IN THE SUPREME COURT OF MISSOURI

Supreme Court Case No. 90107

JAMES KLOTZ and MARY KLOTZ,
Appellants/Cross Respondents,

v.

MICHAEL SHAPIRO, M.D. and METRO HEART GROUP OF ST. LOUIS, INC.,
Respondents/Cross Appellants.

On Appeal from the Circuit Court of St. Louis County, Missouri
Case No. 06CC-4826
THE HONORABLE BARBARA W. WALLACE,
Circuit Court Judge

AMICI CURIAE BRIEF OF WASHINGTON UNIVERSITY, SAINT LOUIS UNIVERSITY, AND UNIVERSITY OF MISSOURI IN SUPPORT OF RESPONDENTS/CROSS APPELLANTS

LASHLY & BAER, P.C.
Stephen G. Reuter, #48167
Lisa O. Stump, #36769
714 Locust Street
Saint Louis, MO 63101
(314) 621-2939
(314) 621-6844 (facsimile)

BRYAN CAVE LLP
Ann K. Covington, # 26619
Riverview Office Center
221 Bolivar Street
Jefferson City, MO 65101
(573) 556-6620
(573) 556-7440 (facsimile)

HAAR & WOODS, LLP
Robert T. Haar, #30044
Susan E. Bindler, #41436
1010 Market Street, Suite 1620
Saint Louis, MO 63101
(314) 241-2224
(314) 241-2227 (facsimile)

Attorneys for Amici Curiae
Washington University, Saint Louis
University, and University of Missouri

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JURISDICTIONAL STATEMENT

Amici Curiae Saint Louis University, the University of Missouri and Washington University (collectively "University Amici") hereby adopt and incorporate herein the Jurisdictional Statement contained in the Brief filed on behalf of Respondents Michael Shapiro, M.D. and Metro Heart Group of St. Louis, Inc. University Amici file their Brief pursuant to Missouri Supreme Court Rule 84.05(f)(2) because they have received consent of all parties to file a brief in this matter.

STATEMENT OF FACTS

The University Amici adopt and incorporate herein the Statement of Facts set forth in the Brief filed on behalf of Respondents Michael Shapiro, M.D. and Metro Heart Group of St. Louis, Inc.

INTEREST OF THE AMICI CURIAE

The four medical schools in Missouri and their affiliated Universities respectfully urge this Court to affirm those aspects of the Circuit Court's rulings upholding the constitutional authority of the General Assembly to limit noneconomic damage awards in medical malpractice cases. The current §538.210 RSMo (Supp. 2008), intended by the General Assembly to limit just one aspect of available damages, is vitally important to the continued availability and affordability of health care in Missouri. It is fair and appropriate. It is accomplishing its objectives. And it is well within the constitutional prerogatives of the legislature.

Health Care Activities of the University Amici

The parties to this Amicus Brief – Saint Louis University, Washington University and the University of Missouri in Columbia and Kansas City (collectively "University Amici") – are on the forefront of the advancement of human health through clinical care, innovative research and the education of tomorrow's health care providers. Saint Louis University and Washington University are charitable corporations that were granted non-profit status because they serve important public purposes. The Universities of Missouri in Columbia and Kansas City are state entities created specifically to perform essential public functions. Collectively, the University Amici educate thousands of doctors and other health care providers each year, conduct extensive research into the causes and cures of disease, and provide health care services to millions of patients in Missouri and

across the country. They meet critical community health needs and provide essential health care services to indigent patients in Missouri.

In the City of St. Louis, for example, there are no longer any public hospitals and few remaining private hospitals. Washington University and Saint Louis University physicians staff four major emergency rooms in St. Louis, which handle over 85% of the emergency room visits in the City. University of Missouri Hospital in Columbia is the primary trauma center outside of Kansas City and St. Louis. It provides trauma care to patients from virtually every county in Missouri, without regard to their ability to pay for those services. The physicians of Washington University and Saint Louis University also provide care to thousands of trauma patients each year from all areas of eastern Missouri. The Washington University physicians and their affiliated medical resident trainees are also the only remaining hospital-based obstetrical delivery service remaining in St. Louis City.

Saint Louis University, Washington University and their affiliated hospitals are founding members and current supporters of St. Louis ConnectCare, the safety net health care provider in St. Louis City that is the successor to Homer G. Phillips Hospital, Max C. Starkloff City Hospital, and St. Louis Regional Medical Center. When direct public support for such institutions and their activities collapsed in 1997, Washington University, Saint Louis University and others stepped in to fill the void, as part of their overall missions of patient care and community support. Washington University and its physicians also perform their mission of patient care for low-income individuals and

community outreach through their close affiliations with four federally-qualified health care centers.

To meet the health care needs of those in St. Louis who may otherwise be unable to afford primary and preventative care, in November 2009, Saint Louis University is opening a health and wellness center called, "Casa de Salud." The new community clinic located on Chouteau Avenue is meant to serve local patients affected by the recent closure of two area clinics. It will provide affordable and, in many instances, free care to approximately 5,000 St. Louis residents.

The University Amici strive to the best of their abilities to continue efforts related to patient care for all through affirmative outreach services, while also serving their other key missions of education and research. They can only meet these community needs by drawing substantial resources away from these other missions, which are already not financially self-supporting endeavors. The University Amici's clinical care revenues are simply not sufficient over the long term to support such community-oriented patient care and outreach if those same revenues must also provide for unlimited medical malpractice claims payments and reserves.

The University Amici's Self-Insurance Programs

The University Amici self-insure the vast majority of their annual medical malpractice payouts and liability exposure. Each year they must set aside sufficient funds to pay the liability and defense costs of current claims and to reserve funds for the

eventual resolution of future claims that could arise from incidents in the current year. When the University Amici establish reserves, those funds are segregated from the general operating funds of these institutions — often for up to ten years or more — and cannot be used for any other aspects of the medical schools' missions, such as community outreach and patient care.

Above their self-insurance retention, the University Amici purchase some "excess" insurance coverage on the open commercial markets to protect against portions of potential catastrophic claims. For example, a self-insured institution might cover the first $2 million in exposure for each claim through internal reserves, then buy commercial excess insurance for the next $10 million or more per claim.

Actuarial methods of calculating internal reserves and the cost of insurance are complex. In general, two important factors in the analyses are the predictability of the institution's future claims experience and the likely or maximum amount of recoverable damages per claim. Uncertainty about the potential exposure on medical malpractice claims and wide variances in the amounts of damage awards require Universities to increase their self-insured reserves and to pay more for excess insurance.

Noneconomic damages are the only element of recovery in a medical malpractice case not amenable to reliable forecast. The damages recoverable by a plaintiff in cases against health care providers include noneconomic and economic damages. Economic damages include medical expense in the past and future, and economic loss based on lost earnings or loss of earning capacity. *See* §538.215 RSMo (2000); §538.205(1) RSMo

(Supp. 2008), *Wyatt v. U.S.*, 939 F. Supp. 1402, 1412-1413 (E.D. Mo. 1996). Economic damages are ascertainable from documentary evidence or through the testimony of experts. However, jurors are given no assistance in assessing the dollar amounts to award plaintiffs for noneconomic damages, which arise from non-pecuniary harm, such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement and loss of capacity to enjoy life. *See* §538.205(7) RSMo (Supp. 2008); *Wyatt*, 939 F. Supp. at 1412-1414.

In the experience of the University Amici, the uncertainty and high variability associated with unlimited noneconomic damage awards dramatically increase the costs to provide for potential medical malpractice liability. Higher noneconomic damage awards affect claims experience resulting in increased premium costs. The unpredictable nature of noneconomic damages before 2005 required the University Amici to set higher reserves, thereby locking up large amounts of funds until much later final resolutions of all claims from a given year.

Evolution of Limitations on Noneconomic Damage Awards in Missouri

In 1986, concerns about a malpractice insurance crisis in Missouri prompted the General Assembly to place a limit on the amount of noneconomic damages that could be recovered from a medical malpractice defendant. Section 538.210 then provided that a plaintiff in a malpractice action could recover no more than "three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant . . . ." §538.210 RSMo (1986).

In the experience of the University Amici, the General Assembly's compromise of codifying this type of damages but limiting the upper boundary of such awards initially had a substantial salutary impact on the costs associated with medical malpractice liability. However, earlier this decade those costs again began to increase substantially, due in large part to a series of lower court decisions that changed the earlier common understandings of the General Assembly's 1986 limitation on noneconomic damages.

In *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. E.D. 2002), and *Cook v. Newman*, 142 S.W.3d 880 (Mo. App. W.D. 2004), the Eastern and Western District Courts of Appeals interpreted the "per occurrence" language of the limitation on noneconomic damages to mean that a separate limit could be applied to each act of medical negligence that caused or contributed to a plaintiff's injury. As a result, malpractice plaintiffs could avoid the effect of the limit by artful pleading – parsing the physician-patient relationship into multiple "occurrences" of negligence.

The effect of *Scott* and *Cook* was to vitiate the 1986 limitation and to seriously undermine a health care provider's ability to reasonably or reliably predict its exposure. The claims experience of University Amici reflects the effect of these decisions.

FIGURE 1

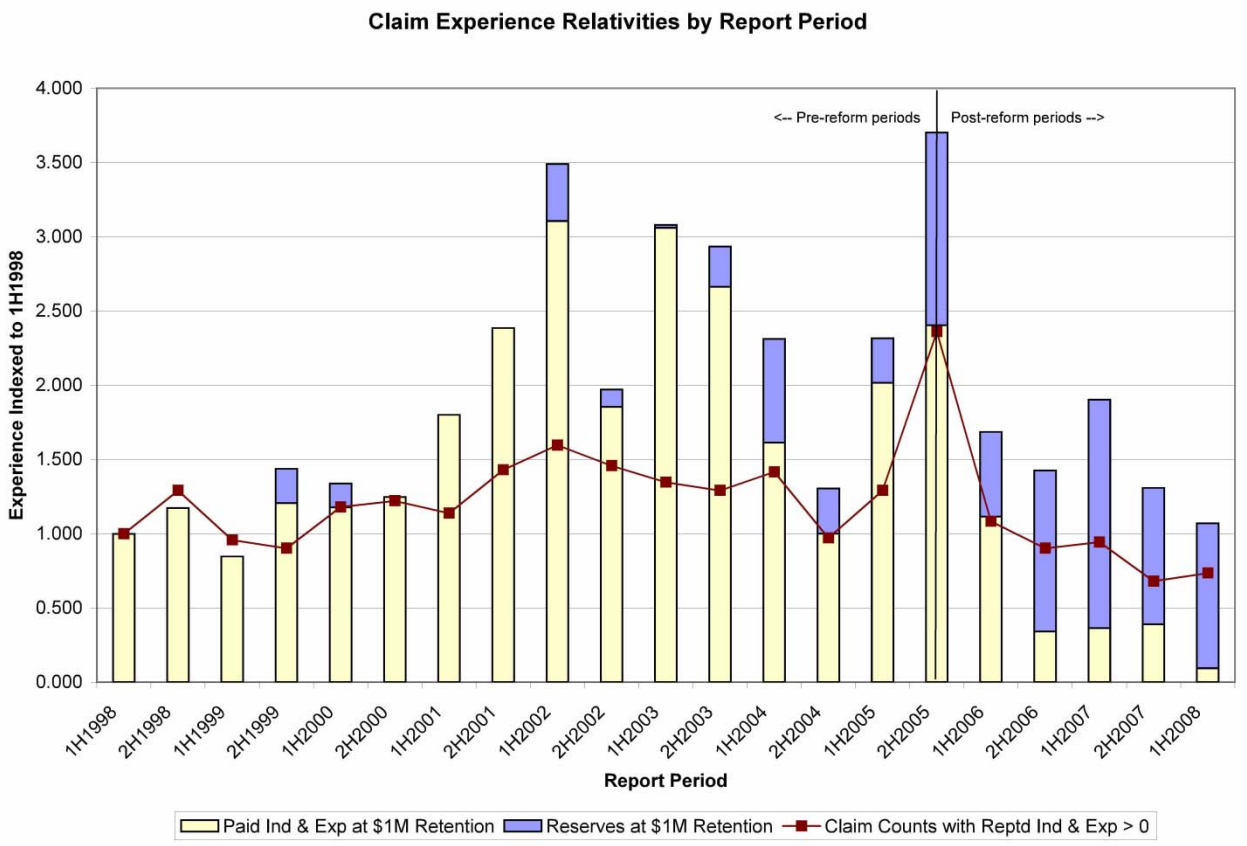

Figure 1 represents the relative claims experience of the University Amici from 1998 through the first half of 2008, limited to the first $1 million in exposure for each claim and scaled to 1998.[1] The red boxes represent claims and lawsuits against the Universities reported in that particular six-month period. These claims have been paid through the self-insured program of the Universities or remain pending. The white portion of the vertical bars reflect the total amount of money paid from the self-insured programs of the University Amici in legal costs and indemnity payments on the claims

[1]Affidavits explaining the data provided by each University Amicus in support of Figure 1 are included in the Addendum to the brief.

and suits first made in that six-month period. The blue portion of the vertical bars represent the amount of funds set aside as reserves for payments on currently pending claims first reported in each six-month period. Figure 1 illustrates the increase in the amounts paid or reserved on claims by the University Amici relative to the number of claims in the first half of the decade – a trend that accelerated in 2002 with the decision in *Scott*. It also shows that the 2005 amendments have been effective in reducing the costs associated with these claims, although these costs have yet to return to the level of 1998.

Prior to the effective date of House Bill 393, the Universities also experienced a substantial increase in the cost of excess insurance. Following the 2005 amendments to §538.210, premium costs have progressively declined.

The Legislative Process

The 2005 tort reform amendments at issue in this case are clearly a legislative response to the erosion of the 1986 limitation on noneconomic damages. Reasonable minds may differ on whether these amendments strike the optimal balance between protecting those injured by medical negligence and promoting the availability of health care for all Missourians. Legislation is seldom that precise or prescient. However, the legislative process also has an iterative quality that over time allows adjustments to be made with the benefit of experience and an evolving political consensus. "[R]eform may take one step at a time." *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955) (Douglas, J.). The General Assembly and the Governor took one such step in 1986, which was upheld by this Court, and they took another such step in 2005, largely at

the invitation of the lower courts. The University Amici believe that the flexibility inherent in the legislative process is essential to the future of health care in Missouri as we compete with other states for the medical personnel and facilities essential to maintaining the high level of health care currently available.

It is therefore critical to the University Amici that the General Assembly retain the constitutional authority to adjust the balance between those injured by medical malpractice and the availability of health care in this State. To that end, the University Amici address the constitutional arguments that most directly challenge the General Assembly's authority in this regard. The University Amici respectfully submit that those challenges should be rejected and the General Assembly's authority reaffirmed.

POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 2, IN THAT THE AMENDMENTS TO §538.210 ARE RATIONALLY RELATED TO THE STATE'S LEGITIMATE INTEREST IN PRESERVING ADEQUATE, AFFORDABLE HEALTH CARE FOR ALL MISSOURIANS

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

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

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

Batek v. Curators of University of Missouri, 920 S.W.2d 895 (Mo. banc 1996)

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT §538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT VIOLATE ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION IN THAT IT IS NOT A SPECIAL LAW AND IT DOES NOT CREATE AN ARBITRARY CLASSIFICATION

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

Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397 (Mo. banc 1980)

Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. banc 1968)

Batek v. Curators of University of Missouri, 920 S.W.2d 895 (Mo. banc 1996)

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT §538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 10, IN THAT THE KLOTZES LACK ANY COGNIZABLE DUE PROCESS INTEREST AND THERE WAS A RATIONAL BASIS FOR THE AMENDMENTS TO §538.210

Fust v. Attorney General for the State of Missouri,
947 S.W.2d 424 (Mo. banc 1997)

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

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

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT VIOLATE THE SEPARATION OF POWERS PROVISION OF THE MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, IN THAT IT DOES NOT IMPROPERLY ENCROACH UPON THE POWERS OF THE JUDICIARY.

Fust v. Attorney General for the State of Missouri,
947 S.W.2d 424 (Mo. banc 1997)

DeMay v. Liberty Foundry Co., 37 S.W.2d 640 (Mo. 1937)

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 2, IN THAT THE AMENDMENTS TO §538.210 ARE RATIONALLY RELATED TO THE STATE'S LEGITIMATE INTEREST IN PRESERVING ADEQUATE, AFFORDABLE HEALTH CARE FOR ALL MISSOURIANS

In 2005, the Missouri General Assembly enacted House Bill 393, which repealed and amended several different sections of the Missouri Revised Statutes relating to claims for damages. Section 538.210, as amended by House Bill 393, provides:

> In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants.

§538.210.1 RSMo (Supp. 2008).

The $350,000 limitation set forth in §538.210 is applicable only to an award of noneconomic damages. In any action against a health care provider, damages must be itemized by the trier of fact to include: past economic damages; past noneconomic damages; future medical damages; future economic damages and future noneconomic

damages. §538.215 RSMo (2000). A medical malpractice plaintiff is entitled to recover – without limitation – all economic and medical damages. Economic damages arise from pecuniary harm and include lost wages and lost earning capacity. §538.205(1) RSMo (Supp. 2008). Medical damages arise from "reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitative services." §538.205(6) RSMo (Supp. 2008). The General Assembly has limited only noneconomic damages – which include, among other things, pain, suffering, mental anguish, and inconvenience.

Appellants/Cross-Respondents James and Mary Klotz ("Klotzes") challenge the constitutionality of the limitation on noneconomic damages in §538.210 under the Equal Protection Clause of the Missouri Constitution, Article I, Section 2. "A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution." *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 903 (Mo. banc 1992). Challengers such as the Klotzes must prove "abuse of legislative discretion beyond a reasonable doubt." *Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324, 327 (Mo. banc 1982). In other words, if a reasonable doubt exists as to a statute's constitutionality, the doubt must be resolved in favor of its validity. *Id*. *See also Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

A.

Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992) and the Constitutionality of Limits on Noneconomic Damages

There should be no doubt about the constitutional validity of §538.210, as amended by House Bill 393. This Court upheld the original version of this statute, first enacted in 1986, in the face of the same constitutional challenge in *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). The 1986 statute imposed a limit on noneconomic damages of $350,000 per occurrence as to each defendant with adjustments for inflation.

In *Adams*, this Court rejected an equal protection challenge to this limit on noneconomic damages. Because the statute did not involve denial of a fundamental right or a suspect class, this Court reviewed the statute under the rational basis test. This Court in *Adams* observed that a statute will survive rational basis review "if its classifications are rationally related to a legitimate state interest." *Id*. at 903. "Rational basis review is minimal in nature." *Id*. A statutory classification will be upheld if "any state of facts reasonably may be conceived to justify it." *Id*. (internal quotation omitted). "Under a rational basis review, a court will strike down the challenged legislation only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *Id*. (internal quotation omitted).

This Court concluded in *Adams* that the 1986 version of §538.210 was enacted to confront a medical malpractice insurance crisis that "threatened adversely to affect

primary health care in Missouri" and that the statute represented an effort by the legislature to reduce rising medical malpractice premiums and to discourage physicians from leaving specialties that carried a higher risk of a malpractice claim. *Id*. at 904. This Court commented that the existence of the crisis was "debatable," and that both sides had presented an "array of evidence" supporting and refuting the existence of a "crisis" in medical malpractice premiums. *Id*. However, the Court acknowledged its obligation to resolve all doubt in favor of the General Assembly. "While some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists." *Id*.

This Court recognized that the 1986 statute treated health care providers differently from other tortfeasors. However, the Court concluded that "[t]he 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." *Id.* It found that the limit on noneconomic damages was a "rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Id.*

B.

The 2005 Limit on Noneconomic Damages is Subject to a Rational Basis Standard of Review

In 2005, the General Assembly revisited many of the statutory provisions intended to promote affordable health care and preserve public health in Missouri, including the provision of §538.210 relating to the limit on noneconomic damages. The amendments to §538.210 clarify that a single noneconomic damages limit applies to the cause of action as a whole rather than independent limits applying to each "occurrence." The amendments also eliminated the provision that permitted a separate limit to be applied to each defendant named by the malpractice plaintiff.

None of these changes to §538.210 affects the logic relied on by this Court in *Adams* when it upheld the validity of a noneconomic damage limitation in the face of an equal protection challenge. This Court's holding was grounded in the deference owed to the judgments of the General Assembly under a rational basis standard of review. This Court properly applied this standard in *Adams* and upheld the validity of the damage limitation after concluding that the limitation was "rationally related to the general goal of preserving adequate, affordable health care for all Missourians." *Id*. at 904-5.

Under the principle of *stare decisis,* this Court should decline to revisit the validity of limitations on noneconomic damages. Since the legislature's changes in 2005 affect only the amount of the limitation, rather than the principle underlying its imposition, there is no reason to depart from the Court's decision in *Adams*. *E.g.*, *Eighty Hundred*

Clayton Corp. v. Director of Revenue, 111 S.W.3d 409, 410 (Mo. banc 2003) (Court bound by earlier interpretation of statute where legislature amended only the rate of applicable tax rather than governing language); *Hodges v. City of St. Louis*, 217 S.W.3d 278, 281-82 (Mo. banc 2007) (declining to revisit constitutionality of limitation on damages payable by a public entity on grounds of *stare decisis*).

Even were this Court to reconsider the validity of §538.210, it still must apply rational basis review. The Klotzes halfheartedly contend that a strict scrutiny standard should be applied – claiming that the statute violates their fundamental constitutional rights, such as the right of trial by jury, right to counsel, open courts and certain remedy. That argument was properly rejected by the Court in *Adams*. Statutory limitations on common law causes of action do not impinge upon any of these rights, even if such rights are deemed fundamental. *E.g., Adams*, 832 S.W.2d at 905-7 (damage cap did not contravene access to open courts, right to trial by jury or due process rights); *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424, 431 (Mo. banc 1997) ("certain remedy" provision not offended by law limiting damages).

The Klotzes' suggestion that the damage limitation adversely affects "suspect classes" such as women, children, the poor and the elderly – thereby triggering a higher level of scrutiny – is equally unavailing. The damage limitation in §538.210 is facially neutral and does not distinguish among these "classes." *See, e.g., Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10th Cir. 1996) (Kansas statute limiting noneconomic damages to $250,000 did not single out persons with disabilities for unfavorable

treatment and did not create suspect classification). A suspect classification exists either where a group of persons is legally categorized and the resulting class has historically been subject to unequal treatment or where a facially neutral law has a discriminatory motive. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). There is no suggestion of a discriminatory motive for the damage limitation. Also, this Court has previously rejected any notion that victims of medical malpractice are a suspect class. *Adams*, 832 S.W.2d at 903.

C.

The 2005 Amendments to §538.210 Are a Reasonable Legislative Response to the Erosion of the 1986 Limitation on Noneconomic Damages

Many of the same reasonable legislative objectives acknowledged in *Adams* underlie the General Assembly's 2005 amendments to §538.210. House Bill 393, and specifically the amendments to §538.210, reflect the General Assembly's attempt to readjust the balance it intended to strike with its 1986 legislation limiting the amount of noneconomic damages. The General Assembly was reacting to a number of judicial decisions that eroded the intended effect of the 1986 statute. As discussed in the Interest of the Amici Curiae, this erosion led to unpredictability in claims analysis, substantially increased costs for health care providers, such as the University Amici, and diverted funds that could otherwise be used by the Amici to benefit Missouri citizens and communities.

The most significant change in application of the statutory limitation occurred as a result of the 2002 decision in *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 570-71 (Mo.App. E.D. 2002). In *Scott*, the Missouri Court of Appeals, Eastern District, concluded that even if a malpractice plaintiff suffered a single indivisible injury, the language allowing a plaintiff to recover up to the $350,000 limit "per occurrence" meant that a separate limit on noneconomic damages could be applied to each "act" of medical negligence that contributed to that injury. The Eastern District held that if the phrase "per occurrence" were not construed to refer to each act of negligence then the language would amount to "mere surplusage." *Id.* at 571. The Western District later reached the same conclusion in *Cook v. Newman*, 142 S.W.3d 880 (Mo.App.W.D. 2004).

The effect of *Scott* and *Cook* was to significantly undermine the 1986 limitation on noneconomic damages. In *Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635 (Mo.App.E.D. 2005), for example, the plaintiff claimed that the defendants failed timely to diagnose and treat his spinal cancer. *Id*. at 641. One doctor, an employee of one of the corporate defendants, saw the plaintiff on five separate occasions. *Id*. at 652. With respect to the actions of that doctor, plaintiffs were allowed to submit five separate occurrences of negligence to the jury – based on each of these five office visits – potentially giving rise to five noneconomic damage limits as to this defendant alone. *Id*. at 652-53. When combined with the allegations against the other defendants, the jury in *Lindquist* was ultimately allowed to consider 18 separate "occurrences" of negligence.

Bruce Keplinger, *Multiple Damage Caps for Claims Against Health Care Providers*, 60 J. Mo. B. 116, 120 (May/June 2004).

Lindquist exemplifies how the failure to diagnose, arguably a singular occurrence, could be divided into as many statutory limits as there were physician-patient encounters. This evolution in the practical application of §538.210 made it difficult, if not impossible, for the University Amici to analyze their exposure on any particular claim. The predictability originally afforded by the enactment of §538.210 in 1986 was dramatically diluted – if not lost altogether.

The 1986 limit was also undermined by interpretations that expanded the number of individuals who qualified as a separate "plaintiff" or "defendant" for purposes of §538.210. For example, in 2001 the Missouri Court of Appeals, Western District, held that despite the derivative nature of consortium claims, and the inclusion of those claims in the statutory definition of noneconomic damages, a spouse was a separate "plaintiff" under §538.210.1; therefore, the spouse's award for loss of consortium was subject to its own limit on noneconomic damages independent of the limit applicable to the injured party. *Wright v. Barr*, 62 S.W.3d 509, 536-37 (Mo.App. W.D. 2001). *See also LaRose v. Washington University*, 154 S.W.3d 365, 372-73 (Mo.App. E.D. 2004) (following *Wright v. Barr*). In *Cook v. Newman*, 142 S.W.3d 880 (Mo.App.W.D. 2004), the court not only followed *Scott* in holding that each "occurrence" gave rise to a separate limit, but it also held that a doctor and a non-hospital health care provider – such as a university – were separate defendants subject to separate limits, even though the liability of the health care

provider was entirely vicarious. *Id*. at 891-92. The *Cook* opinion effectively doubled the exposure of entities such as the University Amici – who employ doctors and other health care professionals for whom they are vicariously liable – multiplying the already exponential effect of the *Scott* decision. An inability to predict the number of occurrences that might be found by a jury thwarted efforts of the University Amici to forecast their exposure on a given claim.

The General Assembly responded to this erosion of the limit on noneconomic damages. In fact, it accepted an invitation. In discussing the number of damage limits available per defendant, the *Scott* court effectively invited a response from the General Assembly:

> We further note that if . . . only one damage cap per defendant always applied in a malpractice case no matter how many separate occurrences of medical malpractice by a single defendant caused the plaintiff's injuries, the clearest and most unambiguous way for the legislature to have expressed such an intent would have been to simply leave the words "per occurrence" out of the statute entirely.

Scott, 70 S.W.3d at 571. In 2005, the General Assembly adopted this suggestion and eliminated the "per occurrence" language from §538.210.

D.

The Klotzes and their Supporting Amici are Asking this Court to Act as a Super Legislature and Reweigh Legislative Facts

The General Assembly's changes to §538.210 are owed the same deference that this Court exhibited in *Adams*. As recently as September 1, 2009, this Court reaffirmed the "highly deferential" nature of rational basis review. In *Committee for Educational Equality v. State of Missouri*, __ S.W.3d __, 2009 WL 2762464 (Mo. banc Sept. 1, 2009), this Court emphasized that "[r]ational basis review does not question 'the wisdom, social desirability or economic policy underlying a statute,' and a law is upheld if it is justified by any set of facts." *Id*. at *9, *quoting Mo. Prosecuting Attorneys & Circuit Attorneys Ret. Sys. v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. banc 2008).

In their equal protection challenge, the Klotzes invite this Court to act as a super legislature and reweigh "the wisdom, social desirability or economic policy" underlying the 2005 tort reform amendments. They ask the Court to sift through the various studies and opinions about whether, prior to 2005, medical malpractice claims were increasing or decreasing, whether increases in the average claims payment could be explained by inflation, whether malpractice insurance premiums were "high" by historical standards, and whether any increases in those premiums might be explained by the business cycle.

However, "[a] legislative choice 'is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *United C.O.D. v. State of Missouri*, 150 S.W.3d 311, 313 (Mo. banc 2004) *quoting FCC v.*

Beach Communications, Inc., 508 U.S. 307, 315 (1993). There need only be "a conceivably rational basis to uphold the regulatory scheme. . . . " Thus, the affidavits and other empirical information submitted by the Klotzes – purportedly to refute the existence of a malpractice liability crisis – are irrelevant to the issues before the Court. *See, e.g.*, *Adams*, 832 S.W.2d at 904 (dismissing "array of evidence" both supporting and refuting existence of "crisis" in medical malpractice premiums). A party may not prevail on a constitutional challenge merely by showing that the General Assembly was, or could have been, mistaken in its legislative findings of fact. "'[T]hose challenging the legislative judgment must convince the court the legislative facts upon which the classification is apparently based *could not reasonably be conceived to be true by the governmental decisionmaker*.'" *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991) (emphasis added), *quoting Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). "If the question of the legislative judgment remains at least debatable, the issue settles on the side of validity." *Id.* at 513.

In 2005, the General Assembly reasonably concluded that the 1986 legislation needed further adjustment. The 1986 legislation was prompted by a need to address a malpractice insurance crisis in the health care industry and to balance damage awards against malpractice-related insurance costs. In 2005, the General Assembly *reasonably could have conceived to be true* that an adjustment of the limit on noneconomic damages would better promote the availability of health care in the State. To argue, as the Klotzes

must, that the effectiveness of this adjustment is not even debatable, is disingenuous. It is also belied by the experience of the University Amici who are submitting this brief.

In fact, the legislative intent identified by this Court in *Adams*, "to reduce in the aggregate the amount of damage awards for medical malpractice," has come to fruition with the 2005 amendments to §538.210. As indicated in Figure 1, since the effective date of House Bill 393, the number of claims relative to the amounts paid or reserved on those claims is significantly reduced. This has, in turn, led to the desired reduction in premium costs for excess insurance. As a result of this reduction, the University Amici have additional funds for improving patient safety, quality care measures, community outreach and research. Certainly the General Assembly reasonably could have conceived these results would be accomplished by the 2005 amendments to §538.210.

E.

Invalidating the Limit on Noneconomic Damages Would Be a Stark and Unwarranted Departure from this Court's Prior Equal Protection Jurisprudence

To invalidate this legislation on equal protection grounds would run counter to previous opinions of this Court upholding the validity of legislative efforts to respond to "public concern over the increased cost of health care and the continued integrity of that system of essential services." *Mahoney*, 807 S.W.2d at 507. *E.g.*, *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 61 (Mo. banc 1989) (upholding validity of a statute exempting health services corporations from malpractice claims); *Mahoney*, 807 S.W.2d at 513 (upholding requirement that plaintiff file health care affidavit); *Adams*, 832

S.W.2d at 904-5 (upholding noneconomic damages limitation); *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996) (upholding tolling statute that excepted medical malpractice claims).

In all of these opinions, this Court recognized the legitimacy of the legislature's interest in responding to concerns about the cost and availability of health care services. As the *Mahoney* court noted, "[t]he preservation of the public health is a paramount end of the exercise of the police power of the state." *Mahoney*, 807 S.W.2d at 507. The Court also recognized in these cases its obligation to defer to the judgment of the General Assembly as to how to accomplish these goals.

To invalidate the 2005 amendments on equal protection grounds would effect a sea change in this Court's equal protection jurisprudence generally. Quite apart from malpractice reform, the Court has consistently declined to question the policy judgments of the legislature absent violation of a fundamental right or discrimination against a suspect class. *See, e.g., Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324, 328 (Mo. banc 1982) (upholding governmental tort immunity statute; deferring to legislature as to appropriate balance between protection of governmental funds and recovery by injured claimants); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829-30 (Mo. banc 1991) (deferring to legislative decision to enact statute of repose that applied to designers and builders but not materialmen); *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424 (Mo. banc 1997) (upholding statute requiring that 50% of any punitive damages award be deemed payable to State of Missouri); *Etling v. Westport*

Heating & Cooling Services, Inc., 92 S.W.3d 771 (Mo. banc 2003) (deferring to legislative decision to exclude non-dependent heirs from recovering workers compensation death benefits); *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638 (Mo. banc 2006) (deferring to legislature's decision to allow claims against licensed sellers by the drink and prohibit claims against sellers of packaged liquor); *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo. banc 2007) (legislature had conceivable rational basis for granting immunity to landowners who permit free recreational access to their property).

Invalidating the limit on noneconomic damages would also sever the historical link between the Equal Protection Clause of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. In the past, this Court has consistently interpreted the Missouri Equal Protection Clause to be coextensive with that of the Fourteenth Amendment. *Bernat v. State of Missouri*, 194 S.W.3d 863, 867 (Mo. banc 2006) *citing Blaske*, 821 S.W.2d at 829. Numerous federal courts have upheld similar limitations on damages against challenges under the Equal Protection Clause of the Fourteenth Amendment. *E.g., Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989) (limitation on damages was reasonably related to valid legislative purpose of maintaining adequate health care services); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986) (plaintiff made no showing that Texas legislature lacked any conceivable basis to conclude that the limitation was related to availability and cost of malpractice insurance); *Smith v. Botsford General Hospital*, 419 F.3d 513, 520 (6th Cir. 2005) (upholding $359,000 limitation because there was reasonably conceivable basis to conclude that

Michigan legislature acted to control increases in health care costs); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (California legislature had a "plausible reason" to believe that limitations on noneconomic recovery would limit rise in malpractice costs).

The 2005 limitation on noneconomic damages in medical malpractice cases does not infringe on any fundamental right or discriminate against any suspect class. It is rationally related to the goal of ensuring affordable health care for all Missourians. In fact, the experience of the University Amici, as set out in the Interest of the Amici Curiae, demonstrates the effectiveness of this limitation in making health care more affordable and available. It aids the University Amici in continuing their missions to improve health care for the citizens of this State and to educate future professionals to practice and advance knowledge in medicine and the sciences relevant to medicine. These interests of the University Amici are undoubtedly among the factors that could conceivably have been considered by the General Assembly in amending §538.210. The University Amici respectfully submit that consistent with its prior opinions, this Court should not find an equal protection violation in this case.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT §538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT VIOLATE ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION IN THAT IT IS NOT A SPECIAL LAW AND IT DOES NOT CREATE AN ARBITRARY CLASSIFICATION

The Klotzes also argue that the amendments to §538.210 violate the prohibition against special legislation in Article III, Section 40 of the Missouri Constitution.

Article III, Section 40 states in pertinent part:

> The general assembly shall not pass any local or special law: . . .
>
> (6) for limitation of civil actions; . . .
>
> * * *
>
> (30) where a general law can be made applicable, . . .

Mo. Const. art. III, Section 40.

The burden is upon the party challenging a statute as a special law to show that the law has an arbitrary classification that lacks a rational relationship to a legislative purpose. *Jackson County v. State*, 207 S.W.3d 608, 611 (Mo. banc 2006). A "special law" is a "[a] law which includes less than all who are similarly situated . . . but a law is not "special" if it applies to all of a given class alike and the classification is made on a reasonable basis." *Ross v. Kansas City General Hospital and Medical Center*, 608 S.W.2d 397, 400 (Mo. banc 1980).

Section 538.210 is not a "special law" because it applies to all persons who bring "any action against a health care provider." There are no members of the stated class omitted "whose relationship to the subject-matter cannot by reason be distinguished from that of those included." *Blaske v. Smith & Entzeroth*, 821 S.W.2d 822, 831 (Mo. banc 1991) *quoting State v. County Court of Greene County*, 667 S.W.2d 409, 412 (Mo. banc 1984). The statute applies equally to all persons who bring a claim against a health care provider; it does not distinguish among those who bring such claims or those health care providers against whom a claim is brought.[2]

The statute does create a distinction between health care providers and other potential tortfeasors. That distinction, however, has long been upheld by this Court. *E.g. Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. banc 1968) (upholding two-year statute of limitations for medical malpractice actions as "reasonable, and not discriminatory"); *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996) (upholding tolling statute that excluded plaintiffs who assert actions against health care providers). Indeed, as long as the distinctions are reasonable, this Court has upheld

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[2] The Klotzes attempt to find classifications in the statute where none exist. They suggest that the statute distinguishes among health care providers that provide medical services to women, racial and ethnic minorities, children, the elderly and poor; health care providers who severely injure married patients; health care providers who commit malpractice in the future; and health care providers who severely injure patients. Appellants' Brief at 58-59. Section 538.210 simply does not draw any of these distinctions.

statutes that distinguish among claims against health care providers. *E.g. Ross*, 608 S.W.2d at 400 (upholding distinction between accrual of malpractice claim based on foreign object left in body and all other malpractice claims); *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63 (Mo. banc 1989) (upholding statute that exempted health services corporations from liability even though statute did not apply to hospitals).

The General Assembly "possesses the power to select and classify objects of legislation, and just as undoubtedly may exercise a wide discretion in the exertion of that power." *Hawkins v. Smith*, 147 S.W. 1042, 1044 (Mo. 1912) (internal quotation omitted). "It is 'sufficient to satisfy the demand of the Constitution if a classification is practical and not palpably arbitrary.'" *Id. quoting Louisville & Nashville R.R. v. Melton*, 218 U.S. 36, 55 (1910). The wisdom or necessity of legislative classification is not for the courts; it is sufficient if any difference in a situation or condition exists which affords a reasonable ground for the classification. *Arnold v. Hanna*, 290 S.W. 416, 422 (Mo. banc 1926). Where, as here, the statute does not involve either a fundamental right or a suspect class, "the same principles and considerations that are involved in determining whether the statute violates equal protection" are applicable. *Blaske*, 821 S.W.2d at 832.

As set forth in Section I, the General Assembly could reasonably have concluded that it was necessary to amend §538.210, both in response to cases like *Scott* and *Cook* and to improve and promote the availability and affordability of health care in Missouri. There were reasonable grounds for amending the statute as evidenced by the large increase in malpractice reserves and insurance premiums for entities such as the

University Amici – the effect of which was to divert funds from other important programs. Health care providers generally, and the University Amici in particular, provide great benefits to Missouri communities. The University Amici provide indigent health care, scholarships to medical students in need, and research programs designed to find cures to, or vaccines for, diseases affecting Missouri citizens. The funding for those activities is directly affected by the costs of medical malpractice liability. The current national debate on health care is certainly evidence that there is a health care crisis in this country that justifies treating health care providers differently from other possible tortfeasors. As in *Adams*, "the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." 832 S.W.2d at 904.

Other states have upheld limitations on noneconomic damages that were challenged on "special legislation" grounds. *See e.g. Gourley ex rel. Gourley v. Nebraska Methodist Health System*, 663 N.W. 2d 43, 66 (Neb. 2003); *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 533 (Va. 1989) (finding "limitation applies to *all* health care providers and to *all* medical malpractice plaintiffs") (emphasis in original); *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115, 1120 (Idaho 2000). As explained by the Idaho Supreme Court, "[B]ecause we find the state had a legitimate interest in protecting the availability of liability insurance for Idaho citizens, and I.C. § 6-1603 is neither an arbitrary, capricious nor unreasonable method of addressing this legitimate societal concern, we find I.C. § 6-1603 does not violate the constitutional

prohibition against special legislation." *Kirkland*, 4 P.3d at 1121. *See also Gourley*, 663 N.W.2d at 69 ("The class is based upon reasons of public policy and substantial differences of situation or circumstances that suggested the justice or expediency of diverse legislation").

The Klotzes have not met their burden. The noneconomic damages limitation in §538.210 does not create an arbitrary classification; it has a rational relationship to a legislative purpose. Consequently, this Court should reject the Klotzes' assertion that §538.210 violates the prohibition against "special law[s]" in Article III, Section 40 of the Missouri Constitution.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT §538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 10, IN THAT THE KLOTZES LACK ANY COGNIZABLE DUE PROCESS INTEREST AND THERE WAS A RATIONAL BASIS FOR THE AMENDMENTS TO §538.210.

The Klotzes maintain that §538.210 also violates the Due Process Clause of the Missouri Constitution, Article I, Section 10, which provides that "no person shall be deprived of life, liberty or property without due process of law." Two elements must be established to demonstrate a substantive due process violation: first, that there is a protected interest to which due process protection applies; and second, that the governmental action was truly irrational. *Reagan v. County of St. Louis*, 211 S.W.3d 104,

111 (Mo. App. E.D. 2006); *Lane v. State Committee of Psychologists*, 954 S.W.2d 23, 24-25 (Mo. App. E.D. 1997). The Klotzes cannot demonstrate either element.

The Klotzes claim that they have a protected property interest in their malpractice claims. However, they cite no authority for this proposition. Nor could they. A malpractice claim is merely an inchoate cause of action based on the common law. It is well-settled that "'[a] person has no property interest, 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.'" *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424, 431 (Mo. banc 1997) *quoting Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); *Blaske v. Smith & Entzeroth*, 821 S.W.2d 822, 834 (Mo. banc 1991) (no due process violation occurs when cause of action is eliminated by change in the law). Indeed, "by statute and decision, the common law is in force in Missouri only to the extent that it has not been subsequently changed by the legislature or judicial decision." *Adams*, 832 S.W.2d at 906; *see* §1.010 RSMo (2000) ("no act of the general assembly or law of this state shall be held to be invalid . . . by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law. . . .")

Even if the Klotzes had a cognizable due process interest, they would still have to establish that "the government action complained of is truly irrational, more than arbitrary, capricious, or in violation of state law." *Lane*, 954 S.W.2d at 24-25 (internal quotation omitted). The General Assembly's authority is plenary and statutes are

presumed to be constitutional. "'The theory of substantive due process is properly reserved for truly egregious and extraordinary cases.'" *Reagan*, 211 S.W.3d at 111 *quoting Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992).

This is not such a case. As set forth in Section I, the amendment of §538.210 was a rational exercise of legislative power in an area in which the legislature may balance competing interests. *Blaske*, 821 S.W.2d at 835. It was intended to reduce the cost and uncertainty associated with medical malpractice claims so as to promote the availability and affordability of health care. In the case of the University Amici, the 2005 limit on noneconomic damages has had the desired effect by freeing up resources for other aspects of their health care mission, including indigent care. The Klotzes' arguments distill to the notion that the statute is unwise or unfair. However, that is an argument that "'must be addressed to the legislature.'" *Id*. *quoting Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63-64 (Mo. banc 1989).

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT SECTION 538.210, AS AMENDED BY HOUSE BILL 393, IS CONSTITUTIONAL BECAUSE THIS PROVISION DOES NOT VIOLATE THE SEPARATION OF POWERS PROVISION OF THE MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, IN THAT IT DOES NOT IMPROPERLY ENCROACH UPON THE POWERS OF THE JUDICIARY.

The Klotzes contend that the amendments to §538.210 violate Article II, Section 1 of the Missouri Constitution, the separation of powers provision, because the amendments impede the traditional judicial function of assessing damage awards for "excessiveness or inadequacy" by imposing a fixed "legislative remittitur." *See* Appellants' Brief at 79. This argument is unpersuasive.

As discussed in Sections I and III, the Missouri courts have consistently upheld the power of the legislature to limit, as well as completely abrogate, common law causes of action. *See Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424, 431 (Mo. banc 1997); *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6 (Mo. banc 1992); *Mahoney v. Doerhoff Surgical Serv., Inc.*, 807 S.W.2d 503 (Mo. banc 1991). As early as 1931, in *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931), the Court acknowledged that a "citizen has no property [right] in a rule of law . . ." and that the legislature "may regulate or entirely abolish the common-law rules of liability . . . ." *Id.* at 647. Under this longstanding doctrine, the Missouri General Assembly unquestionably has the plenary power to enact legislation that limits the recovery of a tort litigant.

It is also well-settled that such a limitation on recovery does not violate the separation of powers provision of the Missouri Constitution. In *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424 (Mo. banc 1997), this Court considered the constitutionality of §537.675, which provides that 50% of any punitive damages award is deemed to be rendered in favor of the State. This Court concluded that there was no separation of powers violation because the statute did not interfere with the judicial function. "Rather, the statute is a limitation on a common law cause of action for punitive damages. Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function." *Id*. at 430-31 *citing Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988).[3]

Like the punitive damages provision at issue in *Fust*, the General Assembly's noneconomic damages limitation in §538.210 does not interfere with any judicial function. Certainly the judiciary decides the facts in a civil case and may determine the

[3] The Klotzes suggest that *Fust* is no longer good law because *Simpson* has since been overruled. In 1988, in *Simpson*, the Court upheld a dram shop provision that precluded a plaintiff from pursuing a civil cause of action unless the putative defendant had been convicted of violating certain liquor laws. In *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), the Court overruled *Simpson*, concluding that it would violate the separation of powers clause to permit a prosecuting attorney – rather than the legislative branch – to determine, through his prosecutorial discretion, whether an injured party could pursue a civil cause of action. *Id*. at 552. Nowhere in *Kilmer* did this Court address the power of the General Assembly to limit a damage award or whether such a limitation would run afoul of the separation of powers doctrine.

amount of damages, but that function does not prohibit the legislature from limiting the recovery as a matter of law. *E.g. Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 438 (Ohio 2007). In fact, numerous statutes in Missouri direct the courts to award double or treble jury damages in certain causes of action. *See, e.g.*, §537.330 RSMo (2000) (person who maliciously damages item shall pay double the value of item); §537.340 RSMo (Supp. 2008) (treble damages to be awarded for destruction of trees); §537.420 RSMo (2000) (life tenant who commits waste liable for treble the amount of damaged item). If the *increase* of a jury award as a matter of law does not run afoul of the separation of powers clause, logically, a corresponding *decrease* cannot violate that mandate. *Arbino*, 880 N.E.2d at 438.

Faced with similar challenges, courts in several other states are in accord. *See, e.g., Gourley ex rel. Gourley v. Nebraska Methodist Health System*, 663 N.W. 2d 43 (Neb. 2003); *Verba v. Ghaphery*, 552 S.E.2d 406 (W.Va. 2001); *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115 (Idaho 2000); *Edmonds v. Murphy*, 573 A.2d 853 (Md. Ct. Spec. App. 1990); *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989). For example, the Supreme Court of Nebraska declared, ". . . the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. We have stated repeatedly that the Legislature may change or abolish a cause of action. Thus, the ability to cap damages in a cause of action is a proper legislative function." *Gourley*, 663 N.W. 2d at 77. The Klotzes' separation of powers argument is without merit.

CONCLUSION

This Court correctly concluded in *Adams* that a limitation on noneconomic damages in medical malpractice cases does not violate the Missouri Constitution. As a matter of constitutional law, this Court must defer to the judgment of the Missouri General Assembly. As with any matter of intense public interest, there are strong and often conflicting opinions about what constitutes the appropriate public policy approach to medical malpractice liability. The consequent debate may well lead to further legislative adjustments in the future. However, as in *Adams*, there can be no legitimate dispute that there is a rational basis for the current approach taken by the General Assembly. The limitation on noneconomic damages has a very real impact on the costs of medical malpractice liability. As set out in the Interest of the Amici Curiae, it directly affects the ability of medical institutions, such as the University Amici, to carry out their health care missions.

The University Amici respectfully submit that the General Assembly was well within its constitutional authority in enacting the 2005 limit on noneconomic damages. They strongly urge this Court to affirm that authority and uphold the trial court's finding that the limit is constitutional. Any other conclusion not only would be inconsistent with prior decisions of this Court, but would have a serious and detrimental impact on the provision of health care in Missouri.

Respectfully submitted,

LASHLY & BAER, P.C.

_____
Stephen G. Reuter, #48167
Lisa O. Stump, #36769
714 Locust Street
Saint Louis, MO 63101
(314) 621-2939
(314) 621-6844 (facsimile)

BRYAN CAVE LLP

_____
Ann K. Covington, # 26619
Riverview Office Center
221 Bolivar Street
Jefferson City, MO 65101
(573) 556-6620
(573) 556-7440 (facsimile)

HAAR & WOODS, LLP

_____
Robert T. Haar, #30044
Susan E. Bindler, #41436
1010 Market Street, Suite 1620
Saint Louis, MO 63101
(314) 241-2224
(314) 241-2227 (facsimile)

Attorneys for Amici Curiae
Washington University, Saint Louis
University, and University of Missouri

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. Brief of the Amici Curiae contains the information required by Rule 55.03;
2. Brief of the Amici Curiae complies with the limitations contained in Rule 84.06(b);
3. Brief of the Amici Curiae, excluding the cover page, certificate of service, this certificate and signature blocks, contains 10,452 words, as determined by the word count tool contained in Microsoft Word 2003 software with which this Brief was prepared; and
4. The diskette accompanying Brief of the Amici Curiae has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

November 5, 2009 _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to Rule 84.06(g), one copy of the foregoing brief and a copy of the brief on disk were mailed, via first-class, postage prepaid on this 5th day of November, 2009 to:

Louis M. Bograd
Andre M. Mura
Center for Constitutional Litigation, P.C.
777 6th Street, N.W., Suite 520
Washington, DC 20001

Mary Coffey
Genevieve Nichols
Coffey & Nichols, LLC
6202 Columbia Ave.
St. Louis, Missouri 63139

J. Thaddeus Eckenrode
Lisa Hope Howe
Eckenrode-Maupin
8000 Maryland Ave., Suite 1300
Clayton, Missouri 63105

Jay E. Sushelsky
Michael Schuster
AARP Foundation Litigation
601 E. Street, N.W.
Washington, D.C. 20049-5893

Matthew J. Padberg
Padberg & Corrigan Law Firm
1926 Chouteau Avenue
St. Louis, Missouri 63103

Tim Dollar
Dollar, Burns & Becker, L.C.
1100 Main, Suite 2600
Kansas City, Missouri 64105

Kevin J. Davidson
David M. Zevan
Zevan and Davidson, LLC
1 North Taylor
St. Louis, Missouri 63108

John B. Boyd
Boyd & Kenter, P.C.
1150 Grand Blvd., Suite 700
Kansas City, Missouri 64106-2317