application of state programs on less than a statewide basis and that some inequities arising from the application of the project terms are not fatal to the project under an equal protection analysis.⁷

The Montana Supreme Court has held that the rights to full legal redress and right of access to the courts under Article II, section 16, are not fundamental rights. Peterson v. School District⁸ and Miller v. Fallon County.⁹ In those cases, the immunity of the Legislature was upheld against challenges that the statute providing for immunity¹⁰ was unconstitutional. Similarly, in

³LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 Mont. 283, 77 P.3d 202 (<http://whattheheckaddress.blogspot.com/2003>).

⁴2006 MT 20, 331 Mont. 28, 129 P.3d 133 (2006).

⁵473 U.S. 432 (1985).

⁶724 N.E.2d 1103 (2000).

⁷Id. No judicial opinions to this effect have been located from Montana courts.

⁸237 Mont. 376, 773 P.2d 316 (1989).

⁹240 Mont. 241, 783 P.2d 419 (1989).

¹⁰Section 2-9-111, MCA.

Linder v. Smith,¹¹ involving the creation of the medical malpractice panel,¹² the Montana Supreme Court held that because access to the courts is not a fundamental right, access may be hindered if there is a rational relationship between the legislative act hindering access and a lawful governmental purpose. In the case of the proposal by Mr. Foster, the purpose of the increased burden of proof, as one element of the pilot project, would be to decrease the reliance upon “defensive” medicine, which would likely be considered a lawful governmental purpose.¹³

The remaining issue is whether, under either constitution, the proposal would deny due process of law. In other contexts,¹⁴ the courts, including the United States Supreme Court, have analyzed whether an established burden of proof is constitutionally appropriate to a proceeding by analyzing the litigant’s interest in an adverse judicial opinion. An example is Addington v. Texas.¹⁵ Under the Addington analysis and the Montana statutes governing available Medicaid medical services,¹⁶ that part of damages recoverable through a cause of action for medical malpractice that is not provided as a Medicaid benefit is noneconomic damages, such as loss of consortium or pain and suffering. The issue, therefore, under the Addington analysis, is whether a Medicaid recipient has such a constitutionally recognized property interest in an action for noneconomic damages that the heightened burden of proof of clear and convincing evidence may not be used to deny that protected interest. This analysis raises the question of whether a plaintiff has a vested interest in any particular burden of proof and, if the answer is “yes”, whether the right to a civil cause of action with a higher burden of proof is nevertheless sufficient under due process of law. In Montana, these questions are at least partially answered by the Montana Supreme Court’s opinion that there is no constitutional right to any cause of action sounding in tort and that the Legislature may therefore alter or abolish common law causes of action sounding in tort to promote legitimate state interests. Meech v. Hillhaven W., Inc.¹⁷ Meech answers the questions posed above because if the Montana Legislature may totally abolish a cause of action then it may also limit recovery under the same cause of action by imposing a higher burden of proof. This conclusion is also supported by the case law from other jurisdictions. In Franklin v. Mazda Motor Corp.,¹⁸ for example, the court held that the power of the legislature to abolish the common law necessarily included the power to set reasonable limits upon the recovery of damages in causes of action that the legislature chose to recognize in statute.

¹¹193 Mont. 20, 629 P.2d 1187 (1981).

¹²Title 27, chapter 6, MCA.

¹³However, no Montana judicial opinions have been located holding to this effect.

¹⁴These other contexts are the prosecution of an individual by the government in an administrative, civil, or criminal action.

¹⁵441 U.S. 418 (1979).

¹⁶Title 53, chapter 6, part 1, MCA.

¹⁷238 Mont. 21, 776 P.2d 488 (1989).

¹⁸704 F. Supp. 1325 (D. Md. 1989)

Limitations upon tort liability have also been upheld by the federal courts in applying the Due Process Clause of the U.S. Constitution. In Duke Power Co. v. Carolina Env'tl Study Group, Inc.,¹⁹ the U.S. Supreme Court upheld a limitation set by Congress upon damages arising from a nuclear power plant incident. The Court found the limitation consistent with the Due Process Clause because the limit bore a rational relationship to the intent of Congress to encourage private interests to produce electricity from nuclear power. From cases such as Duke Power it can be reasoned that a limitation that the Due Process Clause of the U.S. Constitution imposes, like the Montana Constitution, requires only that the proposed limitation by an increased burden of proof be rationally related to the purposes of reducing "defensive" medicine.

III Conclusion

Because of a lack of purely Montana case law on the subject of pilot projects resulting in differing abilities of identical plaintiffs to recover medical malpractice judgments, the issues reviewed in this memorandum are not and cannot be entirely free from doubt. However, the opinions of the Montana Supreme Court and the federal courts indicate that a potential medical malpractice plaintiff receiving Medicaid has no vested interest, in a legal sense, in the burden of proof used to recover noneconomic damages and that a limitation through an increased burden of proof is therefore constitutionally allowable.

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¹⁹438 U.S. 59 (1978).