IN THE SUPREME COURT OF MISSOURI

JAMES KLOTZ and MARY KLOTZ,	)	
	)	**Supreme Court No. 90107**
Appellants/Cross-Respondents,	)	
	)	
vs.	)	
	)	
MICHAEL SHAPIRO, MD and METRO HEART GROUP OF ST. LOUIS, INC	)	
	)	
Respondents/Cross-Appellants.	)	

BRIEF OF AMICUS CURIAE MISSOURI COALITION FOR QUALITY CARE IN SUPPORT OF APPELLANTS

Tim Dollar MO #33123
DOLLAR, BURNS & BECKER, L.C.
1100 Main, Suite 2600
Kansas City, MO 64105
(816) 876-2600
(816) 221-8763 (Fax)
Email: timd@dollar-law.com
Attorney for Amicus Curiae

Table of Contents

Table of Authorities

Cases

Statutes

Legislative History

Secondary Sources

Interest of Amicus Curiae

Missouri Coalition for Quality Care (MCQC)

MCQC was founded in 1987 for the purpose of working to improve quality of care and quality of life for nursing home residents and recipients of in-home healthcare services. It now has over 700 members, most of whom are Missouri citizens. MCQC implores this Court to find Section 538.210 unconstitutional. Eliminating caps on non-economic damages will ensure that the elderly will be able to bring malpractice claims, thus assuring that negligent healthcare providers will be held responsible for injuring the defenseless.

Consent of the Parties

MCQC has received written consent from all the parties to file this brief. Therefore, MCQC is filing this brief pursuant to Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

Points Relied On

I. THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES BECAUSE SECTION 538.210 CANNOT SURVIVE EVEN THE LOW THRESHHOLD OF RATIONAL BASIS REVIEW OF CONSTITUTIONALITY WHEN CAPS ARE ARBITRARY, CAPRICIOUS, AND BEAR NO REASONABLE RELATIONSHIP TO THE STATE'S OBJECTIVES.

A. No Logical Relationship Exists Between the Cap on Non-Economic Damages and the Legislature's Objectives.

Nestlehutt v. Atlanta Oculoplastic Surgery, No. 2007EV002223-J (Ga. Super. Feb. 9, 2009).

B. The Cap Additionally Diminishes Blind Administration of Justice by Discriminating Amongst Tort Plaintiffs.

Ferdon v. Wis. Patients Comp. Fund, 284 Wis. 2d 573 (2005).

Best v. Taylor Mach. Works, 179 Ill. 2d 367 (1997).

C. Recent Decisions in Other Courts Favor Finding Caps Unconstitutional.

Nestlehutt v. Atlanta Oculoplastic Surgery, No. 2007EV002223-J (Ga. Super. Feb. 9, 2009).

Best v. Taylor Mach. Works, 179 Ill. 2d 367 (1997).

Ferdon v. Wis. Patients Comp. Fund, 284 Wis. 2d 573 (2005).

MO. CONST. art. 1, § 2.

WIS. CONST. art. 1, § 1.

ILL. CONST. art. 1, § 2.

WIS. STAT. § 655.017 (1995).

WIS. STAT. § 893.55 (1995).

Adams ex rel. Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992).

MO. REV. STAT. § 538.210 (2005).

II. THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES UNDER STRICT SCRUTINY REVIEW AS WELL BECAUSE THE ELDERLY QUALIFY AS A SUSPECT CLASS, SECTION 538.210 VIOLATES A FUNDAMENTAL RIGHT, AND SECTION 538.210 IS NOT THE LEAST RESTRICTIVE MEANS OF REDUCING INSURANCE PREMIUMS IN MISSOURI.

A. <u>This Court Should Treat the Elderly as a Suspect Class Because Their Political Powerlessness Demands Extra Protection from a Medical Malpractice Cap That Singles Them Out for Worse Treatment Under the Law.</u>

Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

Adams ex rel. Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992).

State v. Blankenship, 830 S.W.2d 1 (Mo. banc 1992).

Lawrence v. Tex., 539 U.S. 558 (2003).

MO. REV. STAT. § 213.055 (1998).

MO. REV. STAT. § 213.070 (1998).

B. Alternatively, Section 538.210 Also Violates a Fundamental Right Because It Denies the Elderly an Equal Opportunity to Pursue Their Claims in Court.

Mahoney v. Doerhoff Surgical Servs., 807 S.W.2d 503 (Mo. banc 1991).

MO. CONST. art. 1, § 2.

MO. CONST. art. 1, § 14.

MO. REV. STAT. § 538.210 (2005).

State ex rel. Cardinal Glennon Mem'l Hosp. v. Gaertner, 583 S.W.2d 107 (Mo. banc 1979).

Adams ex rel. Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992).

C. Section 538.210 Is Not the Least Restrictive Means of Reducing Insurance Premiums Because Other States Have Implemented Measures That Successfully Limit Malpractice Premiums Without, in Some Cases, Instituting a Cap on Damages.

Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006).

Jurisdictional Statement

This Court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution because the Supreme Court has exclusive appellate jurisdiction "over all cases involving the validity of…a statute or provision of the constitution of this state." MO. CONST. art. 5, § 3. *Amicus curiae* MCQC challenges the constitutionality of non-economic damage caps on medical malpractice claims as being in violation of Missouri's Equal Protection Clause. *See* MO. CONST. art. I, § 2. *Amicus* asserts an interest in Appellants' appeal of the judgment in favor of Respondents in the circuit court of St. Louis County in which the circuit court reduced Appellants' non-economic damages and ordered the judgment paid over time.

Statement of Facts

On March 17, 2004, St. Anthony's Medical Center ("SAMC") failed to remove an IV inserted into James Klotz ("Mr. Klotz") by emergency medical services within twenty-four hours of being admitted to the hospital. The failure to change the IV caused cellulitis on Mr. Klotz's wrist. Because the hospital failed to treat the cellulitis with appropriate antibiotics, Mr. Klotz developed sepsis; renal failure; endocarditis; and a subarachnoid hemorrhage and was forced to have a lower extremity amputation.

At trial, the court first asked the jury to determine for what percentage, if any, SAMC was at fault for "fail[ing] to timely remove the IV placed by the ambulance personnel." The court then asked for what percentage, if any, Dr. Michael Shapiro ("Dr. Shapiro") and Metro Heart Group ("MHG") were at fault for "fail[ing] to properly treat the right wrist symptoms in connection with the placement of the permanent pacemaker, or fail[ing] to inform James Klotz of an added risk of infection due to the right wrist signs and symptoms before implanting the permanent pacemaker." The jury concluded SAMC carried thirty-three percent of the fault, while Dr. Shapiro and MHG carried sixty-seven percent of the fault. The awarded damages totaled $2,580,000. But the circuit court reduced the damages to $1,089,000.

Mr. Klotz and his wife, the Appellants, appeal the judgment of the circuit court reducing their non-economic damages. They contend that the 2005 version of Section 538.210 does not apply because they filed their cause of action on December 14, 2004, before the revised cap took effect. Appellants ask that this Court overturn the circuit court's decision and reinstate the original damages award. Appellants further challenge

Section 538.210 as unconstitutional, and ask that this Court invalidate the statute.

Argument

Standard of Review

Courts review constitutional challenges to statutes de novo. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. 2008). Courts will invalidate a statute as unconstitutional when it clearly contravenes a constitutional provision. *Id*. The party challenging a statute's validity bears the burden of proving the statute clearly and undoubtedly violated constitutional limitations. *Id*.

The "principal office of government" is to "promote the general welfare of the people" by ensuring that the law treats everyone equally. MO. CONST. art. 1, § 2. Laws that contravene the Equal Protection Clause of the Constitution will not be enforced. *Adams ex rel. Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992). Courts judge the constitutionality of any law challenged on equal protection grounds according to either a strict scrutiny or rational basis standard. *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 512 (Mo. banc 1991). This Court should invalidate Section 538.210 as unconstitutional because caps on non-economic damages fail both the strict scrutiny and rational basis standards.

I. THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES BECAUSE SECTION 538.210 CANNOT SURVIVE EVEN THE LOW THRESHHOLD OF RATIONAL BASIS REVIEW OF CONSTITUTIONALITY WHEN CAPS ARE ARBITRARY, CAPRICIOUS, AND BEAR NO REASONABLE RELATIONSHIP TO THE STATE'S OBJECTIVES.

A law fails an equal protection challenge when a legitimate state interest bears no rational relationship to the statute's classifications. *Adams*, 832 S.W.2d at 903. Provided that the legislature advances a legitimate policy, courts generally do not question the policy's wisdom; fairness; or desirability. *Id*. But courts have the *power* and the *duty* to strike down legislation that "unreasonably invades rights guaranteed by the state constitution" because it is the judiciary's job to interpret the constitution and say what the law is. *Ferdon v. Wis. Patients Comp. Fund*, 284 Wis. 2d 573, 609–10 (2005). It is not

to absolutely acquiesce to the legislature. *Id*. at 609. *See also Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 377 (1997) ("It is this court's duty to…protect the rights of individuals…no matter how desirable or beneficial…legislation may appear to be"). Section 538.210 falters under rational basis review and should be overturned because a $350,000 cap is a contrived amount that inadequately compensates elderly victims and fails to realize any of the legislature's intended objectives.

A. No Logical Relationship Exists Between the Cap on Non-Economic Damages and the Legislature's Objectives.

The cap on non-economic damages does nothing to reduce doctors' malpractice premiums and, thus, increase access to healthcare. In evaluating the reasons behind increasing premiums, the evidence fails to support non-economic damage awards as the sole or even primary cause. Insurance companies – some of the most vocal lobbyists for caps – admit that caps have "no effect" on their payouts for malpractice claims. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women Children, and the Elderly,* 53 EMORY L.J. 1263, 1275–76 (2004). Other factors, such as decreased investment returns; bad pricing policies; and increasing reinsurance rates more significantly impact whether insurance premiums rise. U.S. Gen. Accountability Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates,* at 4–5 (2003). *See also* Finley, *supra*, at 1276 (emphasizing that improved investment and market conditions, not tort reform, stabilized insurance rates in the late 1980s).

Continuous hikes in premiums in states post-caps also substantiate caps' negligible effect. Premiums soared by as much as 450% in California after the state instituted non-

economic damages caps in 1975. Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE U. L. REV. 119, 142 (2006). Only in 1988, when California enacted insurance reform legislation, did increases stagnate. *Id*. The fact that the Missouri legislature revised Missouri's previous cap should be proof positive to this Court that tort reform does not reduce premiums. In fact, insurance premiums in Missouri continued rising and reached record highs in 2002 and 2003 despite the 1986 cap. *Id*. at 143.

What a cap on non-economic damages actually accomplishes is the erosion of healthcare quality in Missouri, which only results in more lawsuits. The elderly have the greatest opportunity to be injured by medical malpractice. In 2005, persons between the ages of sixty-five and seventy-four averaged 6.5 doctor visits, while persons over seventy-five averaged 7.7 visits. Saadia Greenberg, Admin. on Aging, U.S. Dep't of Health & Human Servs., *A Profile of Older Americans: 2008* 1, 13 (2008), http://www.aoa.gov/AoAroot/Aging_Statistics/Profile/2008/docs/2008profile.pdf. In contrast, persons aged forty-five to fifty-five averaged a much lower figure of 3.9 office visits. *Id*. Short stay hospitals also discharged patients sixty-five and older over three times more often than other age groups. *Id*. Given this more frequent exposure to doctors, it may seem reasonable that claims for medical malpractice have risen among the elderly but not other groups. *See* William M. Sage, *The Role of Medical Malpractice Reform*, J. HEALTH CARE L. & POL'Y 217, 223 (2006). In Texas between 1990 and 2003, for example, paid claims for the elderly rose 14% annually. *Id*. Wrongful deaths claims for

the elderly rose 20% annually. *Id.* The problem is that in spite of rising claims, these same elderly patients were 20% less likely to receive a large malpractice claim because of the cap. *Id*.

This disparity in damages becomes even more troubling when one considers the numerous and repeated incidents of elderly abuse that take place, especially in nursing homes. "Nearly one in twenty elders experience abuse, with the total number increasing annually by 500,000." Martin Ramey, Comment, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California's Elder Abuse Act*, 39 SAN DIEGO L. REV. 599, 602 (2002). "[S]even out of every eight instances of abuse are never reported." *Id*. Moreover, in a sample survey of California, Florida, and Texas nursing home neglect cases, eighty-nine percent of plaintiffs "suffered catastrophic injury or death." Michael L. Rustad, *Neglecting the Neglected: The Impact of Non-Economic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 380 (2006). Seventy-nine percent suffered multiple injuries, including burns; falls; starvation; sexual abuse; and inadequate pain management. *Id*. at 381.

These statistics testify that the medical industry cannot be trusted to improve healthcare quality of its own accord. *See also Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small But Significant Share of Homes Before the S. Special Comm. on Aging*, 110th Cong. 9 (2007) (statement of Kathryn G. Allen, Director, Health Care, GAO), *available at* http://www.gao.gov/new.items/d07241.pdf ("1 in 5 nursing homes nationwide…were cited for serious deficiencies in 2006.") The elderly continue to be victims of poor standards and oversight. Medical

malpractice actions are one of the few ways the elderly can both recover for their injuries and catalyze changes in standards of care. But the elderly, who often do not work, receive primarily non-economic damages, if their claims see a courtroom at all. The minimal threat of capped damages inadequately incentivizes improvement, as compared to the threat of unlimited damages. *See Nestlehutt v. Atlanta Oculoplastic Surgery*, No. 2007EV002223-J, slip op. at 17 (Ga. Super. Feb. 9, 2009) (concluding that a cap's disproportionate restriction on the ability to recover from injurers does little more than shield negligent healthcare providers and diminish deterrence). Thus, in passing this cap, the legislature has initiated a vicious cycle where healthcare professionals follow the same standards that have allowed elder abuse. Perpetuating the status quo in light of an aging population will only result in more tort actions and, consequently, fleeing doctors. It would be better for Missourians if this Court recognized that caps were a chimera that failed to accomplish any of the legislative objectives of reducing premiums, improving healthcare, or stopping doctors from fleeing.

Therefore, this Court should set aside Section 538.210 because it treads on citizens' constitutional rights without achieving the legislative goals for which it was developed.

B. The Cap Additionally Diminishes Blind Administration of Justice by Discriminating Amongst Tort Plaintiffs.

As a matter of policy, this Court should also overturn Section 538.210 because it arbitrarily and capriciously discriminates amongst tort plaintiffs. On the one hand, the statute discriminates between a tort plaintiff injured by medical malpractice and all other

tort plaintiffs. Any other tort plaintiff who had an injury identical to that of a malpractice plaintiff would be able to recover uncapped non-economic damages from her injurer. On the other hand, the statute discriminates between victims of medical malpractice. In evaluating Wisconsin's cap, the *Ferdon* Court reasoned, "the cap divides the universe of injured medical malpractice victims into…[the] severely injured…and less severely injured…Severely injured victims…receive only part of their damages; less severely injured victims…receive their full damages…Thus, the cap's greatest impact falls on the most severely injured victims." 284 Wis. 2d at 617. The cap adds insult to injury when health professionals harm elderly individuals without significant economic damages. Not only does the statute limit their potential recovery generally, but it *confines* recovery almost entirely to the cap. Any economic damages will only go to hospitals or other medical facilities for care maintenance. These disparities between different tort plaintiffs and different age and economic groups "undermine the…consistency and rationality of the justice system." *Best*, 179 Ill. 2d at 406. *See also* Finley, *supra*, at 1313. In fact, "shift[ing] the economic burden…to a small group of vulnerable, injured patients…does not appear rational [or] germane to any objective of the law." *Ferdon*, Wis. 2d at 625.

Thus, to ensure the courts administer justice equally, this Court should invalidate a statute that determines people's value according to whom injured them and their salaries.

C. Recent Decisions in Other Courts Favor Finding Caps Unconstitutional.

Recent history shows that several courts have deemed caps on non-economic damages unconstitutional. *See, e.g., Nestlehutt,* No. 2007EV002223-J, at 15; *Best*, 179 Ill. 2d at 378; *Ferdon*, 284 Wis. 2d at 590 n.12, 674. Textually, Wisconsin's Equal

Protection Clause is comparable to Missouri's. Both underline the government's responsibility to protect life, liberty, and the pursuit of happiness, among other rights. *See* MO. CONST. art. 1, § 2 ("to give security to these things is the principal office of government"); WIS. CONST. art. 1, § 1 ("to secure these rights, governments are instituted"). Illinois words its clause more broadly by assuring equal protection of the above rights without further qualification. *See* ILL CONST. art. 1, § 2.

The legislative histories of Illinois', Missouri's, and Wisconsin's statutes are likewise practically identical. Each instituted non-economic damages caps in response to the perception that these damages were driving up insurance premiums, reducing access to medical care and forcing doctors to flee their states. *See* WIS. STAT. §§ 655.017 and 893.55(4)(d) (1995) (now revised); *Adams*, 832 S.W.2d at 904 (describing the legislative history of the previous version of the cap); S.B. 475, 94th Gen. Assem., Reg. Sess. (Ill. 2005). However, the statutory texts diverge. Illinois' cap is set at $500,000 for physicians, and includes an income provision to compensate plaintiffs who do not work. *Id*. Wisconsin's previous cap, which was ruled unconstitutional, awarded up to $350,000 and was adjusted annually for inflation. *Ferdon*, 284 Wis. 2d at 587. Missouri's current cap limits damages to $350,000 without an inflation adjustment. MO. REV. STAT. § 538.210(1) (2005).

Here, persisting in upholding Missouri's cap when other states with similar equal protection clauses have overturned theirs promotes inequality and injustice under the law. Illinois' cap is more generous than Missouri's both in the greater amount of damages available and the income provision. Still, this cap was declared unconstitutional. Larry

Ingram, *Cook County Judge Negates Malpractice Reforms*, GRANITE CITY PRESS REC., Nov. 17, 2007, *available at* http://granitecitypress-record.stltoday.com. Although Wisconsin's cap offered the same amount of damages as Missouri, it was adjusted for inflation, like Missouri's former cap. Yet it too could not survive even rational basis review. Georgia is the most recent state to nullify its cap, which is substantially similar to Missouri's. *Nestlehutt*, No. 2007EV002223-J, at 4. With more states invalidating non-economic damages caps, the trend in the law supports that these caps infringe on citizens' rights.

Therefore, this Court should reject tort reform and join the growing number of states that have found caps unconstitutional.

II. THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES UNDER STRICT SCRUTINY REVIEW AS WELL BECAUSE THE ELDERLY QUALIFY AS A SUSPECT CLASS, SECTION 538.210 VIOLATES A FUNDAMENTAL RIGHT, AND SECTION 538.210 IS NOT THE LEAST RESTRICTIVE MEANS OF REDUCING INSURANCE PREMIUMS IN MISSOURI.

When a law is challenged on equal protection grounds, courts apply strict scrutiny where the law disadvantages a suspect class or burdens a fundamental right. *Ferdon*, 284 Wis. 2d at 605. *See Adams*, 832 S.W.2d at 903. A law that implicates a suspect class or a fundamental right must advance a compelling governmental interest through the least restrictive means. *Ferdon*, 284 Wis. 2d at 606. The legislature has demonstrated a compelling interest in reducing malpractice insurance premiums in order to improve

healthcare access. Nevertheless, Section 538.210's one size fits all cap is unconstitutional because it disproportionately discriminates against the elderly, who suffer an unequal opportunity to pursue their malpractice claims in courts.

A. This Court Should Treat the Elderly as a Suspect Class Because Their Political Powerlessness Demands Extra Protection from a Medical Malpractice Cap That Singles Them Out for Worse Treatment Under the Law.

A suspect class is a group that has been saddled with disabilities, historically subject to unequal treatment, or placed in a position of political powerlessness. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). Generally, courts have based suspect classes on race, national origin, or illegitimacy. *Adams*, 832 S.W.2d at 903.

Courts have generally rejected age as a suspect class. *Murgia*, 427 U.S. at 313. *See State v. Blankenship*, 830 S.W.2d 1, 16 (Mo. banc 1992). However, where there is an "emerging awareness" that a group deserves protection under the law, the laws and traditions of the recent past are most relevant. *Lawrence v. Tex.*, 539 U.S. 558, 571–72 (2003). Recent history shows that the law has begun to embrace protections for age. *See* MO REV. STAT. § 213.055 (2000); MO REV. STAT. § 213.070 (2000).

Despite contrary precedent, the *Lawrence* Court found that Texas laws prohibiting sodomy violated the Due Process Clause. 539 U.S. at 578. Liberty grants people the right to engage in homosexual conduct without government interference or intrusion. *Id*. The Court noted that while American law did not begin targeting homosexuals until the 1970s, *id*. at 570, legal history and tradition were but "starting point[s]" for constitutional

inquiry, *id*. at 572.

In *Murgia*, the Court did not consider aging police officers so disabled or politically powerless that they "command[ed] extraordinary protection from the majoritarian political process." 427 U.S. at 313. Massachusetts retired uniformed officers at age fifty. *Id*. at 309. The State emphasized that the job was demanding, and with age came decreased physical abilities. *Id*. at 310–11. The Court refused to categorize age as a suspect class because everyone reaches old age upon living a normal life span. *Id*. at 313–14. Age was thus not a specific enough distinction. *Id*. at 314.

Here, Section 538.210 marginalizes elderly medical malpractice victims. The *Lawrence* Court refused governmental intrusion into private conduct. While romantic choices and medical errors are different concepts, regulating legal remedies for medical malpractice is a parallel invasion of the person. The Missouri legislature has effectively put a price tag on the value of a person's life or pain and suffering. It has stripped the elderly of their right to health. At best, the cap leaves the elderly to bear the burden of injuries and increased medical costs in the face of diminished damages. In just California, for example, caps have reduced damages for the elderly on average by 34.6%. Finley, *supra*, at 1287.

Policy also supports recognizing the elderly as a suspect class. Housing and labor laws highlight an emerging awareness that age requires special protections. Given the increasing population of aging Americans and, therefore, the increasing number of potential victims, the law demands innovation, not a wait and see approach. The political powerlessness of the elderly, particularly those in nursing homes, also distinguishes them

from the police officers in *Murgia*. Nursing home patients often require constant care, unlike officers in top physical condition. Yet nurse assistants, the primary caretakers in nursing homes, spend as little as 2.6 hours per day per patient. Christopher H. Schmitt, *The New Math of Old Age*, U.S. NEWS & WORLD REP., Sept. 30, 2002, at 72. Registered nurses spend about forty minutes. *Id*. at 73. Both statistics have been linked to poor standards of care. *Id*. That poor care is reflected by the significant portion of nursing home lawsuits that involve serious injury. David M. Studdert & David G. Stevenson, *Nursing Home Litigation and Tort Reform: A Case for Exceptionalism*, 44 GERONTOLOGIST 588, 592 (2004). In fact, more than half of cases involve death. *Id*. at 593. While everyone aspires to reach old age, no one aspires to suffer from the mental or physical incapacities of many nursing home patients. These infirmities make the elderly uniquely dependent on their caregivers, who are making mistakes because they are overworked and underpaid. *See* Schmitt, *supra*, at 73. Because the elderly are suffering at the hands of health professionals, the judiciary should step in to protect them against legislation that would weaken their position further. As it pertains to caps on non-economic damages only, this Court ought to give the elderly the voice of a suspect class.

Overall, the elderly's present and future need for judicial protection from majority policy should warrant this Court's recognition of them as a suspect class.

B. Alternatively, Section 538.210 Also Violates a Fundamental Right Because It Denies the Elderly an Equal Opportunity to Pursue Their Claims in Court.

A fundamental right is a right the Constitution guarantees explicitly or implicitly.

Mahoney, 807 S.W.2d at 512. Missouri has generally defined these rights as the rights to free speech, vote, personal privacy, interstate travel, and other basic liberties. *Id*. This Court previously held that access to the courts for redress of a medical malpractice injury was not a fundamental right. *Id*. at 511–12.

The Equal Protection Clause of Missouri's Constitution entitles citizens to equality of opportunity under the law. MO. CONST. art. 1, § 2. One way equality of opportunity manifests is through the open courts provision, which guarantees that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person." MO. CONST. art. 1, § 14. These constitutional protections should allow any patient to bring an action in tort for damages against a health care provider for improper treatment. § 538.210(1).

However, in effect, elderly plaintiffs' injuries go uncompensated and the conduct that injured them unpunished. Finley, *supra*, at 1284. Generally, the elderly do not work, and they have lower life expectancies. Sage, *supra*, at 224. This means elderly plaintiffs receive the majority of any tort recovery in non-economic damages. Finley, *supra*, at 1283. Because of the rising costs of trials, lawyers cannot afford to pursue claims that will generate primarily non-economic damages. Daniel Costello, *Malpractice Law May Deny Justice*, L.A. TIMES, Dec. 29, 2007, *available at* http:// www.consumerwatchdog.org/patients/articles/?storyId=19144.

Here, Section 538.210 denies the elderly the equal opportunity to bring a medical malpractice claim. The focus should not be whether individuals *theoretically* may bring a claim. Instead, the focus should be whether individuals *in actuality* may bring a claim.

Section 538.210, in effect, operates as a procedural bar to the elderly. *See State ex rel. Cardinal Glennon Mem'l Hosp. v. Gaertner*, 583 S.W.2d 107, 110 (Mo. banc 1979) (holding that conditioning access to the courts is unconstitutional). Although the statute imposes no formal preliminary procedure before filing a claim, the elderly's inability to find an attorney to represent them because of disproportionate non-economic damages functions as a procedural bar. Effectively denying the elderly their rightful day in court is more than just a substantive change to the common law. *See Adams*, 832 S.W.2d at 905. The *Mahoney* Court thus reasoned incorrectly when it concluded that a cap on non-economic damages did not implicate any fundamental rights. The blame, moreover, should not fall on attorneys. Blaming attorneys for not taking cases is akin to demanding they work for free.

Thus, this Court should conclude that Section 538.210 operates as a procedural bar that violates the elderly's fundamental right to an equal opportunity to bring their claims.

C. Section 538.210 Is Not the Least Restrictive Means of Reducing Insurance Premiums Because Other States Have Implemented Measures That Successfully Limit Malpractice Premiums Without, in Some Cases, Instituting a Cap on Damages.

A law is least restrictive when it is "narrowly drawn" and "necessary" to accomplish a compelling state interest. *Weinschenk v. State*, 203 S.W.3d 201, 217 (Mo. banc 2006). In *Weinschenk*, requiring photo identification to vote violated the Equal Protection Clause because it did not prevent voter fraud more effectively than less restrictive forms of identification, such as bank statements; utility bills; or out-of-state

driver's licenses. *Id*. at 217–18. Photo identification therefore was not necessary to accomplish a compelling state interest. *Id*. at 217.

Here, less restrictive methods could reduce Missouri malpractice premiums without jeopardizing plaintiffs' recoveries. Just as Missouri could regulate voter fraud without photo identification, the Missouri legislature has options other than caps. It could enact insurance reform. California mandates that the insurance commissioner approve any rate increases. Costello, *supra*. Although California has a cap, it is insurance reform, not the cap, that has held premiums "roughly steady" since 1988. *Id*. Alternatively, the legislature could follow Pennsylvania's reform measures. In Pennsylvania, which does not have a cap, plaintiffs must (1) obtain a certificate of merit in which a medical professional states care fell below medical standards and (2) file a case in the venue where the malpractice took place. Amy Worden & Mario Cattabiani, *Malpractice Suits Fall in Pa., Easing Insurance Crisis*, PHILA. INQUIRER, Apr. 24, 2009, *available at* http://www.philly.com/philly/news/local/43607962.html. Suits have dropped 41% since the early 2000s. *Id*. Both of these measures go to the heart of the crisis by directly regulating the industry responsible for skyrocketing rates or cutting down on frivolous lawsuits. Caps, in contrast, are a bandaid on a gushing wound.

Because the legislature could achieve its objectives without limiting plaintiffs' damages, this Court should find that Section 538.210 fails the least restrictive means test.

Conclusion

Section 538.210 cannot pass constitutional muster under either the strict scrutiny or rational basis standards. Given the lack of evidence that supports that caps reduce malpractice premiums, the legislature fails to demonstrate a rational relationship between its findings about the effect of caps and its objectives of creating better access to healthcare and stopping doctors from leaving Missouri. Additionally, the elderly represent a suspect class against whom the statute discriminates, and the statute denies the elderly an equal opportunity under the law to bring meritorious claims. The Missouri legislature also ignores less restrictive alternatives that have been shown to reduce malpractice premiums. For all these reasons, this Court should render Section 538.210 unconstitutional.

Respectfully submitted,

_____

Certificate of Compliance

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Coalition for Quality Care In Support of Appellants is attached to the brief, has been scanned for viruses, and is virus-free.

Pursuant to Rule 84.06(c), the undersigned also hereby certifies that this brief (1) includes the information required by 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5589 words, as calculated by Microsoft Word 2003 for Windows.

Respectfully submitted,

_____

Tim Dollar MO #33123
DOLLAR, BURNS & BECKER, L.C.
1100 Main, Suite 2600
Kansas City, MO 64105
(816) 876-2600
(816) 221-8763 (Fax)
Email: timd@dollar-law.com
Attorney for Amicus Curiae

Certificate of Service

A copy of the foregoing was mailed, postage prepaid, this 1st day of August, 2009

to:

J. Thaddeus Eckenrode
ECKENRODE-MAUPIN
ATTORNEYS AT LAW
Attorneys for Defendants
Michael Shapiro, MD, and
Metro Heart Group of St. Louis, Inc.
8000 Maryland Ave., Ste. 1300
Clayton, MO 63105
Phone: 314-726-6670
Fax: 314-726-2106
Email: jte@eckenrode-law.com

Louis M. Bograd, pro hac vice
Andre M. Mura, pro hac vice
Center for Constitutional Litigation, PC
Co-counsel for Plaintiffs
777 6th Street, N.W., Suite 520
Washington, DC 20001
Phone: 202-944-2803
Fax: 202-965-0920
E mail: lou.bograd@cclfirm.com
andre.mura@cclfirm.com

Mary Coffey, #30919
Genevieve Nichols, #48730
Coffey & Nichols
Co-counsel for Plaintiffs
6202 Columbia Ave.
St. Louis, MO 63139
Phone: 314-647-0033
Fax: 314-647-8231
E mail: mc@coffeynichols.com
gn@coffeynichols.com

_____