NO. SC83783

IN THE SUPREME COURT OF MISSOURI

Mark M. Tendai, M.D.,

Appellant,

v.

Missouri State Board of Registration for the Healing Arts,

Respondents.

ON PETITION FOR REVIEW FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION HON. SHARON M. BUSCH, COMMISSIONER

BRIEF OF THE MISSOURI STATE MEDICAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

HENDREN AND ANDRAE, L.L.C.

Duane E. Schreimann, #27321
221 Bolivar Street
P.O. Box 1069
Jefferson City, MO 65102
(573) 636-8135

Attorneys for Missouri State Medical Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Missouri State Medical Association ("MSMA") is a private, voluntary, non-profit organization of physicians and medical students. Founded in 1850, it serves its members through 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 5,500 physician and medical student members, comprising approximately 80 percent of the physicians in Missouri.

MSMA believes that this case will have a far-reaching impact on practicing physicians and the quality of health care provided to the citizens of this state. Further, MSMA believes that the present litigants will not adequately represent issues affecting MSMA's member physicians because their perspective focuses on the merits of this specific case. MSMA's collective resources and familiarity with the issues pertaining to the practice of medicine and Chapter 334 can aid this Court in a broader sense in providing historical context and background in addressing the legal issues raised by this controversy.

MSMA will present no new issues in this case and will restrict its brief to the arguments as they affect the physicians in this state.

STATEMENT OF FACTS

Amicus Curiae Missouri State Medical Association adopts the statement of facts contained in Appellant's brief.

POINTS RELIED ON

I. The Administrative Hearing Commission (AHC) erred in finding cause for discipline of appellant for "repeated negligence" under section 334.100.2(5), RSMo, because the AHC erroneously interpreted and applied Missouri law by concluding that the statute permits discipline of a doctor for "repeated negligence" when the only act of negligence alleged involves: 1) the same patient; 2) the same condition; 3) the same course of treatment; within 4) the same one-week period, in that "repeated negligence" means acts of negligence involving more than one patient, or more than one course of treatment, condition, or time frame concerning the same patient.

Columbia Athletic Club v. Director of Revenue, 961 S.W.2d 806, 809 (Mo. banc 1998);

Bd. of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, 442 (Mo. App. 1991);

Dorman v. Bd. of Registration for the Healing Arts, WD58840, (Mo. App. Oct. 9, 2001);

Montgomery v. South County Radiologists, Inc., et al., 49 S.W.3d 191 (Mo. banc 2001);

Section 334.100.2(5), RSMo.

II. The Administrative Hearing Commission (AHC) erred in finding cause for discipline of appellant under section 334.100.2(5), RSMo, because the statutory language permitting discipline for "[a]ny conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public" is unconstitutionally vague in violation of due process protections in that physicians of ordinary intelligence must necessarily speculate as to the outer parameters of conduct that may subject them to discipline, and, further, administration of the statute must necessarily depend on unfettered subjective impressions and arbitrary and capricious standards because of the all-encompassing language.

Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. banc 1999);

State v. Mahan, 971 S.W. 2d 307 (Mo. banc 1998);

See Bd. of Ed. of St. Louis v. State, 47 S.W.3d 366 (Mo. banc 2001);

Murray v. Missouri Highway and Transp. Com'n., 37 S.W.3d 228 (Mo. banc 2001);

Fourteenth Amendment to the United States Constitution;

Article I, section 10 of the Missouri Constitution;

Section 334.100.2(5), RSMo.

ARGUMENT

I. The Administrative Hearing Commission (AHC) erred in finding cause for discipline of appellant for "repeated negligence" under section 334.100.2(5), RSMo, because the AHC erroneously interpreted and applied Missouri law by concluding that the statute permits discipline of a doctor for "repeated negligence" when the only act of negligence alleged involves : 1) the same patient; 2) the same condition; 3) the same course of treatment; within 4) the same one-week period, in that "repeated negligence" means acts of negligence involving more than one patient, or more than one course of treatment, condition, or time frame concerning the same patient.

STANDARD OF REVIEW

This Court reviews the final decision of the AHC and the Board of Healing Arts (Board), and not the decision of the trial court. Bodenhausen v. Mo. Bd. Of Registration for the Healing Arts, 900 S.W.2d 621, 622 (Mo. banc 1995). On review, the decision of the AHC and the Board "shall be treated as one decision." Section 621.145, RSMo. Unless otherwise provided by law, the AHC's final decisions are subject to review under the Missouri Administrative Procedure Act; specifically, sections 536.100 to 536.140, RSMo. Section 621.145, RSMo.

Under section 536.140.2, RSMo, appellate review ". . . is limited to determining whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the

decision is unauthorized by law." Community Bancshares, Inc. v. Secretary of State, 43 S.W.3d 821, 823 (Mo. banc 2001). If the agency's decision is based on an interpretation, application, or conclusion of law, the decision is subject to this Court's independent judgment. Id. This first point relied on calls for this Court to exercise its independent judgment because the AHC's interpretation and application of section 334.100.2(5) is erroneous as a matter of law.

"Repeated Negligence"

Section 334.100.2(5), RSMo permits the Board to file a complaint with the AHC against a physician's license for:

> Any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public; or incompetency, gross negligence or repeated negligence in the performance of the functions or duties of any profession licensed or regulated by this chapter. For the purposes of this subdivision, **"repeated negligence"** means the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member of the applicant's or licensee's profession.

Section 334.100.2(5), RSMo.

In Dr. Tendai's case, the Board sought discipline for "repeated negligence" based on alleged negligent treatment of *two* patients, S.G. and J.M.W. (LF. 18). The AHC, however, concluded there was no cause for discipline regarding the

doctor's treatment of J.M.W. (LF. 1054-55), thus negating the basis of the Board's claim of repeated negligence, but, paradoxically, the AHC nevertheless discovered cause to discipline Dr. Tendai for repeated negligence. (LF. 1055).

Therefore, the AHC's finding was based on Dr. Tendai's care of S.G., whom he was treating solely for potential complications connected to her pregnancy. (LF. 1035, 1055). Specifically, the AHC found Dr. Tendai violated the standard of care in his treatment of S.G. "after November 2, 1992 by failing to refer the patient to a perinatologist or by failing to conduct tests and deliver the baby. . . ." (LF. 1050). The only dates Dr. Tendai treated S.G. after November 2, 1992 are November 16, and November 23, 1992.[1] (LF. 1037). So the AHC's finding of repeated negligence is based on Dr. Tendai's care of *one* patient, and *one* treatment -- an examination, given twice during *one* week, for *one* condition -- her pregnancy. As a matter of law, the AHC's finding is erroneous because, as will be shown, these facts cannot constitute repeated negligence.

The issue before this Court is a straightforward question of law: what does "repeated negligence" mean? But in order to answer that question, it is helpful to first bring to mind a few of the fundamental precepts of statutory construction.

---

[1] S.G. had a visit in Dr. Tendai's office on November 9, 1992, but was attended by Dr. Tendai's nurse, not the doctor himself, although he was present. (LF. 1037).

With regard to section 334.100.2(5), the legislature has provided a definition of the term so, if possible, this Court must give effect to that definition. See Jones v. Director of Revenue, 832 S.W.2d 516, 517 (Mo. banc 1992). However, courts are mindful also that the touchstone of statutory construction is legislative intent; and this Court, if necessary to effectuate that intent, will subordinate the strict letter of the law in order to abide by the spirit of the law. See Brownstein v. Rhomberg-Haglin & Assoc., Inc., 824 S.W.2d 13, 16 (Mo. banc 1992).

From a related canon we are instructed if a statute is ambiguous as-applied, the literal implications of the statutory language will be restricted by judicial interpretation to ensure application of the statute does not foster illogical or absurd results. See Ports Petroleum Co. Inc. of Ohio v. Nixon, 37 S.W.3d 237, 240-41 (Mo. banc 2001). Finally, absent a statutory definition, a reviewing court relies on the plain and ordinary meaning of a given word as defined in the dictionary. See Columbia Athletic Club v. Director of Revenue, 961 S.W.2d 806, 809 (Mo. banc 1998) (overruled on other grounds by Wilson's Total Fitness Center, Inc. v. Director of Revenue, 38 S.W.3d 424, 426 (Mo. banc 2001)).

With these rules of construction in mind, and in light of case law cited infra, this Court may turn to the statutory definition of "repeated negligence," which is: ". . . the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member [sic] of the applicant's or licensee's profession." Section 334.100.2(5),

RSMo. So "repeated negligence" essentially means: 1) a breach in the applicable standard of care, 2) "on more than one occasion." The operative word in the statutory definition is "occasion" because there must be "more than one" to constitute repeated negligence, but the legislature has not defined the operative word.

Thus, because there is no statutory definition, to ascertain legislative intent the meaning of "occasion" must be derived from the plain and ordinary dictionary definition. See Columbia Athletic Club, 961 S.W.2d at 809. However the dictionary does not alleviate the difficulty because the definition of occasion is itself ambiguous. Occasion is defined by Webster as:

> 1) a situation or set of circumstances favorable to a particular purpose or development; 2) something that produces an effect or brings about an event; 3) a circumstance, occurrence, or state of affairs that provides ground or reason for something. . . .

Webster's Third New International Dictionary, 1560 (1961).

As is apparent, the dictionary definition of "occasion" is fairly broad. In fact, on its face it is reasonably expansive enough to encompass, in Webster's language, the "set of circumstances" or "state of affairs" that "provide[d] ground" for the AHC's finding of *repeated* negligence -- Dr. Tendai's care of S.G. That is, within the logical ambit of the ordinary meaning, Dr. Tendai's care of one patient, involving one treatment, for one condition, twice in one week, is one set of

circumstances, one state of affairs, *one occasion* -- not "more than one occasion" as is required for discipline for repeated negligence.

Moreover, defining "more than one occasion" to exclude one course of continuing treatment of one patient for one condition makes sense in light of the legislative intent underlying section 334.100.2(5), RSMo. Legislative intent may be gleaned from the object or purpose of the statute in question. See Ports Petroleum, 37 S.W.3d at 240. The purpose of section 334.100.2(5) is to protect the public health and welfare, not to punish physicians. See Bd. of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, 442 (Mo. App. 1991). Admittedly, that purpose is far-reaching because negligence toward one implies risk to all, but nonetheless, amicus asserts the AHC's interpretation of "repeated negligence" operates to permit discipline even in circumstances where a physician's conduct *necessarily* poses risk to only one patient, and not at all to the general public. Consequently, the AHC's interpretation is tantamount to punishment, not protection, and thereby contravenes the legislative intent of section 334.100.2(5).

It just makes sense, in view of the judicially recognized purpose of the statute, to limit the context in which a doctor is subject to discipline to those cases where the public is at greater risk than here. For instance, the public is at greater risk when the physician's conduct affects more than one patient, or relates to more than one condition of the same patient, or involves more than one treatment mode, or, at the very least, involves a time-frame of more than two visits in one week.

The AHC's interpretation of "repeated negligence" unduly expands the statutory language beyond its purpose, and threatens Missouri's doctors with discipline for conduct that is not repeated negligence, but in reality is a solitary, albeit serial, *act* of negligence committed on *one* occasion.

Further, the AHC's interpretation leads to unintended and absurd results. Under the AHC's approach, a doctor can be disciplined for misdiagnosing the same patient regarding the same ailment twice in the same two-minute office visit. Amicus acknowledges this is a ludicrous construction of repeated negligence, but that is precisely the point -- it is completely consistent with current administration of the law. The fact that this ridiculous hypothetical scenario fits the currently recognized cause for physician discipline merely highlights the AHC's sharp deviation from legislative purpose. When the spirit of the law is crushed by heavy-handed application of the letter of the law, the public may ostensibly be protected to some degree, but not nearly in proportion to the degree of punishment threatened to doctors.

Also troubling is that Missouri courts are acquiescing to the AHC's interpretation of repeated negligence apparently without exercising their independent judgment as required by the standard of review for questions of law. See Dorman v. Bd. of Registration for the Healing Arts, WD58840, (Mo. App. Oct. 9, 2001) (affirming administrative discipline of physician for repeated negligence based on treatment of one patient for one condition).

Perhaps most significantly, the AHC's interpretation of "repeated negligence" permits it to discipline a doctor for conduct this Court elsewhere defines as constituting merely an "act" of negligence. On this point, note the AHC is completely without statutory power to discipline for an "act" of negligence, yet by interpreting section 334.100.2(5) it confers itself that power.

To explain, three months ago this Court again addressed the application of section 516.105, RSMo, statute of limitations for medical malpractice actions, and again tacitly held a single "occurrence of an act" of negligence includes a doctor's treatment of one patient at several visits, like Dr. Tendai's conduct here. See Montgomery v. South County Radiologists, Inc., et al., 49 S.W.3d 191, 194 (Mo. banc 2001). The statute itself provides medical malpractice actions ". . . shall be brought within two years from the date of the occurrence of the act of neglect complained of. . . ." Section 516.105, RSMo 2000. This Court, nevertheless, time and again permits actions where the cause would literally be time-barred as long as the "occurrence of the act of neglect" involves several office visits during a continuing course of treatment with a corresponding duty for the doctor to stay the course. Suffice to say, in applying section 516.105, this Court's analysis tacitly relies on a construction of "occurrence" and "act" that readily includes Dr. Tendai's care of S.G. Yet the AHC, contrary to that logic, somehow concludes the very same conduct is "repeated negligence," that is, not the same "occurrence" or "act."

Granted, section 334.100 and section 516.105 are in different chapters, but so what? The fabric of the law is not a patchwork, it is seamless. But when interpreting bodies interweave it with incongruent threads, it gets patched beyond recognition. Stated succinctly, under the law as a whole the same conduct should not be interpreted both in the plural, as *repeated* negligence, and in the singular, as an *act* of negligence, depending on the independent understanding of the particular interpreting body.

For the foregoing reasons, Amicus Curiae MSMA respectfully requests this Court declare the AHC's interpretation of "repeated negligence" as defined in section 334.100.2(5), RSMo is erroneous and unreasonable as a matter of law, and that "repeated negligence" means conduct affecting more than one patient, or relating to more than one condition of the same patient, or, at the least, involving a time-frame of more than two visits in one week.

II. The Administrative Hearing Commission (AHC) erred in finding cause for discipline of appellant under section 334.100.2(5), RSMo, because the statutory language permitting discipline for "[a]ny conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public" is unconstitutionally vague in violation of due process protections in that physicians of ordinary intelligence must necessarily speculate as to the outer parameters of conduct that may subject them to discipline, and, further, administration of the statute must necessarily depend on unfettered subjective impressions and arbitrary and capricious standards because of the all-encompassing language.

Void for Vagueness[2]

As mentioned above, section 334.100.2(5), RSMo permits discipline of a physician for "[a]ny conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public. . . ." Thus, if this Court parses this language, the statute permits an administrative proceeding against a physician for:

> any . . . practice which . . . might be . . . dangerous to the mental . . .
>
> health of . . . the public. . . .

---

[2] For purposes of its void for vagueness challenge to section 334.100.2(5), Amicus relies on both the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution.

Section 334.100.2(5). Predictably, the legislature has not indicated, by definition or otherwise, what such a thing as the public's "mental health" might possibly consist of; that failure is understandable because it is difficult to imagine a concept less susceptible of circumscription. In any event, before 1987, when section 334.100.2(5) was amended, grounds for discipline under this subsection were limited to:

> Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of [the physician].

Section 334.100.2(5), RSMo 1986. The 1987 amendment added the language quoted above -- and challenged here as void for vagueness -- as well as the provision permitting discipline for repeated negligence and the definition of that term. Amicus notes too that the challenged language is separated from the other provisions by a semi-colon so that it is isolated from the language limiting grounds for discipline to conduct related to ". . . performance of the functions or duties . . ." of the physician's profession.

Therefore, within the logic of the legislature's punctuation, a physician may be subject to discipline for conduct which might be dangerous to the public's mental health even though that conduct is completely unrelated to his profession. In that connection, this Court has emphasized attention to the legislature's use of punctuation and conjunctions may be "critical" to interpreting a statute. See Columbia Athletic Club, 961 S.W.2d at 808. However, Amicus does not rely

extensively on the apparent grammatical anomaly in section 334.100.2(5), but merely notes its existence, and suggests it further demonstrates, for purposes of vagueness analysis, the nebulous character of this statute.

Turning to the constitutional challenge, in simple terms the void for vagueness doctrine requires a statute be written clearly and specifically enough to give fair notice about what conduct is prohibited and to limit arbitrary and discriminatory enforcement. See State v. Entertainment Ventures I, Inc., 44 S.W.3d 383, 386 (Mo. banc 2001). The test is ". . . whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955, 957 (Mo. banc 1999).

Additionally, as a counterpart to the above-stated test, the statutory language can not allow government enforcement based on the unfettered subjective impressions of the enforcing agency. See State v. Mahan, 971 S.W. 2d 307, 312 (Mo. banc 1998). In essence, the test is one of notice to the public and guidance to the government within the realm of "reasonable certainty." See Bd. of Ed. of St. Louis v. State, 47 S.W.3d 366, 371 (Mo. banc 2001). The legislature does not have to draw a bright line, but it has to draw a visible line.

To that end, the language in section 334.100.2(5) permitting discipline for any practice that might be dangerous to a patient's or the public's physical or mental health is unconstitutionally vague. First, the statute does not offer any

notice whatsoever about what type of practice might be dangerous to the public's "mental health;" and research of this term indicates there is probably no such thing as the public's mental health, with the possible exception of a concept created within the framework of contemporary psychoanalysis pertaining to aggregate effects of widespread or widely publicized phenomena or trauma.

Other chapters of RSMo shed no light on the term. Section 630.005, RSMo 2000, defining terms under the Department of Mental Health Act, contains definitions relevant to "mental health," but only as relates to individuals, not the public. In short, there is no way for physicians to know what conduct might be harmful to the public's mental health, thus subjecting them to discipline under section 334.100.2(5), and therefore the statute is too vague.

But even assuming this Court were able to divine a clear meaning of the phrase "mental . . . health of . . . the public," nonetheless, the statute gives inadequate notice of the outer limits of conduct that potentially could result in discipline. In essence, the statute literally permits the AHC to find cause to discipline for anything a doctor does that the AHC believes might be dangerous to any person's physical or mental health, whether the person was a patient of the doctor or not, without limits on administrative discretion.

The language at issue here, permitting discipline for "[a]ny conduct . . . which . . . might be harmful . . .," appears syntactically immediately before the language permitting discipline for " . . incompetency, gross negligence or repeated negligence . . .," section 334.100.2(5), so it follows that the legislature intended to

subject conduct *other than* incompetency and negligence to discipline, or else the initial language would be surplusage and a useless gesture. See Murray v. Missouri Highway and Transp. Com'n., 37 S.W.3d 228 (Mo. banc 2001) (explaining that the legislature is presumed to not have intended a meaningless act). But exactly what conduct other than incompetency, gross negligence, or repeated negligence comes within the scope of the statute? There is no way to know because the legislature has failed to draw any line. To be sure, the conduct must be something *less* than incompetency or negligence, because both of those grounds are already provided for, but persons of ordinary intelligence must necessarily guess at what conduct is intended to be covered.

Also troubling is that enforcement of section 334.100.2(5) is only limited by the AHC's subjective impressions about what conduct "might be harmful," other than incompetence or negligence that is. With each successive changing of the guard at the AHC, we can rely on a corresponding change in the perceived grounds for discipline under the first part of section 334.100.2(5). Of course the government may legitimately act to protect the public, but this type of unbridled power to discipline doctors will discourage people from choosing medicine as a career at a time when Missouri desperately needs doctors.

Many Missouri counties have been designated Health Professional Shortage Areas (HPSA) by the U.S. Department of Health and Human Services because of a lack of health care providers, see 19 C.S.R. 10-4.030 (emergency rule establishing procedure for alien physician's INS waiver for work in Missouri

HPSA) (effective April 9, 2001 to October 6, 2001), and the need to encourage, not discourage, people to choose medicine as their profession is currently substantial. To that end, the Missouri Department of Health implemented the Primary Care Resource Initiative for Missouri (PRIMO) to provide financial assistance and guidance to Missourians seeking a career as primary health care providers. 19 C.S.R. 10-4.020. Also, on July 11, 2001, Governor Holden addressed Missouri's shortage of doctors by announcing that a significant portion of Missouri's share of the national tobacco settlement will be spent to improve healthcare in areas facing that shortage.

See www.gov.state.mo.us/press/press071101b.

When members of a profession are subject to administrative discipline, potentially including loss of livelihood, because of a vague statute that permits discipline for unspecified conduct, depending on the subjective understanding of a bureaucrat, then predictably, as a corollary, that profession will experience a decrease in membership. This Court should hold section 334.100.2(5) is void for vagueness because it gives no notice of what conduct is prohibited, and it gives no guidance to the AHC in enforcing discipline. Also, because section 334.100.2(5) specifically permits discipline for incompetence and negligence, the language permitting discipline for "[a]ny conduct . . . which . . . might be harmful . . ." necessarily includes something other than incompetence and negligence, but there is no way to accurately surmise what.

CONCLUSION

For the foregoing reasons this Court should declare the AHC has unreasonably and erroneously interpreted the meaning of "repeated negligence' against the legislature's intended meaning and purpose, and, further, this Court should declare section 334.100.2(5), RSMo is void for vagueness under the due process clauses of the United States and Missouri Constitutions.

Respectfully submitted,

HENDREN AND ANDRAE, L.L.C.

_____

Duane E. Schreimann, #27321
221 Bolivar Street
P.O. Box 1069
Jefferson City, MO 65102
(573) 636-8135

Attorneys for Missouri State
Medical Association

CERTIFICATE OF CONSENT

The undersigned hereby certifies that all of the parties to this proceeding have consented to the MSMA filing this Amicus Curiae Brief in this Court.

HENDREN AND ANDRAE, L.L.C.

_____

Duane E. Schreimann, #27321
221 Bolivar Street
P.O. Box 1069
Jefferson City, MO 65102
(573) 636-8135

Attorneys for Missouri State
Medical Association

CERTIFICATE OF COMPLIANCE WITH

SPECIAL RULE NO. 1

The undersigned certifies that this Amicus Curiae Brief complies with the limitations contained in Special Rule No. 1(b), contains 4050 words, and that the floppy disk filed together with this Amicus Curiae Brief in accordance with Special Rule No. 1(f) has been scanned for viruses and is virus-free.

HENDREN AND ANDRAE, L.L.C.

_____

Duane E. Schreimann, #27321
221 Bolivar Street
P.O. Box 1069
Jefferson City, MO 65102
(573) 636-8135

Attorneys for Missouri State
Medical Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Amicus Curiae's Brief and one copy of the disk required under Special Rule No. 1(f) were served this twenty-third day of October, 2001, by prepaid United States Mail, to Glenn E. Bradford, Glenn E. Bradford & Associates, P.C., The Palace Building, 1150 Grand, Ste. 230, Kansas City, MO 64106, Attorney for the Board of Healing Arts; Johnny K. Richardson, Brydon, Swearengen & England, P.C., 312 E. Capitol Ave., P.O. Box 456, Jefferson City, MO 65102-0456, Attorney for Dr. Tendai; and William A. Mauck, Yates, Mauck, Bohrer, Elliff, Croessman and Wieland, P.C., 3333 E. Battlefield, Ste. 1000, Springfield, MO 65804, Attorney for Dr. Tendai.

_____

Duane E. Schreimann