IN THE SUPREME COURT OF MISSOURI

DEBORAH WATTS as Next Friend for NATHAN WATTS,	)	
	)	**Supreme Court No. 91867**
Appellants/Cross-Respondents,	)	
vs.	)	
LESTER E. COX MEDICAL CENTERS, d/b/a FAMILY MEDICAL CARE CENTER, LESTER E. COX MEDICAL CENTERS, MELISSA R. HERRMAN, M.D., MATTHEW P. GREEN, D.O., WILLIAM S. KELLY, M.D.,	)	
Respondents/Cross-Appellants.	)	

BRIEF OF AMICUS CURIAE MISSOURI AFL-CIO

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Interest of Amicus Curiae

The Missouri AFL-CIO is interested in the outcome of this matter insofar as it affects Missouri citizens that are part of the AFL-CIO. The Missouri AFL-CIO is a federation of unions in Missouri that are affiliated with the National American Federation of Labor—Congress and Industrial Organizations. This includes AFL-CIO's central labor councils, as well as local unions, trade union associations, committees, councils, districts, and regional groups whose parent organizations are also affiliated with the National AFL-CIO. The Federation of Unions encompasses such diverse areas of labor as nursing, construction, transportation, and food workers. The issues presented to this Court are of vital importance to its members.

Consent of the Parties

Plaintiffs/Appellants and Defendants/Respondents have consented to the filing of the Brief of Amicus Curiae Missouri AFL-CIO in Support of Plaintiffs/Appellants.

Jurisdictional Statement

The Supreme Court has jurisdiction over this appeal because it involves a constitutional challenge to a statute of the State of Missouri pursuant to Article V, Section 3 of the Missouri Constitution. Your amicus asserts an interest in Appellant Deborah Watts' appeal of the judgment of the Circuit Court of Greene County.

Points Relied On

I. The cap on non-economic damages set forth in § 538.210 R.S.Mo. is not rationally related to a legitimate state interest because it presents arbitrary and irrational classifications.

Statement of Facts

Your amicus adopts the Statement of Facts of Plaintiff/Appellant Deborah Watts.

Argument

I. The cap on non-economic damages set forth in § 538.210 R.S.Mo. is not rationally related to a legitimate state interest because it presents arbitrary and irrational classifications.

The brief of the Plaintiff/Appellant addresses the issues of whether § 538.210 fails a rational basis review because the caps set arbitrary and irrational classifications and fails to achieve its stated objectives. Your amicus defers to the brief of the Plaintiff/Appellant which expertly presents the constitutional challenges present in the non-economic caps imposed by § 538.210 R.S.Mo. Your amicus does not believe that it can improve on the presentation of the arguments on those issues. However, your amicus does believe that there are certain policy considerations that are specific both to your amicus' federation of unions, as well as other laborers and workers of the State of Missouri, that are affected by the arbitrary and irrational classifications created by § 538.210 R.S.Mo.

The economic caps imposed by § 538.210 were ostensibly created to stabilize malpractice insurance premiums. Though others have put forth meritorious arguments that other means could have been used to achieve this goal, meritorious arguments have also been made that the non-economic caps disproportionately affect certain suspect classes. These arguments, however, lost sight of an essential consideration: the impact

on Missouri's working class. The people that perform the everyday labor necessary to keep our economy strong must be considered.

Ideally, caps on non-economic damages should not exist, for a jury's verdict will be tailored specifically to the facts of the particular case. A negligent wrong-doer thus faces the prospect of fairly and adequately compensating the victim injured by their acts of negligence. The Missouri Legislature, in capping non-economic damages that an injured victim recovers as in the case before this Court, singles out a class for special treatment. It seeks to treat all classes of victims equally. However these caps on non-economic damages as they currently exist, do not affect everyone equally. While, on its face, § 538.210 appears to do so, in reality it does not. Numerous examples exist illustrating how this cap affects Missouri citizens differently. But for your amicus, the examples are particularly relevant when focused on Missouri's working families.

The current economic climate has left a large number of Missouri workers unemployed. Economic downturns such as that we are currently experiencing inevitably lead to layoffs. The effects of recession reach every sector of the job market. Fewer and fewer people are working as unemployment rates soar to a figure higher than 9%. Less skilled and skilled workers alike are typically affected the most in such an economic environment. State, county, and municipal governments are either laying off or not replacing teachers, firefighters, paramedics, and police officers. Private sector workers, in construction and manufacturing are as well affected in the same ways.

As a result, those who are unable to find work are disproportionately affected by

non-economic damages caps. The interests of a class of people who are most in need of income are disregarded. These workers are subject to recall out of their labor unions sometimes on a day-by-day basis. Yet they have encounter difficulty in proving economic damages when they have the temporary and permanent limitations which medical negligence can produce. They lose out on the opportunities of call backs to work. Their losses become compounded.

Older workers must take early incentives to retire from the workforce prematurely, if available, because of a variety of business reasons. Others lose work because of major plant closings, or major plant relocations to areas beyond Missouri's borders. This disproportionate impact is felt because of the inability to be called back as well. They would be working but for the state of the economy, and medical negligence interferes with their quality of life and ability to find other work like those who are laid off.

Instead, the caps operate to favor negligent healthcare providers, and leave other employed individuals untouched, more notably white collar jobs. Thus so-called blue collar jobs that the members of public and private sector workers belong is a class of people who are most affected by economic downturns. They are disproportionately forced to face the negative consequences of the non-economic damages cap.

While more white-collar workers have thus far been able to keep their jobs and thus remain unaffected by the cap, it is the hourly, blue-collar workers and laborers that suffer the most. Workers who get laid off and remain unemployed indefinitely are treated differently under this law. The aging workforce, now into early retirement, or those

fortunate enough to be a salaried employee, who sustain an injury resulting from medical negligence can recover economic and non-economic damages, thus entitling the victim to unlimited actual damages as well as those non-economic damages that are limited by the cap. Stating this differently, if the victim is out of work because of the economic conditions in our state and nation, even though they possess the residual ability to work, they receive disparate treatment when contrasted with their employed counterparts. An unemployed blue-collar worker sustaining the same injury, on the other hand, cannot recover or faces insurmountable hurdles in proving reliably the losses characterized as economic damages. These victims only opportunity for recovery is through the non-economic damages that are limited under the cap. Thus, the non-economic damages cap enables white-collar employees and employed employees of all types of occupations to face a larger recovery solely because of their employed status. Employment should not be a prerequisite to recovery, nor should the absence of employment opportunities be compounded in these ways with non-economic caps so as to restrict the responsibility of the wrong-doer.

Before §538.210 was enacted, an injury to a highly paid white-collar employee would have returned a verdict different from that generated by the same exact injury to an unemployed, blue-collar worker. The party with a higher salary was entitled to higher economic damages. But, both parties were able to recover non-economic damages to cure their losses. So, the potential recovery hinged on the damage suffered by the plaintiff, regardless of whether the plaintiff was employed. An unemployed plaintiff's

injuries and losses could be compensated through non-economic damages, thus lessening the effect of losing economic damages due to unemployment. §538.210 instead shifted the focus to the plaintiff's employment status. Now, a salaried employee is better able to fully recover for losses suffered than is an unemployed laborer. The cap takes away the jury's ability to compensate an unemployed worker through non-economic damages by effectively rendering the unemployed worker's injury less worthy of compensation. Though a doctor may negligently inflict the same amount of harm to different parties, the doctor's liability for that negligence is now determined by the injured party's employment status. An unemployed plaintiff lowers the doctor's liability even if the amount of harm caused by the negligent action remains the same. A temporary change in one's work status thus has a dramatic impact on the compensation available to a victim of malpractice. This is an unjust and unfair way to compensate a party suffering harm. Not only is an unemployed party injured by a negligent doctor, but that party is further injured by the law. Likewise, permanent injuries have a more profound effect on blue-collar workers.

A white-collar employee who loses a limb as a result of medical malpractice is often better able to return to work. Office and white collar jobs are less physically demanding than manual labor jobs. A construction worker, nurse, driver, or other labor-intensive worker who has suffered a severe disability may face struggles far exceeding that of a worker who has a desk-related occupation. While rarely acknowledged, labor-intensive workers with such disabilities have reduced work expectancy, limited

advancement opportunities, and greater difficulty completing ordinary tasks. A cap on non-economic damages has a disparaging impact on such workers. As well as disproportionately affecting the working class as a whole, the non-economic damages cap has a disproportionate effect on young workers.

Becoming partially disabled from medical malpractice at a younger age means more suffering with less compensation than one who sustains the same injury at an advanced age. A construction worker who loses a limb at the age of twenty-five, but is able to maintain employment, must deal with that disability for a much longer period than a fifty-year old. Yet, non-economic damages for both are capped. Clearly, one suffers more and may have less opportunity than another. But the cap vitiates a jury's determination that the younger worker's injury requires greater compensation. Regardless of what a jury would award, the caps would equalize both claims.

§ 538.120 also provides protection for workers in one industry, while providing no such protection for workers in other industries. § 538.120 protects those practicing in the health care industry, such as physicians, from liability for a large verdict based on non-economic damages that are greater than $350,000.00. No other industry receives this protection. The Missouri AFL-CIO represents diverse areas of labor including construction, transportation, food, and health and safety workers. Workers in industries such as those represented and comprising the Missouri AFL-CIO do not receive this protection from large verdicts based on non-economic damages over $350,000.00. A plaintiff with severe injuries but minimal economic damages will not be affected by

§538.210 if he or she receives a large verdict against a worker in the construction industry for damages and injuries that worker caused. Nevertheless, that same plaintiff will have a limited recovery if he or she files suit and receives a large verdict against a physician. So, while blue-collar workers suffer the consequences of having their potential non-economic damages capped, these same workers do not receive such protection in defending lawsuits. The law should not allow doctors to recover unlimited non-economic damages from blue-collar workers while simultaneously preventing blue-collar workers from doing so against those very same doctors.

Heath care is not the only industry that pays insurance premiums to protect against liabilities. If a car manufacturer designs and manufactures a car that is defective, a plaintiff injured as a result of those defects is not limited in the amount of damages he or she can recover. If the manufacturer is responsible for the injuries sustained, the manufacturer must cover the plaintiff's losses. Having to pay higher insurance premiums to cover these claims does not justify prohibiting the plaintiffs from making a full recovery for losses caused by the defective car. Likewise, negligent lawyers are not shielded from liability by a cap on non-economic damages. There is no logical reason to offer protection to doctors for malpractice actions while, at the same time, leaving lawyers fully open to liability for malpractice. If other industries do not enjoy the same protection, there is no justification for protecting the health care industry.

Furthermore, lowering the potential liability for doctors does not serve to increase the effectiveness and care exercised by those in the medical profession. Alternatively, the

cap lessens accountability because doctors are no longer fully responsible for their actions. Holding doctors fully responsible for their injurious actions, on the other hand, would make the practice of medicine more effective by increasing accountability.

Finally, a plaintiff should be entitled to full recovery for injuries and harm caused by another. Accordingly, defendants should be liable for all damages caused by their negligent actions. Limiting liability on the basis of profession is an arbitrary distinction. It shifts the focus away from the plaintiff's injuries and instead focuses on the plaintiff's employment status. The resulting injustice disproportionately affects certain groups. The purpose of civil law is to provide a forum in which plaintiff's can recover for damages suffered at the hands of a negligent defendant. Prohibiting a plaintiff from fully recovering an amount deemed by a jury to be just compensation for injuries inflicted frustrates the purpose of our court system. Consequently, §538.210 must be ruled unconstitutional so plaintiffs throughout this State have the opportunity to have their claims justly resolved.

As stated previously, your amicus defers to the briefs of Plaintiff/Appellant, as well as the other amicus, on the issues of whether §538.210 fails a rational basis review because the caps fail to achieve their stated objectives. Those arguments were expertly put forth by the other parties. Your amicus certainly agrees with all of the arguments advanced to overturn §538.210. Amicus encourages the Court to consider the impact these caps have on the working families of Missouri.

Your amicus has tried to set forth some additional circumstances under which non-

economic caps work to the detriment of Missouri citizens, and in particular those citizens with lower paying jobs and who are more subject to downturns in the economy. Certainly, many other examples exist. It is hoped that this Court will consider these policy arguments with the many other policy arguments advanced by other parties to this action to arrive at the conclusion that caps on non-economic damages not only frustrate the constitutional purpose behind compensating injured victims, but also frustrates a jury's determination as to what would be appropriate in any one instance.

Respectfully Submitted,

\s\ John B. Boyd

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Certificate Of Service

I hereby certify that on this 20th day of October, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to following, and further that I sent a electronic copy hereof by email to :

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