APPEAL NO. SC94322

MISSOURI SUPREME COURT

SHONDA AMBERS-PHILLIPS and RICHARD PHILLIPS, II,

Plaintiffs/Appellants

v.

SSM DEPAUL HEALTH CENTER,

Defendant/Respondent

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

DIVISION 10

Cause No. 13SL-CC04136

Honorable Michael T. Jamison

APPELLANTS' REPLY BRIEF

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I. APPELLANTS HAVE A "REAL AND SUBSTANTIAL" CONSTITUTIONAL CLAIM BECAUSE THE CONSTITUTIONAL QUESTION PRESENTED HAS YET TO BE DECIDED

Curiously, Respondent claims that Appellants lack a "real and substantial" constitutional claim. *Respondent's Brief,* pg. 5. It bases its argument on the fact that this Court – more than 20 years ago – rejected the "same kinds of arguments involving another 10-year statute of repose." *Id.* Indeed, in *Blaske v. Smith & Entzeroth, Inc*., 821 S.W.2d 822 (Mo. banc 1991), this Court held that

> 10 year statute of repose protecting architects, engineers and persons who furnished construction services from liability arising out of a defective or unsafe condition of any improvement to real property…[was] constitutional;…[and was] not invalidated by any of the four constitutional challenges; *i.e.*, Equal Protection, Special Legislation, Access to the Courts, and Due Process.

Blaske, 821 S.W.2d at 825.

There are, however, numerous distinctions between the issues addressed in *Blaske*, and the issues raised in this case. Given these distinctions, to the extent Respondent's reliance on Appellants' alleged lack of "real and substantial" constitutional claims rests on this Court's ruling in *Blaske,* such reliance is erroneous. Defective improvement and foreign object cases are inherently different, which is why *Blaske* is not binding in this case. Additionally, these distinctions point out that the posited "legitimate reasons" set

forth in Respondent's brief for the 10-year repose period imposed by Section 516.105 are, in fact, not legitimate, and are, therefore, unconstitutional.

Specifically, the public policies supporting the enactment of statutes of repose similar to those in *Blaske* – preventing claims where there is a potential lack of privity (*Blaske* at 827*)* – are inapplicable in a foreign object case. Respondent argues that Section 516.105's 10-year repose period might be needed to "foreclose potential liability to individuals having **no relationship** with a plaintiff after 10 years." *Respondent's Brief*, pg. 20 (emphasis added). This simply cannot be a legitimate reason for a statute of repose for medical malpractice claims because litigants in such cases **must** establish privity (i.e., duty) between themselves and the medical provider(s) at issue. Designers of property improvements, on the other hand, lack **any** connection with would-be litigants in those types of cases. In fact, the four consolidated cases in *Blaske* involved a public road and a structure at a community college. *Blaske* at 825. No privity existed between the injured and deceased individuals in those cases, and the architectural, engineering, and/or design defendants. *Id.* The *Blaske* Court found the rationale for the 10-year defective improvement statute of repose similar to that in the common law (e.g., requiring privity of the parties). *Id.* at 830. As stated above, no such rationale is present with respect to Section 516.105, because privity is **required** in foreign object cases.

Moreover, Missouri recognizes that medical malpractice claims involving a foreign object left inside a patient's body to be potentially subject to the doctrine of *res ipsa loquitor*, which, of course, makes the concerns about the availability of witnesses or evidence less significant, or altogether inapplicable. Respondent argues that Section

516.105's 10-year repose period might be needed to uphold a "…defendant's right to be free of potential liability involving a **stale** claim." *Respondent's Brief*, pg. 20 (emphasis added). This – like lack of privity – is inapplicable in foreign object cases. As this Court stated in *Ross v. Kansas City Gen. Hosp. & Medical Ctr*., 608 S.W.2d 397, 399 (Mo. banc, 1980), "…there is **less likely to be as great a problem with stale evidence** when a foreign object is left in the body than in the other types of malpractice cases. There are likely to be **greater certainties of proof** in a foreign object case." (emphasis added). Given the lack of problems with stale evidence and more certainties of proof in foreign object cases, a defendant's right to be free of a stale claim cannot be a legitimate purpose of Section 516.105, because foreign object cases are inherently non-stale.

For these reasons, the statute at issue in *Blaske* is distinguishable from Section 516.105, and, therefore, *Blaske* is not binding precedent in this case, and as such, Appellants do, in fact, have a "real and substantial" constitutional claim given their very real injuries.

II. SECTION 516.105 CREATES UNDULY BURDENSOME PRECONDITIONS BY REQUIRING AN INDIVIDUAL TO OBTAIN SPECIALIZED MEDICAL TREATMENT BEFORE HIS OR HER CLAIM ACCRUES, WHICH DISPROPORTIONATELY AFFECTS CERTAIN SUSPECT CLASSES

Article 1, Section 14 of the Missouri Constitution guarantees that "the courts of justice shall be open to every person, and certain **remedy** afforded for **every injury to person**, property or character, **and that right and justice shall be administered without**

sale, **denial** or delay." (emphasis added). This Court strives "to ensure that article I, section 14 retains its vitality while permitting **proper** deference to legislative enactments." *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000) (emphasis added). Section 516.105, though, prevents access to the court for certain individuals, and as such, denies them of any remedy.

"An open courts violation is established on a showing that: '(1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.'" *Id.* at 461. Under this analysis, this Court has held a variety of legislatively-imposed hurdles invalid under the open court's article to the Missouri Constitution.

In *State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner*, 583 S.W.2d 107 (Mo. banc 1979), this Court found Missouri's statutorily mandated Professional Liability Review Board violative of Article I, Section 14 because it imposed an unduly burdensome precondition on a litigant's right of access to the courts.

In *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. banc 1986) held that it was an unduly burdensome precondition to require a minor to find an adult to pursue a medical malpractice case on his or her behalf, and therefore, the application of the two-year limit to minors over the "ripe old age" of ten offended the open courts and right to a remedy article of the Missouri Constitution. *Id.* at 10. Moreover, while the Court noted that there may be a relationship between insurance rates for providers of medical care and a fixed period which thereafter bars all claims, the effect on insurance rates by the

predecessor version of RSMo. § 516.105 was not sufficient to outweigh the constitutional right of redress for minors.

In *Schumer v. City of Perryville*, 667 S.W.2d 414, 417-18 (Mo. banc 1984), this Court invalidated a "condition precedent to a suit" that a minor who was legally incapable of bringing his own action nonetheless must give notice of his claim before suing a municipality, because allowing legal incapacity to bar a person from suit denied minors a remedy for a recognized injury.

Finally, in *Kilmer*, 17 S.W.3d at 550-54, this Court held invalid a statute allowing a "dram shop" cause of action only after the liquor licensee had been convicted in a criminal prosecution for providing liquor to an intoxicated person. This precondition made a would-be litigant's ability to bring such an action "entirely dependent upon whether or not the county prosecutor has prosecuted and obtained a conviction of their alleged wrongdoer for…selling intoxicating liquor to an obviously intoxicated person." *Id.* The Court held this violated the "open courts" provision by depriving "dram shop" plaintiffs of a certain remedy for their recognized injury. *Id.* 550-54. Although the statute purported to recognize a remedy, it created a precondition such that "where there is no prosecution and conviction, there is no remedy." *Id.* at 551-52.

The foregoing unconstitutional preconditions are no more unduly burdensome on would-be litigants than the preconditions imposed by Section 516.105 which requires a would-be foreign object litigant to: (1) discover the foreign object within 10 years of it being left in his or her body; and (2) file a malpractice case within 10-years of the negligent act.

Initially, Section 516.105 gives foreign object victims the ability to file a malpractice case not within 2 years of the negligent act, but within 2 years of the date the negligent act is discovered. At the same time, though, Section 516.105 takes this right away from two types of foreign object victims. Specifically, Section 516.105 provides for less than a 2-year statute of limitations for individuals whose cause of action accrues more than 8 years after the date of the negligent act. For example, an individual who, through no fault of their own, has no reason to discover a foreign object less than 9 ½ years after the negligent act would not have a 2-year statute of limitations, but rather, would only have a 6 month statute of limitations. Additionally, Section 516.105 takes away any redress for individuals who, through no fault of their own, have no reason to discover a foreign object less than 10 years after the negligent act.

Before an individual can even contemplate filing a foreign object case, that individual must discover the foreign object. This requires an investigation by a medical professional with specialized skills and training, using specialized tools and equipment. In other words, in order to discover a foreign object, individuals are required to: (1) seek out specialized medical professionals (e.g., radiologists, surgeons, etc.); (2) make appointments with these professionals; (3) travel to these appointments (which could very well be unduly burdensome for those without ready access to transportation and/or those who would be required to miss work); and (4) pay for these specialized services (which could result an even more unduly burdensome double financial hit (in addition to missing work)). In fact, in this case, Appellants alleged that it was not until a physician

performed an exploratory surgery on Mrs. Phillips that the foreign objects were discovered. Legal File ("L.F.") pg. 6, ¶¶ 12-14).

This is quite distinct from defective improvement cases – like *Blaske* – that do not involve claims that cannot be discovered absent a visit with a specialized medical professional. Any individual could, in theory, find a defective improvement without the use of specialized equipment or training. For example, if the design of a floor in a wet area (e.g., a shower) failed to include slip resistant tiles, it would be reasonably foreseeable that an individual could injure themselves. Anyone walking on those tiles could determine whether they seemed safe, or not.

Moreover, the unduly burdensome preconditions to bringing a foreign object case disproportionally affect the poor, physically and mentally disabled, wounded, and elderly, than they do those with financial means and physical abilities. In other words, certain classes of individuals are more adversely affected by the time limitations imposed by Section 516.105. For instance, a more affluent, non-physically or mentally disadvantaged individual may more easily be able to get in to see a specialized medical professional sooner than a less affluent, physically or mentally disabled individual. While the statutes of limitations and response in Section 516.105 could, in theory, give the first individual time to pursue his or her claim, the same cannot be said for the latter individual. Requiring individuals to have the means to seek out specialized medical services within 10 years is an unduly burdensome precondition, and unconstitutional.

Finally, there is no meaningful distinction between the unduly burdensome preconditions in *Cardinal Glennon* (requiring a review by a Professional Liability

Review Board), *Strahler* (requiring an individual to bring a claim during a period of legal disability), *Schumer* (requiring a legally incapacitated person to provide notice of a claim), and *Kilmer* (requiring a criminal conviction before allowing a suit), and requiring an individual to discover an undiscoverable object or file a suit in a highly abbreviated limitations period. A person whose injuries are not discoverable during the repose period – or even late in the repose period – are not any more able to obtain redress during the period of undiscoverability than are minors during their period of legal disability, or dram shop victims absent a criminal conviction.

Because Section 516.105 does, in fact, impose unduly burdensome preconditions on would-be foreign object litigants' abilities to pursue recourse for a negligent act, it is unconstitutional under the Missouri Constitution's open courts article.

III. THE STATUTE OF REPOSE AT ISSUE IN *BLASKE* STILL PROVIDES THE POSSIBILITY OF REDRESS, WHILE SECTION 516.105 FORECLOSES ALL POSSIBILITY OF REDRESS

Respondent's make much of the *Blaske* holding, which, as stated above, is not binding on the issues in this case. As the Court stated in *Blaske*,

> [o]nce construction is completed, the designers and builders normally cease to be connected with the improvement, while owners and occupiers continue in control of the improvement during its useful life. Moreover, in instances where ownership or possession changes during the useful life of the real property, the common law generally affords protection to former owners and occupiers as opposed to persons owning or occupying at the

> time of the injury. The common law seldom results in liability for former owners or operators who are not connected to the property at the time of the injury. This is an instance in which the common law reflects a rationale similar to that reflected in the statute, *i.e.*, that after passage of a reasonable period of time, persons no longer associated with the property should not be held liable for injury or death caused by defective or unsafe conditions of the property.

Blaske at 830.

The difference between a defective improvement case and a foreign object case is the ability of a litigant to pursue a remedy. Instead of being able to seek recourse from another party (e.g., the owner or occupier of property with a defective improvement), no such recourse is available in a foreign object case that is brought more than 10-years after the negligent act. This fact has been addressed by courts finding such statutes of repose constitutional. *See e.g. Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988) ("The statute explicitly exempts owners or other persons in possession of the real property from the 15-year limitation period. It is evident the legislature has provided that a remedy will be available to injured parties under the law."). Like the *Blaske* Court pointed out, injured parties in would-be defective improvement cases are not without recourse. The same cannot be said for would-be foreign object litigants.

Because Section 516.105 forecloses the possibility of **any** redress – unlike *Blaske* – it violates the Missouri Constitution's right to a remedy article.

IV. THIS COURT SHOULD OVERRULE *BATEK* AND FIND THE RIGHT TO SEEK REDRESS FOR MEDICAL MALPRACTICE FUNDAMENTAL, SUBJECTING LEGISLATIVE LIMITATIONS ON THESE CAUSES OF ACTION TO HEIGHTENED SCRUTINY

Appellants are well aware that this Court, in *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 889 (1996), stated that it "has previously and repeatedly rejected the argument that victims of medical malpractice are members of a suspect class." Citing *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992). Appellants would point out, though, that stare decisis "is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course." *Medicine Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 335 (Mo. banc 2005). Indeed, this Court overruled *Adams* after 20 years in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (2012) when it found the statute imposing a cap on non-economic damages for medical malpractice violative of the right to trial by jury set forth in the Missouri Constitution.

As Judge Teitelman explained in his opinion concurring in the result in *Klotz v. St. Anthony's Medical Center*, 311 S.W.2d 752, 781-83 (Mo. banc 2010), the legislative classifications created by RSMo. § 538.210 – which, prior to being deemed unconstitutional, limited non-economic damages in medical malpractice cases – must survive strict scrutiny, because they impinge upon the **fundamental** constitutional right of trial by jury. In his concurrence, Judge Teitelman stated "[t]he arbitrary caps imposed by § 538.210 will permit some measure of full compensation to those whose injuries are

primarily economic…[h]owever,...for those whose injuries are predominantly non-economic, the caps arbitrarily will cut off most of their proven, demonstrated damages." *Id*. Additionally, "those with generally more limited economic prospects – the poverty-stricken, the physically and mentally disabled, single mothers, wounded veterans, the elderly, and others – are impacted disproportionately by the arbitrary limits on non-economic damages." *Id.*

Here, Section 516.105 potentially allows some measure of full compensation (now that Section 538.210's non-economic caps have been declared unconstitutional) to those who discover a foreign object left in their body less than 10 years after the negligent act occurred. The same cannot be said for those who do not discover – and have no reason to discover – a foreign object until more than 10 years after the negligent act occurred. As stated above, Section 516.105 disproportionately affects certain classes of individuals differently that another. Again, it adversely affects the poor, disabled, elderly, and others, and denies these individuals their constitutional rights to pursue a remedy for their injuries. In other words, if, but for the 10-year repose period in Section 516.105, individuals would otherwise be able to exercise their constitutional right to pursue a trial by jury for their injuries in a foreign object case, Section 516.105 must serve compelling state interests, and must be narrowly tailored to meet those interests.

For the reasons previously stated in Appellants' opening brief, Respondents cannot – and in fact, did not – provide any such compelling state interests in Section 516.105, and as such, should be declared unconstitutional.

V. SECTION 516.105 IS SPECIAL LEGISLATION THAT VIOLATES THE MISSOURI CONSTITUTION BECAUSE IT TREATS FOREIGN OBJECT VICTIMS DIFFERENTLY, AND THERE IS NO RATIONAL BASIS FOR DOING SO

Article III, Section 40(6) of the Missouri Constitution states that "[t]he general assembly shall not pass any local or special law…for limitation of civil actions." As stated previously, Section 516.105 creates a special law that is unconstitutional under Article III, Section 40 of the Missouri Constitution. Section 516.105 states, in relevant part, that:

> [a]ll actions...for damages for malpractice...shall be brought within two years from the date of occurrence of the act of neglect...**except** that...[i]n cases in which the act of neglect complained of is introducing and negligently permitting any foreign object to remain within the body of a living person, the action shall be brought within two years from the **date of the discovery** of such alleged negligence...and...[i]n cases in which the act of neglect complained of is the negligent failure to inform the patient of the results of medical tests, the action for failure to inform shall be brought within two years from the **date of the discovery** of such alleged negligent failure to inform...and...[i]n cases in which the person bringing the action is a minor less than eighteen years of age, such minor shall have **until his or her twentieth birthday** to bring such action. **In no event shall any action** for damages for malpractice, error, or mistake **be commenced after the**

expiration of ten years from the date of the act of neglect complained of or for two years from a minor's eighteenth birthday, whichever is later.

(emphasis added).

This Court, in *School District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219 (Mo. banc 1991), set out two tests for determining whether or not a statute or ordinance violates the constitutional prohibition against special legislation. This Court stated that the analysis first must determine whether "the law a special or local law? Second, if so, is the vice that is sought to be corrected, the duty imposed, or the permission granted in the statute so unique to the persons, places or things classified by the law that a law of general applicability could not achieve the same result?" *Id.* at 221. This Court has have defined a "special law" as "[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).

Looking closer at Section 516.105, though, the general assembly carved out additional exceptions by creating a discovery rule for specific medical malpractice cases. In doing so, the general assembly separated out foreign object (and negligent failure to inform of test result) victims from all other medical malpractice victims. Were it not for these specific carve-outs, foreign object cases not filed within 2-years of the object being left in an individual's body would be untimely under Section 516.105's 2-year statute of limitations. Section 516.105, therefore, treats potential foreign object litigants differently by giving them 2 years from the date of discovery – which could very well be a date in

time after the date of the negligent act – within which to bring their case. However, even within the foreign object class, Section 516.105 has the very real ability to affect those who discover a foreign object in their body differently. Specifically, for those who discover a foreign object within 8 years of it being left in their body, would-be litigants have a full 2-years to bring a medical malpractice case. For those who discover the object between 8 and 10 years, Section 516.105 provides them less than 2 years to bring a medical malpractice case. Finally, for those who discover the object more than 10 years after it is left in their body, Section 516.105 bars their claim. Section 516.105, therefore, creates different classes of foreign object victims, and treats certain foreign object victims differently by failing to provide a full 2-years from the date of discovery to bring their cause of action – and in certain cases, barring their case altogether.

For the reasons previously stated, there is no rational basis for creating these different classifications, and therefore, the 10-year response period in Section 516.105 is unconstitutional under Article III, Section 40(6) of the Missouri Constitution.

CONCLUSION

For the reasons stated above, this Court should reverse and remand this case to the Circuit Court to allow Appellants to proceed with their case and seek redress for their damages because RSMo. § 516.105 is unconstitutional.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the attached brief complies with Supreme Court Rule 84.06(b), and contains **4,058** words, excluding the cover, the certificate of compliance, the certificate of service as determined by Microsoft Word software, utilizing 13-point Times New Roman font.

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