No. SC94322

IN THE SUPREME COURT OF MISSOURI

SHONDA AMBERS-PHILLIPS and RICHARD PHILLIPS, II,

Plaintiffs-Appellants

v.

SSM HEALTH CARE ST. LOUIS d/b/a SSM DEPAUL HEALTH CENTER

Defendant-Respondent

Appeal from the Circuit Court of St. Louis County
The Honorable Michael T. Jamison

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This action involves the question of whether the 10-year statute of repose found in Section 516.105 RSMo unconstitutionally bars medical negligence claims brought more than 10 years after the alleged negligence. On November 21, 2013, Plaintiffs-Appellants Shonda Ambers-Phillips and Richard Phillips, II ("plaintiffs") filed a petition in the Circuit Court of St. Louis County alleging medical negligence and *res ipsa loquitur* against Defendant-Respondent SSM Health Care St. Louis d/b/a SSM DePaul Health Center ("SSM DePaul"). In response, SSM DePaul filed a motion to dismiss based on the statute of repose found in Section 516.105. Plaintiffs then filed a memorandum in opposition, claiming the statute of repose violates the Missouri Constitution. SSM DePaul filed a reply in further support of its motion to dismiss, after which the circuit court held a hearing on the motion. On May 30, 2014, the circuit court granted SSM DePaul's motion to dismiss with prejudice. Plaintiffs filed their notice of appeal on June 27, 2014.

On appeal, plaintiffs claim Section 516.105 violates the open courts, due process, equal protection, and special legislation provisions of the Missouri Constitution. Plaintiffs also claim the 10-year period of repose should be equitably tolled. Because this case involves a question concerning the validity of a statute enacted by the Missouri General Assembly, as well as the interpretation of the Missouri Constitution, the case is within the exclusive appellate jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiffs allege that on September 13, 1999, Ms. Ambers-Phillips was in a car accident and was taken to SSM DePaul, where they allege an exploratory laparotomy was performed on her (Legal File (LF) 6, 43). They further allege that in June 2013, nearly 14 years after her visit to SSM DePaul, she underwent another exploratory laparotomy at a different hospital, where a doctor allegedly encountered four "foreign bodies" (LF 6).

On November 21, 2013, more than 14 years after Ms. Ambers-Phillips' visit to SSM DePaul, plaintiffs filed a petition in the Circuit Court of St. Louis County alleging medical negligence and *res ipsa loquitur* against SSM DePaul (LF 3). Specifically, they alleged that SSM DePaul failed to account for foreign bodies used during Ms. Ambers-Phillips' 1999 laparotomy (LF 4-16). Mr. Phillips asserted a loss of consortium claim (LF 15).

SSM DePaul filed a motion to dismiss, arguing among other things that plaintiffs' claims were barred by Section 516.105, Missouri's 10-year statute of repose for claims of medical negligence (LF 17-21). Plaintiffs filed a response claiming that the statute of repose in Section 516.105 violates the Missouri Constitution (LF 22-42). SSM DePaul then filed a reply in further support of its motion to dismiss, arguing among other things that plaintiffs lacked a "real and substantial" constitutional claim (LF 43-56).

After a hearing on SSM DePaul's motion to dismiss, the circuit court granted the motion with prejudice (LF 57-72). In its 16-page opinion, the circuit court found that after September 13, 2009, the statute of repose in Section 516.105 extinguished any potential claim based on Ms. Ambers-Phillips' 1999 operation (LF 59-60). Because

plaintiffs filed their action more than 14 years after the date of the alleged negligence, their action had to be dismissed (LF 59-60). The circuit court also found plaintiffs did not present a "real and substantial" constitutional challenge to the statute of repose, and that if even if they did, their challenge would be unsuccessful (LF 60-72).

This appeal followed.

ARGUMENT

I. The circuit court did not err in granting SSM DePaul's motion to dismiss because plaintiffs lack a "real and substantial" constitutional claim, in that their constitutional question has previously been decided, explicitly or implicitly, by this Court.

Standard of Review

This Court reviews a circuit court's grant of a motion to dismiss *de novo*. Devitre v. Orthopedic Ctr. of St. Louis, LLC, 349 S.W.3d 327, 331 (Mo. banc 2011).

Argument

Notably, plaintiffs do not appeal the circuit court's judgment that their constitutional challenge to Section 516.105 is not "real and substantial," having already been rejected by this Court and the Missouri Court of Appeals in cases examining similar statutes (see Appellants' Brief, pp. 7-29).[1] The circuit court decided SSM DePaul's motion to dismiss on this basis, and considered the constitutional issues presented by plaintiffs for the sake of argument only. This Court should affirm the circuit court's judgment in light of plaintiffs' failure to appeal the circuit court's judgment in whole. See Ballard v. City of Creve Coeur, 419 S.W.3d 109, 116 (Mo. App. E.D. 2013) (finding that portions of a circuit court's judgment not appealed must be affirmed). Nevertheless, even if plaintiffs have preserved for review the circuit court's determination that plaintiffs

[1] Their jurisdictional statement (Appellants' Brief, p. 4) uses the phrase.

lack a "real and substantial" constitutional claim, this Court should find they do not have such a claim.

A party raising constitutional issues must raise issues that are "real and substantial and not merely colorable." Schumann v. Mo. Highway & Transp. Comm'n, 912 S.W.2d 548, 551 (Mo. App. W.D. 1995); see also Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 51-52 (Mo. banc 1999) (emphasizing that constitutional challenges to Missouri statutes must be "real and substantial"). A plaintiff bears the burden of proving a statute is unconstitutional; moreover, a court must refrain from questioning the "wisdom, social desirability, or economic policy" of the legislature's decision to enact the statute. Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 829 (Mo. banc 1991).

A constitutional challenge is more than colorable and thus "real, made in good faith, and substantial" when the question is one of first impression. Rodriguez, 996 S.W.2d at 51-52. If the constitutional question has previously been decided, either implicitly or explicitly, the question is merely a colorable assertion of a constitutional impediment. Schumann, 912 S.W.2d at 551.

Missouri courts have explicitly or implicitly addressed the constitutional questions raised by plaintiffs in this case. As such, plaintiffs' challenge of Missouri's statute of repose in Section 516.105 is at best a colorable assertion of a constitutional impediment. Schumann, 912 S.W.2d at 551. Indeed, in plaintiffs' brief, they cite but do not substantively discuss the very case in which this Court rejected the same kinds of arguments involving another 10-year statute of repose: Blaske. Instead, plaintiffs largely

look to cases decided in other states and jurisdictions, ignoring the substance of Blaske and other decisions from this Court and the Missouri Court of Appeals.

The plaintiffs in Blaske brought negligence and other claims and challenged the constitutionality of a 10-year statute of repose that applied. Blaske, 821 S.W.2d at 825, 828-34. Though the statute did not involve claims against health care providers, the constitutional principles and analysis equally apply in this case. Like plaintiffs here, the Blaske plaintiffs sought to have this Court declare a 10-year statute of repose unconstitutional for purportedly violating their due process and equal protection rights, their right to access the courts, and their right to be free from "special legislation." Id. at 825.

This Court rejected such claims and held the statute of repose complied with all constitutional mandates. Id. at 825. Because the Blaske plaintiffs, like plaintiffs here, were not members of a suspect class, and because fundamental rights were not involved, the Court explained that the rational basis test applied in scrutinizing the statute at issue. Id. at 829. Additionally, this Court found the legislature had a rational basis for excluding certain individuals and entities from the purview of the statute of repose, and had not engaged in enacting "special legislation." Id. at 831-32. In its analysis, this Court emphasized the presumption that the legislature acted within its constitutional power to enact the statute of repose, even though application of the statute resulted in some inequality among litigants. Id. at 829.

Additionally, this Court held the statute of repose complied with all due process requirements and the Missouri Constitution's "open courts" provision. Id. at 833-34.

Like plaintiffs here, the Blaske plaintiffs complained of due process and "open courts" violations, alleging (1) the statutory repose period was unreasonable; and (2) the statute eliminated their cause of action before it accrued. Id. at 834. In affirming the statute's constitutionality, this Court emphasized (1) the legislature's power to substantively change the law and eliminate a cause of action; (2) the plaintiffs' lack of a vested property right in any cause of action before accrual; and (3) the difference between a statute of repose and a statute of limitations. Id. at 833-34.

This Court reasoned that when enacting the statute of repose, the General Assembly chose to substantively modify the law to eliminate a cause of action after 10 years. Id. at 834. To hold otherwise would essentially prohibit the legislature from substantively changing the law in any way that could adversely affect a litigant. Id. Such a finding was untenable, especially considering that plaintiffs lack a vested property right in a cause of action before it accrues. Id. The Blaske plaintiffs suffered no due process or open courts violation because, after 10 years, they simply had no cause of action. Id.

Blaske is one of many Missouri decisions that have rejected the kinds of arguments made by plaintiffs here. See, e.g., Batek v. Curators of Univ. of Mo., 920 S.W.2d 895, 899 (Mo. banc 1996) (upholding the legislature's right to impose a different statute of limitations among various malpractice claimants, and holding such a law did not constitute special legislation); Laughlin v. Forgrave, 432 S.W.2d 308, 314 (Mo. banc 1968) (upholding the legislature's right to enact specific statutory time limits regarding certain claims without violating equal protection rights or enacting special legislation); Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 61-62 (Mo. banc 1989) (upholding the

legislature's right to limit or eliminate causes of action without violating Missouri's open courts provisions or a litigant's due process rights).

Courts in other states have reached similar conclusions. See, e.g., Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 287 (Tex. 2010) (holding Texas' statute of repose regarding "foreign object" malpractice did not violate any right to access the courts, properly eliminated uncertainties, created a substantive right to be free of liability after a specified time, and promoted the general welfare of society); Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund, 613 N.W.2d 849, 864-73 (Wis. 2000) (upholding the legislature's right to enact a statute of repose, irrespective of the harshness of the ultimate result, as necessary for societal good).

Case law confirms the 10-year statute of repose at issue here, like others examined in similar contexts in Missouri and elsewhere, passes constitutional muster. At best, plaintiffs have offered merely colorable assertions of unconstitutionality to avoid the impact of a valid 10-year statute of repose that bars their claims. Because plaintiffs lack a "real and substantial" constitutional claim, the Court should reject their challenge and affirm the circuit court's judgment granting SSM DePaul's motion to dismiss.

II. The circuit court did not err in granting SSM DePaul's motion to dismiss because Section 516.105 does not violate the Missouri Constitution's open courts and right to a remedy provision, in that Section 516.105 merely eliminates a cause of action after 10 years rather than creating a condition precedent to accessing the courts.

Standard of Review

This Court reviews a circuit court's grant of a motion to dismiss *de novo*. Devitre, 349 S.W.3d at 331. Likewise, whether a statute is constitutional is an issue of law that this Court reviews *de novo*. State v. Vaughn, 366 S.W.3d 513, 517 (Mo. banc 2012).

Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. Id. A statute should be enforced unless it "plainly and palpably affronts fundamental law embodied in the constitution." Blaske, 821 S.W.2d at 828 (citing Winston v. Reorganized Sch. Dist. R–2, Lawrence Cnty., 636 S.W.2d 324, 327 (Mo. banc 1982)). When the constitutionality of a statute is attacked, the burden is upon the party making the attack to prove the statute is unconstitutional. Id. at 828-29.

Argument

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." As this Court has confirmed, however, this provision does not mean that a plaintiff can always go to court and obtain a judgment on his or her claim.

Blaske, 821 S.W.2d at 832. Whether a statute violates a litigant's right to access the courts turns on whether the statute (1) is a condition precedent to accessing the courts to enforce a valid cause of action; or (2) substantively modifies the law by eliminating a cause of action that previously existed. Blaske, 821 S.W.2d at 833. The former condition violates the open courts provision, while the latter condition does not. Id.

In Blaske, this Court discussed the open courts provision of the Missouri Constitution at length. As noted above, the plaintiffs in that case complained that the relevant statute violated the open courts provision of the Missouri Constitution because the statutory repose period was unreasonable and the statute eliminated their cause of action before it accrued. Id. at 834. In affirming the statute's constitutionality, the Supreme Court emphasized the legislature's power to substantively change the law and eliminate a cause of action, the plaintiffs' lack of a vested property right in any cause of action before accrual, and the difference between a statute of repose and a statute of limitations. Id. at 833-34.

The Court reasoned that when enacting the statute of repose, the legislature chose to substantively modify the law to eliminate the plaintiffs' cause of action after 10 years. Id. at 834. To hold otherwise would prohibit the legislature from changing the law in any way that could adversely affect a litigant. Id. This Court refused to make such a finding, particularly because plaintiffs lack a vested property right in a cause of action before it accrues. Id. Therefore, the Blaske plaintiffs suffered no open courts violation. Id. After 10 years, they simply had no cause of action. Id.

In its analysis, this Court in Blaske also highlighted the difference between a statute of repose and a statute of limitations. Unlike a statute of limitations, a statute of repose eliminates a cause of action altogether after a specified period of time and following a specified event. Id. The Blaske plaintiffs wanted to treat the statute of repose like a statute of limitations, under which the claim would first accrue and then be eliminated. Id. The legislature had no such intent; the statute of repose was not a statute of limitations. Id.

Blaske is one of many Missouri decisions that have rejected the kinds of arguments made by plaintiffs here. See, e.g., Batek, 920 S.W.2d at 899 (imposing a different statute of limitations among various malpractice claimants did not constitute special legislation); Laughlin, 432 S.W.2d at 314 (legislature may enact statutory time limits on certain claims without violating equal protection rights or enacting special legislation); Harrell, 781 S.W.2d at 61-62 (legislature may limit or eliminate causes of action without violating open courts provision or a litigant's due process rights).

Here, the Missouri legislature substantively eliminated plaintiffs' cause of action by enacting Section 516.105. The legislature did not create a condition precedent to accessing the courts. Rather, as was the case in Blaske, the legislature modified the law to provide that no cause of action exists after 10 years. Blaske, 821 S.W.2d at 833. To hold otherwise would prevent the legislature from substantively modifying the law in any way that might adversely affect a potential litigant. Id. at 834.

Plaintiffs ask this Court to consider cases from the Texas Supreme Court, which has found that certain statutes of limitations violate that state's constitutional right of

access to the courts. Those cases are inapposite. In Neagle v. Nelson, the plaintiff discovered that a sponge had been left in his abdomen slightly more than two years after the date of his surgery. 685 S.W.2d 11, 12 (Tex. 1985). The plaintiff's claim was limited by a two-year statute of limitations. Id. The Texas Supreme Court found the statute of limitations was unconstitutional because it violated the open courts provision of that state's constitution. Notably, the case did not involve a statute of repose.

The cases of Nelson v. Krusen and Sax v. Votteler, also cited by plaintiffs, likewise involved a statute of limitations, not a statute of repose. In those cases, the Texas Supreme Court held a statute of limitations that cuts off a plaintiff's access to the courts before he or she knows of a cause of action or has reached the age of majority is unconstitutional. Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983).

In later cases, the Texas Supreme Court reaffirmed the distinction between a statute of limitations and a statute of repose: "The Texas Constitution grants foreign-object claimants a reasonable opportunity to discover their injuries and file suit, even if the two-year limitations period has run **(though not ... if the ten-year repose period has run)**." Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292, 294 (Tex. 2010) (emphasis added). As that court explained, Texas' 10-year "outer-boundary deadline" under its statute of repose "would be surplusage if the limitations statute were itself a no-exceptions cutoff." Id.; see also Methodist Healthcare, 307 S.W.3d at 287 (holding Texas' statute of repose regarding "foreign object" malpractice did not violate any right

to access the courts, properly eliminated uncertainties, created a substantive right to be free of liability after a specified time, and promoted the general welfare of society).

Here, Section 516.105 does not place a condition precedent on access to the courts in connection with a valid cause of action, but rather modifies the law by eliminating a cause of action more than 10 years after it accrues. This Court has held that such a statute does not violate Missouri's "open courts" provision. Thus, Section 516.105 is constitutional. The Court should affirm the circuit court's judgment.

III. The circuit court did not err in granting SSM DePaul's motion to dismiss because the statute of repose in Section 516.105 does not violate the due process clause of the Missouri Constitution either facially or as applied to plaintiffs, in that a statute of repose extinguishes a cause of action before it comes into existence, thus preventing it from accruing; moreover, a litigant does not have a vested property right in a cause of action before it accrues.

Standard of Review

The standard of review is the same as in Argument II above.

Argument

Article I, Section 10 of the Missouri Constitution guarantees that "no person shall be deprived of life, liberty or property without due process of law." Plaintiffs claim Section 516.105 violates substantive due process, either facially or as applied to them. Plaintiffs are wrong; their claims fail.

Substantive due process principles require invalidation of a substantive rule of law if the rule impinges on life, liberty, or property interests that "are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is 'narrowly tailored to serve a compelling state interest.'" Doe v. Phillips, 194 S.W.3d 833, 842 (Mo. banc 2006) (citation omitted). To be considered a "fundamental" right protected by substantive due process, a right or liberty must be one that is "objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Id. (quoting State ex rel. Nixon v. Powell, 167 S.W.3d 702, 705 (Mo. banc 2005)).

The United States Supreme Court "has stated that a litigant does not have a vested property right in a cause of action before it accrues." Blaske, 821 S.W.2d at 834 (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978)). Due process principles do 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." Duke Power, 438 U.S. at 88 n.32 (internal citations and quotations omitted).

As discussed above, a statute of repose extinguishes a cause of action before it comes into existence, thus preventing it from accruing. Blaske, 821 S.W.2d at 834 (noting a statute of repose "does not bar the courts to a person with a valid cause of action; rather, it modifies the common law to provide that there is no such cause of action"); see also CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2187 (2014) (citing 54

C.J.S., Limitations of Actions § 7, at 24) (explaining that a statute of repose "is not related to the accrual of any cause of action" but rather mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued; thus, a statute of repose "can prohibit a cause of action from coming into existence"). Because there is no vested property right in a cause of action before it accrues, the statute of repose in Section 516.105 does not facially violate the due process clause of the Missouri Constitution.

Furthermore, the statute of repose at issue does not violate plaintiffs' due process rights as applied to them. The legislature effectively eliminated plaintiffs' cause of action on September 13, 2009, exactly 10 years after the alleged date of neglect. Plaintiffs have no vested property right in a cause of action that had not yet accrued; under Section 516.105, plaintiffs no longer had a cause of action as of September 13, 2009. Like the Blaske plaintiffs, in this case plaintiffs were not and have not been denied any due process, because they have no cause of action under Section 516.105.

Moreover, the 10-year time limit imposed by the statute of repose is not arbitrary. Plaintiffs claim a 10-year statute of repose with no exceptions or extensions is unreasonable because it leaves no time for an individual to seek redress for his or her damages. Nonetheless, as the Blaske case shows, similar periods have been upheld as constitutional in Missouri. Additionally, such statutes promote the finality of claims and the principle that after a certain amount of time has passed, a party should not be required to litigate a stale claim. Statutes of repose represent a legislative judgment that a

defendant should be free from liability after the legislatively determined period of time. CTS Corp., 134 S. Ct. at 2183 (citing 54 C.J.S., Limitations of Actions § 7, at 24).

Though plaintiffs cite cases from other states that, according to plaintiffs, have found statutes of repose to violate constitutional provisions, plaintiffs again have confused statutes of limitations with statutes of repose. Additionally, as detailed below, plaintiffs have cited cases that have been overruled or are otherwise bad law.

In Whitnell v. Silverman, the statute at issue was not a statute of repose but rather a three-year statute of limitations. Though the Louisiana Court of Appeals found the statute of limitations to be unconstitutional, that judgment was later reversed by the Louisiana Supreme Court. See Whitnell v. Silverman, 646 So. 2d 989 (La. App. 1994), reversed, 686 So. 2d 23 (La. 1996). In reversing the appellate court's judgment, Louisiana's high court found that the statute of limitations did not violate the open courts provision of that state's constitution. 686 So. 2d at 31. Moreover, the plaintiff's equal protection challenge failed because she failed to show the statute treated similarly situated persons differently. Id. at 30. Thus, plaintiffs' reliance on Whitnell is misplaced.

In Kenyon v. Hammer, once again the statute at issue was not a statute of repose, but rather a three-year statute of limitations. 688 P.2d 961, 964 (Ariz. 1984). In that case, the Arizona Supreme Court discussed the fact that Arizona does not have an "open courts" provision in its constitution, but rather a stronger requirement that a "right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." Id. at 966. Thus, the court held the date

of an injury determines the accrual of a cause of action for purposes of the statute of limitations. Id. at 967. The court's opinion was merely a discussion of that state's discovery rule, rather than a determination that a statute of repose was unconstitutional.

Plaintiffs have failed to prove the statute of repose in Section 516.105 violates the substantive due process clause of the Missouri Constitution, either generally or as applied to them. Accordingly, the Court should affirm the circuit court's judgment.

IV. The circuit court did not err in granting SSM DePaul's motion to dismiss because Section 516.105 does not violate the equal protection clause of the Missouri Constitution, in that Section 516.105 is rationally related to a legitimate state interest.

Standard of Review

In making a claim that a statutory classification violates equal protection, a challenger must prove abuse of legislative discretion beyond a reasonable doubt. Blaske, 821 S.W.2d at 829. If reasonable doubt exists, the statute is valid. Id.

Argument

The equal protection clause of the Missouri Constitution provides that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. 1, § 2. This clause safeguards suspect or specially protected classes from "invidious discrimination … between classes." Winston, 636 S.W.2d at 327-28.

Analysis of an equal protection claim involves a two-step process. The first step is to determine whether the classification burdens a "suspect" class or impinges on a

"fundamental right." Blaske, 821 S.W.2d at 829. If so, strict scrutiny of the classification is required. Id. When a statute does not concern a suspect class or fundamental right, however, the statute will withstand an equal protection challenge so long as there is a rational basis for the legislature's classifications. Winston, 636 S.W.2d at 327. A challenger who alleges an equal protection violation must prove "legislative abuse beyond a reasonable doubt and short of that, the issue must settle on the side of validity." Id. at 327. A statutory classification will be upheld if any set of facts reasonably justifies the classification. Blaske, 821 S.W.2d at 829. In fact, where possible, a court has the duty to discover a reasonable rationale supporting the legislature's classification scheme. Winston, 636 S.W.2d at 328.

A. The rational basis test applies.

Because no fundamental right or suspect classification is involved in this case, the rational basis test applies. Fundamental rights under the equal protection clause include rights such as freedom of speech and religion, the right to procreate, and the right to vote. Blaske, 821 S.W.2d at 829. Plaintiffs mistakenly argue the right to seek redress for one's injuries through the courts is a fundamental or "important" right, such that the statute of repose in Section 516.105 must pass strict or intermediate scrutiny. This Court, however, has rejected such a claim before, and has held that Missouri's open courts provision does not mean a plaintiff can always go to court and obtain a judgment on his or her claim. Id. at 829, 832. Moreover, in support of their argument, plaintiffs rely on a case that has been overruled: White v. Montana, 661 P.2d 1272, 1275 (Mont. 1983), overruled, Meech

v. Hillhaven W., Inc., 776 P.2d 488, 491 (Mont. 1989) (overruling White and holding the right to full legal redress is not a fundamental right under the Montana Constitution).

This case also does not involve a "suspect class," which includes constitutionally suspect individuals who require, because of historical reasons, additional or special protection. Id. at 829. Suspect classifications requiring a strict scrutiny analysis are those related to race, national origin, and religion. Id. Others, such as gender and illegitimacy, are measured by intermediate scrutiny. See Glossip v. Missouri Dep't of Transp. & Highway Patrol Emps. Ret. Sys., 411 S.W.3d 796, 812-13 (Mo. banc 2013) (Teitelman, J., dissenting). Notably, Missouri courts have explicitly stated malpractice plaintiffs do not fall within a suspect class. Batek, 920 S.W.2d at 898.

Based on these definitions and principles, plaintiffs are not members of a suspect class; no fundamental right is at issue in this case. Plaintiffs have offered no justifiable reason to overturn precedent and expand the list of fundamental rights or the scope of individuals falling within a suspect class. Because there is no suspect class or fundamental right involved, the rational basis test applies.

B. The statute of repose satisfies the rational basis test.

Missouri courts have emphasized the "minimal nature" of the rational basis test. Blaske, 821 S.W.2d at 829. Under this test, a legislature's classification is improper only if the classification is wholly irrelevant to achieving the state's objective. Id. The rational basis test does not require the legislative objective to be "compelling nor the dilemma grave nor that the legislature choose the best or wisest means to achieve its

goals." Winston, 636 S.W.2d at 328. Any such arguments, similar to plaintiffs' arguments here, are "best directed to the legislature, and not the court." Id.

In this case, plaintiffs bear the burden of proving the legislature's statutory classification under Section 516.105 is wholly unrelated to the state's purpose in creating the statute of repose. Plaintiffs have failed to carry this burden "beyond a reasonable doubt," as required. Winston, 636 S.W.2d at 327. Rather, plaintiffs' assertions amount to an argument the statute is unfair when applied to them. Such claims are properly directed at the legislature, not this Court. Missouri courts (including this one) have repeatedly emphasized the legislature does not overstep the bounds of its authority simply because it enacts a statute that results in some inequality. Blaske, 821 S.W.2d 833, 829.

More importantly, plaintiffs overlook many legitimate reasons for the legislature's decision to enact this statute of repose. For instance, the legislature may have found the unique nature of "foreign object" claims and other malpractice claims warranted the inclusion of health care providers within the protection of the statute. See Blaske, 821 S.W.2d at 830 (employing a similar analysis regarding the professionals involved there). Similarly, the legislature likely determined a final filing deadline was necessary for any malpractice claim, and that there was a need to foreclose potential liability to individuals having no relationship with a plaintiff after 10 years. See id. at 831 (employing a similar analysis to the 10-year statute of repose at issue there). Plaintiffs also ignore a defendant's right to be free of potential liability involving a stale claim. CTS Corp., 134 S. Ct. at 2183.

Plaintiffs cite a number of cases from other states that are irrelevant or distinguishable. As discussed above, plaintiffs' reliance on Kenyon is misguided because the statute in that case was a statute of limitations. 688 P.2d at 967. Austin v. Litvak, 682 P.2d 41 (Colo. 1984), is also distinguishable. In that case, the court concluded a three-year statute of repose unconstitutionally discriminated against "negligently misdiagnosed" plaintiffs by depriving them of the benefits of the discovery rule, when plaintiffs who alleged "foreign object" or "knowing concealment" claims were allowed—under the same statute of repose—to bring suit within two years of discovering their injury. Id. at 48. The court determined the legislature's extension of the discovery rule to some medical malpractice claimants in the statute of repose, while denying it to others, constituted an impermissible discrimination between classes of claimants. Id. at 53. No such distinction between classes of claimants exists in the statute of repose in Section 516.105, which reads as follows: "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."

The other cases cited by plaintiffs are similarly irrelevant or distinguishable. See Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709, 715 (Ohio 1987) (four-year statute of repose that denied certain litigants full year for filing claim violated equal protection clause in state constitution); Shessel v. Stroup, 316 S.E.2d 155, 158 (Ga. 1984) (discussing a statute of limitations), superseded by statute, as recognized by Kaminer v. Canas, 653 S.E.2d 691, 693 (Ga. 2007); Frohs v. Greene, 253 Or. 1, 452 P.2d 564 (Ore.

1969) (discussing a statute of limitations and extending the state's discovery rule to negligence cases); Carson v. Maurer, 424 A.2d 825, 834 (N.H. 1980), overruled, Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007); Kohnke v. St. Paul Fire & Marine Ins. Co., 410 N.W.2d 585, 588-89 (Wis. Ct. App. 1987), aff'd & remanded, 424 N.W.2d 191 (Wis. 1988) (finding a statute of limitations void because it applied to a specific appellant who was a minor when the injury occurred, and declining to determine the constitutionality of statute).

Plaintiffs have failed to carry their burden of demonstrating beyond a reasonable doubt that the legislature abused its discretion when enacting Section 516.105. Winston, 636 S.W.2d at 327. Plaintiffs are not a member of a protected class; no fundamental right is at issue. The statute of repose passes the rational basis test, defeating plaintiffs' equal protection challenge. The judgment of the circuit court should be affirmed.

V. The circuit court did not err in granting SSM DePaul's motion to dismiss because Section 516.105 is not special legislation, in that its statute of repose applies to "any action for damages for malpractice, error, or mistake" and the General Assembly had a rational basis for establishing the 10-year repose period.

Standard of Review

The standard of review is the same as in Argument II above.

Argument

Article III, Section 40(6) of the Missouri Constitution provides that the General Assembly "shall not pass any local or special law … for limitation of civil actions." This

Court has interpreted "special legislation" to be a law that includes "less than all who are similarly situated." Laughlin, 432 S.W.2d at 314-15. The issue of whether a statute is, on its face, a special law depends on the whether the classification is open-ended. Treadway v. State, 988 S.W.2d 508, 510 (Mo. banc 1999) (citing Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. banc 1997)). Classifications based upon factors that are subject to change (such as population) may be considered open-ended, whereas classifications based on historical facts, geography, or constitutional status on a particular date focus on immutable characteristics and are, therefore, considered local or special laws. Id.

There are two potential analyses to determine whether a statute constitutes special legislation. Blaske, 821 S.W.2d at 831-32. The analysis is similar to an equal protection analysis. Id. at 831. Under the first analysis, if the legislature defined a class, a court should consider whether (1) the members of the class are treated the same; and (2) the legislature had a rational basis for establishing the limits of the class. The second analysis uses this same line of logic, requiring a court to consider whether the defining characteristic of the class justifies excluding other potential members. Id. at 831-32.

The statute of repose within Section 516.105 passes both tests. First, as discussed earlier, the legislature had a rational basis for defining the class as it did, especially considering the unique problems and issues involved in "foreign object" and other medical malpractice claims. Second, the statute applies equally to all "foreign object" malpractice claimants who file an action against a health care provider. In fact, the

statute of repose within Section 516.105 applies broadly to "any action for damages for malpractice, error, or mistake." There is no impermissible exclusion under the statute.

Plaintiffs' argument that Section 516.105 involves special legislation rests on the fact that the statute of repose bars their claims but may not bar another person's claim. This contention amounts to an argument that Section 516.105 is unfair and can result in different results for different people. Again, plaintiffs overlook the fact that inequality by itself does not render a statute unconstitutional. Blaske, 821 S.W.2d at 829.

Because Missouri's statute of repose passes the rational basis test and applies equally to all members of the class, there is no special legislation involved. The judgment of the circuit court should be affirmed.

VI. The circuit court did not err in granting SSM DePaul's motion to dismiss because statutes of repose are not subject to equitable tolling, in that a statute of repose is a judgment that defendants should be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.

Standard of Review

This Court reviews a circuit court's grant of a motion to dismiss *de novo*. Devitre, 349 S.W.3d at 331.

Argument

In their final point on appeal, plaintiffs disregard the purpose behind statutes of repose and propose a device (equitable tolling) that would render statutes of repose

essentially meaningless. In particular, plaintiffs argue the statute of repose within Section 516.105 should be equitably tolled because a claimant in a "foreign body" case should not be required to discover his or her injury within a defined timeframe. Plaintiffs also argue stale evidence is less likely in foreign body cases as opposed to other types of malpractice cases.

Generally, time-barring statutes "may be suspended or tolled only by specific disabilities or exceptions enacted by the Legislature"; as such, "courts are not empowered to extend those exceptions." Shelter Mut. Ins. Co. v. Dir. of Revenue, 107 S.W.3d 919, 923 (Mo. banc 2003) (quoting Cooper v. Minor, 16 S.W.3d 578, 582 (Mo. banc 2000)). Beyond specific statutory exceptions, the only equitable tolling exceptions recognized by Missouri courts typically involve statutes of limitation (not statutes of repose) in situations in which (1) pending litigation elsewhere has prevented a plaintiff from bringing suit earlier; or (2) the defendant has prevented the plaintiff from timely bringing suit. Rolwing v. Nestle Holdings, Inc., 437 S.W.3d 180, 184 (Mo. banc 2014) (involving statute of limitations); see also Adams v. Div. of Emp. Sec., 353 S.W.3d 668, 673 (Mo. App. E.D. 2011) (stating equitable tolling permits a plaintiff to toll a statute of limitations when the defendant has actively misled the plaintiff regarding the cause of action, or has raised the precise statutory claim at issue but mistakenly in the wrong forum); State ex rel. Mahn v. J.H. Berra Constr. Co., 255 S.W.3d 543, 547 (Mo. App. E.D. 2008) (noting exception when a person is prevented from exercising his or her legal remedy by the pendency of legal proceedings).

Here, plaintiffs attempt to apply equitable tolling to a statute of repose, not a statute of limitations. Moreover, even if this case involved a statute of limitations, plaintiffs have failed to show that one of the exceptions recognized by Missouri courts applies to their case. In particular, plaintiffs have not alleged that pending litigation elsewhere prevented them from bringing suit earlier. Additionally, they have not alleged that SSM DePaul somehow prevented them from timely bringing suit. Thus, even if this case involved a statute of limitations, plaintiffs have failed to provide a valid, recognized basis to support equitable tolling.

As with their previous arguments, plaintiffs' contention that the statute of repose should be equitably tolled merely amounts to an argument the statute is unfair as applied to them and their case. In addition to the fact that this argument has been considered and rejected by this Court, see e.g., Blaske, 821 S.W.2d at 829, plaintiffs ignore the fact that allowing plaintiffs (through equitable tolling) to file medical malpractice claims more than 10 years after the alleged negligence would disregard the reason why statutes of repose exist in the first place. Though plaintiffs claim "foreign object" cases are somehow different and would require less stale evidence than other types of cases, plaintiffs are wrong. Allowing plaintiffs to file claims at some unknown and unlimited time in the future would leave defendants unable to obtain testimony from deceased or other former employees, and would require the indefinite retention of records. Forcing a defendant to defend itself against stale claims is inequitable and is the main reason why statutes of repose exist.

The U.S. Supreme Court recently reaffirmed the policy reasoning behind statutes of repose, explaining why they are not subject to equitable tolling. CTS Corp., 134 S. Ct. at 2183. Statutes of repose put an outer limit on the right to bring a civil action, and reflect "a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." Id. at 2182-83. Statutes of repose are a "cutoff"—an absolute bar on a defendant's temporal liability. Id. at 2183. Such statutes are, in essence, "a fresh start or freedom from liability." Id.

In emphasizing that statutes of repose are not subject to equitable tolling, the Supreme Court stated as follows:

> Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." Lozano v. Montoya Alvarez, 572 U.S. 1, —, 134 S.Ct. 1224, 1231–1232, 188 L.Ed.2d 200 (2014). Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control. See, e.g., Lampf, *supra*, at 363, 111 S.Ct. 2773 ("[A] period of repose [is] inconsistent with tolling"); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056, p. 240 (3d ed. 2002) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling"); Restatement (Second) of Torts § 899, Comment *g* (1977).

CTS Corp., 134 S. Ct. at 2183. Further explaining the fundamental difference between statutes of repose and statutes of limitation, the Court stated as follows:

> Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to "pursu[e] his rights diligently," and when an "extraordinary circumstance prevents him from bringing a timely action," the restriction imposed by the statute of limitations does not further the statute's purpose. Lozano, *supra,* at —, 134 S.Ct., at 1231–1232. But a statute of repose is a judgment that defendants should "be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason." C.J.S. § 7, at 24.

CTS Corp., 134 S. Ct. at 2183.

As this Court and the U.S. Supreme Court have determined, a statute of repose may not be equitably tolled. Plaintiffs have presented no new or different basis—beyond arguments previously made by others to this Court and the U.S. Supreme Court—to justify a significant change in the law. Accordingly, the judgment of the circuit court dismissing plaintiffs' claims should be affirmed.

CONCLUSION

For the reasons discussed above, plaintiffs have failed to show the statute of repose in Section 516.105 violates the Missouri Constitution, or that equitable tolling of statutes of repose should now be permitted in Missouri. The statute of repose at issue is not an unconstitutional condition precedent to accessing Missouri courts, does not violate due process facially or as applied to plaintiffs, passes the rational basis test and thus comports with the equal protection clause, and is not a special law. Furthermore, plaintiffs have presented no reason (beyond reasons already given by others and rejected by this Court and the U.S. Supreme Court in other cases) why this Court should allow equitable tolling of statutes of repose. The circuit court properly dismissed plaintiffs' claims. This Court should affirm the judgment.

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CERTIFICATE OF COMPLIANCE

This brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). This brief was prepared using Microsoft Word and 13-point Times New Roman font, and contains 8,230 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), and signature block. No appendix is being filed with this brief. The electronic version of this brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I certify that on October 27, 2014, this document was filed electronically using the "Your Missouri Courts" website, causing automated delivery to the attorneys of record, including as follows:

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