IN THE SUPREME COURT OF MISSOURI

Case No. SC91302

MISSOURI ASSOCIATION OF NURSE ANESTHETISTS, INC., GLEN KUNKEL, M.D., AND KEVIN SNYDERS, CRNA,

Appellants,

v.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,

Respondent.

Appeal from the Circuit Court of Cole County
Case No. 09AC-CC00235
Honorable Jon E. Beetem

SUBSTITUTE BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from the entry of summary judgment in favor of the State Board of Registration for the Healing Arts. Appellants brought the action below in three counts for declaratory and injunctive relief, challenging the validity of BOHA's statements that, "it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control," and "Based on the information provided to the Board, it was their opinion that advance practice nurses currently do not have the appropriate training, skill or experience to perform these injections." BOHA sought summary judgment, contending that these statements do not constitute a rule under Section 536.010(6), RSMo., that they were not enforceable standing alone, and that BOHA was, therefore, entitled to summary judgment on the matter. Following presentation of the motion to the trial court, along with a Motion for Partial Summary Judgment filed by Appellants, the court entered summary judgment for BOHA.

The matter was appealed to the Court of Appeals, Western District, pursuant to Article V, Section 3 of the Missouri Constitution. Following an opinion of the Court of Appeals on September 21, 2010, and its denial of a motion to transfer to this Court, transfer was sought pursuant to Rule 83.04. This Court granted the application for transfer on December 21, 2010. Jurisdiction is proper in this Court under Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

The Missouri Association of Nurse Anesthetists, Dr. Kunkel and Kevin Snyders, CRNA,[1] ("Practitioners") challenge official action of the Board of Registration for the Healing Arts ("the Board") in making two statements: "it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control," L.F. 31, and "advance practice nurses currently do not have the appropriate training, skill or experience to perform these injections." L.F. 32, 34.

On September 19, 2007, the Missouri State Medical Association ("MSMA") corresponded to BOHA. That letter stated, in pertinent part:

> It is the MSMA's position that the injection or placement of therapeutic agents into a human body under ultrasonic, fluoroscopic, CT or MR imaging guidance constitutes the practice of medicine and the

[1] A CRNA is a certified registered nurse anesthetist. Under Missouri statutes regulating the practice of nursing, a CRNA is defined as: "'Certified registered nurse anesthetist', a registered nurse who is currently certified as a nurse anesthetist by the Council on Certification of Nurse Anesthetists, the Council on Recertification of Nurse Anesthetists, or other nationally recognized certifying body approved by the board of nursing[.]" §335.016 (8), RSMo. By definition, a CRNA is also an advanced practice registered nurse ("APN"). §335.016 (2), RSMo.

> performance of such should be restricted to licensed physicians in the State of Missouri. We urge the Board of Healing Arts to enforce this position.

L.F. 23. The letter concluded, "We, therefore, request that the application of therapeutic agents under image guidance be limited to medical and osteopathic physicians in Missouri." L.F. 24. The MSMA is a statewide association consisting of physician members. L.F. 36.

MSMA's petition was initially taken up by BOHA at its October 25, 2007, meeting. L.F. 28-29. Immediately prior to that date or on the date of BOHA's meeting, Dr. Kunkel addressed MSMA's request, as did Dr. Donald L. James, D.O. L.F. 25-27. Both Dr. Kunkel and Dr. James disputed the MSMA's assertion that advanced practice nurses ("APNs") lacked the education, skill and training to perform the procedures at issue. L.F. 25-27. Dr. James also made clear his understanding that BOHA was being asked by MSMA to adopt a "policy" on the scope of practice for APNs. L.F. 26-27. Similarly, Dr. Kunkel understood that MSMA was requesting adoption of a policy regarding "restrictions to the care of patients in a[n] interventional pain clinic by an advanced practice nurse." L.F. 25. Kevin Snyders appeared personally at BOHA meeting to explain his involvement with injecting therapeutic agents under fluoroscopic control. L.F. 29.

BOHA did not render a position on the MSMA request at its October meeting. L.F. 29. Its official action at this meeting was to direct "Mr. Dandamundi and Dr. Smith research the nursing statutes to determine the scope of

practice of nurses in performing the injecting of therapeutic agents under fluoroscopic control and to return to the Board for discussion at the next conference call." L.F. 29.

At BOHA's January 24-25, 2008 meeting, Dr. Smith returned and made her report to BOHA. L.F. 30. She stated that she and Mr. Dandamundi had researched the nursing statutes to determine the scope of practice of APNs in performing the procedure in question. L.F. 30. She then referred BOHA to Section 334.100.2(4)(d), RSMo.[2] L.F. 30. Following the report, BOHA adopted a motion that "it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control." L.F. 31.

BOHA notified the MSMA of BOHA's official action in response to the MSMA's request for adoption and enforcement of a policy on the scope of practice for APNs. L.F. 34. BOHA also notified Dr. Kunkel. L.F. 32. In the February 2008 issue of *Progress Notes* (MSMA's monthly newsletter), the MSMA then published an article for its physician members throughout Missouri titled "Healing Arts decides: Injecting therapeutic agents not a job for APNs," in which it reported:

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[2] Section 334.100.2(4)(d) provides that the Board may discipline a physician for "Delegating professional responsibilities to a person who is not qualified by training, skill, competency, age, experience or licensure to perform such responsibilities. § 334.100.2(4)(d), RSMo.

> MSMA recently asked the position of the Missouri Board of Registration for the Healing Arts on non-physicians injecting therapeutic agents under fluoroscopic guidance.
>
> After researching the current statute, rules and regulations governing the practice of medicine and the practice of nursing, it was the Board's decision to advise MSMA and its members that Chapter 334 RSMo. authorizes a physician to delegate professional responsibilities to a person who is qualified by training, skill, competency, age, experience, or licensure to perform such responsibilities.
>
> Based on the information provided to the Board, it was their opinion that advance practice nurses currently do not have the appropriate training, skill or experience to perform these injections.

L.F. 34.

BOHA's statement concerning the scope of practice of APNs was not filed with the Secretary of State or the Joint Committee on Administrative Rules, nor published in the State Register or Code of State Regulations. L.F. 83. In its motion for summary judgment, BOHA stated the "Board does not seek to and cannot seek to, take any action against a physician, advanced practice nurse, or any other individual or entity based on a contention that their actions are proscribed by the letter in question." L.F. 50-51. In its motion for summary judgment, BOHA referenced only the correspondence to the MSMA and Dr.

Kunkel but did not address or refer to the motion adopted by it at its January, 2008, meeting that "it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control." L.F. 49-51.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR BOHA BECAUSE BOHA'S TWO STATEMENTS ON THE SCOPE OF PRACTICE FOR ADVANCE PRACTICE NURSES CONSTITUTE A RULE UNDER SECTION 536.010(6) AND ARE SUBJECT TO THE RULEMAKING REQUIREMENTS OF CHAPTER 536 AND SECTION 334.125, RSMO, IN THAT THE STATEMENTS ARE STATEMENTS OF GENERAL APPLICABILITY THAT IMPLEMENT, INTERPRET OR PRESCRIBE LAW OR POLICY, WITH FUTURE EFFECT ON THE ABILITY OF ADVANCED PRACTICE NURSES TO PERFORM THE PROCEDURES THAT ARE THE SUBJECT OF BOHA'S STATEMENTS.

NME Hospitals, Inc. v. Department of Social Services, 850 S.W.2d 71 (Mo. banc 1993)

Department of Social Services v. Little Hills Healthcare, 236 S.W.3d 637 (Mo. banc 2007)

Young v. Children's Division, State of Missouri Department of Social Services, 284 S.W.3d 553 (Mo. banc 2009)

Section 536.010(6), RSMo

II.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDMGENT FOR BOHA ON COUNT III OF PRACTIONERS' PETITION BECAUSE COUNT III WAS NOT DEPENDENT ON WHETHER BOHA'S STATEMENTS CONSTITUTE A RULE UNDER SECTION 536.010(6), RSMO, IN THAT THE COUNT DID NOT INVOLVE A PROCEDURAL CHALLENGE TO THE PROMULGATION OF A RULE BUT SOUGHT A DECLARATION THAT BOHA WAS WITHOUT JURISDICTION OR AUTHORITY IN LIGHT OF *SERMCHIEF V. GONZALES*, 660 S.W.2D 683 (MO. BANC 1983), TO MAKE POLICIES, INTERPRETATIONS OR DETERMINATIONS THAT DEFINE THE SCOPE OF PRACTICE FOR ADVANCED PRACTICE NURSES.

State ex rel. Goldberg v. Darnold, 604 S.W.2d 826 (Mo. App. W.D. 1980)

State ex rel. Nixon v. Hoester, 930 S.W.2d 52 (Mo. App. E.D. 1996)

Sermchief v. Gonzales, 660 S.W.2d 683 (Mo. banc 1983)

III.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDMGENT FOR BOHA ON ALL COUNTS OF PRACTIONERS' PETITION BECAUSE THE PARTIES HAD STANDING TO MAINTAIN THIS ACTION IN THAT BOHA'S STATEMENTS DIRECTLY AND IMMEDIATELY ADVERSELY AFFECTED THE PARTIES AND THEY HAD NO ADEQUATE REMEDY TO CHALLENGE BOHA' STATEMENTS THROUGH A DISCIPLINARY HEARING.

Bresler v. Tietjen, 424 S.W.2d 65 (Mo. banc 1968)

State ex rel. Glendinning Companies v. Letz, 591 S.W.2d 92 (Mo. App. 1979)

Marshall v. Kansas City, 355 S.W.2d 877 (Mo. banc 1962)

ARGUMENT

STANDARD OF REVIEW

Appellate review of the grant of a motion for summary judgment is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The propriety of the trial court's judgment in entering summary judgment is an issue of law and, since the trial court's judgment is based on the record submitted, no deference is granted to the trial court in the matter. *Id.* On appeal, the record is viewed in the light most favorable to the party against whom judgment is entered. *Id.* Statements in affidavits are taken as true unless contradicted by the non-moving party's response. *Id.* The non-movant is also accorded the benefit of all reasonable inferences from the record. *Id.* The grant of summary judgment on appeal is tested by the same criteria which should be employed by the trial court. *Id.*

I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR BOHA BECAUSE BOHA'S TWO STATEMENTS ON THE SCOPE OF PRACTICE FOR ADVANCE PRACTICE NURSES CONSTITUTE A RULE UNDER SECTION 536.010(6) AND ARE SUBJECT TO THE RULEMAKING REQUIREMENTS OF CHAPTER 536 AND SECTION 334.125, RSMO, IN THAT THE STATEMENTS ARE STATEMENTS OF GENERAL APPLICABILITY THAT IMPLEMENT, INTERPRET OR PRESCRIBE LAW OR POLICY, WITH FUTURE EFFECT ON THE ABILITY OF ADVANCED PRACTICE NURSES TO PERFORM THE PROCEDURES THAT ARE THE SUBJECT OF BOHA'S STATEMENTS.

The essence of regulating is an authority to control and influence the conduct of those subject to the regulatory power. In formulating requirements relating to the regulatory power, the Legislature understood, first, that the regulatory power could be exercised by a variety of means that were both direct and indirect in their application, and, second, that the ability to control and influence conduct was a power that could not be trusted to administrative agencies to be exercised without checks and balances even when they were acting within their regulatory jurisdiction. This system of checks and balances was codified by the Legislature in chapter 536.

When, as here, an administrative agency (the Board of Registration for the Healing Arts, or BOHA) interprets general language in its substantive statute, particularly its disciplinary statute, and determines by official action that "it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control," [L.F. 31,] it sets a standard of conduct that it has determined can be actionable if not adhered to by those under its regulatory control. When that standard of conduct is included in the official and public minutes of the agency and pursuant to that action the agency disseminates its statement that "advance practice nurses currently do not have the appropriate training, skill or experience to perform these injections," [L.F. 32, 34], this public statement of the standard of conduct not only as a practical matter influences and controls the conduct of physicians subject to BOHA's authority but it can also only be taken as an intent by BOHA for its statements to produce the influence and control which naturally occurs when such a public pronouncement is made. It must be recognized and accepted that the great majority (if not all) prudent practitioners who were potentially involved in the conduct BOHA singled out in its statements would choose to follow what the agency says, rather than put their livelihood at risk by violating what is proscribed and risking the initiation of a disciplinary action. Alfred S. Neely, 20 *Missouri Practice*, Administrative Practice and Procedure, 4th ed., §5:12, at 156 (Thompson West 2006).

The principal issue in this appeal is, thus, whether the statements issued by BOHA are subject to the public rulemaking requirements of Sections 536.014

through 536.026, particularly 536.016 and 536.021, and 334.125, because the statements are rules as defined by Section 536.010(6), RSMo. – whether the system of checks and balances that the Legislature created for the exercise of the regulatory power applies to the method of influence and control that BOHA is exercising here.

The position of BOHA and the decision of the trial court, if they correctly interpret Missouri law, undermine the system of checks and balances the Legislature created in Chapter 536 for governing and regulating by state agencies. Besides issues of usurpation by BOHA of the authority and jurisdiction of the Missouri Board of Nursing (discussed under Point II), effectively what has occurred and is occurring here is that BOHA has made statements of general applicability concerning the scope of practice of APNs, disseminated those statements under circumstances it knows will lead to the enforcement of its rule, and is now sitting back while its surrogate, the MSMA and its member physicians, implement BOHA's substantive legal requirement. As the facts clearly show, the MSMA petitioned BOHA to adopt and enforce a policy on acceptable scope of practice by APNs, L.F. 23; BOHA directed its member and its counsel to research nursing practice, L.F. 29; through official action at its Board meeting, BOHA defined what APNs could not do relative to the procedures at issue and reminded the physicians to whom BOHA's statements would be distributed that the physicians' licenses would be subject to discipline for delegating performance of the procedures to APNs contrary to BOHA's stated position, L.F. 31; and then

distributed the statements to the MSMA, who BOHA knew would be in a position to enforce BOHA's dictates. L.F. 34. BOHA disclaims that its statements are a rule, not because they are something other than a "statement of general applicability that implements, interprets, or prescribes law or policy," §536.010(6), RSMo, but because BOHA did not duly promulgate its statement as a rule. L.F. 51. As a result, BOHA asserts it could not take action against a physician or advanced practice nurse "based on a contention that their actions are proscribed by the letter in question." L.F. 51. The trial court agreed.

A.

A rule is defined by statute as "each agency statement of general applicability that implements, interprets, or prescribes law or policy[.]" §536.010(6). *Department of Social Services v. Little Hills Healthcare*, 236 S.W.3d 637, 642 (Mo. banc 2007); *State ex rel. Barnett v. Missouri State Lottery Commission*, 196 S.W.3d 72, 77 (Mo. App. 2006). As differently stated, a rule is an agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts. *Little Hills Healthcare*, 236 S.W.3d at 642. A declaration by an agency is a rule if it has even a slight potential of impacting the substantive or procedural rights of some member of the public. *Little Hills Healthcare*, 236 S.W.3d at 642, *citing Baugus v. Director of Revenue*, 878 S.W.2d 39, 43 (Mo. banc 1994). It has general applicability if it applies to a class of persons who are subject to the pronouncement. *Id.*

BOHA's statements at issue in this case meet the criteria above for a rule. The statements implement policy and interpret law. They apply to all APNs who provide the particular care proscribed and physicians who would use APNs for such care. Finally, they affect the substantive rights of these practitioners to provide the care and treatment identified: BOHA has proclaimed that APNs are not qualified to provide the care and treatment; it makes specific reference to the statutory physician disciplinary provision providing for discipline for "[d]elegating professional responsibilities to a person who is not qualified by training, skill, competency, age, experience or licensure to perform such responsibilities," §334.100.2(4)(d); and it made direct dissemination of the declaration to the MSMA for public distribution to its members. Clearly, BOHA was looking to the MSMA, through its physician members, to enforce BOHA's limitation on the scope of practice of APNs.

In *Young v. Children's Division, State of Missouri Department of Social Services*, 284 S.W.3d 553 (Mo. banc 2009), the Court was concerned with the eligibility requirements for the state's behavioral foster care program and whether the standards and criteria the agency applied in making individualized determinations about eligibility were required to be promulgated as a rule. Those standards and criteria included, among other things, a manual which specified characteristics which it considered in determining whether a child was eligible under the program and "what behaviors qualify, how frequent and recent the behaviors must be, and whether professional treatment is required[.]" *Id.*, 560.

This Court held that setting standards, i.e., specifying criteria and methodology, that interprets or applies statutory language is a rule for purposes of Section 536.010(6). *Id.*, 559-560. The determining factor in the circumstances of rulemaking is whether the elements set out in Section 536.010(6) which define "rule" are met. *Id.*, 559. If so, the rulemaking procedures must be followed, and a failure to do so will not be excused because those standards and criteria might also be later applied in an individualized decision. *Id.*, 560.

NME Hospitals, Inc. v. Department of Social Services, 850 S.W.2d 71 (Mo. banc 1993), is also instructive. There the agency sought to limit the medical services that would be reimbursed under the state's Medicaid program and sought to do so by announcing its decision through a bulletin that was distributed to Medicaid providers. The decision as to what specific psychiatric services among various potential psychiatric services would be included or excluded for reimbursement was a rule because it involved a standard of general applicability and because it defined, in part, the medical services or assistance that were acceptable for reimbursement under Medicaid. *Id.* at 74.

Here BOHA's pronouncement on the scope of acceptable practice for APNs is no different. It seeks to define in general and for future application what procedures may or may not be performed by or delegated to APNs under Missouri law. The agency pronouncements in *Young* and *NME Hospitals* as to what is acceptable or not acceptable under the applicable statute is the same as BOHA's pronouncement here as to what is not an acceptable procedure for APNs. More

importantly for what the Legislature intended in creating the Administrative Practice Act, BOHA's statement regulates without need for further application in an individualized case. BOHA has identified specific conduct which will subject physicians to license discipline and, in doing so, controls the conduct of physicians subject to its authority. The agency pronouncement in *NME Hospitals* was a rule under Section 536.010(6). BOHA's pronouncement here should be treated the same under the law.

B.

As this Court made clear in *Young*, 284 S.W.3d at 559 & 560, and *Little Hills Healthcare*, 236 S.W.3d at 641-42, the sole determinant of whether the rulemaking procedures of chapter 536 are required is whether the statement qualifies as a rule under the language of Section 536.010(6). In other words, the inquiry looks only to the express language of that section. Similarly, as was recognized in *State ex rel. Barnett v. Missouri State Lottery Commission*, it is the substance which constitutes the rule, not the form in which it is delivered. 196 S.W.3d at 77. BOHA, the trial court, and the Court of Appeals, however, focus not on the substance of BOHA's pronouncements in light of the language of Section 536.010(6), but on its form. They do not apparently dispute that BOHA's resolution and its letter to MSMA have general applicability and involve either an interpretation of law or policy. Their argument may be reduced to one of two assertions: either BOHA's actions do not constitute a statement or the actions do not prescribe law or policy.

Section 536.010(6) refers to "each agency statement." The significant terms in this clause are "each" and "statement." Except as qualified by the language which follows the term "statement" in the definition of "rule," (criteria which are met as shown in A above), there is no limitation on the form of statements that are subject to the definition – "each," i.e., every, statement is subject to being a rule if it is a statement and it meets the other qualifications of Section 536.010(6).

Chapter 536 does not define "statement." The language used by the courts in describing statements has been "any announcement" or "declaration," when used as a noun, *Little Hills Healthcare*, 236 S.W.3d at 642, and *Baugus*, 878 S.W.2d at 43, respectively; and "announces," when used as a verb. *NME Hospitals*, 850 S.W.2d at 74. When a term is not defined, the courts will determine the legislative intent by giving the words used their plain and ordinary meaning. *Sermchief v. Gonzales*, 660 S.W.2d 683, 688 (Mo. banc 1983). The general dictionary definition is "the act or process of stating, reciting, or presenting orally or on paper[.]" Webster's Third New International Dictionary of the English Language Unabridged, 2229 (Springfield, Mass.: Merriam Webster, Inc. 2002). Clearly, BOHA's resolution announcing its determination that it was beyond the scope of practice of APNs to perform the subject therapeutic injections and its letter to MSMA and Drs. Kunkel and James to the same effect are statements under either the Court's description of what constitutes a statement or the dictionary definition.

At the trial court and before the Court of Appeals, BOHA focused on the form of one of its statements as a letter "in response to correspondence it had received on the issue." L.F. 50. It is of no significance to BOHA what the substance of its letter is or whether that substance is a statement of general applicability that implements, interprets, or prescribes law or policy. At the same time, in its argument, BOHA ignored and never addressed the official action as memorialized in its resolution that it took in formally adopting the position on the scope of practice for APNs at its open and public meeting. It only wants to acknowledge the letter by which the substance of its formal action was transmitted to MSMA and the other physicians.

Even if BOHA's formal resolution is ignored and its action could be considered as a simple response to correspondence it had received on the issue, it is still a statement, and a qualifying one at that, under Section 536.010(6). In arguing that it was simply replying to correspondence asking for an interpretation, BOHA overlooks the exemptions under Section 536.010(6) that define when something that is otherwise a "statement" is not a statement subject to rulemaking requirements. A statement of policy or one implementing, interpreting or prescribing law is a rule under Section 536.010(6), except when it is a "declaratory ruling issued pursuant to section 536.050, or an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts." §536.010(6)(b), RSMo. Section 536.010(6) specifically provides for an exception to what otherwise meets the definition of rule; however, BOHA's

statement does not purport to be either a declaratory ruling under Section 536.050 or an advisory opinion dealing with a specific set of facts with limited application only to those specific facts. Since BOHA's action meets the definition of a rule but does not come within the specific exception provided for advisory opinions, it must be a rule as defined in the statute. *Missouri Board of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 443 (Mo. App. 1991)(*expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another). *See, also, Kansas Association of Private Investigators v. Mulvihill*, 35 S.W.3d 425, 430 n.9 (Mo. App. W.D. 2000). In the absence of coming within the exception for formal advisory opinions, BOHA cannot issue a statement of general applicability through its response to a request for BOHA's position on an issue (assuming the MSMA's letter could be characterized as such) without promulgating such statement as a rule.

C.

Alternatively, BOHA may be arguing that its statements are not rules because they do not prescribe law or policy. The problem with this argument is made evident by simply reading the statutory language. A rule exists under Section 536.010(6) if there is a "statement of general applicability that implements, interprets or prescribes law or policy." §536.010(6) (emphasis added). Under this language, a statement is a rule if it (i) is generally applicable and (ii) meets one of three alternative criteria—it either implements law or policy, it interprets law or policy, or it prescribes law or policy. A statement does not

have to implement, interpret or prescribe law or policy all in one in order to be a rule. It only need satisfy one of these criteria.

BOHA, the trial court and the Court of Appeals opinion go beyond requiring that a statement must satisfy all three definitional alternatives and that each statement of general applicability to be a rule must prescribe law in addition to implement and interpret it. They would require that a statement must prescribe valid and enforceable law or policy by having gone through the process of promulgation in order to come within the definition of rule in Section 536.010(6). They would take Section 536.010(6) to the point that no agency statement is a rule unless it has been published in the Code of State Regulations as such, espousing a *reductio ad absurdum* position that there is no rule if there is no rule. The problem with this position is that it confuses the question of what is to be the effect of a statement as a duly promulgated rule with the preliminary inquiry of whether the statement is a rule in the first instance that is subject to the rule promulgation procedures.

To come to its position, BOHA cited *United Pharmacal Co. v. Missouri Board of Pharmacy*, 159 S.W.3d 361 (Mo. banc 2005) (*Pharmacal I*). The trial court's judgment merely states, "The Court being duly advised in the premises finds that the complained of statement of Respondent, published in their newsletter, does not constitute a rule as defined in §536.010(6) RSMo 2000." L.F. L.F. 80. Unlike the present case, *United Pharmacal I* was a case about proper venue to challenge a rule under Section 536.050.1. That section allowed for

special venue in the county of the plaintiff's residence in contravention of the general revenue statute requiring venue in Cole County when a state agency is a defendant. 159 S.W.3d at 364-65. What *United Pharmacal I* held was that the plaintiff could not maintain its challenge to the FAQ posted on the agency's website in a venue other than Cole County because there was never an attempt to promulgate the FAQ as a rule and "[w]ithout promulgation of an administrative rule, section 536.050.1 cannot support venue to dispute the validity of a rule." *Id.* at 366. In short, the special venue rule of Section 536.050.1 may only be invoked if a rule has been duly promulgated. This is the limit of what *United Pharmacal I* states and holds. It is a case solely about venue, not about what constitutes a rule under Section 536.010(6). The limited nature of *Pharmacal I* is shown by the Court's description of that holding when it considered the case again on appeal after remand: "This Court held that venue was improper in Buchanan County, vacated the trial court's judgment, and remanded the case for transfer to the Cole County Circuit Court." *United Pharmacal Co. v. Missouri Board of Pharmacy*, 208 S.W.3d 907, 909 (Mo. banc 2006) (*United Pharmacal II*).

In this case, BOHA did not challenge the venue in which the action was filed. Nowhere in its Motion for Summary Judgment did it mention the word "venue" or claim foul that the action was brought in the Cole County Circuit Court as opposed to somewhere else. L.F. 49-51. *United Pharmacal I* cannot be the basis for summary judgment in BOHA's favor for the simple reason that *United Pharmacal I* was not directed to the merits of the challenge to the rule of the

agency. Proper application of the rule of venue stated in *United Pharmacal I* directs that this case be filed in the precise circuit court in which it was filed but it does not direct what the result should be on the actual challenge to the rule.

Not surprisingly, BOHA points to the following two sentences from the *United Pharmacal I* opinion: "Not everything that is written or published by an agency constitutes an administrative rule," and "The FAQ was merely an expression of BOHA's interpretation of law without a[ny] force and effect." L.F. 50. These sentences, however, need to be read in their proper context and by considering the other language of the opinion which falls between the first sentence and the second (the omitted language is emphasized below):

> Not everything that is written or published by an agency constitutes an administrative rule. In this case, the board made no attempt to comply with the protective procedures required for the promulgation of a rule. In fact, the agency did not even try to promulgate the FAQ as a rule. Pharmacal's claim of venue pursuant to section 536.050.1 must fail because the FAQ was not an administrative rule and, as such, there is no challenge to the validity of a rule or threatened application of a rule. The FAQ was merely an expression of the board's interpretation of law without any force or legal effect.

159 S.W.3d at 365. As the entire excerpt shows, the court was not concerned with whether the statement was a "rule" but with whether it was a "promulgated rule."

This was the predicate for venue being proper outside of Cole County in *United Pharmacal I*.

To the extent that *United Pharmacal I* could be read to concern what is a rule under §536.010(6), such language is *dicta* as clearly established by the language quoted above from *United Pharmacal II*. 208 S.W.3d at 909. More importantly, the FAQ (Frequently Asked Questions) posted online in the *United Pharmacal I* case is qualitatively different from BOHA's statements here. The agency in *Pharmacal I* posed its own question and then answered it. 159 S.W.3d at 364-364. The question was a simple one and in phrasing the question or the answer, the agency did not make reference to its disciplinary statute and did not distribute it directly to those directly regulated by it. Substantively, the question and answer – "Does an entity have to be licensed as a pharmacy to sell veterinary legend drugs to the consumer/owner of the animal(s)? Yes." – does not establish a standard of conduct and does not directly control or influence regulated behavior.

BOHA's actions here were initiated by a petition for adoption of a policy by BOHA relating to the conduct of those regulated by BOHA. BOHA placed the matter on its agenda for two separate meetings and after receiving a report on the issue, BOHA took a formal vote and adopted a formal position on the issue. The statements of BOHA were directly regulatory in nature: they defined what BOHA determined to be proscribed conduct by those licensed by it and which could lead to disciplinary action being initiated against them. Those statements, when publicly declared, controlled and influenced the conduct of physicians subject to

BOHA's jurisdiction by naturally inducing them to conform their conduct to what BOHA declared to be forbidden.

BOHA also cited *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994), and *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 23 (Mo. banc 2003). *Baugus* is cited solely for the proposition "that not every generally applicable statement or announcement of intent by a state agency is a rule." L.F. 86. As with BOHA's discussion of *United Pharmacal*, what is telling is the language from the case that BOHA omits (omitted language is emphasized):

> Not every generally applicable statement or "announcement" of intent by a state agency is a rule. Implicit in the concept of the word "rule" is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract.

878 S.W.2d at 42. In *Baugus*, the agency's decision to place the words "prior salvage" on a particular class of vehicle titles was not a rule because "[t]o abbreviate such title designation and use the word 'prior' before the mandatory 'salvage' does not implement, interpret, or prescribe law or policy. The word merely communicates the difference between the two types of title." *Id.* As such, it did not substantively affect the legal rights of the car dealers challenging the title designation. *Id.*

Baugus looked to the substance of the agency's action to determine whether it was a rule and not to the manner in which it was conveyed. If that approach is followed here and the principles enunciated in *Baugus* correctly applied, the only determination that can follow is that BOHA's statements are a "rule." BOHA responded to a particular and specific request to adopt a standard of conduct as it related to the scope of practice for APNs and to enforce such a standard. BOHA adopted a blanket standard that it was beyond the scope of practice for any APN to engage in the performance of certain pain management procedures in the state. However one wants to characterize BOHA's action, BOHA clearly intended to implement, interpret, or prescribe law or policy. BOHA's statements were clearly directed at bringing about a particular response from those subject to its regulatory power – physicians – to forthwith refrain from using APNs for the procedures described in the statements. Further, BOHA quoted from its disciplinary statute to drive home what the consequences would be for failing to adhere to its edict.

What also distinguishes *Baugus* from this case is the *Baugus* court's determination that the language placed on the vehicle title did not substantively affect the car dealers, i.e., it caused them no injury by either imposing an additional obligation or taking away some right. 878 S.W.2d at 42. Here there is a very distinct and identifiable substantive impact on the rights of APNs to engage in their profession. As the court pointed out in *Baugus*, "Implicit in the concept of the word 'rule' is that the agency declaration has the potential, however, slight of impacting the substantive or procedural rights of some member of the public.

Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract." *Id.* Clearly, BOHA's statements have the potential, more than just slight, of impacting the right of APNs to practice within the scope of their nursing license or for physicians to utilize APNs for the subject procedures.

The *Missouri Soybean* case also does not support BOHA's position. As explained in that case, a policy statement is a rule when it sets a standard of conduct, i.e., it commands an "as yet unnamed, unspecified group of people" to do something or to refrain from doing something. 102 S.W.3d at 23. The statement in *Missouri Soybean* was an inventory of rivers in the state that failed to meet applicable water quality standards. That list did not establish a standard of water quality or provide for the means or methods for dealing with the impaired water quality. The list was not a rule because it did not "command the appellants to do anything or to refrain from doing anything; no legal rights or obligations are created." *Id.* No substantive rights were impacted by the inventory created by the agency. *Id.* ("The mere nomination of these waters has no effect on the appellants' rights.") Consistent with *Baugus*, the list of rivers was not a rule because it lacked substantive impact as the substance of the list caused neither injury nor imposed new obligations.

Applying the principles of *Misosuri Soybean* to this case, BOHA's action set standards relating to the scope of practice for APNs, which BOHA intended to have general and prospective application. Moreover, BOHA's action has

substantive effect on the rights and obligations of APNs and physicians in the state.

United Pharmacal, *Baugus* and *Missouri Soybean* do not support the conclusion of the trial court that BOHA's statements on the acceptable scope of practice for APNs is not a rule.

D.

In its argument at the trial court, BOHA admitted that its action "is without force and effect," "does not have the force or effect of law," and that it cannot take action against a physician, APN or anyone else, but somehow takes from this that its rule is not subject to challenge. L.F. 50-51. BOHA misses the point, however, that the rule was issued (even though not promulgated); that it was issued specifically to the MSMA, which had asked for the adoption and enforcement of policy; that the decision was, in fact, disseminated to the MSMA members; and that, most importantly, the health care practitioners represented by physicians and APNs have been aggrieved by the rule and the manner in which it was disseminated. There would be little check on arbitrary conduct by BOHA or motive for it to comport with the requirements for duly promulgating rules if it could avoid challenges to its rules by simply having its pronouncements disseminated through a surrogate such as the MSMA. The natural, probable and foreseeable consequences of the circumstances in which BOHA published its rule is that APNs are limited in the scope of what would otherwise be an acceptable scope of practice under the nursing statutes and the regulations of the Board of

Nursing. The Practitioners are entitled to a judicial declaration of what BOHA now admits: its rule is invalid and cannot be relied on.

For summary judgment to be entered on behalf of a party, there must be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. Mo. R. Civ. Pro. 74.04(c)(6). BOHA was not entitled to judgment as a matter of law as its adoption of a policy on the acceptable scope of practice for APNs is a rule and, as such, is subject to the rule-making requirements of chapter 536. The trial court erred in granting summary judgment for BOHA.

II.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDMGENT FOR BOHA ON COUNT III OF PRACTIONERS' PETITION BECAUSE COUNT III WAS NOT DEPENDENT ON WHETHER BOHA'S STATEMENTS CONSTITUTE A RULE UNDER SECTION 536.010(6), RSMO, IN THAT THE COUNT DID NOT INVOLVE A PROCEDURAL CHALLENGE TO THE PROMULGATION OF A RULE BUT SOUGHT A DECLARATION THAT BOHA WAS WITHOUT JURISDICTION OR AUTHORITY IN LIGHT OF *SERMCHIEF V. GONZALES*, 660 S.W.2D 683 (MO. BANC 1983), TO MAKE POLICIES, INTERPRETATIONS OR DETERMINATIONS THAT DEFINE THE SCOPE OF PRACTICE FOR ADVANCED PRACTICE NURSES.

Even if the trial court is correct regarding the procedural challenges to BOHA's statements on the acceptable scope of practice for APNs (Counts I & II of the petition), it erred in granting summary judgment on the challenge to the authority and jurisdiction of BOHA to make any statement (however characterized) that regulates the practice of APNs. The Practitioners brought their action in three counts. Counts I and II were challenges to the validity of BOHA's statement on the basis that the statements are a "rule" under Section 536.010(6): that BOHA failed to follow the procedures under chapter 536 for adopting a rule (Count I), and that it also failed to follow required procedures under Section

334.125.1 (Count II). L.F. 10-11. Count III, however, challenged whether BOHA had the jurisdiction or authority to adopt such a position in the first place. L.F. 13-14. In this regard, paragraph 20 from the common facts, which is incorporated by reference in Count III, pleads specifically that BOHA has sought to usurp the authority of the Board of Nursing. L.F. 9. Paragraph 37 under Count III pleads the scope of the authority of BOHA: "Section 334.120.1 provides that the Board of Healing Arts was created 'for the purpose of registering, licensing and supervising all physicians and surgeons, and midwives in this state.'" L.F. 13 (emphasis in original). Paragraphs 38 and 39 set out the grant of authority to BOHA to formulate rules and regulations, L.F. 13, and Paragraph 40 cites BOHA's regulation setting out BOHA's views regarding its purpose and mission. L.F. 13, *quoting* 20 CSR 2150-1.010(1). Paragraphs 41 and 42 set out the authority of the Board of Nursing:

> 41. Section 335.036.1(2) gives the Board of Nursing the power to "[a]dopt and revise such rules and regulations as may be necessary to enable it to carry into effect the provisions of sections 335.011 to 335.096 [related to Nurses]"
>
> 42. Section 335.036.1(3) gives the State Board of Nursing the power to "prescribe minimum standards for educational programs preparing persons for licensure pursuant to the provisions of Sections 335.011 to 335.096 [related to Nurses]."

L.F. 13-14. Paragraph 43 cites the regulation issued by the Board of Nursing relating to the scope of practice for registered professional nurses. L.F. 14. The final allegation in Count III states, "The Board of Healing Arts lacks authority to define and determine the scope of practice for registered professional nurses and advanced practice nurses." L.F. 14.

As this recitation of the allegations of Count III show, Count III is not predicated on and does not depend on whether BOHA's statements on the scope of practice of APNs are a rule under Section 536.010(6). A careful review of the common facts will also show that the common facts do not make such an allegation, L.F. 4-10, nor does Count III incorporate by reference the allegations found in Counts I and II where the reference to Section 536.010(6) may be found. L.F. 13. What Count III alleges is that BOHA took official action defining the scope of practice for APNs and disseminated that official position to the MSMA and others, to the detriment of the Practitioners and APNs licensed by the Board of Nursing.

What Count III is predicated on is the decision of *Sermchief v. Gonzales*, 660 S.W.2d 683 (Mo. banc 1983). In *Sermchief*, the Missouri Supreme Court held that under the nursing statutes the Legislature recognized the expanding scope of nursing practice in the delivery of health care and did not seek to constrain that scope through statutory definitions. *Id.* at 689. Under the nursing statutes, nurses were authorized to assume duties and responsibilities within the field of professional nursing so long as the duties and responsibilities were consistent with

the nurse's specialized education, judgment and skill in the delivery of that care. *Id.* Because the health care being challenged in *Sermchief* was within the practice of professional nursing, BOHA lacked authority to take action against the nurses for the unauthorized practice of medicine or to discipline the physicians for allowing the nurses to carry out the procedures being challenged. *Id.* at 690. As the court also noted, BOHA lacked the authority to do what it was threatening because the Legislature had statutorily assigned the regulation of the practice of nursing and the determination of the scope of nursing practice to the Board of Nursing. *Id.* The statutes under which BOHA operated specifically removed nursing licensure and regulation from its jurisdiction. *Id., citing* §334.155, RSMo. Thus, under *Sermchief*, the scope of practice of APNs is dependent on whether the practice in question was consistent with a nurse's specialized education, judgment and skill in the delivery of the subject care. This, however, is a matter solely within the province of the Board of Nursing to decide.

When the trial court ruled in its judgment "The Court being duly advised in the premises finds that the complained of statement of Respondent, published in their newsletter, does not constitute a rule as defined in §536.010(6) RSMo 2000," L.F. 80, it misses the point of the distinction between Count III and Counts I and II. It doesn't matter under Count III whether BOHA's statements are "rules" or not for purposes of Section 536.010. BOHA made statements on matters outside its jurisdiction, those statements were wrong as a matter of law and they impacted

the rights of APNs and physicians who would utilize them to engage in their livelihood.

The arguments presented by BOHA to the trial court and at the Court of Appeals treat this issue as one that can be decided solely on the pleadings and apparently concede that the issue can be resolved outside the normal procedure for summary judgment. Even if, *arguendo*, this were true, as the recitation of the pleadings related to Count III show, this count is determinable by what APNs can do and not do under the nursing statute, which has been specifically pleaded. In terms of summary judgment procedure, BOHA's motion contains not one scintilla of factual matter that addresses the real issue under Count III. If this count is to be judged on the pleadings and not by summary judgment, the legal effect of a pleading as a statement for relief is determined by the substance of the recitals. *State ex rel. Goldberg v. Darnold*, 604 S.W.2d 826, 831 (Mo. App. W.D. 1980), *superseded on other grounds by amendment of statute as determined in Kansas Ass'n of Private Investigators v. Mulvihill*, 35 S.W.3d 425, 431 (Mo. App. W.D. 2001). While it is true that the prayer for relief used the terms "rule" and "letter rule" to refer to BOHA's action on the scope of practice for APNs, this has no effect on the substance of the allegations which determine Practitioners' right to relief. "The allegations, not the prayer, determine the cause of action and the scope of relief to which the pleader is entitled." *State ex rel. Nixon v. Hoester*, 930 S.W.2d 52, 53-54 (Mo. App. E.D. 1996). The substance of Count III is not dependent on whether BOHA's adoption of its statement establishing the scope of

practice for APNs is a rule under Section 536.010(6). It was error for the trial court to issue summary judgment for BOHA on Count III.

III.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDMGENT FOR BOHA ON ALL COUNTS OF PRACTIONERS' PETITION BECAUSE THE PARTIES HAD STANDING TO MAINTAIN THIS ACTION IN THAT BOHA'S STATEMENTS DIRECTLY AND IMMEDIATELY ADVERSELY AFFECTED THE PARTIES AND THEY HAD NO ADEQUATE REMEDY TO CHALLENGE BOHA' STATEMENTS THROUGH A DISCIPLINARY HEARING.

Below and before the Court of Appeals, BOHA argued that the Appellants should not be allowed to maintain their action because the physicians, at least, could choose to disobey what BOHA has said about delegating the procedures in question to APNs and proceed to make whatever challenges they had in a disciplinary proceeding before the Administrative Hearing Commission. While the trial court's judgment did not rule in this respect, BOHA argued that it was an alternative grounds for affirming the action of the trial court before the Court of Appeals and the Court of Appeals' opinion accepted BOHA's contention and even went beyond it in affirming the trial court's judgment. It is anticipated that the issue will be the subject of this Court's review of the appeal as well.

When BOHA argues and the Court of Appeals agrees that "Practitioners have the same freedom to act whether or not the Board makes known its opinion as to its discretion to file a complaint," Opinion of Court of Appeals at 8, and holds on principles of ripeness and standing that those impacted by BOHA's

actions have an adequate remedy to challenge the lawfulness of the action and its impact on them, they exhibit a lack of understanding of the regulatory power and the purpose of the declaratory remedy.

State agencies affect the lives of untold Missourians every day in what they do and what they say. The actions of licensing and regulatory agencies are particularly pervasive in the manner in which they influence the conduct of those licensed and regulated by them. When a licensing agency interprets its disciplinary statute, it sets a standard of conduct for those it regulates. When it announces that interpretation in a statement adopted through formal action and disseminates it, it influences the conduct of those it licenses. Indeed, it defies all reason that an agency would formally adopt and issue an interpretation without the intent and expectation that those subject to its authority would adhere to its dictate. At a minimum, interpreting its disciplinary statute and issuing a statement that specific conduct would be grounds for discipline under a statute has a chilling effect on the conduct described by the agency. Prudent practitioners who were potentially involved in the conduct would choose to follow what the agency says, rather than put their livelihood at risk by violating the statement and risking the initiation of a disciplinary action. Alfred S. Neely, 20 *Missouri Practice*, Administrative Practice and Procedure, 4th ed., §5:12, at 156 (Thompson West 2006). In the words of *State ex rel. Glendinning Companies v. Letz*, 591 S.W.2d 92, 99 (Mo App. 1979), a licensee under the circumstances presented here is faced with a "dilemma" because "they must stop the [activity]; or, if they believed they

were within their legal rights to proceed with them, they could do so only at the risk of the suspension or revocation of their liquor licenses." A statement such as that at issue here no less regulates, i.e., controls and influences, the actions of those under the jurisdiction of the agency than it would if it appeared in the Code of State Regulations. Indeed, because of its specificity and directness, the statement would have even greater impact on those regulated.

As this case also illustrates, other factors can play a part in both the form and substance of how regulation occurs. Associations of state licensees may have selfish economic or other interests they wish to protect through regulation of their industry, particularly involving the encroachment on their practice from professionals outside the specialty. Within the symbiotic relationship with the agency, these associations can achieve their protectionist, exclusionary or other goals through regulation by proxy or surrogacy. The actions of the licensed profession, but more importantly the actions of those closely associated with but not regulated by the licensing agency, are effectively controlled when the agency issues an interpretation of its disciplinary statute to and through the professional association in order that it be disseminated by the association. The agency does not have to resort to public rulemaking when it can effectively influence and control the actions of those not regulated by it on behalf of those within the profession who have an economic or political position to advance. Clearly, then, the actions of agencies which influence the conduct of those licensed or regulated

by them can also profoundly affect and "aggrieve," in the legal sense, others associated with the licensees or regulated persons.

This Court has recognized that licensees and others do not have to resort to civil disobedience to challenge unlawful actions of state agencies under the heavy hand of discipline or simply forego the conduct to avoid the consequences. In *Bresler v. Tietjen*, 424 S.W.2d 65, 70 (Mo. banc 1968), the Court held that the Declaratory Judgment Act, §527.010, *et seq*, was an appropriate means for licensed optometrists to challenge rules of the Board of Optometry that related to their manner of doing business and which could lead to discipline of their licenses. *Id.* *See, also, Marshall v. Kansas City*, 355 S.W.2d 877, 879 (Mo. banc 1962) (declaratory judgment appropriate remedy to challenge city's ordinance even though plaintiffs did not assert an intent to violate the ordinance where city's action created uncertainty and insecurity of plaintiffs with respect to their rights, status and legal relationships with the city). *Glendinning Companies*, quoted above, similarly makes clear that administrative agencies may be challenged in their actions when those actions place parties in the position of risking their professional licenses by ignoring what BOHA has said or conform their conduct accordingly even though BOHA lacks the substantive and procedural authority to regulate the conduct in question. 591 S.W.2d at 99.

The reality of the regulatory world is that agency statements interpreting law, in whatever form issued, influence and control the actions of those regulated and also have a ripple negative effect on those outside the regulated profession.

The Legislature and the courts have recognized the right to challenge such action through declaratory relief before licenses and livelihoods are irreversibly threatened. BOHA and the Court of Appeals may find some residual freedom of action on behalf of physicians and APNs but it is only because they are blind to the reality of the regulatory world. The fundamental point—the one protected by the declaratory judgment remedy—is that in light of BOHA's interpretation of its disciplinary statute, that freedom becomes simply illusory and, while BOHA and the Court of Appeals might hold to an illusion of freedom of action, no rationally thinking physician or APN would exercise that freedom in light of what BOHA has said.

CONCLUSION

For summary judgment to be entered on behalf of a party, there must be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. Mo. R. Civ. Pro. 74.04(c)(6). BOHA was not entitled to judgment as a matter of law as its adoption of a policy on the acceptable scope of practice for APNs is a rule and, as such, is subject to the rule-making requirements of chapter 536. The trial court erred in granting summary judgment for BOHA. Even if the trial court was correct whether the statements of BOHA were a rule under Section 536.010(6), RSMo, the substance of Count III is not dependent on whether BOHA's adoption of its statement establishing the scope of practice for APNs is a rule under Section 536.010(6). It was error for the trial court to issue summary judgment for BOHA on Count III.

The judgment of the trial court should be reversed and the case remanded to the trial court.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Respondent's Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 9,652 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached CD-ROM disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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Thomas W. Rynard

Certificate of Service

I hereby certify that a true and correct hard copy of the above Brief was sent by U.S. Mail, postage prepaid, and an electronic version by CD-ROM included with the brief to Edwin R. Frownfelter, Assistant Attorney General, 615 E. 13th Street, Suite 401, Kansas City, Missouri 64106, Frownfelter, edwin.frownfelter@ago.mo.gov, Attorney for Respondent; Marshall Wilson, Berry & Wilson, LLC, 304 E. High Street, P.O. Box 1606, Jefferson City, MO 65101, MarshallWilson@berrywilsonlaw.com, Attorney for Amicus Curiae American Association of Nurse Anethetists; and Richard M. Aubuchon, General Counsel, Missouri Chamber of Commerce & Industry, Inc., P.O. Box 149, Jefferson City, Missouri 65102, raubuchon@mochamber.com, Attorney for Amicus Curiae Missouri Chamber of Commerce and Industry, Inc., on this 24th day of January, 2011.

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