

IN THE
Supreme Court of Missouri

No. SC91867

DEBORAH WATTS as Next Friend for NATHON WATTS,
Appellants,

vs.

LESTER E. COX MEDICAL CENTERS d/b/a FAMILY MEDICA CARE CENTER,
Respondent,

LESTER E. COX MEDICAL CENTERS,
Respondent,

MELISSA R. HERRMAN, M.D.,
Respondent,

MATTHEW P. GREEN, D.O.,
Respondent,

WILLIAM S. KELLY, M.D.,
Respondent.

On Appeal from the Circuit Court of Greene County, Missouri

Case No. 0931-CV01172

THE HONORABLE DAN J CONKLIN,
Circuit Court Judge, Division III

BRIEF OF *AMICUS CURIAE* PARAQUAD, INC.
IN SUPPORT OF APPELLANTS

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II. INTEREST OF THE *AMICUS CURIAE*

Paraquad, Inc. (“Paraquad”) is a private 501(c)(3), not-for-profit with a mission to empower people with disabilities to increase their independence through choice and opportunity. Founded in 1970, it is one of the oldest non-residential Centers for Independent Living in the country. Paraquad’s guiding principle is to advance the independent living philosophy. Paraquad provides over 40 diverse services. As a core service for persons with disabilities, advocacy is an integral part of Paraquad's programs and services. There are several ways that Paraquad staff actively advocates for independent living opportunities. The goal of Paraquad’s advocacy initiatives is to make communities free of architectural, communication and attitudinal barriers. In its role as advocate for persons with disabilities, the instant case is of particular importance to Paraquad as the damage cap applicable to medical malpractice victims unfairly, irrationally, and disproportionately discriminates against persons with disabilities.

RSMO. § 538.210 V.A.M.S. setting a limit on the sum that may be awarded in actions for medical negligence is unconstitutional because it irrationally and disproportionately discriminates against the persons with disabilities.

III. CONSENT OF THE PARTIES

Paraquad, Inc. has received verbal consent from counsel for the parties to file this amicus curiae brief.

IV. STATEMENT OF FACTS

Paraquad, Inc., adopts the Appellants' Statement of Facts.

V. ARGUMENT AND AUTHORITY

A. RSMo. § 538.210 Is Unconstitutional In That It Violates Amendment XIV To The United States Constitution And Art. I Section 2 Of The Missouri Constitution In That It Places A Discriminatory And Irrational Burden On Persons With Disabilities.

1. Introduction.

RSMo. §538.210 places a “cap” on the sum a victim of malpractice may recover in a lawsuit. The recoverable amount is limited to \$350,000.00 regardless of the number of defendants, the number of plaintiffs and the number of negligent acts that contributed to the injuries incurred. The cap, though applicable to all medical malpractice victims, has a particularly invidious impact on victims who are already burdened by a physical or mental disability.

Many victims of malpractice will suffer a resultant loss of employment or employability as well as other “economic” injuries. Unfortunately, many persons with disabilities are already unemployed or unemployable when subjected to the additional insult of medical negligence. These individuals often will have *de minimus* claims for economic damages. Their compensation will be necessarily more limited to non-economic damages when compared to otherwise previously healthy persons.

The non-economic cap will have a disparate effect on persons with disabilities. Many persons with disabilities live below the poverty line and are of limited means. They are unable to retain counsel on any hourly basis. Rather, they must enter into contingency contracts. The expenses associated with prosecuting medical malpractice claims, combined with the relatively

low success rates on these cases, will render cases with only non-economic recovery financially unattractive to counsel. Persons with disabilities are thereby denied viable access for civil redress of these wrongs.

The disparate impact on persons with disabilities is violative of their equal protection guarantees. Moreover, due to our country's historic discrimination against persons with disabilities, any review of the statute should be undertaken pursuant to strict scrutiny. Alternatively, persons with disabilities should be accurate as "guise-suspect" status and receive commensurately enhanced scrutiny. Assessing RSMo. §538.210 demonstrates its unconstitutional character in its particularly harsh and unfair treatment of persons with disabilities.

2. **Under Missouri Law, Persons With Disabilities Are A "Suspect Class"**

RSMo. §538.210 VAMS violates Article I, Section 2 of the Missouri Constitution and Amendment XIV to the United States Constitution, denying equal protection to persons with disabilities who are victims of malpractice. In evaluating claims that a law violates the equal protection clauses of the Missouri or U.S. Constitutions the Court must first determine whether the law burdens a suspect class or impinges a fundamental right. *In re Care and Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. 2003). If it burdens a suspect class or impugns a fundamental right the statute's constitutionality will be strictly construed. Amicus adopts the arguments of the Appellant that Missouri's constitutionally guaranteed right to trial by jury is a fundamental right.

"A suspect classification exists where a group of persons is legally categorized and the resulting class is 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Id*, quoting, *Missourians for*

Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. banc 1997). That persons with disabilities are “persons with disabilities” is a tautological truth. The United States Congress has determined that they have been subjected to a sordid history of vile discrimination and occupy a position of political powerlessness.

The Americans with Disability Act of 1990 (“ADA”) 42 U.S.C. 12101, *et seq*, was enacted as a federal remedial response to the pervasive prejudice and discrimination historically suffered by persons suffering physical and mental disability. 42 U.S.C. 12101(b)(1). Congress, acting in its role as fact-finder undertook three years of hearings, with thousands of hours of testimony coming from hundreds of sources. Lowndes, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 Fla. L. Rev. 417, 444 (1992). Following this grand deliberative process Congress concluded persons with disabilities to be persons subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of such individuals to participate in, and contribute to society.

The foregoing conclusion is readily discernible from the “Findings and Purposes” section of the ADA. Congress found that “historically, society has tended to isolate and segregate individuals with disabilities” and that “such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. 12101(a)(2). In its factual findings Congress noted discrimination against persons with disabilities “persists in such critical areas as employment, housing, public accommodations, education, transportation, communications, recreation, institutionalization, **health services**, voting, and access to public services.” 42 U.S.C. 120101(a)(3)[emphasis added].

Congress additionally determined persons with disabilities “continually encounter various forms of discrimination including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communications barriers, overprotective rules and policies, failure to make modifications to existing facilities, and practices, exclusionary qualification standards, and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities. 42 U.S.C. 12101(a)(5). Furthermore, “people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.” 42 U.S.C. 120101(a)(6). “[T]he continuing existence of unfair and unnecessary discrimination and prejudice,” Congress concluded, “denies people with disabilities the opportunity for which our free society is justifiably famous.” 42 U.S.C. 12101(a)(9).

Beginning with Justice Stone’s famous “Footnote 4,” Courts have been cautioned to regard legislation negatively affecting “discrete and insular minorities” with a “more searching inquiry.” *United States v. Carolene Products*, 304 U.S.144, 152-3 n.4 (1938). This directive has accorded suspect class status to race and national origin based classification. Gender and legitimacy premised classifications are accorded quasi-suspect status. The genesis of the quasi-suspect status of gender classification can be traced to the 1972 Amendments to Title VII (codified at 42 U.S.C. Section 2000(e), *et seq.*). In that scenario, great deference was accorded by the Court to the findings, conclusions and remedial efforts of Congress. *See, Craig v. Boren*, 429 U.S. 190 (1976). Similarly, the ADA, like Title VII, is a product of Congress’ legislative prerogative provided for in Section 5 of the 14th Amendment. It simply is without any logic or sense to judicially recognize Congress’ findings of historical bias in regards to gender, and later

disclaim the relevance of similar findings in regard to persons with disabilities. Persons with disabilities should be defined, at a minimum, as a guise-suspect class.

Judicial restraint in this area has often been attributed to the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).¹ Amicus respectfully submits this precedent is of limited relevance as it predates enactment of the ADA. *Cleburne*'s reticence to extend protection to the mentally disabled was founded on assumptions directly contravened by the findings of Congress noted in relation to passage of the ADA. Accordingly, Amicus submits persons with disabilities be accorded suspect status classification, based upon their historical and existent disadvantages.

3. RSMo. § 538.210 Causes A Disparate Impact On Persons With Disabilities, A Suspect Class, Warranting Strict Scrutiny Of The Statute's Constitutionality.

On its face, RSMO. §538.210 does not classify persons with disabilities. However, the statute does disproportionately discriminate against persons with disabilities in a several respects, resulting in a disparate impact. Persons with disabilities in the State of Missouri are notably underemployed and under paid when compared to their able-bodied counterparts. For 2007, over 77% of Missouri's persons with disabilities were not employed full-time. Erickson, W & Lee, C.

¹ Courts following *Cleburne* have applied a heightened level of scrutiny to classifications premised on disability, however. See, *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1984) suggesting a rational basis test "with sharper focus" be applied in cases involving classification of the mentally disabled. The sharper focus assessment requires the government to show the classification bears a substantial relationship to achievement of an important governmental objective.

(2008) *2007 Disability Status Report: Missouri*. Ithaca N.Y. Cornell University Rehabilitation Research training Center on Disability Demographics & Statistics, pg. 28. Similarly, the median earnings for the persons with disabilities who are fully employed are \$6,100.00 less than their unencumbered counterparts (\$30,500.00 versus \$36,600.00). *Id* at 30. In 2007, 24.8% of persons with disabilities in Missouri lived in poverty whereas less than 10% of the able-bodied were so categorized. *Id* at 34. From the foregoing one may readily conclude the vast majority of persons with disabilities who are victims of malpractice will have no claim for lost earnings and even when they do they will be at a rate greatly diminished in comparison to others.

The foregoing statistics are vitally important to understanding the disparate impact on a suspect class. Because the vast majority of persons with disabilities are unemployed they will likely have no claim for lost wages. Secondly, the majority of persons with disabilities obtain health care, if at all, via government programs which have liens on any recovery sounding in tort. Thus, in the case of a verdict, any sum recovered for medical expenses will be subject to repayment under Medicare or Medicaid liens.² The injured party will be a mere conduit for these monies and will derive no benefit. Thus, the majority of persons with disabilities will have the prospect of a maximum gross recovery of \$350,000.00.

The vast majority of the class' victim's compensation will be in the form of non-economic damages. Thus, the cap on damages will affect persons with disabilities victim much more than the able-bodied person suffering the same injury. This has been borne out in a Rand

¹ The situation is more dire for those who choose to settle without a trial. Any sum recovered by way of settlement will not itemize what portion is recovered for economic versus, non-economic damages. Thus, the whole settlement may be consumed by fees, expenses and liens, leaving the injured party with nothing.

Institute for Civil Justice study, which found the persons most impacted by California's version of tort reform were those with modest economic losses but significant damages to their quality of life. See, Pace, et al, *Capping Non-Economic Awards in Medical Malpractice Trials, California Jury Verdicts Under MICRA*.

Medical malpractice cases are expensive to prosecute and have been made ever more costly by House Bill 393. Under RSMo. §538.225 a plaintiff must acquire reports from experts in each specialty that is the subject of the suit. This is so regardless of whether the principal of medicine involved is basic to all specialties. Thus, the more providers who participate in the error, the more experts who must be retained by plaintiff's counsel. This, combined with the non-economic damage cap will make pursuit of cases on behalf of persons with limited economic damages less attractive to plaintiff's counsel who face substantial investment and the prospect of modest reward if successful. This conclusion has been borne out by a U.S. General Accounting Office study, which noted "attorneys may be less likely to represent injured parties with minor economic damages if non-economic damages are limited." U.S. General Accounting Office (GAO) *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates*, GAO-03-702 (2003) at pg. 42.

A simple example may serve to illustrate the plight created for disabled malpractice victims. Suppose an unemployed paraplegic (lower limb paralysis) suffers an upper extremity nerve transection during a shoulder surgery. As a result, the individual suffers unremitting pain only marginally improved with daily narcotics. That individual will suffer an undeniable loss in quality of life. His access to counsel will be limited to those willing to take the matter on a contingency basis as paying an attorney an hourly fee will likely be beyond his means. The lawyer reviewing the case will face the prospect of investing \$50,000.00 to \$100,000.00 to

secure experts, conduct discovery and otherwise prepare the matter for trial. Counsel will also know that with a 40% contingency fee, the best outcome from a fee standpoint will be \$140,000.00. Counsel will thus face the prospect of risking \$100,000.00 to earn a \$140,000.00 fee that will only be recovered after trial and appeal. In light of the fact that the vast majority of medical negligence cases are won by the defendant, this will not be a case the attorney will undertake. Rather, he will wait for the case with substantial economic damages to justify his monetary and temporal investment. Unfortunately for the paraplegic, though having a meritorious case, he will be denied representation and thereby be denied access to the courts³. These same problems are not faced by malpractice victims with substantial economic damages. The damage cap thus acts to unfairly burden persons with disabilities who are injured as a result of medical negligence, violating their right to equal protection.

A related problem arises in a more subtle way for persons with disabilities. Multiple surveys have consistently shown persons with disabilities lack access to quality health care and have poorer outcomes than do general populations. Hwang, et al. *Access and Coordination of Health Care Service for People With Disabilities*. Journal of Disability Policy Studies 2009 20; 35-45. It is intuitively obvious that the poorer the quality of care one receives, the more likely that poor care will equate to malpractice. Thus, though persons with disabilities are more likely to be victims of malpractice, based on the foregoing, they are among the least likely to secure counsel, and on the rare occasions they do obtain representation, then will recover much less compensation.

³ The data underlying this point is discussed at some length in plaintiffs' brief and will not be repeated herein.

Amicus recognizes that disparate impact is not, in and of itself, determinative of a violation of a class' right to equal protection. It is, however, evidence to be considered. It should be noted House Bill 393 fails to identify the problems or issues to be cured by the cap and fails to state how a damage cap will cure these unidentified problems. Moreover, there is no basis for unduly and disproportionately impacting persons with disabilities. What must have been patently obvious to the legislature in 2005, however, was the impact the damage cap would have on medical malpractice victims without significant economic damages. As Plaintiffs' brief demonstrates, the prejudicial effects on the elderly, children and women has been the subject of substantial discussion in various periodicals and law review journals. The fact the legislature proceeded to cavalierly enact such a discriminatory statute to the detriment of a class of people long victimized by society should be sufficient for this Court to employ heightened scrutiny in evaluating the damage cap's constitutionality.

Amicus suggests this Court apply strict scrutiny to RSM. §538.210. "To pass strict scrutiny review, a governmental intrusion must be justified by a 'compelling state interest' and must be narrowly drawn to express the compelling state interest at stake."

Bernat v. State, 194 S.W.3d 863, 868 (Mo. 2006). Amicus adopts the arguments advanced by the Appellants regarding studies and data accrued since 1986, which firmly support the position that non-economic damage caps do not affect malpractice premiums, but do effectively rob the most severely injured victims of malpractice of their right to compensation. The irrationality of the cap is made manifest by the exclusion of a cost of living allowance (COLA). Unlike the cap of 1986, H.B. 393 did not provide for yearly increases in the cap to account for inflation. As such, each plaintiff in each succeeding year faces a cap in real dollars diminishing from those that reach trial in a prior year. Allowing less each year in real dollars must presume a crisis that worsens each

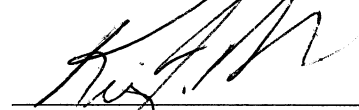
year, regardless of the cap. Thus, the legislature must have concluded that a cap could not significantly impact the “undefined crisis.” Given this, one must logically conclude the crisis’ origin was a product of something other than increasing jury verdicts. The Vidmar Amicus brief well states the actual origin of the alleged crisis, and the arguments therein are adopted by Amicus Paraquad.

Assuming, *arguendo*, the Court declines to find strict scrutiny the appropriate standard of review, this does not negate the substantial disparate impact on persons with disabilities who are victims of malpractice. Amicus submits this Court factor such disparate impact into its analysis along with the other Constitutional arguments advanced by the Appellants herein.

VI. CONCLUSION

Persons with disabilities are a class of persons who have historically suffered great prejudice and discrimination. They have historically lacked political power and should be considered a suspect class for purposes of due process and equal protection analysis. Strict scrutiny of RSMo. §538.210 mandates the statute be found unconstitutional. The arbitrarily low damage cap on non-economic damages in medical negligence cases has a disparate discriminatory impact on a suspect class. The cap’s impact on the persons with disabilities’ right to redress is not justified by the legislature’s desire to protect the financial interests of medical liability insurers. For the reasons stated, Paraquad asks this Court reverse the trial court in this matter and hold RSMo. §538.210 unconstitutional.

Respectfully submitted,



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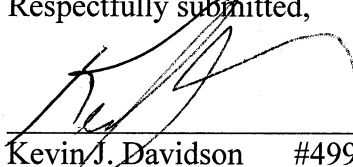
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GREEN, D.O., WILLIAM S. KELLY, M.D.,)	
)	
Respondents/Cross-Appellants.)	

VII. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of MO.SUP.CT.R. 84.06(b). It contains no more than 31,000 words of text (specifically containing 3,765). It was prepared using Microsoft Word for Windows 2010.

Respectfully submitted,



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)	
Respondents/Cross-Appellants.)	

VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 21 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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