

**IN THE SUPREME COURT OF MISSOURI**

**CASE NO. SC90107**

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**JAMES KLOTZ AND MARY KLOTZ**

**Appellants/Cross-Respondents**

**vs.**

**MICHAEL SHAPIRO, M.D. AND METRO HEART GROUP, LLC**

**Respondents/Cross-Appellants.**

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**On Appeal from Circuit Court of St. Louis County**

**Case No. 06CC-4826**

**Honorable Barbara Wallace, Judge**

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**MISSOURI PROFESSIONALS MUTUAL'S BRIEF AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF INTEREST ..... 1

LEGAL ARGUMENT ..... 1

I. Missouri’s Non-Economic Damages Cap, As Amended By R.S. Mo. § 538.210, Is Valid Under The Missouri Constitution Because The Legislature Had A Rational Basis For Adopting The Revised Cap..... 2

A. Challenges to the Constitutionality of the Damages Cap Are Governed by a Rational Basis Review..... 3

B. At the Time H.B. 393 was enacted, Missouri was Facing a Medical Malpractice Liability Insurance Crisis in that Premiums Had Skyrocketed..... 8

C. In 2005, the Legislature Had Evidence That Doctors Were Leaving Certain Disciplines and/or the State, Creating An Access to Care Issue for Missourians..... 11

D. The So-Called Expert Affidavits Proffered by Plaintiffs Do Not Invalidate the Facts Upon Which the Legislature’s Decision to Enact H.B. 393 Was Based..... 15

E. Since the 2005 Cap’s Enactment, the “Crisis” Statistics Have Significantly Improved..... 19

CONCLUSION ..... 21

CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT

RULES 84.06(b)..... 23

CERTIFICATE OF SERVICE..... 24

## TABLE OF AUTHORITIES

### FEDERAL CASES

	<u>Page(s)</u>
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981).....	17-19
<i>Vance v. Bradley</i> , 440 U.S. 93 (1979).....	18

### STATE CASES

<i>Adams v. Children’s Mercy Hosp.</i> , 832 S.W.2d 898 (Mo. banc 1992).....	2-3, 5-8, 15, 17
<i>Arbino v. Johnson &amp; Johnson</i> , 880 N.E.2d 420 (Ohio 2007).....	6
<i>Blaske v. Smith &amp; Entzeroth, Inc.</i> , 821 S.W.2d 822 (Mo. banc 1991).....	4, 14
<i>C.J. v. State Dep’t of Corr.</i> , 151 P.3d 373 (Alaska 2006).....	6, 13
<i>Evans ex rel. Kutch v. State</i> , 56 P.3d 1046 (Ala. 2002).....	6
<i>Findley v. City of Kansas City</i> , 782 S.W.2d 393 (Mo. banc 1991).....	4-5
<i>Gilbert v. Sec. Fin. Corp. of Okla., Inc.</i> , 152 P.3d 165 (Okla. 2006).....	6

<i>Hughes v. PeaceHealth,</i>	
178 P.3d 225 (Or. 2008).....	6
<i>Kirkland v. Blaine County Med. Ctr.,</i>	
4 P.3d 1115 (Idaho 2000).....	6
<i>Mahoney v. Doerhoff Surgical Servs.,</i>	
807 S.W.2d 503 (Mo. banc 1991).....	4, 17-19
<i>Murphy v. Edmonds,</i>	
601 A.2d 102 (Md. 1992) .....	6
<i>Phillips v. Mirac, Inc.,</i>	
651 N.W.2d 437 (Mich. App. 2002).....	6
<i>Pulliam v. Coastal Emergency Servs. of Richmond, Inc.,</i>	
509 S.E.2d 307 (Va. 1999).....	6
<i>Rhyne v. K-Mart Corp.,</i>	
562 S.E.2d 82 (N.C. 2002).....	6
<i>Scholz v. Metro. Pathologists, P.C.,</i>	
851 P.2d 901 (Colo. 1993) (en banc).....	6
<i>Scott v. SSM Health Care St. Louis,</i>	
70 S.W.3d 560 (Mo. banc 2002).....	9-10
<i>Seminole Pipeline Co. v. Broad Leaf Partners, Inc.,</i>	
979 S.W.2d 730 (Tex. App. 1998).....	6
<i>Univ. of Md. Med. Sys. Corp. v. Malory,</i>	
795 A.2d 107 (Md. 2001) .....	6

<i>Verba v. Ghaphery</i> , 552 S.E.2d 406 (W. Va. App. 2001).....	15
<i>Wiley v. Henry Ford Cottage Hosp.</i> , 668 N.W.2d 402 (Mich. 2003).....	6
<b>STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS</b>	
R.S. Mo. § 538.210.....	1-2, 8, 22
Rule 84.05(f).....	2
<b>OTHER AUTHORITIES</b>	
American Medical Association, <i>America’s Medical Liability Crisis: A National View</i> , Mar. 15, 2005, available at <a href="http://www.ama-assn.org/ama/pub/health-&lt;br/&gt;system-reform/resources.shtml">http://www.ama-assn.org/ama/pub/health- system-reform/resources.shtml</a> . .....	11
Congressional Budget Office, <i>The Effects of Tort Reform: Evidence From the States</i> (June 2004), available at <a href="http://www.cbo.gov/ftpdoc.cfm">http://www.cbo.gov/ftpdoc.cfm</a> .....	20
D.P. Kessler, W.M. Sage, D.J. Becker, <i>Impact of Malpractice Reforms on the Supply of Physician Services</i> , 293 J.A.M.A. 21, June 1, 2005. ....	13
David A. Lieb, <i>House Endorses New LawsUIT Limits</i> , HANNIBAL COURIER-POST, Feb. 17, 2005.....	12
Fred J. Helinger and William E. Encinosa, <i>The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians</i> , July 3, 2003, available at <a href="http://www.ahrq.gov/research/tortcaps/tortcaps.htm">http://www.ahrq.gov/research/tortcaps/tortcaps.htm</a> .....	13
Jay Angoff, <i>Tort Reform: Include Malpractice Insurer’s [sic] in the Discussion</i> , ST. LOUIS POST-DISPATCH, Jan. 5, 2005 .....	12

Kenneth E. Thorpe, *The Medical Malpractice ‘Crisis’: Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS, Sppl. Web Exclusives (Jan. 21, 2004), available at <http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.20v1> ..... 13

Kris Hilgedick, *Tort Reform Takes Shape*, JEFFERSON CITY POST-TRIB., Feb. 1, 2005..... 12

Terry Ganey, *Doctors v. Lawyers: Doctors’ Malpractice Insurance Rates Drop With Fewer Negligence Claims*, COLUMBIA DAILY TRIB., Oct. 4, 2009..... 20

Tim Hoover, *Doctors Push for Malpractice Limits*, THE KANSAS CITY STAR, Feb. 9, 2005..... 12

W. Kip Viscusi and Patricia H. Born, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. OF RISK & INS., 23-43 (Mar. 2005) ..... 13

## **STATEMENT OF INTEREST**

Missouri Professionals Mutual (“MPM”) is a nonprofit medical professional liability insurer, formed in 2003 under Chapter 383 of the Revised Statutes of Missouri. Insuring more than 2,400 physicians in the State of Missouri, MPM is the state’s largest insurer of medical professionals, and is directed by its Missouri physician members. MPM was created to re-empower physicians and to restore stability and affordability to physicians’ and surgeons’ insurance premiums. Plaintiffs’ challenges to the damages caps set forth in R.S. Mo. § 538.210 bear on the precise issues MPM was created to address, and the outcome of this case will directly impact the lives and practices of MPM’s member-insureds.

## **LEGAL ARGUMENT**

In 2005, the Missouri Legislature enacted House Bill 393 (“H.B. 393” or the “2005 cap”), which amended an existing cap (the “1986 cap”) on non-economic damages awards in medical malpractice claim cases, and set the revised cap at \$350,000 without provision for future inflation adjustments. In this appeal, Plaintiffs have attempted to raise constitutional challenges to the trial court’s application of the 2005 cap to a non-economic damages verdict awarded to them by a jury in a medical professional negligence action. Those challenges must be rejected, because the 2005 cap is constitutional.

This Court previously held the 1986 cap to be constitutional, recognizing that a cap on non-economic damage awards is rationally related to the legitimate goal of ensuring Missourians have access to medical care through the reduction of liability

insurance premiums for medical professionals. *See Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992). Plaintiffs would have this Court ignore its settled precedent and find the cap unconstitutional as amended by H.B. 393. Plaintiffs' arguments, which reiterate without material variance arguments already rejected in *Adams*, rest on affidavits not properly before this Court, as well as on a minority position taken by courts in other jurisdictions, and are unpersuasive.

MPM offers this brief to provide the Court an historical record and an understanding of relevant experiences of Missouri insurers and MPM's member-insureds that are not discussed in Plaintiffs' brief.<sup>1</sup> MPM urges the Court to follow its precedent in *Adams*, remain in the majority of jurisdictions that have consistently affirmed the constitutionality of non-economic damages caps under rational basis review, and reject Plaintiffs' unfounded arguments to the contrary.

**I. Missouri's Non-Economic Damages Cap, As Amended By R.S. Mo. § 538.210, Is Valid Under The Missouri Constitution Because The Legislature Had A Rational Basis For Adopting The Revised Cap.**

This Court has expressly affirmed the constitutionality of legislative caps on non-economic damages in medical negligence cases. *See Adams*, 832 S.W.2d at 898. In *Adams*, the Court confirmed that the issue was governed by a rational basis review, and that a legislative cap on non-economic damages in medical negligence cases is rationally

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<sup>1</sup> MPM's amicus brief is filed with the consent of all parties, in accordance with Rule 84.05(f).

related to legitimate government objectives. *Id.* at 903-04. As demonstrated below, the arguments considered in *Adams* are substantially the same as the constitutional arguments raised here, yet Plaintiffs have provided no compelling basis for this Court to overrule its own precedent in favor of the minority decisions cited in Plaintiffs' brief. The cap as amended by H.B. 393 is constitutional for the same reason as the pre-revision cap was held constitutional in *Adams*: each was rationally related to the legitimate goal of protecting Missourians' access to adequate medical care.

**A. Challenges to the Constitutionality of the Damages Cap Are Governed by a Rational Basis Review.**

Black-letter Missouri law places significant hurdles before parties, like Plaintiffs, who assert constitutional challenges to duly-enacted state statutes. As this Court noted when considering constitutional attacks on the 1986 cap,

[a] statute is presumed to be constitutional and will not be held unconstitutional unless it clearly and undoubtedly contravenes the constitution. A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution.

*Adams*, 832 S.W.2d at 903 (citing *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991)). Consequently, when the constitutionality of a statute is challenged, the burden of proof is on the party claiming that the statute is unconstitutional. *Id.* And, in the absence of a denial of a fundamental right or the presence of a suspect class, a challenged statutory provision will be subject only to a rational basis review. *Id.*

This Court “has often articulated the minimal nature of a ‘rational basis’ analysis,” stating that a “classification will be sustained if any state of facts reasonably can be conceived to justify it.” *Blaske*, 821 S.W.2d at 829 (internal citations omitted). This is true even where a statute in effect *creates* inequality, as Plaintiffs allege the 2005 cap does. See *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 512 (Mo. banc 1991) (“State legislatures are presumed to have acted within their constitutional power despite the fact that, *in practice*, their laws result in some inequality.”) (emphasis added). Consequently, even if application of the 2005 cap results in variant classifications, the presumption of statutory validity could be overcome “*only* if the classification rests on grounds *wholly irrelevant* to the achievement of the state’s operative.” *Id.* Put another way, a “statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” *Id.*

It is critical to note that when a rational basis review is undertaken, “[s]tates are not required to convince the courts of the correctness of their legislative judgments.” *Id.* This Court has steadfastly adhered to the principle and practice that “[a]t the outset of our obligatory search for an acceptable rationale for the legislature’s determination, we are mindful that our own policy choices are irrelevant to any rational basis analysis.” *Findley v. City of Kansas City*, 782 S.W.2d 393, 396 (Mo. banc 1991) (internal citations omitted). As this Court elaborated in *Findley*:

The fact that we think the legislature’s choices socially undesirable, unwise, or even unfair is of little consequence to our decision . . . if the legislature’s classification advances the legislature’s legitimate policy. The rational

basis test does not require that the legislative objective “be compelling nor the dilemma grave, nor that the legislature choose the best or wisest means to protect its goals.”

*Id.* at 396 (quoting *Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 328 (Mo. banc 1982)). Thus, under the rational basis test, regardless of a court’s policy preferences or subsequent data that may contradict prior legislative determinations, a statute must be upheld if it could possibly have been conceived by the legislature as rationally related to a legitimate state interest. *Id.* (citing *Mahoney*, 807 S.W.2d at 512).

This Court applied the rational basis standard when it reviewed the *Adams* challenges to the 1986 cap. 832 S.W.2d at 903. Plaintiffs have provided no compelling basis for this Court to now abandon its precedent in favor of engaging in a stricter review; in fact, Plaintiffs have merely reiterated the “fundamental right” arguments already rejected by this Court in *Adams*. Plaintiffs’ contention that the Court in *Adams* somehow left open the issue of whether a non-economic damages cap impinges upon the right to trial by jury, open courts, due process,<sup>2</sup> or certain remedies such that it violates equal

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<sup>2</sup> Although Plaintiffs’ Brief only *expressly* refers to the “right to counsel,” it appears Plaintiffs *intended* to refer to their right to due process. *See* Plaintiffs’ Brief at pp. 60-64. Even assuming the *Adams* Court left this issue open, which MPM denies, Plaintiffs have failed to make a persuasive argument on this point. None of the authorities on which Plaintiffs rely support their conclusion that a statute limiting one

protection – as Plaintiffs now assert anew – is wholly unfounded. *See* Plaintiffs’ Brief at p. 47, n. 17. To the contrary, the *Adams* decision expressly held that the 1986 cap did *not* violate those fundamental rights. *See* 832 S.W.2d at 903, 905-07.<sup>3</sup>

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portion of a plaintiff’s potential recovery deprives that plaintiff of his or her right or access to counsel.

<sup>3</sup> Plaintiffs’ attempt to convince this Court that it should apply a heightened level of scrutiny based on a minority position taken by courts in other states is contrary to *Adams* and should be rejected. *See* Plaintiffs’ Brief at pp. 47-48, n. 1, and p. 55. This Court’s *Adams* opinion was and remains consistent with a clear majority of other jurisdictions’ decisions in which the constitutionality of damages caps was upheld under rational basis review. *See, e.g., Hughes v. PeaceHealth*, 178 P.3d 225 (Or. 2008); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *C.J. v. State Dep’t of Corr.*, 151 P.3d 373 (Alaska 2006); *Gilbert v. Sec. Fin. Corp. of Okla., Inc.*, 152 P.3d 165 (Okla. 2006); *Wiley v. Henry Ford Cottage Hosp.*, 668 N.W.2d 402 (Mich. 2003); *Phillips v. Mirac, Inc.*, 651 N.W.2d 437 (Mich. App. 2002); *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82 (N.C. 2002); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Ala. 2002); *Univ. of Md. Med. Sys. Corp. v. Malory*, 795 A.2d 107 (Md. 2001); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730 (Tex. App. 1998); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992). The controlling nature of this

Substantively, the *Adams* Court was asked to address the same contentions Plaintiffs are making today – *i.e.*, that there was no “crisis,” and that the cap on non-economic damages is not rationally related to the legislative goals of lowering insurance premiums and ensuring access to quality medical services. *Id.* at 904. With respect to the former argument, the Court stated:

[b]oth sides offer an array of evidence that both supports and refutes the existence of a “crisis” in medical malpractice premiums . . . . While some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists.

*Id.* With respect to the latter arguments, the Court concluded:

[h]ere, the preservation of public health and the maintenance of generally affordable health care costs are reasonably conceived legislative objectives that can be achieved, if only inefficiently, by the statutory provision under attack here. The legislature could rationally believe that the cap on non-economic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice

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Court’s decision in *Adams* resolves the constitutional issues raised in Plaintiffs’ brief. But even assuming, for the sake of argument, that the amendments to the cap made as a result of H.B. 393 merit a new review of the constitutional issues, only a rational basis review would be appropriate under this Court’s established precedent.

insurance premiums paid by health care providers. Were this to result, the legislature could reason, physicians would be willing to continue “high risk” medical services in Missouri and provide quality medical services at a less expensive level than would otherwise be the case . . . . *As such, the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians.*

*Id.* (emphasis added).

In enacting H.B. 393, the Legislature had the same legislative objective as it had in enacting the 1986 cap: namely, to ensure Missourians’ access to quality healthcare through reducing professional liability insurance premiums for medical professionals. Because, as set forth more fully below, the Legislature was provided with evidence and testimony that supported its conclusion that a revised non-economic damages cap would serve both objectives, as set forth more fully below, the 2005 cap must be affirmed.

**B. At the Time H.B. 393 was enacted, Missouri was Facing a Medical Malpractice Liability Insurance Crisis in that Premiums Had Skyrocketed.**

In 1986, the Missouri Legislature enacted R.S. Mo. § 538.210 (the “1986 cap”), capping non-economic damage recoveries at \$350,000 in actions alleging medical malpractice. The 1986 cap did not ultimately limit plaintiffs’ non-economic recoveries strictly to \$350,000, however, because it provided for inflation-based adjustments over time and was held, for example, to permit multiple \$350,000 recoveries for a single

plaintiff where multiple acts of negligence were alleged to have caused that plaintiff's injuries, even where only one defendant allegedly caused the injuries. *See, e.g., Scott v. SSM Health Care St. Louis*, 70 S.W.3d 560 (Mo. banc 2002).

The Legislature introduced and enacted H.B. 393 in 2005 in response to a staggering increase in the price of medical professional liability insurance. Specifically, and despite the 1986 cap, from 1998 to 2003, gross premiums written by licensed insurers nearly doubled, from \$94,908,930 to \$186,479,369. *See* Missouri Department of Insurance Missouri Medical Malpractice Insurance Report, October 2005 ("2005 MDI Report"), Section I, Medical Malpractice Insurance Licensed and Non-Admitted Premiums, 1997-2004. In addition, during that same period, the amount of gross premiums written by non-admitted carriers, or "surplus lines," quadrupled from \$10,010,000, or 9.5% of the market, to \$40,481,669, or 17.8% of the market. *Id.* Plaintiffs do not, and cannot, dispute the fact of these increases, or that the increases occurred at rates greater than inflation. As summarized by the Missouri Department of Insurance:

After two years of steady premium hikes, health care providers began moving to unlicensed carriers, known as "surplus lines" insurers, in 2003 . . . . Policyholders go to surplus lines companies when they can no longer find coverage in the regular commercial market . . . . These unlicensed, but legal insurance companies accounted for 18 percent of sales in 2003 versus 13 percent the prior year. Earned premium doubled from 2002 to 2003.

2003 Missouri Department of Insurance Annual Report (“2003 MDI Report”), Executive Summary. The Department’s Director further acknowledged that several large carriers had withdrawn from the market or become insolvent, which, in turn, made it additionally difficult for physicians to find affordable professional liability insurance. *See* 2003 Missouri Department of Insurance’s 2003 Current Difficulties Report, at Executive Summary.

As early as 2003, it was apparent both to the Department of Insurance, and to the Legislature (to which the Department’s Reports were presented) that, due to continued premium increases, medical professionals were having difficulty finding affordable medical professional liability insurance in the regular commercial market. Compounding the insurance premium problem, although the number of reported and paid medical professional negligence claims had declined, by 2004, “[t]he average award per paid claim increased sharply for the third consecutive year, reaching a historic high.” 2005 MDI Report, Executive Summary. In addition, the average claim adjustment expense paid per defendant increased from \$31,053 in 2002 to \$42,683 in 2004, rapidly outpacing inflation. *See* 2005 MDI Report, Section I, Major Historical Trends. By 2004, the gross premium written had increased to \$246,655,563.<sup>4</sup> *Id.* In March 2005, the American

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<sup>4</sup> A brief comparison of these premium figures to more recent, post-tort reform premiums provides perspective. For example, the gross premium written in 2008 was only \$206,807,163. *See* 2008 Missouri Medical Malpractice Insurance Report (“2008 MMI Report”), Section I, Historical Trends.

Medical Association confirmed the troubling impact of such numbers, identifying Missouri as one of twenty states “in crisis” due to its escalating malpractice premiums. See American Medical Association, *America’s Medical Liability Crisis: A National View*, Mar. 15, 2005, available at <http://www.ama-assn.org/ama/pub/health-system-reform/resources.shtml>.

Again, Plaintiffs do not attempt to deny the *fact* of the inflated insurance premiums; indeed, they could not colorably do so. Rather, Plaintiffs simply dispute the *cause* of these sharply increasing premiums. Nevertheless, under the rational basis review, the precise cause of the premium increases is simply irrelevant to this Court’s analysis of whether the Legislature acted rationally in responding to them. For the reasons set forth below, the Legislature’s response was rational, and the 2005 cap should be upheld as constitutional.

**C. In 2005, the Legislature Had Evidence That Doctors Were Leaving Certain Disciplines and/or the State, Creating An Access to Care Issue for Missourians.**

While considering and debating H.B. 393, the Legislature heard from many Missouri doctors about the impact of soaring professional liability insurance premiums on their ability to practice. That evidence showed a decidedly adverse effect on Missourians’ access to health care.

On February 8, 2005, the House Judiciary Committee heard from Ellen Nichols, a neurosurgeon from Joplin who was forced to close her independent practice after her malpractice insurance premiums doubled less than a year after she and another doctor

were named as defendants in a lawsuit from which both were later dismissed. *See* Tim Hoover, *Doctors Push for Malpractice Limits*, THE KANSAS CITY STAR, Feb. 9, 2005. Dr. Nichols testified before the Legislature that she was considering moving to another state, and said, “I no longer believe that it is good enough to be a good doctor and practice good medicine . . . . I need your help.” *Id.* Dr. Nichols was just one of many doctors who testified that day and implored the committee to approve H.B. 393.

Similarly, over a dozen doctors joined then-Governor Matt Blunt at a legislative news conference, during which the president of Jefferson City Medical Group stated that the entity had experienced increased costs and decreased availability of medical liability insurance, and that, “[b]ecause of more favorable litigation laws in other states, we’ve had difficulty replacing physicians who have retired.” Kris Hilgedick, *Tort Reform Takes Shape*, JEFFERSON CITY POST-TRIB., Feb. 1, 2005.

During House debates over the bill in February 2005, representatives heard from Dr. Julie Wood, who explained that she had to leave her family practice in Macon because her medical professional liability insurance premiums more than tripled in one year to \$71,000, an amount more than three-fourths of her income. *See* David A. Lieb, *House Endorses New LawsUIT Limits*, HANNIBAL COURIER-POST, Feb. 17, 2005. Dr. Wood further testified that her rate rose primarily because she delivered babies, which insurers considered high-risk. *Id.* As a result of Dr. Wood’s departure from practice, her former Macon patients had to travel to other cities to deliver their babies. *Id.*

The Legislature thus heard direct evidence that increased professional liability insurance premiums threatened the availability of healthcare to Missourians. Plaintiffs

admit the Legislature was provided with this information. *See* Plaintiffs' Brief at p. 31. And in addition to the testimony and reports provided to the Legislature, empirical data studies then available confirmed that earlier-enacted damages caps in Missouri and elsewhere had the desired effect of lowering, or slowing the growth of, medical professional liability insurance premiums, while increasing the number of physicians in evaluated states. *See* Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS, Sppl. Web Exclusives (Jan. 21, 2004), *available at* <http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.20v1> (noneconomic damages caps reduced the growth of professional liability insurance premiums by 12.7%); W. Kip Viscusi and Patricia H. Born, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. OF RISK & INS. 23-43 (Mar. 2005) (states with noneconomic damages caps have had 16% lower insurer losses and 6.2% lower growth in premiums); D.P. Kessler, W.M. Sage, D.J. Becker, *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 J.A.M.A. 21, June 1, 2005 (damages caps are associated with three percent higher growth in physician supply after three years); Fred J. Helinger and William E. Encinosa, *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians*, July 3, 2003, *available at* <http://www.ahrq.gov/research/tortcaps/tortcaps.htm> (states with caps have, on average, twelve percent higher physician supply per capita than states without caps).

Because *proponents* of legislative enactments have no burden “to convince the court of the correctness of legislative judgments,” and instead need only show that “any state of facts reasonably [could] be conceived to justify” the legislative determinations

made in enacting a statute, the Court need look no further than the above evidence presented to and available for the Legislature's consideration to affirm the constitutionality of the 2005 cap as a whole as rationally related to a legitimate government objective and interest. *Blaske*, 821 S.W.2d at 829.

And as for the constitutionality of *specific* 2005 cap provisions, the Legislature's removal of the inflation-based future adjustments provision cannot alone make an otherwise constitutional cap unconstitutional. It clearly falls within the "legislative policy determination" purview that this Court has expressly held to be outside its scope of review. *Id.* The words of the West Virginia Court of Appeals, rejecting a similar inflation-based revision challenge, are illustrative:

Presumably the legislature was aware of the effects of inflation and could have opted for some cap indexed to inflation. That the legislature did not index the cap to inflation but set forth an absolute dollar amount does not render the cap unconstitutional. It is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted. If the legislature finds that it does not, it is within its power to amend the legislation as it sees fit. This Court may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. Accordingly, we decline to find the cap invalid based on inflation.

*Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. App. 2001) (internal quotations and citations omitted).

Just as in *Verba*, and consistent with its holding in *Adams*, this Court should affirm Missouri's 2005 cap as rationally related to the legitimate governmental purpose of ensuring Missourians' continued access to quality health care.

**D. The So-Called Expert Affidavits Proffered by Plaintiffs Do Not Invalidate the Facts Upon Which the Legislature's Decision to Enact H.B. 393 Was Based.**

Eschewing the basic tenets of rational basis review, Plaintiffs improperly seek to retroactively challenge the accuracy of the information available to and provided the Legislature during its 2005 debate by now proffering so-called "expert" affidavits of their own purporting to invalidate the available 2005 evidence. The Court should disregard these affidavits. Not only is a post-enactment judicial determination of the correctness of legislative judgments wholly inappropriate in a rational basis review, but the affidavits in question were improperly introduced *after* trial and lack foundation. Even if these affidavits were somehow both relevant and admissible, however, they are utterly without persuasive force.

The Vidmar affidavit's conclusions, for example, on which Plaintiffs principally rely, are simply based on the total number of medical *licenses*, which, while indicative of the number of physicians *capable* of practicing in Missouri, are not indicative of how many were *actually* practicing at any particular time, where they were practicing, and whether they continued to perform the high-risk procedures and treatments that had

resulted in increased premiums.<sup>5</sup> As shown above, the Legislature heard direct testimony from affected Missouri practitioners, testimony that is not contradicted by the data contained in the Vidmar affidavit, retrospectively or otherwise.

The Angoff affidavit is similarly unpersuasive. Mr. Angoff does not dispute that professional liability insurance premiums had increased in the years preceding the enactment of H.B. 393. To the contrary, he *agrees* that the Legislature needed to take action in response to the high medical professional liability insurance premiums, and merely disputes the *cause* of the increase, blaming it on the so-called “insurance cycle.”<sup>6</sup> Angoff Affidavit, (Legal File (“LF”) at 737-41); *see also* Jay Angoff, *Tort Reform: Include Malpractice Insurer’s [sic] in the Discussion*, ST. LOUIS POST-DISPATCH, Jan. 5, 2005 (advocating for legislation to, among other things, reduce the surcharge imposed on obstetricians that, in some instances, amounted “to more than 50 percent of their annual net income.”)

The Peters Affidavit<sup>7</sup> and the Daniels and Martin Affidavit<sup>8</sup> do not even address the issue of the increase in medical professional liability premiums. The Peters Affidavit,

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<sup>5</sup> *See* Vidmar Affidavit, (Legal File (“LF”) at 925-30), and Exhibits 2 and 3 thereto (LF at 962, 965).

<sup>6</sup> Glaringly absent from Mr. Angoff’s affidavit is even a single reference to any authority in support of this conclusion.

<sup>7</sup> *See* Peters Affidavit (LF, 881 *et seq.*).

<sup>8</sup> *See* Daniels and Martin Affidavit (LF, 774 *et seq.*).

in fact, is not based on Missouri data. *See* Peters Affidavit (LF at 885) (“My research regarding medical malpractice litigation and settlements has not been focused on Missouri claims”). Likewise, the Finley Affidavit is not based on Missouri data, and does not contest the fact that the cost of medical professional liability insurance had skyrocketed prior to the enactment of H.B. 393. *See* Finley Affidavit (LF at 858) (“I have not conducted any research specific to Missouri malpractice cases.”) The data supporting the conclusions in the Daniels and Martin Affidavit is also suspect in that it is based on jury verdicts reported at least *15 years before* the enactment of H.B. 393. *See* Daniels and Martin Affidavit (LF at 779) (admitting that their study focused on verdicts from sixteen states between 1988 and 1990). As a threshold matter, then, each of the affidavits proffered by Plaintiffs should be disregarded for lack of competence.

Fundamentally, of course, Plaintiffs’ affidavits constitute an improper attempt to invade the province of the legislature. As this Court stated in *Adams*, “[i]t is not the Court’s province to question the wisdom, social desirability or economic policy underlying a statute [or] *to determine whether a medical malpractice crisis exists.*” 832 S.W.2d at 903-04 (internal citations omitted) (emphasis added). It is indeed ironic that Plaintiffs’ brief, which repeatedly alleges that the statute at issue improperly usurps the role of the judiciary, asks the Court to substitute its judgment for the reasoned policy determinations of the Legislature. Plaintiffs nevertheless purport to proffer their affidavits on the basis of a single quotation from the *Mahoney* case, attributed to *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), and set forth

originally in *Vance v. Bradley*, 440 U.S. 93, 111 (1979).; *see* Plaintiffs' Brief at pp. 31-

32. Specifically, Plaintiffs cite *Mahoney* for the proposition that:

those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

807 S.W.2d at 512-13. But Plaintiffs neglected to note pertinent language embodied in *Vance*, providing that:

[i]t makes no difference that the facts [upon which a legislative classification is based] may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

440 U.S. at 112. Further, in *Minnesota v. Clover Leaf Creamery*, the Supreme Court explained that:

[a]lthough parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as it is evident from all the considerations presented to the legislature, and those of which we may take judicial notice, that the question is at least debatable. *Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.*

449 U.S. at 464 (internal citations and quotations omitted) (emphasis added). The Supreme Court elaborated that “it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.” *Id.* at 469-70 (internal quotations and citations omitted) (emphasis added). Finally, this Court held, in its *Mahoney* decision upholding another section of Chapter 538, that “[i]f the question of the legislative judgment remains at least debatable, the issue settles on the side of validity.” 807 S.W.2d at 513.

Because Plaintiffs have not disputed the fact that medical professional liability insurance premiums had dramatically increased prior to the enactment of H.B. 393, that medical professionals were having trouble finding affordable professional liability insurance, or that the Legislature had been presented with testimony that certain health care providers were leaving high risk practices, leaving certain parts of the State, and quite possibly leaving the State altogether, Plaintiffs cannot colorably argue that it is not at least *debatable* that the Legislature had a rational basis for enactment of the 2005 cap. Plaintiffs have thus failed to meet their burden to establish there was no set of facts upon which the Legislature could have reasonably determined the cap was necessary to promote the goal of ensuring Missourians’ access to adequate health care.

**E. Since the 2005 Cap’s Enactment, the “Crisis” Statistics Have Significantly Improved.**

Even if Missouri law permitted judicial reconsideration of legislative policy determinations in light of post-enactment events – and it does not – history has demonstrated that the Legislature’s determinations with respect to H.B. 393 were correct.

Specifically, after the 2005 cap was enacted, Missouri gross insurance premiums have decreased even as the number of licensed physicians in the state increased. Thus, while this Court's rational basis review is in no way dependent on the correctness of the Legislature's policy determinations, the Court can affirm the constitutionality of the 2005 cap with confidence in the rationality of those determinations, because the available empirical evidence ultimately proves them to have been correct.

“Missouri lost 225 physicians in the three years leading up to” the passage of H.B. 393, but since the first full year the amended cap was in place, Missouri has *gained* 486 doctors. Terry Ganey, *Doctors v. Lawyers: Doctors' Malpractice Insurance Rates Drop With Fewer Negligence Claims*, COLUMBIA DAILY TRIB., Oct. 4, 2009 (citing figures from Missouri Board of Healing Arts). Despite this increase, the total gross malpractice insurance premiums written has *decreased* from \$246,655,563 in 2004 to \$206,807,163 in 2008. These plain facts comport with trends in other states with similar caps, and demonstrate that non-economic damages caps produce the desired effect of lowering medical malpractice premiums. See Congressional Budget Office, *The Effects of Tort Reform: Evidence From the States* (June 2004) (reporting that 1998 Patricia Born and W. Kip Viscusi study “found that damages caps and other reforms reduced insurance companies' costs and the premiums they charged,” and that 2004 Kenneth Thorpe study “found that insurers in states that adopted caps on non-economic damages awards experienced lower loss ratios while earning lower premiums than insurers in other states”), available at <http://www.cbo.gov/ftpdoc.cfm>, last visited Oct. 28, 2009. Stated simply, the Legislature's 2005 actions in revising the cap produced the intended results.

The cost of medical professional liability insurance in Missouri has decreased, and substantial losses of physicians were prevented, thereby ensuring Missourians' continued access to quality health care.

Additionally, professional liability insurance is now available to Missouri physicians from a greater number of sources. A key component to setting premiums and reserves for insurance contracts is predictability of losses but, without an effective cap, loss predictability is difficult to attain. In 2002, the number of companies writing medical professional negligence liability insurance in Missouri began to decline significantly. 2008 MMI Report, Statistics Section, at 17. In 2008, however, after H.B. 393 had been in effect for three years, the number of companies writing medical professional negligence liability insurance in Missouri increased. *Id.*

In summary, the 2005 cap worked to stabilize the Missouri medical professional negligence liability insurance marketplace, and to ensure that Missourians enjoy continued access to quality health care. The statistics demonstrate a rational basis – at the very least – for the Legislature's work on H.B. 393.

### **CONCLUSION**

In 2005, the Legislature acknowledged evidence that Missourians were at risk of losing access to quality healthcare, and acted rationally in response by enacting H.B. 393 to amend an existing cap on non-economic damages in suits alleging medical negligence. As a result, the medical liability insurance marketplace has stabilized, medical liability insurance premiums have decreased, and the number of physicians licensed to practice in Missouri has continued to increase. This Court should not disturb the Legislature's

rational response to an unquestioned threat. For all the above reasons, the Court should affirm the decision of the trial court and uphold the constitutionality of the cap on non-economic damages contained in Section 538.210.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT  
RULES 84.06(B)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to word count function of Microsoft Word 2000 by which it was prepared, contains 6,014 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the CD-ROM filed herewith containing this Appellant's Brief in electronic form complies with the Missouri Supreme Court Rule 84.06(g), because it has been scanned for viruses and is virus-free.

Dated: Nov. 5, 2009

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The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by (\_\_\_) United States Mail, postage prepaid; (\_\_\_) fax; (\_\_\_) E-mail; (X) Federal Express; and/or (\_\_\_) Hand Delivery this 5th day of November, 2009, to:

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