IN THE SUPREME COURT OF MISSOURI

CASE NO. SC90107

JAMES KLOTZ AND MARY KLOTZ

Appellant/Respondent

vs.

MICHAEL SHAPIRO, M.D. AND METRO HEART GROUP, LLC

Respondents/Appellants.

On Appeal from the Circuit Court of St. Louis County
Case No. 06CC-4826
Honorable Barbara Wallace, Judge

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

AARP is a nonpartisan, nonprofit membership organization of nearly 40 million persons age 50 and older, including residents of nursing homes and other long-term care facilities, their spouses, and other relatives. More than 800,000 AARP members live in Missouri. AARP's mission is to help people 50+ achieve independence, choice, and control in ways that are beneficial and affordable to them and society. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. Protecting the financial security of and ensuring quality health care services for people as they age are two of AARP's highest priorities. AARP supports laws and policies designed to protect the rights of health care consumers to go to court and obtain redress when they have been victims of neglect or abuse.

STATEMENTS OF JURISDICTION AND FACTS

Amicus curiae AARP hereby adopts the statement of facts and the jurisdictional statement provided in the initial brief of Appellants James Klotz and Mary Klotz.

SUMMARY OF 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. The Missouri Supreme Court has held that "this constitutional protection, like that in the Fourteenth Amendment, U.S. Const. amend. XIV, requires that laws 'operate[ ] on all alike' and 'not subject the individual to an arbitrary exercise of the powers of government.'" *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. 2006) (quoting *Kansas City v. Webb*, 484 S.W.2d 817, 823 (Mo. banc 1972)). *See also Creason v. City of Wash.*, 435 F.3d 820, 823 (8th Cir. 2006) (holding that government must "treat all similarly situated people alike"). Accordingly, the revised statutory cap on non-economic compensatory damages found in Mo. Rev. Stat. §538.210 (2008) violates the Equal Protection Clause of the Missouri Constitution because it arbitrarily classifies plaintiffs based on their ability to collect economic damages. In so doing, it disproportionately limits the recovery available to low-income victims of medical malpractice, including older individuals.

Caps on non-economic damages send a dangerous message that no matter how egregious or repulsive the malpractice perpetrated on the victim with limited economic damages, the cost to the tortfeasor will never exceed actual economic injury plus $350,000. Such limitations on the right to recovery operate as a barrier to the victims' ability to retain competent counsel and a concomitant disincentive to health care providers, including the operators of nursing homes, to effectively

address preventable medical errors. Victoria A. Schall, *The New Extreme Makeover: The Medical Malpractice Crisis, Non Economic Damages, The Elderly, and the Courts,* 5 APPALACHIAN J.L. 151, 164 (2006). Given the prevalence of medical errors and the longstanding inability of state and federal governments to adequately address quality of care problems in both the acute and the long term care industries, older people and people of limited means desperately need every tool of deterrence available. The limitations on non-economic damages result in systemic under-deterrence of acts of medical negligence and the conditions that bring them about.

ARGUMENT

I. CAPS ON NON-ECONOMIC DAMAGES UNFAIRLY DISCRIMINATE AGAINST PEOPLE WITH LIMITED INCOMES, INCLUDING OLDER PEOPLE.

Caps on non-economic damages discriminate against older people in three key ways: (A) caps interfere with the rights of older victims to fair and full compensation because they, by virtue of their life circumstances, can recover only limited economic damages plus the capped amount of the non-economic damages; (B) the caps decrease and even eliminate the wrongdoer's incentive to improve standards and to ensure that future bad acts will not occur; (C) the caps effectively

deny low-income victims, including older individuals, access to the justice system to redress their injuries.

A. Caps On Non-Economic Damages Unfairly Discriminate Against People With Limited Incomes, Including Older People, Because They Can Collect Only Minimal Economic Damages.

If an older individual is hurt, or even fatally injured, as a consequence of another person's medical negligence, the damages recoverable for that injury or wrongful death would be limited significantly by the application of the $350,000 cap on non-economic damages required by Section 538.210. Because older individuals often live on fixed or limited incomes, tort plaintiffs over the age of 65 typically receive minimal economic damages recoveries for lost income. But medical malpractice injuries nonetheless cause debilitating pain and greatly reduce the life activities of countless older individuals. Non-economic damages provide a significant means for juries to assess and compensate for these severe and life-altering effects of medical malpractice. Thus, without the availability of non-economic damages recovery, the majority of older individuals will be awarded only damages for current and future medical costs and the pain and life-altering effects of medical malpractice will go uncompensated.

Lucinda Finley, a professor of law at the University of Buffalo Law School, has studied damages awards, and the effects of damages caps, in several states. Finley concludes that non-economic damage caps disproportionately harm the "hidden victims of tort reform"- women, children, older persons, minorities, and the poor because their losses are often difficult to put into monetary terms and because their wage-earning abilities are usually lower. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1280-12814 (2004).

Finley found, after years of empirical research, damages caps are *de facto* discrimination, shutting certain groups out of the civil justice system and categorizing their suffering as less "worthy" of compensation than others. Finley, *supra*, at 1313. Finley concluded states with caps are moving toward a society where the worst types of harm--such as loss of ability to engage in meaningful activities--are those least likely to be compensated and, more troubling, a society that dispenses justice according to a person's wage-earning ability, not his or her individual circumstances.[1] *Id.*

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[1] *See also* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U.PA. L. REV. 463 (1998); Thomas Koenig & Michael Rustad, *His and*

Unless the medical negligence, abuse, or neglect that the victim suffers is so extreme and demonstrably intentional as to warrant the award of punitive damages, the victim could only receive the maximum amount allotted under Missouri's non-economic damages cap.

B. Caps On Non-Economic Damages Further Discriminate Against Older Individuals And Other Disadvantaged Communities Because They Diminish Incentives To Prevent Injuries And Improve Quality Of Care For Practitioners Treating These Populations.

The possibility of tort liability, and the corresponding compensatory damages, gives medical practitioners a strong financial incentive to invest adequately in safety. "Optimal deterrence requires that injurers bear the full social cost of their risk-taking activities, including nonpecuniary losses." Prof. Jennifer Arlen, *Tort Damages*, in 2 ENCYC. OF LAW & ECON. 682, 702 (2000). However,

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Her Tort Reform, 70 WASH. L. REV. 1 (1995); David Studdert, *et al.*, *Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFFAIRS 54 (2004); Amanda A. Edwards, *Medical Malpractice Non-Economic Damages Caps: Recent Developments*, 43 HARV. J. LEGIS. 213 (2006).

Section 538.210 immunizes tortfeasors from non-economic damages above $350,000 and greatly reduces the incentives to invest in safety.

Because older individuals are unable to recover significant economic damages to the extent of non-elderly plaintiffs, Section 538.210 disproportionately reduces the deterrent effect of tort law in preventing injuries to older persons. AARP's Public Policy Institute conducted a study that found that "[p]reventable medical error and injury are of particular concern for older people because there is evidence that they are injured at a substantially higher rate than patients in other age groups," with "patients age 65 and older experienc[ing] medical injury two to four times as often as patients in age groups under the age of 45." Andrew H. Smith, *Medical Error and Patient Injury* 3 (Sept. 1998), http://www.aarp.org/research/health/carequality/aresearch-import-711-IB35.html. A survey of nursing home neglect cases in California, Florida, and Texas found 79% "of the residents suffered from multiple injuries including burns, falls, starvation, sexual abuse, and the failure of pain management." Michael L. Rustad, *Neglecting the Neglected: The Impact of Non-economic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 381 (2006). Non-economic damages account for roughly 80% of awards in such cases. *Id.* at 344-45. Consequently, a cap on non-economic damages not only disproportionately deprives older victims of full compensation

but also perpetuates medical malpractice injuries by reducing incentives to invest in the personnel, training, management, nutrition, security, and equipment needed to make facilities safer.

C. Caps On Non-Economic Damages Disproportionately Undermine The Tort Law's Deterrent Effect By Limiting Access To Justice For Older Plaintiffs.

The Section 538.210 cap on non-economic damages not only denies older plaintiffs *full* compensation for their injuries, but reduces greatly the incentive for attorneys to accept such cases on a contingent fee basis and effectively denies older medical malpractice victims of *any* compensation whatsoever.

Because most medical malpractice suits are so expensive to bring to trial, low-income plaintiffs, including many older individuals, can only afford to bring their claims to trial if attorneys accept their cases on a contingent fee basis, where the attorney recovers a fee only upon successful verdict or settlement. *See* Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV., 635, 646 (Winter 2006) ("[T]he only way for most people to afford representation, especially in a substantial matter like medical malpractice, is to hire a lawyer who will handle it on a contingency fee basis…"). Consequently, the prospect of retaining counsel

on a contingent fee basis is about access to the legal system for most low-income plaintiffs, including older individuals. *Id* ("Plaintiffs' lawyers are the gatekeepers to the civil justice system …. [C]ontingency fees are about 'access to justice' through the mechanism of civil litigation, or the threat of civil litigation").

Contingency fees typically range from 33-40% of the gross award. The costs of mounting the litigation, frequently six figures in complex medical negligence cases, are then reimbursed from the clients' portion with the client often netting less than 50% of the recovery. For victims with little economic injury, non-economic damages play a "practical role . . . in facilitating the payment of legal fees." W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale,* 1 MICH. L. & POL'Y REV. 141, 158 (1996). However, if these victims can never receive more than $350,000 in non-economic damages, he or she may be unable to find any attorney willing to take the case.

By limiting access to attorneys who will represent low-income individuals in medical negligence cases, these victims are likely to be deprived of access to legal redress altogether. "[L]imits on [non-economic damage] awards may affect access to the civil justice system by making cases financially unattractive to plaintiffs' lawyers working on a contingency fee basis." Daniels & Martin, *supra*, at 645. As Suffolk Law Professor Michael L. Rustad has explained: "Plaintiffs' counsel

representing nursing home residents are 'cherry-picking cases with well-off clients who can show economic damages,' leaving most elderly nursing home victims without the possibility of legal representation." Rustad, *supra*, at 333. Consequently, non-economic damage caps have "creat[ed] two tiers of malpractice victims," where "lawyers are turning away cases involving victims that don't represent big economic losses–most notably retired people, children and housewives." Rachel Zimmerman, *As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, WALL ST. J., Oct. 8, 2004, at A1. The ultimate outcome is that medical malpractice tortfeasors have little incentive to make meaningful changes to ensure that wrongful acts do not recur.

II. OLDER PERSONS ARE AT GREATER RISK OF BEING VICTIMS OF MEDICAL MALPRACTICE.

A. Older Persons Use a Significantly Larger Proportion of Health Care Services.

In 2005, over 13.2 million persons aged 65 and older were discharged from short-stay hospitalizations. *Administration on Aging – Statistics – A Profile of Older Americans 2007 – Health Insurance Coverage*, http://www.aoa.gov/prof/Statistics/profile/2007/14.aspx. This is a rate of 3,596 for every 10,000 persons aged 65+, or over three times the comparable rate for persons of all ages (which

was 1,174 per 10,000). *Id.* The average length of stay for persons aged 65+ was 5.5 days; the comparable rate for persons of all ages was 4.8 days. *Id.* Older persons averaged more office visits with doctors in 2005: 6.5 office visits for those aged 65-74 and 7.7 office visits for persons over 75, while persons aged 45-65 averaged only 3.9 office visits during that year. *Id.*

The overwhelming preponderance of U.S. health care costs now arise in the final years of life.[2] It is fair to surmise that persons exposed to the unequal treatment of arbitrary caps on non-economic damages will be those who access health care with the greatest frequency and with life-threatening illnesses and chronic conditions or, older people.

B. Older People Are More Likely to Suffer Egregious Harm As a Result of Medical Neglect.

Older people are vulnerable to preventable medical injuries, particularly in hospitals and long-term care settings. Nursing homes are highly regulated and must comply with the regulations set forth in the Omnibus Budget Reconciliation Act

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[2] Joanne Lynn & David M. Adamson, *Living Well at the End of Life,* RAND Health (2003).

(OBRA) of 1987, which set minimum standards of care for long-term care facilities that receive federal funding. 42 U.S.C. § 1396r(b)(4) and 42 U.S.C. § 1395i(b)(4).

Residents in long-term care facilities are vulnerable to abuse and neglect, and the evidence that exists suggests that abuse and neglect are serious and widespread. "Nearly one in twenty elders experience abuse, with the total number increasing annually by 500,000 . . . [and] seven out of every eight instances of abuse are never reported." Martin Ramey, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California's Elder Abuse Ac*t, 39 SAN DIEGO L. REV. 599, 602 (2002). The numerous instances of abuse and neglect to which nursing home residents are routinely subjected are alarming. Federal enforcement efforts are inadequate to remedy the problem, and even facilities cited for abuse continue practices that harm, and sometimes kill, residents. For example, the Director of Health Care for the federal Government Accountability Office recently testified that:

> A small but significant proportion of nursing homes nationwide continue to experience quality-of-care problems – as evidenced by the almost 1 in 5 nursing homes nationwide that were cited for serious deficiencies in 2006. . . . [These are] deficiencies that cause actual harm or place residents in immediate jeopardy.

Nursing Home reform: Continued Attention is Needed to Improve Quality of Care in Small But Significant Share of Homes Before the S. Special Comm. on Aging, 110th Cong. 3, 9 (2007) (statement of Kathryn G. Allen, Director, Health Care, GAO) available at http://www.gao.gov/new.items/d07241.pdf.

In addition, "[d]espite CMS's [Centers for Medicare& Medicaid Services] efforts to strengthen federal enforcement policy, it has not deterred some homes from repeatedly harming residents. . . . [S]anctions may have induced only temporary compliance in these homes because surveyors found that many of the homes with implemented sanctions were again out of compliance on subsequent surveys."[3] *Id.*, at 27.

A recent report by the Office of Inspector General for the United States Department of Health and Human Services found that the quality of care issues in America's nursing homes can pose significant dangers to residents of those homes.

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[3] Every nursing home that receives Medicare or Medicaid payment must undergo a standard state survey not less than once every fifteen months. CMS uses federal comparative surveys, which are conducted in at least five percent of state-surveyed nursing homes in each state, to ensure the quality of state surveys.

DEPT. OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, *Memorandum Rept.*: *Trends in Nursing Home Deficiencies and Complaints*, OEI-2-08-00140 (2008). The OIG Report found that, in each of the past three years, 91% of nursing homes surveyed were cited for deficiencies. *Id.*, at 1. In 2007, almost 17% of nursing homes surveyed by state health agencies were cited for causing or placing nursing home residents at risk of actual harm or placing them in immediate jeopardy.[4] *Id.*, at 9. The OIG found that the number of nursing homes that were cited for immediate jeopardy deficiencies has increased over the last several years. *Id.*

Unfortunately, the number of preventable medical errors remains a critical problem in our hospital system, as well. A 2006 report by the Institute of Medicine of the National Academies (IOM) found that medication errors injure 1.5 million people each year. INST. OF MED. OF THE NAT'L ACADS., *Preventing Medication*

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[4] Immediate jeopardy is defined as "a situation in which the provider's noncompliance with one or more of the requirements of participation [in the Medicaid and Medicare programs] has caused, or is likely to cause, serious injury, harm, impairment or death to a resident." Immediate jeopardy (cont. on next pg.) requires that nursing homes take immediate corrective action. 42 C.F.R. § 488.301.

Errors (2006). There are significant human and financial costs to these mistakes. The IOM estimated that there were on average at least one medication error per hospital patient per day, although error rates vary widely across facilities. In an earlier study, the IOM found that a sizable number of people have been and will continue to be injured as a result of preventable medical mistakes. Relying on information from 1997, the IOM found that at least 44,000 and perhaps as many as 98,000 people died in hospitals due to medical errors. INST. OF MED. OF THE NAT'L ACADS., *To Err is Human, Building a Safer Health Care System* (2000). Even using the more conservative numbers, the IOM concluded that deaths in hospitals due to preventable adverse events exceeded the number of deaths that were attributable to the eighth leading cause of the death for that year. *Id.*

An AARP study found that at least 6% of hospitalized patients age 65 and older suffer a medical error that was serious enough to result in a measurable injury or prolonged hospital stay. Andrew H. Smith, AARP Public Policy Institute, *Medical Error and Patient Injury: Costly and Often Preventable* (1998). This is nearly twice the rate of injury faced by younger patients. Older patients are particularly susceptible to adverse drug events, falls, hospital-acquired infections, pressure sores, delirium and surgical complications. *Id.*

As the above discussion demonstrates, older people utilize a significant proportion of health care services from both hospitals and long term care, and a significant proportion of people relying on such services will be injured as a consequence of medical errors in such health care settings. However, when older people are victims of neglect or abuse, they may not be able to fully and fairly vindicate their rights through malpractice actions if their recovery for their non-economic damages is limited.

CONCLUSION

This case has far-reaching implications for older people and for people with limited incomes in Missouri who will be deprived equal protection under the law if the non-economic damage cap contained in Section 538.210 is upheld. Mr. and Mrs. Klotz are representative of the many people who are disproportionately harmed by Missouri's statutory caps limiting non-economic damages. For the reasons stated above, the Court should declare unconstitutional the amended Section 538.210, reverse the decision of the circuit court granting Dr. Shapiro and MHG's motion for verdict reduction, and reinstate the full jury award against MHG and Dr. Shapiro.

Dated: July 31, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, and the signature block contains, 3,900 words (as determined by Microsoft Word 2003 software);

(2) That the CD-ROM filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, the appendix, and a copy of the CD-ROM containing a copy of the brief, were mailed, Federal Express Overnight Delivery, this 31st day of July, 2009, to:

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