

APPEAL NO. SC94322

MISSOURI SUPREME COURT

SHONDA AMBERS-PHILLIPS and RICHARD PHILLIPS, II,

Plaintiffs/Appellants

v.

SSM DEPAUL HEALTH CENTER,

Defendant/Respondent

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

DIVISION 10

Cause No. 13SL-CC04136

Honorable Michael T. Jamison

APPELLANTS' BRIEF

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INTRODUCTION

This case arises from complications suffered by Appellant Shonda Ambers-Phillips due to foreign objects being left in her abdomen following one or more surgeries at Respondent SSM Depaul Health Center's hospital following a car accident in or around September, 1999. On or about June 30, 2013, Appellant Ambers-Phillips underwent an exploratory laparotomy for a subphrenic abscess at Mercy Hospital in St. Louis. During the operation, four foreign objects were found in Appellant Ambers-Phillips' abdomen.

Appellants filed a lawsuit on November 21, 2013 – within 5 months of Appellant Ambers-Phillips' discovery of the foreign objects. Appellant Ambers-Phillips brought two counts against Respondent for: (1) medical malpractice; and (2) *res ipsa loquitur*. Appellant Richard Phillips – Appellant Ambers-Phillips' husband – brought a loss of consortium claim against Respondent. On May 30, 2014, the Circuit Court of St. Louis County dismissed Appellants' claims, with prejudice, as barred by the ten year statute of repose found in RSMo. § 516.105.

In this case, Appellants argue that RSMo. § 516.105 violates the Missouri Constitution's Open Courts and Right to a Remedy provisions because it denies citizens their right to bring a medical negligence action if the final element required for such an action – an injury – is not established until after the repose period passes. Moreover, RSMo. § 516.105 violates the Missouri Constitution's Due Process Requirements on its face or, alternatively, as applied to Appellants. Specifically, RSMo. § 516.105 violates the Missouri Constitution's Equal Protection Clause because the state has no interest in

barring malpractice claims before they vest, and it arbitrarily and irrationally discriminates against certain victims of medical malpractice. Because RSMo. § 516.105's statute of repose impinges upon certain citizens' fundamental rights to open courts, a remedy, and due process, it must pass strict scrutiny. Even if RSMo. § 516.105's statute of repose does not impinge on a fundamental right, it nonetheless violates an important right that must pass intermediate scrutiny. Moreover, even if RSMo. § 516.105's statute of repose is not subject to strict or intermediate scrutiny, it nonetheless cannot pass rational basis scrutiny because it arbitrarily and irrationally discriminates against certain victims of medical malpractice. Additionally, RSMo. § 516.105 violates the Missouri Constitution's provision against creating special laws that limit civil actions. Finally, at the very least, the ten year repose period set forth in RSMo. § 516.105 should be equitably tolled.

“An act of the legislature carries a strong presumption of constitutionality.” *Missouri Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006). A person challenging the constitutionality of a Missouri law may overcome the presumption of constitutionality, however, by demonstrating that “it clearly contravenes a constitutional provision.” *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). For the reasons discussed below, this Court should invalidate RSMo. § 516.105 on the basis of the constitutional grounds stated above, because this statute is in direct contravention to the laws embodied in the Missouri Constitution. *See Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991).

For the reasons discussed below, RSMo. § 516.105, is unconstitutional both on its

face and as applied to Appellants circumstances. As such, Respondent cannot rely on RSMo. § 516.105 to bar Appellants' claims, and therefore, Appellants respectfully request that this Court reverse and remand this case to the Circuit Court of St. Louis so that Appellants can seek redress for their damages.

JURISDICTIONAL STATEMENT

The Missouri Constitution provides the Missouri Supreme Court with exclusive appellate jurisdiction in all cases involving the validity of a state statute. Mo. Const. Art. V, § 3. This Court, accordingly, has exclusive jurisdiction over this appeal, which concerns the validity of RSMo. § 516.105. It also has jurisdiction over any other issue that may be presented, even if these issues, standing alone, would not otherwise be directly appealable to this Court. *See State ex rel. Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985).

The constitutional questions sought to be presented in this case are real and substantial, because they directly affect Appellants ability to seek redress for their damages. Moreover, these questions were properly preserved for appellate review because Appellants presented their constitutional objections to RSMo. § 516.105 in a timely fashion, and with the requisite specificity. *See Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989).

After the Circuit Court dismissed Appellants' Petition, with prejudice, pursuant to RSMo. § 516.105, Appellants timely filed a notice of appeal and a jurisdictional statement.

For these reasons, jurisdiction properly lies in this Court.

STATEMENT OF FACTS

This case arises from complications endured by Appellant Shonda Ambers-Phillips due to foreign objects being left in her abdomen following one or more surgeries at Respondent SSM Depaul Health Center's hospital following a car accident in or around September, 1999. Legal File (L.F.) 004-016. Following the accident, employees of Respondent performed an exploratory laparotomy on Appellant Ambers-Phillips. *Id.* On or about the beginning of June, 2013, Appellant Ambers-Phillips noticed an epigastric mass, and suffered from severe pain in her abdominal area. *Id.* On or about June 30, 2013, Appellant Ambers-Phillips underwent an exploratory laparotomy for a subphrenic abscess at Mercy Hospital in St. Louis. *Id.* During the operation, four foreign objects were found in Appellant Ambers-Phillips' abdomen. *Id.* The discharge diagnosis of Appellant Ambers-Phillips was that the foreign bodies were accidentally left in her body following a surgical operation. *Id.*

Appellants filed the present case on November 21, 2013 – within 5 months of Appellant Ambers-Phillips' discovery of the foreign objects. L.F. 003-004. Appellant Ambers-Phillips brought two counts against Respondent for: (1) medical malpractice; and (2) *res ipsa loquitur*. L.F. 004-016. Appellant Richard Phillips, II – Appellant Ambers-Phillips' husband – brought a loss of consortium claim against Respondent. *Id.*

On February 7, 2014, Respondent filed a Motion to Dismiss, setting forth three reasons why Appellants' case should be dismissed. L.F. 002, 017-021. First, Respondent argued that Appellants' claims were barred by the ten year statute of repose found in RSMo. § 516.105. Second, Respondent argued that Appellants' claims were barred by

the statute of limitations found in two year statute of limitations found in RSMo. § 516.105. Finally, addressing only Count IV of Appellants' Petition, Respondent argued that Appellant Shonda Ambers-Phillips' *res ipsa loquitor* claim against it should be dismissed for failure to plead all the required elements of the cause of action.

After Appellants filed a Response in Opposition to Respondent's Motion to Dismiss (L.F. 022-042) and Respondent's filed a Reply to Respondent's Response in Opposition (L.F. 043-056), the Circuit Court held a hearing on May 16, 2014. L.F. 001.

On May 30, 2014, the Circuit Court entered an Order and Judgment dismissing Appellants' Petition, with prejudice, pursuant to the ten year statute of repose found in RSMo. § 516.105. L.F. 057-072.

On June 27, 2014, Appellants timely filed a Notice of Appeal to this Court. L.F. 073-080.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI CONSTITUTION'S OPEN COURTS AND RIGHT TO A REMEDY PROVISIONS BECAUSE IT DENIES CITIZENS THEIR RIGHT TO BRING A MEDICAL NEGLIGENCE ACTION IF THE FINAL ELEMENT REQUIRED FOR SUCH AN ACTION – AN INJURY – IS NOT ESTABLISHED UNTIL AFTER THE REPOSE PERIOD PASSES**

Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985).

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984).

Montgomery v. S. Cnty. Radiologists, Inc., 168 S.W.3d 685, 691 (Mo. Ct. App. 2005).

Mo. Const. Art. I, § 14.

- II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI CONSTITUTION'S DUE PROCESS REQUIREMENTS ON ITS FACE OR, ALTERNATIVELY, AS APPLIED TO PLAINTIFF**

Doe v. Phillips, 194 S.W.3d 833, 844-45 (Mo. banc 2006).

Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984).

Ross v. Kansas City Gen. Hosp. & Med. Ctr., 608 S.W.2d 397, 400 (Mo. 1980).

Pennell v. City of San Jose, 485 U.S. 1, 11 (1988).

Mo. Const. Art. I, § 10.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI CONSTITUTION'S EQUAL PROTECTION CLAUSE BECAUSE THE STATE HAS NO INTEREST IN BARRING MALPRACTICE CLAIMS BEFORE THEY VEST, AND IT ARBITRARILY AND IRRATIONALLY DISCRIMINATES AGAINST CERTAIN VICTIMS OF MEDICAL MALPRACTICE

Marbury v. Madison, 5 U.S. 137, 163 (1803).

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984).

Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709 (Ohio 1987).

Mo. Const. Art. I, § 2.

IV. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI CONSTITUTION'S PROVISION AGAINST CREATING SPECIAL LAWS THAT LIMIT CIVIL ACTIONS

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 832 (Mo. 1991).

Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 400 (Mo. banc 1980).

Mo. Const. Art. III, § 40(6).

V. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE EVEN IF NOT UNCONSTITUTIONAL, THE TEN YEAR REPOSE PERIOD SET FORTH IN RSMO. § 516.105 SHOULD BE EQUITABLY TOLLED

R.A.C. v. P.J.S., Jr., 927 A.2d 97 (N.J., 2007)

Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 559 (1974)

Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 399 (Mo. banc, 1980)

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI CONSTITUTION'S OPEN COURTS AND RIGHT TO A REMEDY PROVISIONS BECAUSE IT DENIES CITIZENS THEIR RIGHT TO BRING A MEDICAL NEGLIGENCE ACTION IF THE FINAL ELEMENT REQUIRED FOR SUCH AN ACTION – AN INJURY – IS NOT ESTABLISHED UNTIL AFTER THE REPOSE PERIOD PASSES

Art. I, § 14 of the Missouri Constitution states that “the courts of justice shall be open to every person, and **certain remedy afforded for every injury** to person, property or character, and that right and justice shall be administered without sale, denial or delay.” (emphasis added). Generally speaking, open courts provisions are designed to guarantee that courts of justice will be open to every person seeking redress for injuries he or she endured.

Historically (i.e., prior to the General Assembly’s imposition of statutes of limitations and repose), a patient could have brought a cause of action for negligently leaving an object in an individual’s body more than ten years after surgery, and thus, a well-established common law claim exists. Because the open courts provision is a due process guarantee, a plaintiff must have a **vested** right at stake. In order to prove medical malpractice (and therefore establish a **vested** right at stake), a plaintiff must establish that: (1) an act or omission of the defendant failed to meet the required standard of care; (2) the defendant was negligent in the performance of the act or omission; and (3) the act

or omission caused the plaintiff's injury. *Montgomery v. S. Cnty. Radiologists, Inc.*, 168 S.W.3d 685, 691 (Mo. Ct. App. 2005). To be actionable, then, a claim for medical malpractice requires **an injury**. In a foreign object case, the cause of action accrues the moment a patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury. *See* RSMo. § 516.105(1). The relevant discovery date, therefore, is the date the medical malpractice claim vests.

The Missouri Constitution's open courts provision protects citizens from legislative acts that abridge his or her right to sue before he or she has a reasonable opportunity to discover the wrong, and bring suit to redress said wrong. If a statute bars an individual from bringing a case within **any** time period **following** the **vesting** of his or her right to bring such a case, the statute is a violation of the open courts and right to a remedy provision of the Missouri Constitution. While the General Assembly is certainly entitled to set a period of time within which claims must be brought – whether foreign object cases, or not – it may not deny an individual a reasonable opportunity to discover the alleged wrong **and** seek redress for that wrong.

Applying the same analysis, other courts, when addressed with the situation, have determined that such a statute violates a state's constitutional right of access to the courts. *See e.g., Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985) (holding statute of limitations violates right of access to courts as applied to Appellant who discovered negligence after period was up); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (declaring that statute of limitations cutting off cause of action before discovery of injury is unconstitutional under

open courts provision); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) (concluding that two-year statute of limitations for minors over age six violates open courts provision).

The General Assembly, in enacting RSMo. § 516.105, has sought to limit the time in which malpractice actions may be brought and it has done so in a manner which denies to some people (including Appellants) a remedy for injury to their person. RSMo. § 516.105 does not alter the elements of a medical malpractice claim or change the rule of damages. In short, RSMo. § 516.105 does not change the substantive character of a malpractice action. All RSMo. § 516.105 does is close the Courts of Missouri to those who are not reasonably able, within ten years, to know of the injury they have suffered. This absolute bar violates Appellants' constitutional rights for open courts and to a remedy.

For these reasons, RSMo. § 516.105 violates the Missouri Constitution's open courts and right to a remedy provisions, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI CONSTITUTION'S DUE PROCESS REQUIREMENTS ON ITS FACE OR, ALTERNATIVELY, AS APPLIED TO PLAINTIFF

Art. I, § 10 of the Missouri Constitution provides that "no person shall be deprived of life, liberty or property without due process of law." Due process requires that a

legitimate legislative purpose be furthered by rational means. *See Doe v. Phillips*, 194 S.W.3d 833, 844-45 (Mo. banc 2006).

RSMo. § 516.105 violates this constitutional guarantee because it fails to provide **any** length of time for certain individuals to pursue a medical malpractice case. For the same reasons as stated above, if a statute bars an individual from bringing a case within **any** time period **following** the **vesting** of his or her right to bring such a case, the statute is a violation of the due process provision of the Missouri Constitution.

A substantive due process claim is based on the argument that a statute, on its face, is unconstitutional. In this context, the statute is unconstitutional if it is arbitrary, capricious and not rationally related to a legitimate public purpose. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988). As the Missouri Supreme Court previously pointed out, the medical malpractice “statute[] of limitation will not be held unconstitutional as denying due process unless the time allowed for commencement of the action and the date fixed when the statute commences to run are **clearly and plainly unreasonable**. Two years from the date of the act of neglect was upheld in *Laughlin* [*v. Forgrave*, 432 S.W.2d 308 (Mo. 1968)] as not unreasonable. Two years from the date of discovery in case of a foreign object left in the body **could not be** less than two years after the date of the act of neglect and might well be considerably longer, **so**, a fortiori, **it is not unreasonable**.” *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 400 (Mo. 1980) (emphasis added). What *Ross* failed to account for, though, were situations where, as here, the statute of **repose** denied time for commencement of the action. By barring a case before it vests – as is the case where a foreign body is not

discovered within ten years of the object being left in a person's body with an arbitrary ten year limit – RSMo. § 516.105 unconstitutionally denies a citizen of his or her due process rights. While in general, a two year statute of limitations may be reasonable, a ten year statute of repose that undermines an extension of the statute of limitations simply cannot be reasonable, because it leaves no time for an individual to seek redress for his or her damages.

Alternatively, as applied to Appellants, RSMo. § 516.105 is unconstitutional as it bars Appellants' claims specifically because while the statute of limitations was tolled, the statute of repose serves to bar an otherwise timely filed case. Some courts have found that such a result requires the invalidation of such a statute on an "as applied" basis when they operate to bar latent injury claims before the claims even could have been brought. *See, e.g., Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984) (interpreting the accrual language in its statute of repose as the date of injury, rather than the date of the negligent act, because a contrary interpretation would force the court to "declare the statute unconstitutional" as it would bar causes of action before they accrue); *Whitnell v. Silverman*, 646 So. 2d 989 (La. Ct. App. 1994) (upholding the trial court's determination that Louisiana's statute of repose was unconstitutional as applied to the misdiagnosis of latent injury diseases); *Terry v. New Mexico State Highway Comm'n.*, 645 P.2d 1375, 1378 (N.M. 1982); and *O'Connor v. Altus*, 67 N.J. 106, 117, 335 A.2d 545, 553 (1975).

The above line of cases point out that applying a statute of repose to a latent injury case, like here, "potentially allows **no** time to sue because it bars the cause of action before it accrues. Under this rationale, statutes of repose **clearly** violate due process

requirements.” Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627, 644 (1985) (emphasis added)

For the foregoing reasons, RSMo. § 516.105 violates the Missouri Constitution’s due process guarantees on its face **and** as applied to Appellants, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS’ PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI CONSTITUTION’S EQUAL PROTECTION CLAUSE BECAUSE THE STATE HAS NO INTEREST IN BARRING MALPRACTICE CLAIMS BEFORE THEY VEST, AND IT ARBITRARILY AND IRRATIONALLY DISCRIMINATES AGAINST CERTAIN VICTIMS OF MEDICAL MALPRACTICE

Art. I, § 2 of the Missouri Constitution states that:

all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that **all persons are created equal and are entitled to equal rights and opportunity under the law**; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

(emphasis added).

When a statute is challenged on equal protection grounds, one of three standards of review applies. These three standards are: (1) rational basis review; (2) intermediate review; and (3) strict scrutiny review.

The Missouri Supreme Court has previously held that legislative classifications that burden a suspect class or impinge upon a fundamental right must pass “strict scrutiny” to be upheld; that is, they must be justified by a compelling state interest and must be narrowly drawn to further that interest. *Bernat v. State*, 194 S.W.3d 863, 864 (Mo. banc 2006). Legislative classifications that do not quite burden “fundamental” rights (e.g., gender) must survive “intermediate scrutiny” meaning that they must serve “important governmental objectives and must be substantially related to achievement of those objectives.” *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Finally, statutes that are not subject to heightened scrutiny will only be upheld if they are rationally related to a legitimate state interest. *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 512 (Mo. 1991).

While most courts that have addressed the issue at hand have applied rational basis review, courts have applied heightened levels of scrutiny for medical malpractice statutes of repose, as well. *See e.g. Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984) (finding the “right to bring and pursue the action” is a **fundamental** right under the Arizona Constitution and thus invoking strict scrutiny of medical malpractice legislation which affects that right); *White v. Montana*, 661 P.2d 1272, 1275 (Mont. 1983) (finding the right to recover tort damages to be a **fundamental** right and thus invoking strict scrutiny of medical malpractice legislation which affects that right.); *Carson v. Maurer*, 424 A.2d

825, 830 (N.H. 1980) (determining that the intermediate scrutiny standard is appropriate because the right to recovery for personal injuries, although not fundamental, is **important.**).

**A. RSMO. § 516.105’S STATUTE OF REPOSE IMPINGES UPON
CERTAIN CITIZENS’ FUNDAMENTAL RIGHTS TO OPEN
COURTS, A REMEDY, AND DUE PROCESS, IT MUST PASS
STRICT SCRUTINY**

“As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” To be considered a “fundamental” right protected by substantive due process, a right or liberty must be one that is “objectively, deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. 2006) (internal citations omitted). A fundamental right is a right “explicitly or **implicitly** guaranteed by the Constitution.” *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1972) (emphasis added). They include the rights to free speech, to vote, freedom of interstate travel, the right to personal privacy and other basic liberties. *See e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

The U.S. Constitution does not have an *explicit* open courts clause. However, as the Supreme Court stated in *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803),

“[t]he very essence of civil liberty certainly consists in the right of every individual to claim the **protection of the laws, whenever he receives an injury**. One of the first duties of government is to afford that protection.” (emphasis added). The right to protection under the law after receiving an injury is, therefore, an *implicit* guarantee of the U.S. Constitution, as the preamble to the Constitution states that its purpose is, in part, to “secure the Blessings of Liberty to ourselves and our Posterity....” U.S. Const. Preamble. Because RSMo. § 516.105’s has the effect of denying Appellants **any** protection under the law for their damages, it violates a **fundamental right** of Appellants, and must, therefore, pass strict scrutiny.

In order to survive strict scrutiny, a limitation on a fundamental right must serve compelling state interests, and must be narrowly tailored to meet those interests. *Komosa v. Komosa*, 939 S.W.2d 479, 482 (Mo.App. E.D.1997) (“Any state restriction which significantly interferes with the exercise of a fundamental right is subject to strict scrutiny and cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”).

In this case, RSMo. § 516.105 interferes with Appellants’ fundamental right of access to the courts to seek redress against Respondent for leaving foreign objects in Appellant Shonda Ambers-Phillips’ body, along with Appellant Richard Phillips’ right to recover against Respondents for loss of consortium. There is no compelling state interest against barring any such rights before an individual has the opportunity to discover the negligent act.

Likewise, RSMo. § 516.105 is not narrowly tailored to serve any compelling state interests in depriving Appellants of their fundamental right. By absolutely barring an individual from pursuing a medical malpractice action before the negligence can be discovered simply because the discovery is not made within ten years of the negligent act, the Missouri General Assembly deprived Appellants of their day in court. By granting a tolling period for “foreign object” cases, yet setting an absolute bar of ten years, RSMo. § 516.105 has the effect of absolutely barring a case before it exists. A narrowly tailored statute of repose would have provided an exception to the statute of repose by allowing for tolling of that period in foreign object cases – much like the exception to the statute of limitations. In other words, a narrowly tailored RSMo. § 516.105 would have provided for tolling of the repose period in the same way that the limitations period is tolled in order to allow individuals to bring a foreign object case within two years of the discovery of the foreign object, even if that discovery was made outside the ten year period.

Because the State has no compelling interest in barring an individual’s rights of redress before that individual has the opportunity to discover the negligent act, and because the General Assembly failed to narrowly tailor RSMo. § 516.105, the statute cannot pass strict scrutiny, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

**B. EVEN IF RSMO. § 516.105'S STATUTE OF REPOSE DOES NOT
IMPINGE ON A FUNDAMENTAL RIGHT, IT NONETHELESS
VIOLATES AN IMPORTANT RIGHT THAT MUST PASS
INTERMEDIATE SCRUTINY**

Even if RSMo. § 516.105 does not impinge on a fundamental right, intermediate scrutiny should nonetheless be applied in the Court's analysis because it impinges upon an "important" right. As the New Hampshire Supreme Court indicated in *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980), intermediate scrutiny standard is appropriate because the right to recovery for personal injuries is "important." Clearly, the right to pursue a medical malpractice case is an important common law right that was granted to individuals. As such, it should at least be subject to intermediate scrutiny, which was defined by the U.S. Supreme Court in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) as follows:

Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction...the excessive restrictions cannot survive.

The State has no interest in imposing an absolute bar on foreign object malpractice cases where the Appellant cannot discover the negligent act within ten years of its occurrence. Previously, the Missouri Supreme Court addressed the imposition of the two

year statute of limitations for medical malpractice action by citing an article in the *Journal of Legal Medicine* that stated “[s]tate legislatures reacted in the 1970’s to a perceived crisis in medical malpractice insurance by enacting these types of limitations provisions.” *Strahler v. St. Luke’s Hosp.*, 706 S.W.2d 7, 10 (Mo. 1986). Whatever interests the State has in enacting statutes of limitations applicable to medical malpractice claims, it has no such similar interest in enacting statutes of repose that bar cases before they can be brought. RSMo. § 516.105 has the effect of precluding any redress for an individual before the case vests. This is certainly not an interest of the State, and for this reason, it cannot pass intermediate scrutiny.

To the extent the State does have such an interest, RSMo. § 516.105 cannot meet the second part of the two-part test in that it does not limit its restrictions, but rather imposes an excessive restriction. Specifically, the U.S. Supreme Court further defined the second part of the *Central Hudson* test, that the statute be narrowly drawn, as requiring that “the regulatory technique may extend only as far as the interest it serves.” As stated above, a narrowly tailored statute of repose would have provided an exception to the statute of repose by including a tolling period of that period in cases of foreign objects – much like the exception to the statute of limitations.

Because the State has no interest in barring an individual’s rights of redress before that individual has the opportunity to discover the negligent act, and because the General Assembly failed to narrowly tailor RSMo. § 516.105, the statute cannot pass intermediate scrutiny, is unconstitutional, and therefore, this Court should reverse and remand this

case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

C. EVEN IF RSMO. § 516.105'S STATUTE OF REPOSE IS NOT SUBJECT TO STRICT OR INTERMEDIATE SCRUTINY, IT NONETHELESS CANNOT PASS RATIONAL BASIS SCRUTINY BECAUSE IT ARBITRARILY AND IRRATIONALLY DISCRIMINATES AGAINST CERTAIN VICTIMS OF MEDICAL MALPRACTICE

Even if RSMo. § 516.105 is not subject to strict or intermediate scrutiny, it nonetheless cannot pass rational basis scrutiny because it arbitrarily and irrationally discriminates against certain victims of medical malpractice.

Again, the State has no interest in imposing an absolute bar on foreign object malpractice cases where the Appellant cannot discover the negligent act within ten years of its occurrence. As an absolute bar to an action, RSMo. § 516.105 has the effect of barring a case before it comes into existence. The State certainly has no interest in preventing individuals the ability to seek redress for their injuries, and therefore, it cannot pass rational basis scrutiny.

Even if the State does have such an interest in depriving citizens of redress in certain foreign object cases, there is nothing magic (i.e., non-arbitrary) about the ten year repose period. It is possible for someone to only first discover, or have reason to discovery, a foreign object in their body more than ten years after it was left there. The ten year repose period is simply an arbitrary number set by the Missouri General

Assembly in an effort to absolutely bar certain medical malpractice actions whose statute of limitations begins more than two years after the negligent act occurred. Moreover, while the statute of repose found in RSMo. § 516.105 will rarely come into play absent a long tolling of the statute of limitations, the inability to discover a foreign object negligently left in an individual's body more than ten years after the occurrence means that before it is even possible to bring a malpractice case, the case is barred. It is therefore irrational for a statute to impose impossible requirements such as establishing a vested right in a malpractice case (i.e., discovering an injury) before any such injury can or reasonably could be discovered. This, of course, is the reason that a panoply of states since the 1980s have overturned such statutes. *See e.g., Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984) (violated State equal protection clause); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (holding that a three-year statute of repose in medical malpractice actions violated equal protection provision of state constitution insofar as the statute applied to persons whose claims were based on negligent misdiagnosis); *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709 (Ohio 1987) (holding that a health care liability statute of repose violated equal protection clause of state constitution as applied to adult litigants who, following discovery, did not have adequate time to file actions); *Shessel v. Stroup*, 316 S.E.2d 155 (Ga. 1984) ((violated equal protection clause); *Frohs v. Greene*, 452 P.2d 564, 565 (Or. 1969) (“It is manifestly unrealistic and unfair to bar a negligently injured party’s cause of action before he has had an opportunity to discover that it exists. This is true whether the malpractice consists of leaving a foreign object in the body or whether it consists of faulty diagnosis or treatment.”); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (violated

State equal protection guarantees); and *Kohnke v. St. Paul Fire & Marine Ins. Co.*, 410 N.W.2d 585 (Wis. App., 1987).

Because RSMo. § 516.105 is an arbitrary and irrational law which bars cases where the negligent act cannot be discovered until more than ten years after the act, it cannot pass rational basis scrutiny, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

**IV. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS’
PETITION BECAUSE RSMO. § 516.105 VIOLATES THE MISSOURI
CONSTITUTION’S PROVISION AGAINST CREATING SPECIAL
LAWS THAT LIMIT CIVIL ACTIONS**

Art. III, § 40(6) of the Missouri Constitution states that “[t]he general assembly shall not pass any local or special law...for limitation of civil actions.”

The Missouri Supreme Court has have defined a “special law” as “[a] law which includes less than all who are similarly situated..., but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.” *Ross v. Kansas City General Hospital and Medical Center*, 608 S.W.2d 397, 400 (Mo. banc 1980). A facially special law is presumed to be unconstitutional. *O’Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993).

RSMo. § 516.105 excludes individuals from being able to bring a medical malpractice cause of action who, because of their inability to discover a foreign object left in their body within ten years of the act occurring, are barred by the repose period.

Because this law does not apply uniformly and equally to all those whose claim is based on a foreign object being left in the body, it is subject to the same scrutiny that all special laws must endure. Specifically, “the test for ‘special legislation’ under article III, § 40, of the Missouri Constitution, involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither a fundamental right nor a suspect class is involved, *i.e.*, where a rational basis test applies.” *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. 1991).

As stated above, RSMo. § 516.105 imposes a bar on certain members (*i.e.*, foreign object victims unable to discovery the injury until more than ten years after the negligent act) of a class (*i.e.*, all medical malpractice victims) to bring a civil action. This, of course, is a “limitation of [a] civil action[.]” that is unconstitutional under Art. III, § 40(6). Previously, the Missouri Supreme Court stated that RSMo. § 516.105 “...applies uniformly throughout the state, equally to all those whose claim is based on a foreign object being left in the body and equally to all those whose claim of medical malpractice is not based on the leaving of a foreign object in the body.” *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 400 (Mo. 1980). As the present case demonstrates, this is not **entirely** true. RSMo. § 516.105 actually applies differently to those whose claim is based on a foreign object being left in the body. For those who discover the object and file a case within ten years, RSMo. § 516.105 does not bar their claim. For those who discover the object and file an otherwise timely case outside of ten years, RSMo. § 516.105 does bar their claim. This, of course, makes RSMo. § 516.105 a special law that must pass rational basis scrutiny which, as already mentioned, it cannot.

For the foregoing reasons, RSMo. § 516.105 is a special law, is arbitrary and irrational and therefore cannot pass rational basis scrutiny, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

V. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' PETITION BECAUSE EVEN IF NOT UNCONSTITUTIONAL, THE TEN YEAR REPOSE PERIOD SET FORTH IN RSMO. § 516.105 SHOULD BE EQUITABLY TOLLED

While a statute of limitations is generally regarded as procedural, a statute of repose is considered substantive. The cause of action ceases to exist or is extinguished at the end of the repose period, regardless of whether the Appellant has yet suffered an injury.

In *R.A.C. v. P.J.S., Jr.*, 927 A.2d 97 (N.J., 2007), the New Jersey Supreme Court was faced with the question of whether equitable tolling can ever apply to a statute of repose. In *R.A.C.*, the Appellant filed a child support reimbursement action nearly eight years after the period of repose. The statute at issue required a reimbursement action to be filed before the child turned twenty-three years old. However, the Appellant did not discover that he was not the child's biological father until the child was twenty-nine years old, and did not file a petition for reimbursement of the \$109,696.82 in involuntary child support he paid until the child was nearly thirty years old. As the Court stated, "we have equated statutes of repose with substantive statutes of limitations and suggested that equitable principles **would apply** if consonant with the legislative intent and purpose."

Id. at 107, see also *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 559 (1974) (“the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.”). The Court continued, stating that “equitable tolling will arise only in extraordinary circumstances consistent with legislative intent.” *Id.* at 108. The Court stated that the “‘major concern’ of the statute – the financial support of children – is no longer an issue after children have reached the age of twenty-three and presumably are capable of supporting themselves.” *Id.* As such, the Court held that the repose period was not equitably tolled.

With respect to RSMo § 516.105, the Missouri Supreme Court previously stated that “[o]ne reason why the legislature acted may have been that the legislature considered it **particularly unfair** that a claimant in whom a foreign object has been left should be barred by the statute of limitations even before there was any discovery of the foreign object, as happened to Appellant in [*Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. 1968)]. Or the legislature might have believed it was proper to measure from the time of discovery in the foreign object cases rather than from the time of the act of neglect, because there is **less likely to be as great a problem with stale evidence** when a foreign object is left in the body than in the other types of malpractice cases. There are likely to be greater certainties of proof in a foreign object case. A rational legislature could have based its decision on such considerations.” *Ross v. Kansas City General Hospital and Medical Center*, 608 S.W.2d 397, 399 (Mo. banc, 1980) (emphasis added).

Thus, the “particular[] unfair[ness]” of the undiscoverability of a foreign object is just the type of legislative intent and purpose that would compel the intervention of equitable tolling of the statute of repose.

For this reason, the statute of repose set forth in RSMo. § 516.105 should be equitably tolled, thereby rendering this case timely under both the statute of limitations and statute of repose, and thus, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

CONCLUSION

For the reasons set forth above, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages because RSMo. § 516.105 violates the Missouri Constitution’s open courts and right to a remedy provisions, and is therefore unconstitutional.

Also, RSMo. § 516.105 violates the Missouri Constitution’s due process guarantees on its face and as applied to Appellants, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

Moreover, because the State has no compelling interest in barring an individual’s rights of redress before that individual has the opportunity to discover the negligent act, and because the General Assembly failed to narrowly tailor RSMo. § 516.105, the statute cannot pass strict scrutiny. Because the State has no interest in barring an individual’s rights of redress before that individual has the opportunity to discover the negligent act,

and because the General Assembly failed to narrowly tailor RSMo. § 516.105, the statute cannot pass intermediate scrutiny. At the very least, because RSMo. § 516.105 is an arbitrary and irrational law which bars cases where the negligent act cannot be discovered until more than ten years after the act, it cannot pass rational basis scrutiny. For these reasons, RSMo. § 516.105 violates the equal protection clause of the Missouri Constitution, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

In addition, RSMo. § 516.105 is a special law, is arbitrary and irrational and therefore cannot pass rational basis scrutiny, is unconstitutional, and therefore, this Court should reverse and remand this case to the Circuit Court to allow Respondents to proceed with their case and seek redress for their damages.

Finally, at the very least, the statute of repose set forth in RSMo. § 516.105 should be equitably tolled, thereby rendering this case timely under both the statute of limitations and statute of repose. Accordingly, Appellants request that this Court reverse and remand this case to the Circuit Court to allow them to proceed with their case and seek redress for their damages.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the attached brief complies with Supreme Court Rule 84.06(b), and contains **7,682** words, excluding the cover, the certificate of compliance, the certificate of service, and the appendix as determined by Microsoft Word software, utilizing 13-point Times New Roman font.

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