

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC91302**

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**MISSOURI ASSOCIATION OF NURSE ANESTHETISTS, INC., et al.,**

**Appellants,**

**v.**

**STATE BOARD OF HEALING ARTS,**

**Respondent.**

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**On Petition for Review from the  
Cole County Court, 19th Judicial District  
Honorable Jon E. Beetem**

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**BRIEF OF AMICUS CURIAE  
MISSOURI CHAMBER OF COMMERCE & INDUSTRY IN SUPPORT OF  
APPELLANTS**

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**Statutory Authority:**

§ 536.010(6). .....6

§ 536.026.1.....7

## **INTERESTS OF AMICUS CURIAE**

The Missouri Chamber of Commerce & Industry, Inc., (“Chamber”) is a Missouri Not For Profit Corporation in good standing. The Chamber is the largest statewide general business organization in Missouri. The Chamber represents nearly 3,000 employers and almost 200 local chambers of commerce in advancing the cause of Missouri business. Missouri businesses are subject to statutory and administrative agency regulatory oversight in a multitude of instances.

This case addresses the power of an administrative agency to develop and change public policy without engaging the full, fair and open rulemaking process. Chamber members are subject to the regulatory power of state agencies by way of statute and administrative rule. Therefore, Chamber members have a direct interest in the outcome of this case and this Court’s interpretation of when an agency is required to fulfill the mandates of rulemaking procedures set forth by statute. The Chamber supports reversal of the trial court’s grant of Respondent’s Motion for Summary Judgment.

## **CONSENT OF THE PARTIES**

The Chamber received consent from Counsel for Appellants, Jim Duetsch and Tom Rynard as well as consent from Counsel for Respondent, Edwin Frownfelter, to file this brief by as required by Missouri Court Rule 84.05(f)(2).

## **JURISDICTIONAL STATEMENT**

The Chamber adopts the jurisdictional statement of the Appellants.

## **STATEMENT OF THE FACTS**

The Chamber adopts the statement of the facts as set forth by the Appellants.

**POINTS RELIED ON**

**I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT STATE BOARD OF REGISTRATION FOR THE HEALING ARTS BY HOLDING THAT THE RESPONDENT DID NOT CREATE A RULE AS DEFINED IN RSMo, § 536.010(6) WHEN IT ISSUED A STATEMENT DETERMINING WHAT CONSTITUTED DUTIES COULD NOT BE DELEGATED TO ADVANCED NURSE PRACTITIONERS.**

**ARGUMENT**

**I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT STATE BOARD OF REGISTRATION FOR THE HEALING ARTS BY HOLDING THAT THE RESPONDENT DID NOT CREATE A RULE AS DEFINED IN RSMo, § 536.010(6) WHEN IT ISSUED A STATEMENT DETERMINING WHAT CONSTITUTED DUTIES COULD NOT BE DELEGATED TO ADVANCED NURSE PRACTITIONERS.**

The trial court erred by granting summary judgment in favor of Respondent. In this case the Court determined Respondent’s statement, which established that a certain medical procedure was non-delegable by a physician, did not constitute a rule but merely a statement of opinion. The Board of Healing Arts (“Board”) made the determination of what constituted a non-delegable procedure at the behest of the Missouri State Medical Association (“MSMA”). To answer this request of MSMA the Board must have

addressed the threshold questions of what constituted the practice of medicine and what constituted a procedure that could not be delegated by all physicians. These questions are subject to debate but are both expressions of public policy with general and prospective application to all physicians.

The definition of a rule under Missouri statute is very broad. The definition provides that a, “[r]ule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy . . . .” RSMo, § 536.010(6). There are limits to the definition of rule. However, in this case the statement of what constituted a non-delegable procedure was of general and prospective application that established a standard of conduct and fits the definition of a rule despite the limits on the definition. *See e.g., Mo. Soybean Ass’n v. Mo. Clean Water Comm’n*, 102 S.W.3d 10, 22 (Mo. Banc 2003). This Court has addressed this issue on several occasions and determined that agency actions having general applicability must be accompanied by promulgating a rule. *Division of Medical Services v. Little Hills Healthcare, L.L.C.*, 236 S.W.2d 637 (Mo. banc 2007) and *NME Hospitals, Inc. v. Division of Medical Services*, 850 S.W.2d 71 (Mo. banc 1993). Based upon prior precedent, the trial court should have determined that the letter and subsequent publication of the letter by the Board was indeed a rule.

Respondent would have the Court hold that the letter was merely an advisory opinion not to be relied upon for prospective or general application. Businesses throughout Missouri generally rely upon statements from agency officials and letter rulings in making business decisions. For example, a determination of what constitutes

the minimum wage, or what items may be subject to sales tax, or what constitutes a pollutant could be sought by businesses from the respective agencies which handle such matters. If the Court holds that the answers received by businesses in response to inquiries are merely advisory opinions it will create an illusory system of certainty in government. This lack of certainty may subject businesses to piecemeal policy decisions created by adjudication rather than by the process of rulemaking.

The Appellants were denied the ability to participate in the creation of public policy affecting all physicians and nurse anesthetists. Had Respondents followed the rulemaking requirements Appellants would have been of guaranteed an opportunity to participate in the notice and comment portion of the process. RSMo, § 536.026.1. Notice and comment on rulemaking is integral to creating sound public policy. The Board utilized internal staff to research statutes, rules, and regulations and determined what constituted the practice of medicine and what was non-delegable for all physicians. This internal review of the law resulted in the issuance of a determination for all physicians and nurse anesthetists regarding what procedure could not be delegated. This action constituted a rule.

That the Board provides for administrative review and adjudication via the Administrative Hearing Commission (“AHC”) is of little comfort. A parallel proceeding is underway in a disciplinary action brought by the Board against Dr. Kunkel for the very conduct that was established by letter ruling at issue in this case. *State Board of Registration for the Healing Arts v. Glenn A. Kunkel, M.D.*, Case No. 90-1259. This

pending enforcement action illustrates the point that the letter ruling at issue in this case was a statement of general and prospective application that established a standard of conduct and thus constituted a rule.

### **CONCLUSION**

The regulatory maze affects all businesses in Missouri. Business leaders navigating the regulatory maze should be afforded the opportunity to rely upon the rulings and guidance of government agencies. Should the government be allowed to take the position that letter rulings are merely advisory opinions with no force and effect of law the businesses which rely upon them are left with no option but to proceed into the regulatory maze with no guidance - only to be subject to fines and discipline for straying from the unknown path. This situation presented is untenable for an already over-regulated business sector.

The Chamber urges the Court to hold that the letter ruling presented in this case was indeed an attempt to create a rule of general and prospective application. The Chamber respectfully suggests that the trial court's judgment be reversed and the Court enter an Order granting summary judgment to the Appellants.

**Respectfully submitted,**

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Chamber of Commerce & Industry, Inc., in Support of Appellants is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 1243 words, as calculated by the Microsoft Word software used to prepare this brief.

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**CERTIFICATE OF SERVICE**

I hereby certify that two true and accurate copies of the foregoing were mailed first class, postage prepaid, or hand delivered this 10<sup>th</sup> day of January 2011, to:

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