No. 90107

IN THE SUPREME COURT OF MISSOURI

JAMES KLOTZ and MARY KLOTZ,

Appellants/Cross-Respondents,

v.

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

Respondents/Cross-Appellants.

Appeal from the Circuit Court of St. Louis County, Missouri
Honorable Barbara Wallace, Circuit Judge

AMICI CURIAE BRIEF OF MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, NFIB/MISSOURI, MISSOURI MOTOR CARRIERS ASSOCIATION, HEALTH COALITION ON LIABILITY AND ACCESS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, PHYSICIANS INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS

Mark A. Behrens
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street N.W., Suite 200
Washington, DC 20004
Tel: (202) 783-8400

Robert T. Adams (Mo. Bar No. 34612)
(COUNSEL OF RECORD)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Tel: (816) 474-6550

Attorneys for Amici Curiae

(Of Counsel Listed on Following Page)

Of Counsel

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Allan J. Stein
AMERICAN INSURANCE ASSOCIATION
2101 L Street, NW
Suite 400
Washington, DC 20037
(202) 828-7158

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES & LEGISLATION

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

As organizations representing a wide range of Missouri businesses, health care professionals, and their insurers, *amici* have an interest in ensuring that Missouri's civil litigation environment is fair, predictable, and reflects sound policy. These goals are furthered by Mo. Rev. Stat. § 538.210, which generally limits noneconomic damages to $350,000 in health care liability actions. *Amici* have a substantial interest in the constitutionality of the statute and would be adversely impacted if it is nullified.

CONSENT OF PARTIES

The parties have consented to the filing of this brief. Therefore, *amici* file this brief pursuant to Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

JURISDICTIONAL STATEMENT

Amici adopt Respondents/Cross-Appellants' Jurisdictional Statement.

STATEMENT OF FACTS

Amici adopt Respondents/Cross-Appellants' Statement of Facts.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN FINDING THAT MISSOURI'S NONECONOMIC DAMAGES LIMIT IN HEALTH CARE LIABILITY CASES APPLIES, BECAUSE MO. REV. STAT. § 538.210 LIMITS NONECONOMIC DAMAGES IN HEALTHCARE LIABILITY ACTIONS, IN THAT THE STATUTE IS A VALID EXERCISE OF LEGISLATIVE AUTHORITY.

Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc), *cert. denied*, 506 U.S. 991 (1992).

INTRODUCTION

Noneconomic damages awards, such as for pain and suffering, are highly subjective and inherently unpredictable. There is "no market for pain and suffering." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 549 (2006). Consequently, legal scholars have long recognized that putting a "monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 Law & Contemp. Probs. 219, 222 (1953). "[J]uries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985). One commentator noted the difficulty expressed by jurors in putting a price on pain and suffering:

> Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical[s]. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

Trial lawyers understand these dynamics and suggest juries award extraordinarily large amounts for pain and suffering. That was the situation here, where the jury

awarded plaintiffs over $2.5 million in compensatory damages — noneconomic damages were more than forty percent of the total award.

Large pain and suffering awards, such as in the subject appeal, are of fairly recent vintage. Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff's actual pecuniary loss, such as medical expenses. That is not true today. In recent years, a confluence of factors has led to a significant rise in the size of pain and suffering awards, creating the need for statutory upper limits to guard against excessive and unpredictable outlier awards. Such awards may occur when juries are improperly influenced by sympathy for the plaintiff, bias against a deep-pocket defendant, or a desire to punish the defendant rather than compensate the plaintiff. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002).

Statutory limits, such as Mo. Rev. Stat. § 538.210, promote more uniform treatment of individuals with comparable injuries, *see* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995) (unpredictability "undermines the legal system's claim that like cases will be treated alike"), facilitate settlements, address "over- or under precautions by affected industries and insurers," *id.*, and limit arbitrariness that may raise potential due process problems. *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"), *reh'g denied*, 691 N.W.2d 436 (Mich.), *cert. denied*, 546 U.S. 821 (2005); *see also* Paul V. Niemeyer, *Awards for Pain and Suffering: The*

Irrational Centerpiece of Our Tort System, 90 Va. L. Rev. 1401, 1414 (2004) ("The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

Indeed, as this Court found in *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc), *cert. denied*, 506 U.S. 991 (1992), when it upheld another cap on noneconomic damages in health care liability actions:

> The legislature could rationally believe that the cap on noneconomic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice insurance premiums paid by health care providers. Were this to result, the legislature could reason, physicians would be willing to continue "high risk" medical practices in Missouri and provide quality medical services at a less expensive level than would otherwise be the case.

Id. at 904. The Court concluded that the cap was "rationally related to the general goal of preserving adequate, affordable health care for all Missourians." *Id.* at 904-905.

Likewise, Mo. Rev. Stat. § 538.210 was a rational legislative response to outlier awards in health care liability cases, rising health care costs, and concerns about excessive liability that were contributing to an exodus of physicians from Missouri. The Legislature drew a careful balance when it enacted Mo. Rev. Stat. § 538.210. To promote greater access to affordable health care for all Missourians, the Legislature decided upon a substantial, but not unlimited, remedy for the distinct minority of

Missourians that may find themselves as medical malpractice claimants with extraordinary noneconomic loss. Overall, the law is pro-consumer despite the claimed negative impacts to a few, such as the Appellants here. The noneconomic damage cap does not take away from any economic or punitive damages award.

This Court should respect the doctrine of *stare decisis* with regard to *Adams* and respect the Legislature's sound policy judgment with respect to the subject cap. *See generally* Victor E. Schwartz, Mark A. Behrens & Monica Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

I. THE EVOLUTION AND RISE OF PAIN AND SUFFERING AWARDS

A. Modest Beginnings

Initially, the common law rarely recognized damages beyond pecuniary harm. Until the mid-nineteenth century, damages that compensated plaintiffs for intangible losses were often referred to as "exemplary damages." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 614-15 (2003). An early law review article recognized, "[t]he difficulty of estimating compensation for intangible injuries, was the cause of the rise of [exemplary damages] . . . [W]hen the early judges allowed the jury discretion to assess beyond the pecuniary damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment." Edward C. Eliot, *Exemplary Damages*, 29 Am. L. Reg. 570, 572 (1881) (presently entitled U. Pa. L. Rev.); *see also* Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 519 (1957) ("In the

1760's some courts began to explain large verdicts awarded by juries in aggravated cases as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings"). By the mid-1900s, the law firmly established that pain and suffering awards were to compensate for intangible injuries; punitive damages punished a defendant for wrongful conduct.

Prior to the Twentieth Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars, each of which may have included an element of noneconomic damages. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 396 (2007). High noneconomic damage awards were uniformly reversed. *See id.* at 379-87. As recently as the 1930s, pain and suffering awards were generally modest. *See* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

B. The Turning Point

The size of pain and suffering awards took its first leap after World War II, as trial lawyers such as Melvin Belli began a campaign to increase such awards. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). Trial lawyers soon became adept at increasing pain and suffering awards. For example, during a nine-month period in 1957, there were fifty-three verdicts of $100,000 or more. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 568 (2006). Scholars

began to question the proper role and measurements for such awards. *See* Charles A. Wright, *Damages for Personal Injuries,* 19 Ohio St. L.J. 155 (1958).

Overall, in inflation-adjusted terms, the average award grew from $38,000 in the 1940s and 1950s to $48,000 in the 1960s. *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989). The pace continued. For example, from the 1960s to the 1980s, pain and suffering awards in wrongful death cases grew 300%. *See id.* Pain and suffering awards became the most substantial part of tort costs. As the Third Circuit found, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitutes the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

Scholars largely attribute this rise to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that "someone should pay"; and (5) better organization by the plaintiffs' bar. *See* Merkel, *supra*, at 553-66; Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004).

C. The Recent and Rapid Skyrocketing of Awards

In recent years, pain and suffering awards skyrocketed, both nationally and in Missouri. Between 1994 and 2000, jury awards in personal injury cases grew by an alarming 176%. *See There is an Attack on Medical Profession*, Sunday News (Lancaster,

Pa.), May 16, 2004, at P3 (citing Jury Verdict Research). From 1994 to 2001, average jury awards rose from $1.14 million to $3.9 million in medical malpractice cases and $187,000 to $323,000 in automobile cases. *See* Robert P. Hartwig, *Liability Insurance and Excess Casualty Markets: Trends, Issue & Outlook*, at 51 (Ins. Info. Inst., Oct. 2003) *available at* http:// server.iii.org/yy_obj_data/binary/686661_1_0/liability.pdf.

The bulk of this rise can be attributed to pain and suffering awards. For instance, one study found that pain and suffering awards accounted for sixty to seventy percent of jury verdicts between 1990 and 2000. *See Attack on Medical Profession, supra*, at 1 (citing Jury Verdict Research). Another study reports that pain and suffering awards represent more than half of all tort damages. *See* Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System* 17 (2003), *available at* https://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (pain and suffering awards represent twenty-four percent of U.S. tort costs; economic damages represent twenty-two percent). As United States Circuit Court Judge Paul Niemeyer has recognized, "money for pain and suffering . . . provides the grist for the mill of our tort industry." Niemeyer, 90 Va. L. Rev. at 1401; *see also* Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (noting pain and suffering awards in the United States are more than ten times those awarded in the most generous of the other nations).

In fact, the average pain and suffering award in 1989 was $319,000; just ten years later it was $1,379,000. *See* Kim Brimer, *Has "Pain and Suffering" Priced Itself Out of*

the Market, Ins. J., Sept. 8, 2003, *available at* http://www.insurancejournal.com/magazines/southcentral/2003/09/08/partingshots/32172.htm. This rise may be due, at least in part, to increasing statutory and constitutional restrictions on punitive damage awards, which led lawyers to bolster other forms of recovery. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002).

II. THE PUBLIC POLICY BASES UNDERLYING MISSOURI'S NONECONOMIC DAMAGES STATUTE

A. The Litigation and Economic Climate Preceding Enactment of the 2005 Reform

Missouri first enacted a noneconomic damages cap for medical negligence actions in 1986. *See* 1986 Mo. Laws 879, § 538.210. This cap was initially set at $350,000, but adjusted annually for inflation. In 1992, this Court upheld that cap in *Adams v. Childrens' Mercy Hospital*, 832 S.W.2d 898. By 2005, the cap had crept up to $579,000, and Missouri's medical liability environment progressively worsened, prompting the Legislature to amend the law and set the noneconomic damages limit at $350,000.

According to several reports issued by the Missouri Department of Insurance, Financial Institutions & Professional Regulations (DIFP), the average malpractice award increased from $166,623 in 2001 to $253,304 in 2005. *See* 2005 Medical Malpractice Insurance Report, Dept. of Ins., Fin. Inst. & Prof. Regs., Sep. 2006, at 26, *available at* http://insurance.mo.gov/reports/medmal/2005_Medical_Malpractice_Report..pdf. This represents an increase in average awards of approximately fifty-two percent over four

years. For physicians and surgeons, in particular, this represented the continuation of a deteriorating situation, as the average amounts they paid on claims increased approximately eight-four percent from 1999 to 2005. *See id.* at 27.

Over the same period, Missouri insurers experienced "depressed and even negative returns for the period of 1999-2003." 2008 Medical Malpractice Insurance Report, Dept. of Ins., Fin. Inst. & Prof. Regs., July 2009, at iv, *available at* http://insurance.mo.gov/Contribute%20Documents/2008MedicalMalpracticeReport.pdf. In addition, insurer's "costs had exceeded 100 percent of [earned] premium during seven of the eight years preceding 2004." *Id.* Insurers were being stretched to their limits, and needed to increase premiums to avoid a collapse within Missouri's insurance market.

Higher premiums, in turn, placed greater financial strain on the medical community. Many physicians, particularly those in specialized practices, could no longer afford to maintain their insurance or chose to relocate in light of premium increases. *See* Dan Margolies, *Doctors Assail State for Soaring Premiums*, Kan. City Star, July 16, 2004, at C1, *available at* 2004 WLNR 19108743 (reporting that forty percent of neurosurgeons in Missouri had retired and almost twenty-seven percent had relocated over the span of a few years); Bill Bell Jr., *Doctors Make House Call*, St. Louis Post-Dispatch, Jan. 30, 2003, at A1, *available at* 2003 WLNR 1743817 (reporting malpractice rates for obstetrician/gynecologists ranged from $60,000 to $120,000 per year); *see also* Alan Bavley, *Malpractice Fears Put Doctors on Defense*, Kan. City Star, June 1, 2005, at A1, *available at* 2005 WLNR 22803779.

Increasing average awards, higher insurance premiums, and an exodus of medical professionals combined to create an untenable environment. The availability and affordability of medical malpractice insurance became seriously compromised. *See* 2008 Medical Malpractice Insurance Report, *supra*, at 17 (showing a gradual decrease in the number of companies writing medical malpractice insurance beginning in 2001); *see also* Mo. Dept. of Ins., 3 Public Policies 1, 3 (2004) (quoting Missouri Director of Insurance, Scott B. Lakin, that the "major problem is convincing companies to enter and compete in the Missouri market"). As this Court appreciates, Missouri is not isolated in the economy; it must compete with other states. If the state's legal climate is not competitive, service providers will go elsewhere. *See, e.g.,* Editorial, Joseph Nixon, *Why Doctors Are Heading to Texas*, Wall St. J., May 17, 2008, at A9, *abstract available at* 2008 WLNR 9419738.

Recognizing the impact ever-increasing noneconomic damage limits had on this environment, the Legislature decided in 2005 to fix the medical malpractice noneconomic damages cap at $350,000. *See* Mo. Rev. Stat. § 538.210. The Legislature additionally amended the law so plaintiffs could not separately apply the capped amount to each named defendant and "stack" the total recovery. *See id.* The new law, which applied to all causes of action filed after August 25, 2005, received overwhelming bipartisan support, passing 112-47 in the House and 23-8 in the Senate. *See* Mo. House J., Mar. 16, 2005, at 664-66; Mo. Sen. J., Mar. 16, 2005, at 478-79.

B. Positive Results for Missouri's Economy

The 2005 reform had an immediate and beneficial impact on Missouri's medical malpractice environment. Prior to the new law taking effect, the number of newly opened medical malpractice claims "spiked sharply" to 2,425 claims, eclipsing the previous record of 2,128 claims in 1986 when the original cap was enacted. 2005 Medical Malpractice Insurance Report, *supra*. Since 2005, the number of medical malpractice claims has declined dramatically and remained steady at levels roughly one-third lower than they were between 2000 and 2004. *See* 2008 Medical Malpractice Insurance Report, *supra*, at 18.

In addition, the average medical malpractice award has significantly decreased. In 2008, the average award amount was $202,612, or approximately twenty percent less than in 2005. *See id.* at 25. These more manageable average award amounts have enabled several insurers to cut malpractice rates. For instance, the Medical Liability Alliance, which underwrites about five percent of Missouri's medical insurance market, announced a six percent across-the-board rate reduction in July 2007; the Physicians Professional Indemnity Association, which underwrites about four percent of the market, implemented a fourteen percent base rate reduction at the beginning of 2008. *See* Terry Ganey, *Doctors vs. Lawyers*, Colum. Daily Trib., Oct. 4, 2009, *available at* 2009 WLNR 19611660.

In addition, physicians and other medical personnel are returning to Missouri. According to the Board of Healing Arts, Missouri lost 225 physicians in the three years leading up to 2005 reform. Since the first full year the new law was in place, however,

the state has *added* 486 doctors. *See id.* As former Missouri Governor Matt Blunt recently summarized:

> Missouri's medical malpractice claims are now at a 30-year low. Average payouts are about $50,000 below the 2005 average. Malpractice insurers are also turning a profit for the fifth year in a row—allowing other insurers to compete for business in Missouri.

Matt Blunt, *How Missouri Cut Junk Lawsuits*, Wall St. J., Sep. 22, 2009, at A23, *abstract available at* 2009 WLNR 18711971. The cap has worked as the Legislature intended.

III. MISSOURI'S NONECONOMIC DAMAGES STATUTE REPRESENTS LEGITIMATE, CONSTITUTIONAL LEGISLATIVE POLICY

A. Numerous Courts Have Enacted and Upheld Limits on Noneconomic Damages

Missouri is not alone in trying to restrain outlier pain and suffering awards. Approximately two-thirds of the states have enacted limits on such awards. *See* Nat'l Ass'n of Mut. Ins. Cos., *Noneconomic Damage Reform*, *available at* http://www.namic.org/reports/tortReform/NoneconomicDamage.asp (surveying statutory noneconomic damages limits). Missouri is among numerous states that have adopted a limit specifically applicable to health care liability actions.[1]

---

[1] *See, e.g.*, Ga. Code Ann. § 51-13-1; Ind. Code § 34-18-14-3; La. Rev. Stat. Ann. § 40:1299.42; Neb. Rev. Stat. § 44-2825; Okla. Stat. tit. 63, § 1-1708.1F; S.C. Code Ann. § 15-32-220; Tex. Civ. Prac. & Rem. Code Ann. § 74.301; *see also* Alaska Stat.

Furthermore, the clear trend among state supreme court decisions evaluating the constitutionality of such laws, and laws generally applicable to all tort or civil cases, is to uphold the legislation, as this Court did in *Adams*. *See* Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps."). Examples include:

- **Alaska:** *C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006) (noneconomic damages cap for personal injury did not violate equal protection under state constitution); *Evans ex rel. Kutch v. State,* 56 P.3d 1046 (Alaska 2002) (noneconomic damages cap did not violate the right to a jury trial, equal protection, due process, separation of powers doctrine, access to courts, or prohibition against special legislation).

- **California:** *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.) ($250,000 noneconomic damages cap in medical malpractice actions did not violate equal protection or due process), *appeal dismissed*, 474 U.S. 892 (1985); *Van Buren v. Evans*, 2009 WL 1396235 (Cal. App. May 20, 2009) (unpublished) (same); *see also Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

---

§ 09.17.010; Colo. Rev. Stat. § 13-21-102.5(3)(a); Haw. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. Ann. § 60-19a02(b); Md. Cts. & Jud. Proc. Code § 11-108; Ohio Rev. Code Ann. § 2315.18.

- **Colorado:** *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004) ($1 million aggregate limit on damages recoverable in health care liability actions did not violate equal protection, right to jury trial, or separation of powers); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998) ($250,000 noneconomic damages cap with alternate $500,000 cap did not violate equal protection, due process, or access to courts); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (cap law did not violate due process or equal protection).

- **Florida:** *Mizrahi v. North Miami Med. Ctr., Ltd.*, 761 So. 2d 1040 (Fla. 2000) (wrongful death statute precluding adult children from recovering nonpecuniary damages in action for a parent's death due to medical malpractice did not violate equal protection); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla.) (statute providing for recovery of 80% of lost wages and earning capacity and capping noneconomic damages at $250,000 in medical malpractice claims when party submits to a binding medical arbitration panel did not violate equal protection, due process, takings, right to jury trial, single subject requirement, or nondelegation doctrine), *cert. denied*, 510 U.S. 915 (1993).

- **Idaho:** *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000) ($400,000 noneconomic damages cap did not violate right to jury trial, prohibition against special legislation, or separation of powers).

- **Kansas:** *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990) ($250,000 noneconomic damages cap in health care liability actions did not violate right to jury trial or due process), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989) ($100,000 limit on

noneconomic damages for wrongful death did not violate equal protection, due process, or right to jury trial); *Adams v. Via Christi Reg'l Med. Ctr.*, 19 P.3d 132 (Kan. 2001) (same).

- **Louisiana:** *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992) (medical malpractice noneconomic damages cap did not violate state or federal equal protection guarantees or open courts provision of state constitution), *cert. denied*, 508 U.S. 909 (1993); *see also Owen v. United States*, 935 F.2d 734 (5th Cir.), *cert. denied.* 502 U.S. 1031 (1992).

- **Maine:** *Peters v. Saft*, 597 A.2d 50 (Me. 1991) ($250,000 limit on nonmedical damages recoverable against servers of liquor did not violate equal protection, due process, right to jury trial, or right to remedy).

- **Maryland:** *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) ($350,000 noneconomic damages cap did not violate equal protection or right to jury trial).

- **Massachusetts:** *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329 (Mass. 1989) ($20,000 limit on charitable institution liability did not violate right to jury trial, equal protection, or due process), *cert. denied*, 493 U.S. 1056 (1990).

- **Michigan:** *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002) (medical malpractice noneconomic damages cap did not violate equal protection, separation of powers, or the right to have damages determined by a jury); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. App. 2004) (same for noneconomic damages cap in product liability actions); *see also Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (2005) (Mich. law).

- **Minnesota:** *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) ($400,000 limit on damages for embarrassment, emotional distress, and loss of consortium did not violate right to remedy).

- **Montana:** *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989) (Wrongful Discharge From Employment Act's noneconomic damages prohibition did not violate access to courts, right to remedy, or equal protection).

- **Nebraska:** *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) ($1.25 million aggregate damages limit in medical liability actions did not violate prohibition against special legislation, equal protection, open courts, right to remedy, right to jury trial, takings, or separation of powers).

- **New Mexico:** *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002) (medical liability cap not unconstitutional).

- **Ohio:** *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007) (noneconomic damages cap for certain tort actions did not violate right to jury trial, right to remedy, due process or equal protection).

- **Oregon:** *Greist v. Phillips*, 906 P.2d 789 (Or. 1995) ($500,000 noneconomic damages cap did not violate remedies provision, privileges and immunities, right to jury trial, due process or equal protection); *Hughes v. Peacehealth*, 178 P. 3d 225 (Or. 2008) (reaffirming *Greist*); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (statute precluding award of noneconomic damages to uninsured motorists in actions arising from automobile accidents did not violate right to jury trial or right to remedy).

- **South Carolina:** *Wright v. Colleton County Sch. Dist.*, 391 S.E.2d 564 (S.C. 1990) ($250,000 aggregate damages cap in Tort Claims Act did not violate right to jury trial, right to remedy, equal protection, or separation of powers).

- **South Dakota:** *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) ($500,000 limit on noneconomic damages "remains in full force and effect").

- **Texas:** *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) ($500,000 general damages limit for health care providers did not violate open courts, right to redress, or equal protection).

- **Utah:** *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) ($250,000 noneconomic damages cap in medical malpractice actions did not violate open courts, uniform operation of laws, due process, right to jury trial, or separation of powers).

- **Virginia:** *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) ($1 million limit on medical malpractice recoveries did not violate right to jury trial, prohibition against special legislation, separation of powers, takings, due process, or equal protection); *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989) (limit on recoveries in medical malpractice actions did not violate due process, right to jury trial, separation of powers, prohibition against special legislation, or equal protection); *see also Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989).

- **West Virginia:** *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877 (W.Va. 1991) ($1 million cap on noneconomic damage awards in medical malpractice

actions did not violate equal protection, due process, or right to remedy); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001) (reaffirming *Robinson*).

- **Virgin Islands:** *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (noneconomic damages cap in medical malpractice actions did not violate Seventh Amendment to United States Constitution).

In fact, more than two times as many state courts of last resort have upheld statutory limits on noneconomic damages awards than have struck them down.[2] For example, the Ohio Supreme Court recently found that a cap:

> bears a real and substantial relation to the general welfare of the public. The General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system

---

[2] For cases striking down caps, see *Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lakin v. Senco Prods. Inc.*, 987 P.2d 463 (Or. 1999); *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).

of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.

Arbino, 880 N.E.2d at 435-36. The Alaska Supreme Court has said that such laws "bear[ ] a fair and substantial relationship to a legitimate government objective." *Dep't of Corrections*, 151 P.3d at 381. These courts and others have recognized, "It is not this court's place to second-guess the Legislature's reasoning behind passing the act," *Gourley*, 663 N.W.2d at 69; rather, "it is up to the legislature . . . to decide whether its legislation continues to meet the purposes for which it was originally enacted." *Ghaphery*, 552 S.E.2d at 412.

B. This Court Has Respected the Legislature's Prerogative To Place Rational Bounds on Tort Liability

The Court has traditionally respected the Legislature's overlapping authority to decide broad tort policy rules for Missouri. For example, in *Adams, supra,* this Court held that medical liability reforms providing for $350,000 limit on noneconomic damages recoverable from any one defendant in a health care liability action, allowing future damages to be in periodic payments, and requiring apportionment of fault to include percentage allocated to released parties did not violate the equal protection provisions of the Missouri or United States Constitutions, or the open courts, right to remedy, or due process provisions of the Missouri Constitution, and the noneconomic damages cap did not violate the right to jury trial in the Missouri Constitution.

In addition, this Court has upheld:

- a $100,00 limit on tort recoveries against State agencies, *see Richardson v. State Hwy. & Transp. Comm'n*, 863 S.W.2d 876 (Mo. banc 1993) (statute limiting tort recoveries against State agencies to $100,000 did not violate equal protection provisions of Missouri or United States Constitutions); *Fisher v. State Hwy. Comm'n of Mo.*, 948 S.W.2d 607 (Mo. banc 1997) (statute did not violate state constitutional rights regarding "the enjoyment of the gains of their own industry," equal protection, or open courts and certain remedy).
- a ten-year statute of repose for improvements to real property, *see Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991) (repose statute did not violate equal protection or due process provisions of Missouri or United States Constitutions, did not constitute prohibited special legislation, and did not violate open courts provision of Missouri Constitution); *Magee v. Blue Ridge Prof. Bldg. Co., Inc.*, 821 S.W.2d 839 (Mo. banc 1991) (statute did not violate open courts provision of Missouri Constitution or due process or equal protection provisions of Missouri or United States Constitutions);
- Missouri's Dram Shop Act, *see Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638 (Mo. banc 2006) (Act did not violate open courts provision of Missouri Constitution or equal protection provisions of Missouri or United States Constitutions);
- a punitive damages "sharing" statute, *see Hoskins v. Business Men's Assurance*, 79 S.W.3d 901 (Mo. banc 2002) (statute authorizing state to assert

a lien of fifty percent of any final punitive damages judgment did not violate Excessive Fines provisions of Missouri or United States Constitutions); *Fust v. Attorney General*, 947 S.W.2d 424 (Mo. banc 1997) (statute did not violate single subject, "clear title," due process, equal protection, or special law provisions of the Missouri Constitution, the separation of powers, or represent an unconstitutional attempt to grant money to private persons in contravention of the Missouri Constitution);

- a sovereign immunity statute, *see Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324 (Mo. banc 1982) (sovereign immunity law permitting tort claims only if arising from public employee's operation of a motor vehicle did not violate equal protection under the Missouri or United States Constitutions);
- an affidavit of merit requirement for medical malpractice actions, *see Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. banc 1991) (affidavit of merit requirement for medical malpractice actions did not violate right to jury trial, open courts, or separation of powers provisions of Missouri Constitution or equal protection or due process provisions of Missouri or United States Constitutions); and
- a statute which exempted health service corporations from some forms of liability for injuries to patients, *see Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. banc 1989) (statute did not violate open courts provision of Missouri Constitution and did not violate equal protection or due process provisions of Missouri or United States Constitutions).

Indeed, as this Court made explicit in *Adams*, "[i]t 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." *Id.* (quoting *Winston*, 636 S.W.2d at 327)).

The same concept has been expressed by the United States Supreme Court, which has stated:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (internal citations omitted).

The long-standing recognition of the separation of powers, both by this Court and by the United States Supreme Court, derives logical and factual support from the inherent strengths of the legislative process. This is particularly true with respect to tort law, because the impacts on Missouri's citizens go far beyond who should win a particular case. The Legislature can focus more broadly on how tort law impacts the availability and cost of health care delivery. The Legislature has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed decisions about the need for broad public policy changes in the law. Through the hearing process, the Legislature is the best body equipped to hold a full discussion of the competing principles and controversial issues of tort liability, because it has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

A similar point was made by United States Supreme Court Justice Harland Stone, who cautioned that "the only check upon [the Court's] exercise of power is [the Court's]

own sense of self-restraint. For the removal of unwise laws from the statute books *appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*" *United States v. Butler*, 297 U.S. 1, 79 (1936).

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added). The Court's statement is particularly applicable here.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

In contrast to this Court's tradition and the greater weight of decisions from other states, Plaintiffs here seek to convince this Court to use an expansive view of the Missouri Constitution to sit as a "super legislature." Plaintiff's plea brings to mind a highly discredited period in the United States Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the

"*Lochner* era" (after the unsound decision, *Lochner v. New York*, 198 U.S. 45 (1905)), the Court nullified Acts of Congress that it disagreed with as a matter of public policy, using the United States Constitution as a cloak to cover its highly personalized decisions.

Lochner-like decisions create unnecessary tension between the legislative and judicial branches and undermine public confidence in the courts. *See* Comment, *State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative, State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000) (Ohio Supreme Court's decision to strike down a prior tort reform law drove "a deeper wedge between the Ohio judiciary and its legislature" and "may have undermined the Ohio Supreme Court's valued position as a defender of the constitution.").

Such decisions also may raise potential problems under the United States Constitution. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001); Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 Seton Hall L. Rev. 649, 664 (2001) ("If too many state courts insist on preserving a historical, illegitimate law-making power to frustrate civil justice reform, perhaps it is not too far-fetched to imagine a federal court solution to the problem."); M. Margaret Branham Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is

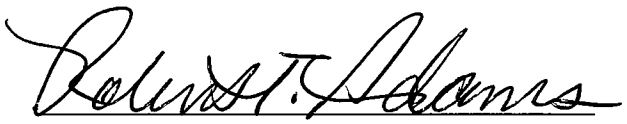
not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

Furthermore, a decision to strike down the medical malpractice noneconomic damage cap would undermine the principle of *stare decisis*, and could lead to challenges to other socially beneficial laws in Missouri. *See*, *e.g.*, Mo. Rev. Stat. § 190.606 (emergency medical services immunity); Mo. Rev. Stat. § 537.120 (physician not liable for good faith restraint of mentally incapacitated persons); Mo. Rev. Stat. §§ 340.287, 537.037 (Good Samaritan laws); Mo. Rev. Stat. § 188.130 (no cause of action for wrongful life); Mo. Rev. Stat. § 537.325 (immunity for inherent risks of equine activities); Mo. Rev. Stat. § 537.550 (limitation on liability of counties, cities, or villages for harms at fairs or festivals); Mo. Rev. Stat. § 537.595 (immunity from liability for claims relating to weight gain or obesity); Mo. Rev. Stat. § 537.230 (limit on liability of mining operator for wrongful death of employee); Mo. Rev. Stat. § 538.228 (immunity for physicians who provide medical treatment at a city or county health department); Mo. Rev. Stat. §§ 191.737, 538.228 (immunity for persons who report information in good faith to the department of health and senior services); Mo. Rev. Stat. § 194.285 (immunity for anatomical gifts); Mo. Rev. Stat. § 196.981 (immunity for matters related to donating, accepting, or dispensing certain prescription drugs).

CONCLUSION

For these reasons, this Court should uphold Mo. Rev. Stat. § 538.210.

Respectfully submitted,



Robert T. Adams (Mo. Bar No. 34612)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Mark A. Behrens
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street N.W., Suite 200
Washington, DC 20004
(202) 783-8400

Of Counsel

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Allan J. Stein
AMERICAN INSURANCE ASSOCIATION
2101 L Street, NW
Suite 400
Washington, DC 20037
(202) 828-7158

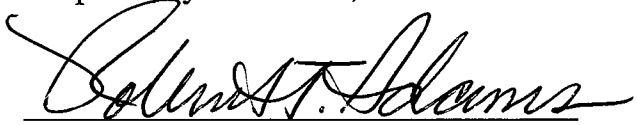
Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Dated: November 4, 2009

RULE 84.06(C) CERTIFICATION

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (3) this Brief contains 6,838 words, as calculated by the Microsoft Word software used to prepare this Brief.

Respectfully Submitted,



Robert T. Adams (Mo. Bar No. 34612)

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk (that the undersigned certifies was scanned for viruses and is virus free) have been mailed, first class mail postage prepaid, on November 4, 2009, to:

Mary Coffey
Genevieve Nichols
COFFEY & NICHOLS, LLC
6202 Columbia Avenue
St. Louis, MO 63139
Co-Counsel for Plaintiffs

Lisa M. Bograd
Andre M. Mura
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W., Suite 250
Washington, DC 20001
Co-Counsel for Plaintiffs

Jay E. Sushelsky
AARP FOUNDATION LITIGATION
Michael Schuster
AARP
601 E Street, N.W.
Washington, D.C. 20049-5893
Attorneys for Amicus Curiae AARP

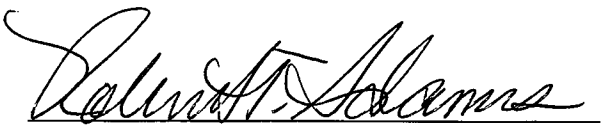
Kevin J. Davidson
David M. Zevan
ZEVAN AND DAVIDSON, LLC
1 North Taylor
St. Louis, MO 63108
Attorneys for Amicus Curiae Paraquad, Inc.

Matthew J. Padberg
PADBERG & CORRIGAN LAW FIRM
1926 Chouteau Avenue
St. Louis, MO 63103
Attorney for Amicus Curiae Missouri AFL-CIO

John B. Boyd
BOYD & KENTER, P.C.
1150 Grand Boulevard, Suite 700
Kansas City, MO 64106-2317
Attorney for Amicus Curiae Missouri AFL-CIO

Tim Dollar
DOLLAR, BURNS & BECKER, L.C.
1100 Mainm Suite 2600
Kansas City, MO 64105
Attorney for Amici Curiae Missouri Coalition for Quality Care &NAACP

J. Thaddeus Eckenrode
Lisa H. Howe
ECKENRODE-MAUPIN ATTORNEYS AT LAW
8000 Maryland Avenue, Suite 1300
St. Louis, MO 63105
Counsel for Defendants



Robert T. Adams (Mo. Bar No. 34612)