IN THE MISSOURI SUPREME COURT

JAMES KLOTZ, et al.,	)	
	)	
Appellants/Respondents,	)	
	)	
v.	)	Case No. SC90107
	)	
MICHAEL SHAPIRO, M.D., et al,	)	
	)	
Respondents/Appellants.	)	

Appeal from the Circuit Court of St. Louis County

The Honorable Barbara Wallace

Amici Curiae Brief
Missouri State Medical Association and
American Medical Association
in Support of Respondents/Appellants

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INTEREST OF AMICI CURIAE

With the consent of all parties, the American Medical Association ("AMA") and the Missouri State Medical Association ("MSMA") file this brief as amici curiae. The AMA and MSMA (collectively, the "Medical Associations") have a substantial interest in the resolution of this case and a unique perspective on the issues that it raises.

The physicians who comprise the Medical Associations are the providers of health care to the American people. Thus, the Medical Associations have first hand knowledge of how tort law affects the cost and availability of medical care. They understand the necessity for tradeoffs among competing interests in the extraordinarily complex system for delivering health care. They are acutely aware that the Court's resolution of this case will directly affect the willingness and ability of physicians to provide health care services to the people of Missouri.

The MSMA is an organization of physicians and medical students. MSMA serves its members through the promotion of the science and art of medicine, protection of the health of the public, and betterment of the medical profession in Missouri. MSMA has approximately 6,000 members and is located in Jefferson City.

The AMA, an Illinois non-profit corporation, represents approximately 240,000 physicians, medical residents, and medical students who practice throughout the United States, including Missouri. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States. The AMA submits this brief on its own behalf and as a

representative of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is an unincorporated association among the AMA and all 50 state medical societies as well as the Medical Society of the District of Columbia. Established in 1995, the purpose of the Litigation Center is to advance AMA policies through the American legal system.

STATEMENT OF FACTS

As relevant to this amici curiae brief, the facts are straightforward.

A. Application of non-economic damages limit

Plaintiff James Klotz sued a hospital, a physician group, and a physician (collectively, "the Defendant health care providers") for medical malpractice in connection with care he received from them. LF 48-49. Plaintiff Mary Klotz sued the Defendant health care providers for loss of consortium as a result of her husband's injuries. LF 49-50. Plaintiffs prevailed after a jury trial. LF 1438.

The jury awarded Mr. Klotz:

Past Economic Damages	$ 760,000
Past Non-Economic Damages	$ 488,000
Future Medical Damages	$ 525,000
Future Economic Damages	$ 22,000
Future Non-Economic Damages	$ 272,000
	$2,067,000

LF 1438. By application of the $350,000 limit on non-economic damages in § 538.210, RSMo Supp. 2008, Mr. Klotz's total award was reduced to $1,792,300.[1] LF 1445-1447.

The jury awarded Mrs. Klotz:

Past Economic Damages	$184,000
Past Non-Economic Damages	$211,000
Future Non-Economic Damages	$118,000
	$513,000

LF 1438. After application of the non-economic damages limit, Ms. Klotz was awarded $292,570. LF 1445-1447. The Klotzes' combined final award totaled $2,084,870. LF 1445-1447.

B. Procedural Background

Plaintiff James Klotz originally filed his action against the hospital on December 14, 2004. LF 1438. On April 28, 2005, the petition was amended to add a loss of consortium claim for Mary Klotz. LF 1438.

House Bill 393 was passed by the General Assembly and approved by the Governor on March 29, 2005. House Bill 393, 2005 Mo. Laws 641, 657. House Bill 393

[1] The circuit court applied the provisions of House Bill 393 to the claims against the physician and physician group and it applied prior Missouri law to the claims against the hospital. The calculations are at pages 1445-47 of the legal file. The calculation is not at issue in this appeal.

went into effect on August 28, 2005. § 538.305, RSMo Supp. 2008. See also Mo. Const. art. III, § 29. Thereafter, on December 2, 2005, the Klotzes dismissed their original action without prejudice. LF 1438-39. One year later, on December 4, 2006, they refiled this action against the Defendant health care providers. LF 1439.

Regarding their standing as members of a suspect class, neither of the Klotzes' alleged that they were members of a racial or ethnic minority group, a child, elderly, or poor. LF 48-50, 216-219. They did not allege that they were members of any suspect class that had been historically excluded from effective participation in the political process. Id. Plaintiffs alleged that their own constitutional rights had been violated, but did not assert that the rights of third parties were being violated. LF 216-219.

After the jury entered its verdict and the trial court denied their constitutional challenges, this appeal followed. Plaintiffs settled with the hospital while the appeal was pending. App. Br. 6. Plaintiffs did not appeal the judgment against the hospital, and the hospital dismissed its appeal. App. Br. 4, 6.

ARGUMENT

Modern health care is breathtaking in its ability to mend broken bodies and cure disease. Through advances in technology and learning, physicians and other health care providers can effect cures that are truly awe inspiring. New lives have been forever changed by advances in technology that have allowed in utero surgery to correct potential life-long defects prior to birth. Leef Smith, In-Utero Surgery Offers Hope: Virginia Baby Healthy After Procedure, Wash. Post, Jan. 28, 2006 ("After the surgery, on a heart the size of a grape, Grace VanDerwerken became the world's first fetus to have a cardiac device implanted, doctors said."). Adult lives are extended through new treatments for everyday killers such as stroke, heart disease, and cancer. American Heart Association, Heart Disease and Stroke Statistics 2009 Update, 119 Circulation e21, e40-e41 table 2-2 (2009) (noting the death rates for cardiovascular disease, coronary heart disease, and stroke decreased by 27%, 33.7%, and 28.3%, respectively, between 1995 and 2005); American Cancer Society, Cancer Facts and Figures 18 (2009) (noting the cancer five-year survival rate increased from 50% to 66% between 1975 and 2004). People cherish few things as much as their health and that of their families and friends.

Modern methods of health care delivery are neither simple nor cheap. New technologies, prescription drugs, and other innovations require significant and ongoing investments of time and capital for research, development, and propagation. The most talented individuals must be recruited and then trained. The latest technology and methods of providing care must be dispersed across the country's geographic, economic, and cultural divides.

Moreover, health care costs are increasing more rapidly than inflation, accounting for greater and greater shares of our nation's gross domestic product. Congressional Budget Office, Key Issues in Analyzing Major Health Insurance Proposals XI (Dec. 2008). In 2009, health care and related activities will account for 17 percent of the gross domestic product. Id. By 2017, they are expected to account for nearly 20 percent of the GDP. Id. Over that same time period, annual health expenditures per capita are projected to rise from $8,300 to $13,000. Id. This economic reality results in ongoing tension in the system. High costs prevent some people from obtaining health care access. Government has competing obligations in other areas (for example, administration of the justice system, public education, and transportation) and has not been able to provide coverage to everyone without it. Access issues persist to this day.

Administration of the health care system also requires oversight to ensure adequate, quality care. Federal, state, and local government agencies have administrative, civil, and in some cases criminal jurisdiction to oversee and protect the integrity of the health system. See, e.g., 42 U.S.C. § 1320a-7. Physicians and other health care providers are licensed by the state and required to maintain high professional and ethical standards. § 334.100, RSMo 2000 & Supp. 2008. When they fail to do so, licensing boards may take remedial actions up to and including license revocation. Id. Physicians and other health care providers who participate as providers in the Medicare and Medicaid programs are separately regulated. See, e.g., 13 CSR 70-3.030; 42 U.S.C. § 1395cc. In addition, health care providers practicing in specific areas are subject to even more stringent regulation. For example, separate federal and state authorities

oversee the handling of controlled substances. 21 U.S.C. § 801, et seq.; Chapter 195, RSMo 2000 & Supp. 2008. Health professionals engage in self-regulation. Peer review, credentialing, and other quality review mechanisms are used to establish and maintain high quality standards. Many physicians are board certified in a specialty and are subject to separate oversight by the certifying organization. Physicians adhere to ethical codes that govern their conduct as well. American Medical Association, AMA Code of Medical Ethics, cited in Brandt v. Medical Defense Associates, 856 S.W.2d 667, 670-71 n.1 (Mo. banc 1993). Finally, health care providers are subject to tort liability for medical malpractice.

Thus, maintenance of an adequate and effective system of medical care is a complicated process involving many competing objectives. In determining the proper role of government and the nature and extent of the duties and liabilities of private parties, policymakers and members of the public hold a wide range of opinions.

The issue in this case concerns the legislature's decision to establish a $350,000 outer limit for non-economic damages in actions against health care providers. Appellants make two general categories of arguments against the limit. They challenge the concept of the non-economic damages limit by contending that a limit on the non-economic damages of medical malpractice claimants is not a legitimate state policy choice. Points Relied On 3–8. Appellants have presented their arguments against the concept of a non-economic damages limit as equal protection, special legislation, due

process, open courts and certain remedies,[2] right to jury trial, and separation of powers challenges. All of these arguments rely on the common premise that limiting non-economic damages does not rationally further a legitimate government purpose. In fact, Appellants have grouped them under a common heading. App. Br. 28. Appellants also challenge the manner in which the non-economic damages limit was implemented. Points Relied On 1, 2. The Medical Associations will separately address those two sets of arguments.

I. Non-economic damages limits are constitutional as a concept. (Responds to Points Relied On 3–8.)

The first question presented is whether legislation establishing a $350,000 outer limit for non-economic damage awards against health care providers violates the Missouri constitution. § 538.210, RSMo Supp. 2008. Plaintiffs in lawsuits may recover economic damages (for example, medical expenses and lost wages), non-economic damages for intangible injuries, and punitive damages for egregious conduct. As an exception to the general rule that tort damages are intended to be compensatory only, plaintiffs are entitled to recover those amounts without regard for other sources from which the plaintiffs have previously recovered (the "collateral source" rule). Washington v. Barnes Hosp., 897 S.W.2d 611, 619-20 (Mo. banc 1995). A non-economic damage

[2] In the sixth point relied on, Mrs. Klotz asserts a violation of the open courts and certain remedies provision. App. Br. 10-11, 64-69. Mr. Klotz has not alleged a violation of the open courts and certain remedies provision. App. Br. 7-12.

limit does not affect the right or ability of medical malpractice plaintiffs to recover all of their past and future economic damages, punitive damages, and duplicative amounts from collateral sources. The limit applies only to the inherently subjective portion of awards intended to compensate plaintiffs for intangible, non-economic harm. After application of the limit, Mr. Klotz's total damages award was $1,792,300, and Mrs. Klotz's total damages award was $292,750. LF 1445-47. The combined total was $2,084,870. Id.

As originally proposed, House Bill 393 would have imposed a more restrictive $250,000 non-economic damages limit and would have completely abolished joint and several liability. HB 393 §§ 537.067, 538.210 (2005) (available at http://www.house.mo.gov/content.aspx?info=/bills051/biltxt/intro/HB0393I.htm). As the bill progressed through the General Assembly, legislators debated the merits of its provisions and amendments were made. Activity History for HB 393 (available at http://www.house.mo.gov/content.aspx?info=/bills051/action/aHB393.htm). In the final version, the non-economic damages cap was increased to $350,000 and joint and several liability was retained for defendants who were found liable for 51% or more of the verdict. §§ 537.067, 538.210, RSMo Supp. 2008. The bill passed with bipartisan, super-majority support in both houses. Journal of the House (Mar. 16, 2005) (112 in favor and only 47 against); Journal of the Senate (Mar. 16, 2005) (23 in favor and only 8 against). The Governor approved the law on March 29, 2005. 2005 Mo. Laws at 657.

A. Limitations of liability are subject to rational basis scrutiny

In reviewing the constitutionality of legislation for purposes of equal protection, the Court applies different levels of scrutiny depending on the private and governmental

interests that are at stake. In most cases, the Court scrutinizes the legislation to determine whether any rational basis may be conceived for it. Mo. Prosecuting Attorneys and Circuit Attorneys Retirement Sys. v. Pemiscot County, 256 S.W.3d 98, 102 (Mo. banc 2008). "It is this Court's obligation to discover, if possible, an acceptable rationale that might have influenced the General Assembly and which reasonably supports the legislative determination." Winston v. Reorganized Sch. Dist. R-2, 636 S.W.2d 324, 328 (Mo. banc 1982). This deferential standard of review ensures that the soundness, wisdom, and economic or social desirability of law are determined by the legislature. Id. at 327. As a practical matter, it means courts will not invalidate legislative policy choices if a conceivable basis for them exists, even if contrary evidence can be cited.

When "heightened" intermediate or strict scrutiny applies, the Court analyzes the legislative objective and means more closely and considers other alternatives that the legislature could have pursued. See, e.g., Weinschenk v. State, 203 S.W.3d 201, 211 (Mo. banc 2006) (to pass strict scrutiny, legislation must serve "compelling" government objectives and must be "narrowly tailored" to achieve those objectives); State v. Stokely, 842 S.W.2d 77, 79 (Mo. banc 1992) (to pass intermediate scrutiny, legislation must serve "important" governmental objectives and must be "substantially related" to those objectives). Heightened scrutiny necessarily involves judicial policy judgments because the judiciary must weigh the costs and benefits of different policy choices. In doing so, the Court looks behind the text of an enactment and questions the legislature's process and motives, which in normal circumstances constitutes "a most obvious and egregious violation of the separation of powers." Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d

822, 835 (Mo. banc 1991). As such, it is reserved for those cases where legislation affects a suspect class or a fundamental right.

The Klotzes have nominally asked this Court to apply rational basis scrutiny, but the substance of their argument follows the framework for heightened scrutiny. App. Br. 28-56. Heightened scrutiny is not warranted in this case because the non-economic damages outer limit does not affect a suspect class or fundamental right.

1. Victims of negligence are not a suspect class.

A suspect class is a political minority group that has been historically excluded from the political process and discriminated against. Mahoney v. Doerhoff Surgical Servs., 807 S.W. 2d 503, 512 (Mo. banc 1991); Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 63 & n.4 (Mo. banc 1989). They are groups that have been saddled with disabilities, subjected to purposeful unequal treatment, and relegated to a position of political powerlessness. Harrell, 781 S.W.2d at 63 n.4. Race, religion, national origin, and illegitimacy are examples of suspect classes that warrant such judicial intrusion into the legislative process. Mahoney, 807 S.W.2d at 512; Harrell, 781 S.W.2d at 63 & n.4.

Appellants alleged that the legislation discriminates between all victims of medical malpractice, severely injured victims of medical malpractice, victims of medical malpractice who have been injured by multiple health care providers or multiple acts of malpractice, the spouses of severely injured victims of malpractice, and women, racial and ethnic minorities, children, the elderly, and the poor. App. Br. 46, 48-50. Their brief argues that the law is unconstitutional as to "future victims" of malpractice because the limit is not adjusted for inflation. App. Br. 52.

First, victims of medical malpractice are not a suspect class. Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 903 (Mo. banc 1992). Given the principles that inform recognition of suspect classes, an assertion that medical malpractice claimants are a suspect class "is without support in either law or reason." Id. "Victims" of medical malpractice are not a political minority that can be excluded from the political processes and discriminated against. To the contrary, all citizens have the same interest in balancing their rights to seek compensation if they are injured in the future against their desire for adequate and affordable health care. Different people attach different weight to those priorities, but no "class" of people exists that warrants protection from the political process. The legislature may legitimately treat medical malpractice claims differently from other types of claims. Adams, 832 S.W.2d at 903; Harrell, 781 S.W.2d at 63 (holding that victims of medical negligence are not members of a suspect or quasi-suspect class); Mahoney, 807 S.W.2d at 512; Batek v. Curators of the Univ. of Mo., 920 S.W.2d 895, 898 (Mo. banc 1996) ("this Court has previously and repeatedly rejected the argument that victims of medical malpractice are members of a suspect class"); Laughlin v. Forgrave, 432 S.W.2d 308, 314-15 (Mo. banc 1968) (rejecting an equal protection challenge to a shorter statute of limitations for medical malpractice claims). Cf. Fisher v. State Hwy. Comm'n of Mo., 948 S.W.2d 607, 610 (Mo. banc 1997) ("Victims of government negligence are not members of a suspect class."); Goodrum v. Asplundh Tree Expert Company, 824 S.W.2d 6, 7 (Mo. banc 1992) (workers' compensation plaintiffs are not members of a suspect class).

Appellants allege that the caps discriminate against ethnic and racial minorities,

women, children, the elderly, and the poor. App. Br. 48-50. Of those groups, only racial, ethnic minorities, and women qualify as suspect classes warranting heightened scrutiny. Mahoney, 807 S.W.2d at 512; Stokely, 842 S.W.2d at, 79. See also Missourians for Tax Justice Education Project v. Holden, 959 S.W.2d 100, 103 (Mo. banc 1997) (wealth is not a suspect class). No allegation has been made that either Plaintiff is a member of an ethnic or racial minority. LF 48-50, 216-219. Mrs. Klotz is a woman, but § 538.210 does not impose gender-based classifications. The non-economic damage limit is uniform and treats all plaintiffs equally.

Likewise, Mrs. Klotz argues that her claim for loss of consortium is being unduly curtailed. App. Br. 52-53, 64-69. It is well settled that a negligence claim and a derivative loss of consortium claim can be subject to the same damages limit. Richardson v. State Hwy. & Transp. Comm'n, 863 S.W.2d 876, 879 (Mo. banc 1993). In interpreting § 538.210, appellate courts had held that a medical malpractice loss of consortium claim was subject to a separate limit. LaRose v. Washington University, 154 S.W.3d 365, 372-73 (Mo. App. E.D. 2004); Wright v. Barr, 62 S.W.3d 509, 538 (Mo. App. 2001). In enacting House Bill 393, the General Assembly clarified that a loss of consortium claim should be subject to the same limit as the injured party from which the spouse's claim derives. § 538.210.4, RSMo Supp. 2008. Mrs. Klotz's right to recover has not been abolished. In fact, she was awarded $292,570 even after application of § 538.210. LF 1445-1447.

Other than gender, no allegation has been made that the Appellants are members of any of the groups that are allegedly being discriminated against. LF 48-50, 216-219.

A person cannot assert the constitutional rights of a third party. Mo. State Med. Ass'n v. State, 256 S.W.3d 85, 88 (Mo. banc 2008). Appellants' allegations of constitutional injury to third parties are not justiciable. Id.

Appellants allege that the failure to increase awards for inflation will deny "future victims" their constitutional rights. App. Br. 52. Appellants, of course, cannot assert the constitutional rights of future victims. Id. Their argument that the adequacy of the limit may be eroded by inflation and that the legislature will not amend the limit is entirely speculative and hypothetical. Courts will not adjudicate unripe, hypothetical, or speculative claims of potential injury to future plaintiffs. Missouri Alliance for Retired Americans v. Dept. of Labor, 277 S.W.3d 670, 677-78 (Mo. banc 2009) (plurality opinion); id. at 680-81 (Wolff, J., concurring).

2. Limitations of liability do not affect a fundamental right.

The "fundamental rights" that trigger heightened scrutiny are those rights that are fundamental to the concept of ordered liberty such as voting, free speech, and freedom of religion. See, e.g., Blaske, 821 S.W.2d at 829. While the Missouri Constitution guarantees the right to jury trial, the right to due process, and the right to open courts and certain remedies, those procedural provisions ensure access to enforce recognized causes of action in the courts. See, e.g., Snodgrass v. Martin and Bayley, Inc., 204 S.W.3d 638, 640-41 (Mo. banc 2006). They do not guarantee the right to any particular substantive cause of action. Blaske, 821 S.W.2d at 832-834. In Missouri, personal injury and other tort claims are common law causes of action. Missouri has adopted the common law in the state, but only to the extent that it does not conflict with other state statutes. § 1.010,

RSMo 2000. As such, the General Assembly has authority to limit the contours of liability and even abolish causes of action. See, e.g., Vincent v. Johnson, 833 S.W.2d 859, 862 (Mo. banc 1992) (rejecting plaintiffs' argument that "various provisions of the Missouri constitution create a constitutional right to causes of action that existed at common law and to full recovery of damages"). Procedural rights of access are not offended by limitations of liability and do not qualify as fundamental rights that trigger heightened scrutiny. See, e.g., Etling v. Westport Heating & Cooling Servs., 92 S.W.3d 771, 774-75 (Mo. banc 2003) (per curiam) (holding that the open courts provision does not confer a fundamental right for purposes of equal protection analysis).

Appellants ask this Court to find that the rights to jury trial, open courts, and certain remedies are fundamental rights that should trigger heightened scrutiny. App. Br. 47. That argument has been repeatedly rejected in prior decisions. Adams, 832 S.W.2d at 903 (holding that no equal protection violation would exist, even assuming those rights were "fundamental"); Etling, 92 S.W.3d at 774-75 (open courts provision does not confer a fundamental right for purposes of equal protection analysis); Fisher, 948 S.W.2d at 610 (the right to enjoyment of gains is not a fundamental right for purposes of equal protection analysis). See also Goodrum, 824 S.W.2d at 10 (workers' compensation plaintiffs did not hold a fundamental right for purposes of equal protection analysis); Blaske, 821 S.W.2d at 829 (no fundamental right was implicated by a statute of repose); Mahoney, 807 S.W.2d at 512 (affidavit requirement in chapter 538 does not touch a fundamental right).

3. The Missouri cases were rightly decided.

Appellants state that they are at most asking this Court to reexamine its decision in Adams. App. Br. 28-29 n.9. But their argument fails to apply the established rational basis analysis framework in Missouri. They suggest that the Court should apply heightened rational basis review, intermediate scrutiny, or strict scrutiny as courts in other states have. App. Br. 47-48 n.17, 55-56. As such, they are not asking this Court to overrule one decision, but instead are suggesting a fundamental shift in the relationship between the Missouri judiciary and the other branches of government.

Missouri cases establishing the standards for rational basis review and refusing to carve out a constitutional exception for medical malpractice plaintiffs were rightly decided and should not be overruled or modified. Those cases have been consistently reaffirmed and applied in other contexts. They provide a workable rule that recognizes and respects the responsibilities of each co-equal branch of government.

Regarding House Bill 393, there could hardly have been a fuller public debate on the wisdom of a non-economic damages limit as opposed to other remedial measures. The 2005 legislative changes were preceded by a protracted period of political and legislative debate including gubernatorial vetoes of tort reform legislation in 2003 and 2004, legislative attempts to override those vetoes, a 2004 primary election in which the incumbent governor was defeated, and a 2004 general election at which a new governor was elected, all members of the House stood for election, and half the members of the Senate stood for election. See Journal of the House (Apr. 27, 2004) (recording the vote on an attempt to override the veto of House Bill 1304); Journal of the Senate (Sept. 11,

2003) (recording the vote on an attempt to override the veto of Senate Bill 280). Following that 2004 election, House Bill 393 was introduced, further debated, and finally passed by bipartisan, super-majorities in both Houses. The Governor then approved it.

Individuals may differ about the short or long term soundness of that exercise in representative democracy. But no reason exists to apply heightened scrutiny to address an issue that the political process is fully equipped to and has, in fact, completely addressed. The application of heightened scrutiny to the liability limitation at issue in this case would entangle this Court in the highly charged health care policy debate, in which the economic, scientific, and political assumptions change often. As institutions, the legislative and executive branches are much better adapted for addressing policy issues on an ongoing basis. Those branches have broader fact-finding capabilities. They do not have to rely on information provided by litigants and amici curiae but can solicit more diverse information from better sources. They can commission studies and hold hearings. They can coordinate the development of new policy with the execution of existing policies. Moreover, legislative and executive processes are less time-consuming and therefore more responsive to new developments. The legislative cycle is defined by the annual legislative session from January to May each year. Court cases can drag on for years. As an example, this case will be argued to the Court for the first time more than four years after House Bill 393 went into effect and more than three years after the plaintiffs filed their lawsuit. Health care is the archetype of a policy issue that is best addressed through the legislative process.

Elevating an issue to the constitutional level frequently intensifies rather than

quiets the level of debate. For example, when the United States was grappling with the effects of industrialization, the United States Supreme Court recognized a substantive due process right to freedom of contract. See, e.g., Lochner v. New York, 198 U.S. 45, 56-57 (1908). That decision increased rather than allayed political tension because it prevented the policymaking branches from implementing new regulatory regimes to address modern circumstances. The decision and its progeny were finally overruled after a period of protracted public and political debate. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

Since constitutional law is more difficult to change than statutory law, political compromise is more difficult to achieve. Constitutional rules are harder to change in response to new developments. It can take several election cycles and a substantial investment of resources by all sides to develop consensus for a constitutional amendment. Changes in decisional law can take even longer to effect. By way of contrast, the legislature can respond to changes in the health care environment at each legislative session.

The federal involvement in the health care system also complicates the matter. As a condition of participating in the Medicaid program, the federal government often imposes rules that states must follow to obtain federal funding. See, e.g., 42 U.S.C. § 1396h (providing for enhanced payments to states that adopt state laws providing for False Claims Act liability). Thus, in its role as a participant in that federal program, the legislature needs the ability to respond to policy changes at the federal level. The dynamic nature of the health care system emphasizes the wisdom of deferring to the

policy choices that have been made by the political branches.

Going forward, Missouri courts will have occasions to interpret and apply the text of House Bill 393 to concrete factual scenarios. With the benefit of that insight and by keeping abreast of broader societal and economic conditions, the General Assembly will have opportunities to further refine those rules. In this way, Missouri appellate courts and the Missouri legislature will continue their classic dialogue in which the legislature enacts laws, the courts interpret and apply those laws to concrete sets of facts, and the legislature then responds with new enactments that supplement or modify the original enactments in response to how the legislation plays out "in the real world."

House Bill 393 is a perfect example of this kind of dialogue between the legislature and the courts. Many of its provisions address issues that were previously addressed by Missouri appellate courts to either codify, modify, or reverse those interpretations. See, e.g., Vincent, 833 S.W.2d at 864; Cook v. Newman, 142 S.W.3d 880, 899-90 (Mo. App. W.D. 2004) (en banc); Wright, 62 S.W.3d at 536-37; Burns v. Elk River Ambulance Inc., 55 S.W.3d 466, 485 (Mo.App. S.D. 2001). As parties litigate and appellate courts decide how the text of House Bill 393 should be interpreted, its scope and effect will be fleshed out as well and the legislature can use that information to further the common goal of serving Missouri's citizens. As with any human endeavor, the results are never perfect but the democratic political processes provide the best way for achieving a common consensus on issues like health care that affect so many in so many different ways.

Since limitations of liability do not implicate a suspect class or affect a fundamental right, rational basis review applies to them. They are constitutional if a rational basis may be conceived for them.

B. Non-economic damage limits have a rational basis.

This Court has previously held that a limit on non-economic damages in medical malpractice actions has a rational basis. Adams, 832 S.W.2d at 904-05; Vincent, 833 S.W.2d at 862. Missouri has limited non-economic damages for claims against health care providers since 1986. In Adams v. Children's Mercy Hospital, the Missouri Supreme Court was presented with nine separate constitutional challenges to the non-economic damages limit. 832 S.W.2d at 903. It rejected all of them. Id. The Court noted the assertion that victims of medical malpractice are a suspect class was "without support in either law or reason." Id. It further held that the rights to trial by jury, open courts, and a certain remedy had not been infringed even if those rights were treated as "fundamental rights." Id. While policy arguments can be made on either side of the issue, the legislature acts rationally in limiting non-economic damages because the government has a legitimate interest in "the preservation of public health and the maintenance of generally affordable health care costs" and in "maintaining the integrity of health care for all Missourians." Id. at 904. The legislature could rationally believe that a non-economic damages limit would reduce the aggregate amount of damage awards for medical malpractice, and thereby reduce malpractice insurance premiums. Id. A reduction in those costs would encourage physicians to continue to provide high-risk medical practices and quality medical services at less cost than would otherwise be the

case. Id. The non-economic damage limit was merely an outer limit on one component of a damages award and did not completely abolish them. Id. Regarding the open court, trial by jury, and due process claims, the Court held that limiting non-economic damages does not interfere with access to the courts. Id. at 905-08. Instead, it merely defines the contours of the malpractice cause of action. Id. All other claims were not preserved. Id.

This Court and the Court of Appeals have made similar observations about the purposes of Chapter 538 generally and the non-economic damages limit specifically. Initially, this Court noted that chapter 538 adopts special rules for medical malpractice claims, promotes "the continued integrity of the health care system," and furthers the legitimate government purpose of preserving public health. Mahoney, 807 S.W.2d at 507. At the most general level, the legislature has a legitimate interest in preserving "an adequate system of medical care for the citizenry." Id. at 508. If a piece of legislation can reasonably be conceived as ameliorating "the cost and availability of health care services," it satisfies rational basis review. Id. at 513. In Vincent, the Supreme Court noted "the general purpose of chapter 538 is to reduce the cost of medical malpractice." 833 S.W.2d at 867. Accord Budding v. SSM Healthcare Sys., 19 S.W.3d 678, 680 (Mo. banc 2000) (chapter 538 limits causes of actions against health care providers). The Court of Appeals has reached the same conclusion. See e.g., Redel v. Capital Region Med. Ctr., 165 S.W.3d 168, 177 (Mo. App. E.D. 2005) ("[I]t is readily understood from the history and text of Chapter 538 that the enactment is a legislative response to the public's concern over the increased cost of health care and the continued integrity of that system of essential services").

Appellants limited their rational basis argument to refuting one potential purpose for the non-economic damage limits. App. Br. 31- 46 (arguing over the merits of one potential rational basis instead of attempting to refute every conceivable rational basis for the legislation). Since Appellants have not even negated the conceivable rational bases for the limits identified in prior Missouri appellate opinions, their argument fails as a matter of law.

The health care decisions are also consistent with the well-established principle that the legislature may define causes of action, grant immunities, and limit or even abolish certain types of common law liability. See, e.g., Snodgrass, 204 S.W.3d at 640-41; Blaske, 821 S.W.2d at 833. At the most basic level, limitations of liability have a rational basis because the protected entity will have lower costs that will help ensure its solvency and that will allow it to provide better or less costly service to the general public. Harrell, 781 S.W.2d at 61 ("The legislature might easily perceive that the costs of a plan would be substantially increased if the Health Services Organization were to be subject to claims originating in malpractice, that the cost of these claims would necessarily be shared by other plan members, and that malpractice liability might threaten the solvency of the plan."); Richardson, 863 S.W.2d at 879 ("Restricting the amount recoverable – like limiting recovery to certain enumerated torts – allows for fiscal planning consonant with orderly stewardship of governmental funds, while permitting some victims to recover something.").

In applying those principles, this Court has also held that the legislature can completely immunize health maintenance organizations from liability and can eliminate

or limit the tort liability of architects and builders, employers, state governmental entities, and even dram shops. Snodgrass, 204 S.W.3d at 640-41 (upholding a statute that prohibited a cause of action by injured minors who have purchased package liquor); Etling, 92 S.W.3d at 774-75 (upholding a statutory provision denying workers' compensation benefits to non-dependents); Fisher, 948 S.W.2d at 609 (upholding a statute limiting recovery from a state governmental entity to $100,000 total); Richardson, 863 S.W.2d at 879 (upholding a statute limiting recovery from a state governmental entity to $100,000 total); Goodrum, 824 S.W.2d at 10 (upholding a statutory provision permitting the Labor and Industrial Relations Commission to make an exclusive determination of whether employee injuries resulted from an accident or an intentional act by the employer); Blaske, 821 S.W.2d at 825 (upholding a statute of repose that eliminated the liability of architects, engineers, and builders after 10 years); Harrell, 781 S.W.2d at 63 (upholding a statute immunizing HMOs from liability).

C. The non-economic damage limit in House Bill 393 rationally furthers the government's legitimate interests in clarifying the applicable outer limit for non-economic damages, stabilizing malpractice insurance premiums, avoiding over-deterrence and the practice of defensive medicine, encouraging health care providers to practice in Missouri, and curbing the rate of health care cost increases generally.

House Bill 393's non-economic damage outer limit rationally furthers legitimate government purposes in at least five ways by:

- clarifying the applicable non-economic damage limit;

- stabilizing malpractice insurance premiums;
- protecting against over-deterrence and the practice of defensive medicine;
- encouraging health care providers to practice in Missouri; and
- helping curb the general rate of health care cost increases.

First, House Bill 393 clarified the application of the non-economic damages limit. Missouri appellate courts had held that a separate cap applied for each distinct negligent act because the non-economic damages limit applied "per occurrence." Scott v. SSM Health Care St. Louis, 70 S.W.3d 560, 570-71 (Mo.App. E.D. 2002); Cook, 142 S.W.3d at 889-90. See also Romero v. U.S., 865 F.Supp. 585, 593 (E.D. Mo. 1994). Those opinions held that, if the General Assembly had intended for one cap to apply regardless of the number of negligent acts that occurred, the "per occurrence" language in § 538.210 would be superfluous. Id. But many commentators, elected officials, and members of the public had thought that the "per occurrence" language in the text was at least ambiguous and that the ambiguity would be resolved in favor of limiting liability. See, e.g., Bruce Keplinger, Multiple Damage Caps for Claims Against Health Care Providers, 60 J. Mo. Bar 116, 120 (2004); Kevin McManus, Comment, Finding A Cure for High Medical Malpractice Premiums: The Limits of Missouri's Damage Cap and the Need For Regulation, 49 St. Louis U. L.J. 895, 897 nn. 13-14 and accompanying text (2005) (citing newspaper articles and other sources); Chandler Gregg, Comment, The Medical Malpractice Crisis: A Problem With No Answer?, 70 Mo. L. Rev. 307, 322 n.107 (2005). See also Journal of the House (Apr. 27, 2004) (in vetoing a 2004 tort reform proposal, Governor Holden acknowledged that the bill did "address some legitimate medical

malpractice concerns such as reversing the *Scott* decision"); Bob Schaper, ed., Down to the Wire: What Matt Blunt and Claire McCaskill Have in Mind for *Your* Business, St. Louis Commerce Magazine (Oct. 2004) (available at http://www.stlcommercemagazine.com/archives/october2004/cover.html). (According to State Auditor and candidate for Governor Claire McCaskill, "Doctors in Missouri are facing alarming increases in medical malpractice insurance rates. Limits on non-economic damages in medical malpractice cases should be restored. These common sense limits were undermined by a recent court decision."). Since those opinions involved questions of statutory interpretation, the General Assembly was free to amend the statute to clarify its application. The legislature acts rationally when it clarifies the law in an area where disagreement exists.

Second, a medical malpractice crisis existed in the nation as a whole and in Missouri specifically. One commentator summarized the problem that skyrocketing premiums posed for doctors at the time:

> In recent years, medical malpractice insurance premiums have skyrocketed for doctors around the country. As a result, many doctors have moved to more general practices, have moved to states in which insurance premiums are cheaper, or have given up practicing medicine altogether. These problems have reached epidemic proportions in many states, precipitating government involvement at both the state and federal levels, in what has been deemed a "medical

malpractice crisis."

Gregg, 70 Mo. L. Rev. at 307-08. Missouri was suffering along with other states. The AMA designated Missouri as one of twenty states around the country in a "crisis" situation. Donald J. Palmisano, Health Care in Crisis: The Need for Medical Liability Reform, 5 Yale J. Health Pol'y, L. & Ethics 371, 371-72 n.7 (2005).

Data from the Missouri Department of Insurance confirms that insurance premiums were skyrocketing in Missouri. In 2000, malpractice insurers wrote $113,578,169 in malpractice insurance premiums. Department of Insurance, Financial Institutions, and Professional Registration, Statistics Section, 2008 Missouri Medical Malpractice Insurance Report 3 (July 2009). By 2004, that amount had increased to $246,655,563. Id. Thus, in only four years, malpractice insurance premiums more than doubled. Id. Insurance premiums stayed at those high levels in 2005 and 2006 at $232,504,144 and $238,513,369. Id.

Following the enactment of House Bill 393, insurance premiums fell. In 2007, $216,599,281 in premiums were written. Id. In 2008, $206,807,163 in premiums were written. Id. Those premium decreases represent multi-million dollar annual savings for the health care system. Moreover, the full effects of House Bill 393 have not been realized. The implementation of House Bill 393's new tort liability rules in 2005 and the large influx of claims that preceded its effective date have led to mixed claims data, making future liability difficult to project. Department of Insurance, Financial Institutions, and Professional Registration, 2008 Missouri Medical Malpractice Insurance Report xi. Insurers are still pricing their malpractice insurance products to account for

that uncertainty. Further benefits may accrue as insurers gain confidence in how House Bill 393 will function and be applied.

It is quite logical to presume that limiting damage awards will decrease or at least curb the rate of increase for malpractice insurance premiums. Adams, 898 S.W.2d at 904; Harrell, 781 S.W.2d at 63. California adopted reforms that included a $250,000 cap on non-economic damages and joint and several liability reform in 1975. Palmisano, 5 Yale J. Health Pol'y, L. & Ethics at 379. Between 1976 and 2002, California's premiums increased by only 235% while premiums in the rest of the country rose by 750%. Id. California claims are settled in one third the time of claims in other states resulting in faster compensation for injured parties. Id. California thus serves as a model of how tort reform can benefit the entire health care system. The legislature could have considered the positive experiences of California in revising the limit in § 538.210.

Likewise, the appellate decisions emphasizing the possibility of multiple caps for each "occurrence" of negligence meant that health care providers and insurers faced much greater potential future liability. That uncertainty contributed to the malpractice insurance premium spike. Gregg, 70 Mo. L. Rev. at 322 n.107 ("The decision rightfully scared insurers in Missouri and led insurers to increase liability premiums.") The legislature could rationally conclude that limiting non-economic damages would arrest or reverse that trend. McManus, 49 St. Louis U. L.J. at 897 ("By tightening the cap, they hope it will provide greater savings for insurers, and insurers will then pass the savings on as lower premiums.").

While Appellants do not dispute that malpractice insurance premiums were rising

in the years before House Bill 393 was enacted, they contend that the primary cause of such increases was the insurance business cycle and accuse insurers of "cooking the books." App. Br. 34 n.11, 36. Appellants' suggestion that the cause was solely attributable to insurance cycles and not to increased liability exposure presents a false dichotomy, because the malpractice premium spike may have had multiple causes in varying degrees. The legislature could have rationally believed that excessive liability exposure was the sole, primary, or most easily fixable cause, and that other contributing factors were secondary or would be more difficult to timely fix. The legislature is not required to address every aspect of a problem in one piece of legislation. It acts rationally by proceeding incrementally and waiting to see what the effects of its initial reforms will be. City of St. Louis v. Liberman, 547 S.W.2d 452, 458 (Mo. banc 1977) ("The state . . . is free to regulate one step at a time, recognizing degrees of harm and addressing itself to phases of a problem which presently seem most acute to the legislative mind.").

To cite from the Department of Insurance's statistics again, incurred losses for malpractice insurers had more than doubled in the years before House Bill 393 was enacted, rising from $93.9 million in 2001 to $197.3 million in 2002 and $188.3 million in 2003. Department of Insurance, Financial Institutions, and Professional Registration, 2008 Missouri Medical Malpractice Insurance Report 15. The uncertainty occasioned by unexpected appellate decisions coupled with dramatic increases in incurred losses resulted in skyrocketing malpractice premiums. At the very least, the legislature had a rational basis for reaching that conclusion. The legislature's amendment of § 538.210

rationally furthered its interest in stabilizing medical malpractice insurance premiums. Adams, 832 S.W.2d at 904; Batek, 920 S.W.2d at 899 (reducing the uncertainty of medical malpractice litigation is a legitimate government objective).

Third, the threat of medical malpractice litigation and large medical malpractice verdicts leads to over-deterrence and the practice of "defensive medicine." Unlike other types of business activities where tort law may provide one of the few deterrents or compensatory mechanisms for regulating business activity, health care providers are highly regulated. They are licensed by and accountable to state licensing boards. See, e.g., Chapter 334, RSMo 2000 & Supp. 2008 (licensing of physicians). The Centers for Medicare and Medicaid Services regulates them as Medicare providers. See, e.g., 42 U.S.C. § 1395cc. The Missouri Department of Social Services regulates them as Medicaid providers. See, e.g., 13 CSR 70-3.030. Federal oversight authorities such as the Office of Inspector General for the United States Department of Health and Human Services monitor their activities. See, e.g., 42 U.S.C. § 1320a-7. The federal Drug Enforcement Agency and state Bureau of Narcotics and Dangerous Drugs regulate them as controlled substance prescribers. 21 U.S.C. § 801, et seq.; Chapter 195, RSMo 2000 & Supp. 2008. They are self-regulated through peer review, credentialing, and board certification processes. Thus, the addition of tort liability does not impose an incentive to exercise reasonable care that would not otherwise exist. Health care providers are already subject to serious sanctions if they fail to follow proper care guidelines. To the contrary, the more relevant risk is over-deterrence.

Over-deterrence leads to the practice of "defensive medicine," which generally

refers to the practice of increasing the volume or intensity of health care services to protect against possible lawsuits. Congressional Budget Office, Letter to Hon. Orrin G. Hatch 3 (Oct. 9, 2009) (available at http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09Tort_Reform.pdf); Palmisano, 5 Yale J. Health Pol'y, L. & Ethics at 374-75. In one survey, 93% of health care providers stated that they had practiced defensive medicine at one time or another. David M. Studdert, et al., Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment, 293 JAMA 2609, 2612 (June 1, 2005). The costs of defensive medicine are hard to quantify. The total cost to the health care system may be as much as $70 billion to $126 billion per year. Palmisano, 5 Yale J. Health Pol'y, L. & Ethics at 374-75. The non-partisan Congressional Budget Office recently estimated that the federal government alone could save $54 billion over a ten year period if a package of tort reform measures including non-economic damage limits and modification of joint and several liability was implemented nationwide. Congressional Budget Office, Hatch Letter 3-4. Those savings would result from a direct reduction in medical liability premiums and a corresponding decrease in utilization due to less defensive medicine. Id. Thus, over-deterrence and the practice of defensive medicine are significant and ongoing concerns for everyone.

In Snodgras, this Court expressly noted that "civil lawsuits are not the only means of achieving social or economic objectives" and that the legislature may choose other "criminal and civil liabilities and administrative enforcement actions" as a means of protecting public health. 204 S.W.3d at 641. Accord Harrell, 781 S.W.2d at 61 (the legislature can consider the existence of other remedies that facilitate an adequate

recovery). In light of the myriad other remedies that exist to address substandard care, the non-economic damages limit on tort liability rationally furthers the government's interest in avoiding over-deterrence and the practice of defensive medicine. Id.

Fourth, high malpractice premium rates and malpractice rules that encourage or are perceived to encourage litigation deter physicians from practicing in a state. They create a culture in which health care providers do not want to practice in the state. Rising malpractice insurance premiums also cause practicing physicians to restrict services, retire early, or relocate. Palmisano, 5 Yale J. Health Pol'y, L. & Ethics at 375. Patient access to care is affected when physicians are discouraged by soaring malpractice premiums from pursuing certain specialties or practicing in certain areas. Id. High malpractice premiums also affect the practice area choices of medical residents and medical students. Between 2001 and 2003, the number of medical residents who reported that liability issues were their top concern increased from 15% to 62%. Id. Likewise, in a 2003 survey, 48% of third and fourth year medical students indicated that the current medical liability environment was a factor in their specialty choice. Id. at 374 & n.21.

Appellants cite AMA data to argue the number of physicians "in" Missouri was increasing. App. Br. 39-42. Appellants fail to qualify their assertions in several important respects. First, Missouri switched from a one year to a two year licensing period in 2002. See State Board of Registration for the Healing Arts, Healing Arts News 5 (Summer 2003). Thus, when physicians renewed their licenses in 2002, they would be shown as active licensees through 2004 and the heart of the malpractice crisis. Those

numbers would include physicians who renewed their licenses in 2002 but who retired or relocated the bulk of their practices as a result of the crisis. Second, Appellants focus on the number of physicians "in" Missouri when the relevant consideration is the number of physicians "practicing in" Missouri. The AMA data depends on physician self-reporting of their "preferred address" irrespective of where that physician may actually practice. American Medical Association, Medical Liability Reform – NOW! 49 (July 14, 2004). Since Missouri has a number of large population centers that straddle the state border (St. Louis, Kansas City, Joplin, and St. Joseph), it is quite easy for physicians in those cities to relocate all or a substantial part of their practice to another state. This phenomenon particularly occurs in the Kansas City metropolitan area because Kansas is perceived as having a much better tort environment than Missouri. Contrary to Appellant's argument, physicians report that the climate for recruiting and retaining health care professionals has improved with the passage of House Bill 393. Terry Ganey, Doctors vs. Lawyers: Doctors malpractice insurance rates drop with fewer negligence claims, Columbia Daily Tribune (Oct. 4, 2009). Data from the Missouri Board of Registration for Healing Arts indicates that Missouri lost 225 physicians in the three years leading up to the passage of House Bill 393 and added 486 physicians in the first full year since House Bill 393 was passed. Id. See also Matt Blunt, How Missouri cut junk lawsuits, Wall St. J., Sept. 22, 2009, at A23 (noting examples of physicians who quit practicing in the state because of the increase in malpractice insurance premiums).

Moreover, Appellants' basic premise that it was not rational for the legislature to take action until physicians were "fleeing" the State is faulty. App. Br. 39-42. It is like

suggesting that the General Assembly cannot provide for a fire department until someone's house is on fire. The General Assembly acted rationally when it passed legislation to prevent the problem of high malpractice premiums from continuing until it caused the greater problems of inadequate physician supply and deteriorating patient access to care. By enacting House Bill 393, the climate for physician recruitment and retention has improved. The legislature rationally acts to maintain and increase the number and types of physicians practicing in the State by adopting limits on malpractice liability. Batek, 920 S.W.2d at 899 (holding that the legislature may limit malpractice liability to "limit the burdens and disruptions that malpractice litigation imposes in the delivery of accessible health care").

Fifth and finally, non-economic damage limits are justified as a tool for curbing societal health care costs in general. Rising health care costs impact everyone: employers, health care providers, and patients. Cost increases are passed on to consumers in the form of higher premiums, higher copayments, reduced services, and higher taxes. Health care costs may threaten the continuing viability of businesses. Since most coverage in our country is employer-based, businesses must sometimes drop coverage or reduce benefits for existing employees, forego additional hiring, or lay off employees to counteract rising health care costs. Individuals without employer-based coverage often cannot afford coverage because of the high costs.

Over the summer, in an address to the AMA, President Barack Obama discussed the problem that high health care costs pose for our nation:

> Make no mistake: the cost of our health care is a threat

to our economy. It is an escalating burden on our families and businesses. It is a ticking time-bomb for the federal budget. And it is unsustainable for the United States of America.

. . .

Our costly health care system is unsustainable for doctors like Michael Kahn in New Hampshire, who, as he puts it, spends 20 percent of each day supervising a staff explaining insurance problems to patients, completing authorization forms, and writing appeal letters; a routine that he calls disruptive and distracting, giving him less time to do what he became a doctor to do and actually care for his patients.

Small business owners like Chris and Becky Link in Nashville are also struggling. They've always wanted to do right by the workers at their family-run marketing firm, but have recently had to do the unthinkable and lay off a number of employees – layoffs that could have been deferred, they say, if health care costs weren't so high. Across the country, over one third of small businesses have reduced benefits in recent years and one third have dropped their workers' coverage altogether since the early 90's.

> Our largest companies are suffering as well. A big part of what led General Motors and Chrysler into trouble in recent decades were the huge costs they racked up providing health care for their workers; costs that made them less profitable, and less competitive with automakers around the world. If we do not fix our health care system, America may go the way of GM; paying more, getting less, and going broke.

American Medical Association, Obama Addresses Physicians at AMA Meeting: Transcript of President Obama's Remarks (June 15, 2009) (available at http://www.ama-assn.org/ama/pub/about-ama/our-people/house-delegates/2009-annual-meeting/speeches/president-obama-speech.shtml). Though the President differs on the means for addressing the problem, he agreed that efforts need to be undertaken to "scale back the excessive defensive medicine reinforcing our current system of more treatment rather than better care." Id. As noted, the non-partisan Congressional Budget Office estimated the federal government could realize substantial ongoing savings by implementing a comprehensive tort reform package. Congressional Budget Office, Hatch Letter at 3-4. The fact that non-economic damage limits are also being debated at the federal level is evidence itself that rational arguments can be made for limits. The fact that a certain policy choice is opposed by some does not make it unconstitutional. If it were, unanimity would be required to pass legislation. Rising health care costs pose an ongoing threat to our nation. The legislature had a rational basis for concluding that non-economic damage limits

would help further a legitimate state purpose by curbing the rate of increase for health care costs for society as a whole. Adams, 832 S.W.2d at 904. Accord Batek, 920 S.W.2d at 899 (cost savings provide a rational basis for a shorter limitations period for medical malpractice claims); Harrell, 781 S.W.2d at 63 (cost savings provide a rational basis for granting immunity to an HMO). Cf. Richardson, 863 S.W.2d at 879 (cost savings provide a rational basis for limiting liability of the government).

The legislature had a rational basis for choosing non-economic damage limits as the means to further its legitimate government interests. A non-economic damage limit is a modest restriction on the medical malpractice cause of action. Adams, 832 S.W.2d at 904. It does not affect plaintiffs' ability to recover economic damages. Plaintiffs can recover all of their out-of-pocket damages, including medical expenses, lost wages, and lost earning capacity. § 538.205, RSMo Supp. 2008. Plaintiffs may still recover their full economic damages from health care providers, even if they have been compensated by other collateral sources. See, e.g., Washington, 897 S.W.2d at, 619-20; § 490.715, RSMo Supp. 2008. Punitive damages may still be recovered for egregious conduct.

Since they compensate the plaintiffs for intangible, non-pecuniary harms, non-economic damages are inherently subjective. Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291, 301-02 (Mo. banc 1978). Few objective standards exist to guide juries in determining them or to assist judges in policing their outer limits. Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 98 (Mo. banc 1985) (noting that "a jury has virtually unfettered discretion" to determine damages in the "large range between the damage extremes of inadequacy and excessiveness"); Knifong v. Caterpillar, Inc., 199 S.W.3d

922, 926-32 (Mo. App. W.D. 2006) (upholding a refusal to remit a jury award of $2,500,000 for non-economic damages even though plaintiff's economic damages were limited to $14,530). Thus, while their purpose is compensatory, they may also result in disproportionate damage awards that will ripple through the entire health care system. Accordingly, state legislatures across the country have enacted outer limits for non-economic damage awards. A typical limit is $250,000. See, e.g., Congressional Budget Office, Hatch Letter at 2. To put that dollar amount in perspective, $250,000 is enough money to fund:

- Undergraduate educations for three children at the University of Missouri-Columbia, including tuition, room and board, books, supplies, and personal expenses, see Mizzou, Undergraduate Admissions, Costs & Financial Aid (available at http://admissions.missouri.edu/costsAndFinancialAid/costs/index.php) (four years @ $20,600 per year for a total of $247,200);
- The outright purchase of a home ($220,000) and a new car ($30,000), or
- A retirement nest egg.

After debate, the limit in House Bill 393 was increased from the standard $250,000 limit to $350,000. So, the plaintiff could accomplish any of the above goals in whole or in part and still have an additional $100,000 left over.

The legislature determined that a non-economic recovery that allowed the plaintiff to achieve such significant economic milestones would be sufficient compensation for a person's intangible injuries, and that other societal costs and risks associated with large non-economic damage awards outweighed any advantages from allowing larger awards.

Its policy choice was rational and the statute is constitutional. Adams, 832 S.W.2d at 904; Vincent, 833 S.W.2d at 862; Batek, 920 S.W.2d at 899; Harrell, 781 S.W.2d at 61, 63.

II. The legislature constitutionally implemented the non-economic damage limit. (Responds to Points Relied On 1 and 2)

House Bill 393 constitutionally implemented its revision of the non-economic damages limit. First, it was not retrospective legislation because it only applied to causes of actions filed after its effective date. House Bill 393 did not change substantive rights but at most only clarified the remedy for those rights. Second, regarding the clear title and single subject challenges, the statute of limitations for such causes of action had already run when the Appellants filed their petition on December 4, 2006. LF 1439; § 516.500, RSMo 2000.

A. House Bill 393 is not retrospective legislation.

House Bill 393 was approved by the Governor on March 29, 2005. Under the Constitution, it took effect on August 28, 2005. Mo. Const. art. III, § 29. House Bill 393 included a separate section making it effective for claims filed after that day. § 538.305, RSMo Supp. 2008.

No impediment existed to prevent Plaintiffs from filing their lawsuit prior to August 28, 2005. In fact, Plaintiff James Klotz filed a similar action against the hospital on December 14, 2004. LF 1438. Plaintiff Mary Klotz joined that action on April 28, 2005. LF 1438. Plaintiffs could have pursued that action and availed themselves of the perceived benefits of the prior law. Instead, they chose to dismiss their cause of action on

December 2, 2005 and refile it almost a year later on December 4, 2006. LF 1438-39.

The revisions to the non-economic damage limits were procedural, not substantive, changes to the law. House Bill 393 did not impose a new substantive restriction on damage recoveries that had not previously existed in the law. To the contrary, it simply clarified the application of the pre-existing non-economic damages limit. Such adjustments of existing remedies are procedural changes. Accordingly, even if they were considered to be "retrospective" because they occurred after a cause of action had accrued, they are constitutional.

In Hess v. Chase Manhattan Bank, this Court evaluated the constitutionality of applying statutory changes that were made to the Merchandising Practices Act in 2000 to an alleged violation of that law that occurred in 1999. 220 S.W.3d 758, 769-72 (Mo. banc 2007). The Court noted the general rule that procedural and remedial statutes may be applied retrospectively, but substantive statutes may not. Id. Procedural laws describe the method for enforcing rights or obtaining redress. Id. Substantive laws create, define, and regulate rights. Id. The Court first noted that the operative facts giving rise to the cause of action had not changed. Id. Rather, the amendment substituted a new or more appropriate remedy for enforcement of the existing right. Id. Specifically, the 2000 amendments allowed:

- Private parties to sue for violations that could previously be enforced only by the Attorney General;
- Changed the manner of calculating damages (arguably); and
- Permitted private parties to recover their attorneys' fees.

Id. Each of these changes had the potential to increase the damage award against the defendant, as they changed the manner in which damages were calculated or the parties to which a defendant could be liable. Id. The Court held such changes were not substantive because they simply adjusted the remedy for an existing wrong. Id. See also Cook, 142 S.W.3d at 892-93 (inflation-adjustments in favor of plaintiffs in the previous version of the non-economic damage limit were remedial and could be applied to increase the defendants' liability four years after plaintiff's cause of action accrued).

Similarly, House Bill 393 did not eliminate an existing cause of action for plaintiffs. Plaintiffs may still bring claims for medical malpractice. House Bill 393 adjusted the remedy by which they may enforce that claim and clarified the application of the pre-existing non-economic damages limit. Such changes are procedural only and may be retrospectively applied. Hess, 220 S.W.3d at 769 (finding that broadening the classes of plaintiffs to which a defendant was liable and changing the calculation of their damages only affected the remedy available).

Finally, House Bill 393 includes a severability clause, indicating that the legislature's intent was for the remainder of the Act to be effective even if one provision was invalidated. House Bill 393, § 1. If the Court were to find § 538.305 to be retrospective, the remainder of House Bill 393 should be upheld. In that case, all of House Bill 393's provisions would take effect and be applied to causes of action accruing on or after August 28, 2005.

B. House Bill 393's title clearly expressed its single subject and the statute of limitations for such challenges ran before Appellants filed this action.

Appellants' clear title and single subject argument is internally inconsistent. Clear title challenges fall into two groups: (1) titles that are overbroad and (2) titles that are underinclusive. Jackson County Sports Complex Auth. v. State, 226 S.W.3d. 156, 161 (Mo. banc 2007). An overbroad title is so general that almost anything could be interpreted to be encompassed by it. Id. The public has no clear indication of what the contents of the bill are. Id. On the other hand, a bill with an underinclusive title includes provisions that are not covered by its title. Id. Thus, it contains provisions that the public would not expect to find in the bill. A bill has a single subject if all of its provisions relate to the same subject, have a natural connection therewith, or are incidents or means to accomplish its purpose. Mo. State Med. Ass'n v. Mo. Dep't of Health, 395 S.W.3d 837, 840 (Mo. banc 2001).

Appellants have alleged that the title for House Bill 393 was both overbroad and underinclusive. Compare App. Br. 23-25 (arguing that the title is "so broad and amorphous as to constitute a clear title violation"), with id. 25-28 (arguing that the "title does not even include all topics within its cover"). Those arguments are inconsistent. It is difficult to imagine a title that would be so general that it was overbroad and yet still fail to give notice of some of the bill's provisions. The title for House Bill 393 certainly did not suffer from such an anomalous defect. Since Appellants have conceded that the bill's title was not overbroad by arguing that it is underinclusive, the only question is

whether the title is in fact underinclusive. It was not.

The title for House Bill 393 clearly put the public on notice that the bill was amending "sections relating to claims for damages and the payment thereof." Every amendment in the bill relates to damage claims or their payment. Appellants argue that §§ 355.176 and 508.010 relate to claims for declaratory and injunctive relief and are not included in the title. App. Br. 25. Section 355.176 concerns the registered agent of a corporation for purposes of "service of process, notice, or demand required or permitted by law." Section 508.010 relates to venue for causes of action. Clearly, both of these statutes are related to claims for damages and their payment because they define part of the process for making such damage claims. Apparently, Appellants believe that because they would also apply to other causes of action, the title does not suffice. Under that standard, no legislation could ever be passed because it will always be possible to state a different subject to which a bill's provisions also relate. The test is whether all of the bill's provisions relate to a common subject that is expressed in the title. Amendment of the service of process and venue statutes was related to, had a natural relationship with, and was a necessary means and incident to changing the law regarding damage claims.

Thus, in Fust v. Attorney General, the title for the bill provided that it enacted legislative changes "for the purpose of assuring just compensation for certain person's damages." 947 S.W.2d 424, 427 (Mo. banc 1997). The bill repealed sections involving insurance, interest, or pleadings and enacted new sections to replace them. Id. at 429. The challengers argued that the bill's subject should be limited to insurance, interest, or pleadings and that the tort victims' compensation fund was not consistent with that

subject. Id. The Court rejected that argument, holding that the insurance, interest, and pleadings sections being repealed and the tort victims compensation fund were all steps being taken as means to accomplish the purpose of assuring just compensation for damages as expressed in the bill's title. Id. Similarly, in this case, the title for House Bill 393 adequately put the public on notice of the bill's single subject and there is no constitutional violation. Id. See also State ex rel. St. John's Mercy Health Care v. Neill, 95 S.W.3d 103, 106 (Mo. banc 2003) (holding that a change to venue requirements was related to the single subject "general not for profit corporations, and reinstatement of other corporations"; Akin v. Dir. of Rev., 934 S.W.2d 295, 302 (Mo. banc 1996) (holding that a tax increase was related to education where the tax increase was the means to fund education).

More importantly, Appellants' challenge to House Bill 393 is untimely. Section 516.500, RSMo 2000, requires a challenge to a procedural defect to be asserted before the adjournment of the next legislative session. A later lawsuit is permitted only if (1) "there was no party aggrieved who could have raised the claim within that time," (2) the plaintiff is the first party aggrieved, and (3) the claim was filed not later than adjournment of the next legislative session following the first person being aggrieved. § 516.500.

In this case, the next legislative session adjourned by operation of law on May 30, 2006. Mo. Const. art. III, § 20(a). Appellants filed this lawsuit more than six months later. LF 1. They did not file their reply raising their clear title and single subject challenges until July 11, 2008, more than two years after the limitations period had run.

LF 216. Accordingly, their claims are barred by § 516.500. Appellants do not qualify for the late filing exception because they were aggrieved and could have filed their claim within the original period as evidenced by their original action that was pending when House Bill 393 took effect and that they subsequently dismissed on December 2, 2005. LF 1438-39. The first assertion of a procedural violation in the enactment of the law on July 11, 2008, was clearly untimely and in violation of § 516.500, RSMo 2000. Appellants also do not qualify for the late filing exception because any medical malpractice plaintiff with a claim that was filed after August 28, 2005, but before May 30, 2006 could have raised such a claim in their petition. Accordingly, there were other parties who could have raised the claim and Appellants are not the first aggrieved parties.

Section 516.500, RSMo 2000, was enacted to provide certainty for the public that otherwise valid laws would not be disqualified due to procedural defects after a reasonable time for challenges had passed. Hammerschmidt v. Boone County, 877 S.W.2d 98, 105 (Mo. banc 1994) (Holstein, J., concurring) (recommending the enactment of a limitation period for procedural challenges; § 516.500 was adopted during the next legislative session). Permitting such late procedural challenges to laws would substantially undermine the public's ability to rely on legislative enactments. Id. Accordingly, this Court should reject Appellants' clear title and single subject challenges

for untimeliness.[3]

[3] Appellants did not interject their legislative procedure challenge until July 11, 2008. LF 216. The § 516.500, RSMo 2000, limitations issue does not appear to have been briefed in the circuit court. Given the purpose of § 516.500, the Medical Associations believe that this Court should consider the issue sua sponte if necessary. It would be manifestly unfair for a procedural challenge that was filed more than two years late to be decided and applied with precedential effect to all malpractice defendants in the state. At the very least, any decision questioning the constitutionality of House Bill 393 on procedural grounds should be expressly qualified as to the rights of other defendants to assert § 516.500 as a defense in actions against them.

CONCLUSION

This Court should AFFIRM the decision of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned certifies:

1. That this Brief complies with Rule 84.06(g) of this Court; and

   that this Brief contains 13,061 words according to the word count feature of Microsoft Office Word 2003 SP-3 software with which it was prepared.

2. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

3. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Brief and a diskette with the text of the Brief were served on this 5th day of November, 2009, by United States mail, postage prepaid to the following individuals:

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