SC90107

IN THE SUPREME COURT OF MISSOURI

JAMES KLOTZ AND MARY KLOTZ,

Appellants/Respondents,

vs.

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

Respondents/Appellants.

Appeal from the Circuit Court of St. Louis County, Missouri
Case No. 06CC-4826
The Honorable Barbara Wallace, Judge

BRIEF AMICUS CURIAE OF MISSOURI HOSPTIAL ASSOCIATION

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STATEMENT OF INTEREST

Amicus curiae Missouri Hospital Association ("MHA") is a private, not-for-profit organization whose mission is to create an environment that enables member hospitals and health care systems to improve the health of their patients and community. Since its creation in 1922, MHA has grown from 50 to more than 150 member hospitals. MHA represents virtually every acute care hospital in the state, as well as most of the federal and state hospitals and rehabilitation and psychiatric care facilities. MHA regularly appears as *amicus curiae* in Missouri courts in support of its member hospitals and health care systems when fundamental issues affecting the delivery of health care are at stake.

MHA's interest in this appeal is to encourage this Court to uphold the solution adopted by the legislature in 2005 for problems arising from the complex interplay among health care delivery and availability, malpractice insurance premiums, and tort litigation. Missouri's elected legislature heard all viewpoints and exercised its collective judgment in the best interests of all Missouri citizens. Because the fundamental interests of MHA and its members, as well as those who depend on available and affordable hospital care, would be adversely impacted by a decision overturning the legislation, MHA offers this brief to aid the Court in its consideration of the issue.

CONSENT OF PARTIES

The parties have consented to the filing of this brief by *amicus curiae* Missouri Hospital Association.

POINT RELIED ON

I. Appellants' constitutional challenges to House Bill 393 and Section 538.210 RSMo (2005) should be rejected because Appellants have not carried their heavy burden to show that the 2005 legislation plainly and palpably affronts fundamental law embodied in the constitution in that debates about wise public policy or statistical interpretation are matters entrusted to the judgment of elected legislators, which is entitled to judicial deference.

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

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

Harrell v. Total Health Care, Inc., 781 S.W.2d 58 (Mo. banc 1989)

Winston v. Reorganized School Dist. R-2, 636 S.W.2d 324 (Mo. banc 1982)

ARGUMENT

I. Appellants' constitutional challenges to House Bill 393 and Section 538.210 RSMo (2005) should be rejected because Appellants have not carried their heavy burden to show that the 2005 legislation plainly and palpably affronts fundamental law embodied in the constitution in that debates about wise public policy or statistical interpretation are matters entrusted to the judgment of elected legislators, which is entitled to judicial deference.

Appellants' Initial Brief, and the various amicus briefs filed in support of Appellants, seek to continue the debate about health care in Missouri, and the impact that malpractice premiums and tort litigation have on Missouri health care. Consistent with the separation of powers established by Article II, Section 1 of the Missouri Constitution, such debates about pressing problems, appropriate remedies, and wise public policy are entrusted to the legislative process, and the Missouri legislature has heard these matters debated in many sessions. In 2005, the legislature exercised its collective judgment after hearing many viewpoints. Dissatisfied with that legislation, Appellants and their supporters now ask this Court to overturn it as unconstitutional based on many of the same policy arguments and value judgments the legislature heard but declined to adopt.

An appeal to the highest court of Missouri is not a legislative debate. This is a court of law, governed by legal principles. Those who ask the judicial branch

to overturn the collective judgment of Missouri's elected legislators carry a heavy burden here.

As this Court has recently reiterated, "a statute is cloaked in a presumption of constitutional validity" and "may be found unconstitutional only if it clearly contravenes a specific constitutional provision." *Weigand v. Edwards,* 2009 WL 2381337 at *2 (Mo. banc 2009). "This Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute." *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006) (internal quotations omitted). "Courts will enforce a statute *unless it plainly and palpably affronts fundamental law embodied in the constitution.* When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional." *United C.O.D. v. State of Missouri*, 150 S.W.3d 311, 312 (Mo. banc 2004) (emphasis added). For example, "[w]hen a challenger asserts a statutory classification is violative of equal protection doctrine he must prove abuse of legislative discretion *beyond a reasonable doubt*, and short of that, the issue must settle on the side of validity." *Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324, 327 (Mo. banc 1982) (rejecting arguments that sovereign immunity violated constitutional rights of some tort victims) (emphasis added).

Appellants and their supporters must also overcome *stare decisis* because this Court has already established several guiding principles in its decision

upholding previous comparable provisions regarding medical malpractice litigation. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). Thus, for example, there is no fundamental right or suspect class at issue here, so for purposes of equal protection "the challenged statutory provisions will be upheld if rationally related to a legitimate state interest." *Id.* at 903. And, as this Court has recognized more recently, "'equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with a resulting disadvantage to various groups or persons.'" *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

Similarly, in *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. banc 1989), this Court rejected various constitutional challenges to a statute granting tort immunity to entities qualified as a "health services corporation." Among other things, this Court noted that the legislature authorized formation of such corporations "to sanction one method of combating the cost of health care." *Id.* at 61. The statute did not deny a remedy to tort victims; it "simply limits … access to an additional pocket." *Id.* at 62. This Court also rejected arguments based on non-Missouri authority questioning the constitutional validity of caps on damage awards: such authority is "very probably out of line with Missouri's authority to the extent that it suggests that there may be no distinction among different classes of injured parties based on the nature of their claims. We have consistently sanctioned a shorter statute of limitations for malpractice cases than that which

obtains in other cases." *Id.* at 63. In concluding the plaintiff had not overcome the presumption of constitutional validity, this Court closed with comments equally applicable here:

> The statute operates in an area in which the legislature may balance competing interests. [Plaintiff's] argument reduce to the suggestion that the statute is unwise or unfair. This argument must be addressed to the legislature.

Id. at 63-64.

Although Appellants and their supporters acknowledge some of these standards in passing, their arguments do not adhere to these principles. Instead, they essentially attack the *bona fides* of the legislature, suggesting the legislature "knew—or at least had been told" various propositions of supposed fact by opponents of the 2005 legislation. Appellants' Initial Brief at 43. Such attacks are both improper and immaterial in light of the "well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives or reasons of the legislature or the members thereof." *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 169 (Mo. 1967) (internal quotation omitted). Nor can Appellants be heard to complain that the 2005 legislation was influenced by those who lobbied for tort reform. As this Court recognized in upholding a ten-year statute of repose protecting architects, engineers and construction-services providers, "lobbying is an essential and important function in the legislative process." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 835 (Mo. banc 1991). "[T]he right of citizens to

petition the legislature in the form of lobbying is one of the most fundamental rights guaranteed by the free speech provision of the first amendment." *Id.* "Courts absolutely may not look behind the legislature's enactment of a statute to second guess the process by which the legislature arrived at its conclusion." *Id.* Were a court to do so, "it would constitute a most obvious and egregious violation of the separation of powers." *Id.*

In any event, the "facts" offered by Appellants are merely a collection of questionable propositions on one side of a debate that the legislature was called upon to resolve. For example, Appellants attempt (at page 37 of their Initial Brief) to establish the supposed facts before the legislature in 2005 based on snippets from a report by the Missouri Hospital Association issued in 2002—*three years earlier*—but the insurance market and legal environment are ever-changing in reaction to new developments. Thus, the 2002 MHA report could not, and did not, reflect the impact of the decision only months earlier in *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo.App.2002), which upheld the application of multiple damage caps in a single case. *Scott* multiplied the potential exposure for hospitals and other health care providers and generated corresponding uncertainty in the insurance market, as well as among self-insured entities.

By 2005, MHA was pointing to several disturbing developments in an escalating crisis in the affordability of medical malpractice liability insurance, including these:

- Physicians were leaving their medical practices in Missouri, either through early retirement or relocation to other states with more hospitable coverage environments.
- Physicians and hospitals were reducing their scope of services because of liability costs.
- Hospital trauma centers faced the prospect of closure from physicians leaving or curtailing their practices. Without physicians to meet round-the-clock demands for immediate access to trauma care, a hospital cannot sustain its trauma center designation.
- Higher medical malpractice premiums appeared to be affecting physician practice decisions that were in turn affecting hospitals. The St. Louis media had reported neurosurgeons were increasingly likely to refer riskier procedures to academic medical centers rather than local community hospitals.

Nor is Appellants' reliance on a few statistics determinative, or even informative, on the legal issues before this Court. Contrary to arguments by Appellants and their supporters, general statewide statistics may not accurately portray the quality, affordability and availability of health care in various parts of Missouri, a state of considerable demographic diversity. The legislature had to consider the interests of all Missourians, make choices, and pass legislation. Those legislators stand directly accountable to voters, to whom they ultimately answer for the choices they make. It is not for this Court to substitute its judgment

for that of the legislature or to wade into a debate on public policy and statistical interpretation.

CONCLUSION

Although Appellants and their supporters may have proven their dissatisfaction with the 2005 legislation, such arguments fall far short of proving it unconstitutional. Time and again, this Court has rejected arguments to invalidate the legislature's collective decisions to advance important social objectives such as available and affordable health care by imposing monetary, temporal or other limits on tort liability and litigation. So too, Appellants here have shown no right to relief in this forum. "It is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute, as these are matters for the legislature's determination." *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 277-78 (Mo. banc 2002) (internal quotation omitted).

Accordingly, *amicus curiae* Missouri Hospital Association urges this Court to deny Appellants' constitutional arguments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief contains 2,198 words; and

4. The disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

On this 4th day of November, 2009, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by mail, first-class postage prepaid, addressed to:

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