SC93012 and SC93254

IN THE SUPREME COURT OF MISSOURI

WANDA MAYES, *et alia*,

Appellants,

v.

SAINT LUKE'S HOSPITAL OF KANSAS CITY, *et alia*,

Respondents.

On Appeal from the Circuit Court of Jackson County
Honorable Charles H. McKenzie, Circuit Judge
Case No. 1116-CV23789
Honorable John M. Torrence, Circuit Judge
Case No. 1216-CV28166

BRIEF OF THE APPELLANTS

JONATHAN STERNBERG, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2345 Grand Boulevard, Suite 675
Kansas City, Missouri 64108
Telephone: (816) 753-0800
Facsimile: (877) 684-5717
jonathan@sternberg-law.com

LELAND F. DEMPSEY, Mo. #30756
AUSTIN BRADLEY, Mo. #65348
Dempsey and Kingsland
City Center Square
1100 Main Street, Suite 1860
Kansas City, Missouri 64105
(816) 421-6868
(816) 421-2610 facsimile
leland@dandklaw.com
austin@dandklaw.com

COUNSEL FOR APPELLANTS

Preliminary Statement

This is a brief for two appeals in a medical negligence wrongful death case. The widow and children of Ira Mayes sued health care providers, alleging they failed to provide proper care for Mr. Mayes's post-operative open chest wound, causing his death.

The plaintiffs filed timely affidavits of merit under § 538.225, R.S.Mo., disclosing the identity and opinion of their expert who agreed with the merits of their claims, and who then was deposed. When the plaintiffs dismissed their original case and promptly re-filed it, the defendants agreed to transfer the discovery to the re-filed case, including the expert and his deposition. After a year of pretrial litigation, the defendants moved to dismiss the re-filed case, arguing that the plaintiffs' failure to re-file their affidavits of merit in that second case mandated dismissal under § 538.225. The trial court agreed and dismissed the action without prejudice. When the plaintiffs again re-filed their action days later, now re-filing the affidavits of merit, the trial court again dismissed, holding the third action was time-barred by the statute of limitations in § 537.100, R.S.Mo.

Both judgments were error. Section 538.225, either by itself or as applied through the statute of limitations, is an arbitrary and unreasonable barrier to the ability of medical negligence plaintiffs to have access to the courts to remedy their legally recognized injury, in violation of Mo. Const. art. I, § 14. It also changes such plaintiffs' right to a trial by jury as heretofore enjoyed, in violation of Mo. Const. art. I, § 22. Additionally, the plaintiffs substantially complied with § 538.225, as they apprised the defendants of their expert and his opinions, meeting the intent of that statute and precluding dismissal. This Court should reverse either judgment and remand for further proceedings.

Table of Contents

Table of Authorities

Cases

Constitution of Missouri

Revised Statutes of Missouri

Missouri Supreme Court Rules

Other Authorities

Jurisdictional Statement

These are appeals in two separate actions by Appellants for medical negligence and wrongful death against Respondents. In the first, the trial court dismissed Appellants' action for failure to file medical affidavits of merit under § 538.225, R.S.Mo., which requires that a plaintiff in a medical negligence case file such an affidavit or otherwise requires her action to be dismissed. In the second appeal, after Appellants re-filed their action, the trial court dismissed the action as time-barred under § 537.100, R.S.Mo.

Before the trial court in both actions and now, on appeal, Appellants challenge the constitutional validity and applicability to them of § 538.225, either by itself or through the statute of limitations in § 537.100. As this brief explains, § 538.225 violates Appellants' rights to "open courts" guaranteed by Mo. Const. art. I, § 14, as well as their "right of trial by jury as heretofore enjoyed" guaranteed by Mo. Const. art. I, § 22(a).

This Court, as opposed to the Missouri Court of Appeals, has "exclusive appellate jurisdiction in all cases involving the validity of a … statute … of this state." Mo. Const. art. V, § 3. To activate this exclusive jurisdiction, a claim that a "law directly violates the constitution" may be "either facially or as applied." *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 912 (Mo. banc 1997) (emphasis removed).

Thus, as this appeal involves the constitutional validity – facially and as applied to Appellants – of a Missouri state statute, exclusive appellate jurisdiction of this case lies in this Court. Mo. Const. art V, § 3.

Statement of Facts

This is a consolidated appeal from two dismissals of a wrongful death medical negligence action in which the survivors of Ira Mayes alleged medical personnel failed properly to manage Mr. Mayes's post-operative open chest wound, causing his death. The Court consolidated the two appeals in this case for briefing after both appeals' respective records had been filed. This brief refers to the Legal File in the first, Case No. SC93012, as "Legal File I," and the second, Case No. SC93254, as "Legal File II." The only transcript is in Case No. SC93012.

A. The Medical Negligence Plaintiffs Alleged Caused Mr. Mayes's Death[1]

On March 4, 2008, Mr. Mayes, who was 75 years old, underwent a standard procedure with Respondent Richard Stuart, M.D., at Respondent St. Luke's Hospital ("St. Luke's") in Kansas City, Jackson County, Missouri, to remove a sternal wire from his chest previously placed there during aortic valve replacement surgery (Legal File I 12-13; L.F. II 8-9). The new procedure left Mr. Mayes with an open chest wound just inches

[1] As these appeals are from dismissals without presentation of evidence, the facts in this section are those alleged in Appellants' petitions (L.F. I 10-26; L.F. II 6-22), as well those taken from the deposition of Appellants' expert, Richard Berg, M.D. (L.F. I 136-61; L.F. II 46-71). Respondents denied most of these allegations for insufficient knowledge, though they admitted their identities and that Mr. Mayes both was their patient and underwent the procedures alleged (L.F. I 28-50; L.F. II 129-42, 181-90).

from his heart, proper management of which required "wet-to-dry" dressing changes twice each day (L.F. I 12-13, 141; L.F. II 8-9, 51).

Performing a "wet-to-dry" dressing change of an open chest wound involves properly packing the wound with saline-soaked gauze while being careful not to contaminate the gauze or wound (L.F. I 147; L.F. II 57). As a result, due to the level of difficulty involved, it normally is performed by a nurse or other healthcare professional (L.F. I 147; L.F. II 57). Neither Mr. Mayes nor his wife, who was disabled and confined to a wheelchair, were physically capable or prepared to perform the "wet-to-dry" dressing change (L.F. I 13, 144; L.F. II 9-10, 54).

Nonetheless, Mr. Mayes was discharged home from St. Luke's on the same morning of his procedure and ordered to perform the "wet-to-dry" dressing changes himself (L.F. I 13, 144; L.F. II 9, 54). Home health care was neither provided nor offered, nor were antibiotics prescribed for Mr. Mayes's at-home use (L.F. I 13, 141; L.F. II 9, 51). St. Luke's nursing staff only briefly instructed Mr. Mayes how to perform a "wet-to-dry" dressing change (L.F. I 141; L.F. II 51). Moreover, this instruction took place while Mr. Mayes was still under the effects of anesthesia (L.F. I 141; L.F. II 51). He also was sent home with a two-sentence, handwritten discharge instruction that omitted several steps in the "wet-to-dry" dressing change process (L.F. I 141; L.F. II 51).

Three days after the March 4 procedure, Mr. Mayes returned to Dr. Stuart's offices, Respondent Mid-America Heart and Lung Surgeons, P.C. ("MAHL"), for a scheduled follow-up appointment (L.F. I 14, 147-48; L.F. II 10, 57-58). The nurses at MAHL noted Mr. Mayes had been unable to perform the "wet-to-dry" dressing changes

on his sternal wound, as he never had removed the original piece of gauze in the wound, instead inserting new wet gauze into the wound covered with dry gauze twice per day (L.F. I 14, 147-48; L.F. II 10, 57-58). Despite this, Mr. Mayes again was sent home, still with no order for home healthcare (L.F. I 147-48; L.F. II 57-58).

Over the next twelve days, Mr. Mayes developed an infection at his wound site and became delirious (L.F. I 14, 145; L.F. II 10, 55). He presented to Western Missouri Med. Ctr. on April 19, 2008, with a temperature of 104.5 degrees and purulent drainage from his open chest wound. (L.F. I 14, 141-42; L.F. II 10, 51-52). He then was then transferred back to St. Luke's, where his wound was cultured, growing out methicillin-resistant staphylococcus bacteria, and he was found to have an infection of his replaced aortic valve and an abscess in his aorta (L.F. I 14, 150; L.F. II 10, 60). Mr. Mayes suffered sepsis, stroke, and renal failure, and died at St. Luke's on March 28, 2008, from these causes directly related to his infection (L.F. I 14, 150; L.F. II 10, 60).

B. Proceedings Below: Case #1 and Case #2

On March 4, 2010, Mr. Mayes's wife, Wanda Mayes, along with Mr. Mayes's five children, filed a petition for damages in the Circuit Court of Jackson County against St. Luke's MAHL, and Dr. Stuart (L.F. I 93).[2] The petition was assigned Case No. 1016-CV07251 (L.F. I 114; Appendix A1), which this brief refers to as "Case #1." The

[2] A full copy of this petition is not in the record, because it was not introduced in either Case #1 or Case #2; as the trial court found, though, the allegations in the petitions in Case #1 and Case #2 were the same (L.F. I 82-83, 114; Appx. A1).

plaintiffs alleged MAHL and Dr. Stuart wrongfully caused the death of Mr. Mayes by carelessly and negligently failing to provide proper care of his post-operative wound (L.F. I 19-22). They also alleged St. Luke's had done the same (L.F. I 22-24). In both those claims, the plaintiffs also sought damages for their loss of consortium, companionship, comfort, and the like, due to Mr. Mayes's death (L.F. I 21, 24). As well, they alleged all defendants wrongfully had damaged Mr. Mayes under a "loss of chance" theory (L.F. I 24-25).

In their petition, the plaintiffs additionally raised "constitutional objections" to a multitude of "recent legislation concerning medical malpractice/negligence actions," specifically that the legislation at issue stemming from House Bill 393 "violate[s] the Missouri Constitution and [is] therefore invalid and without legal effect" (L.F. I 14). Among these were § 538.225, R.S.Mo., the "affidavit of merit" statute for medical negligence cases, which purported to require the plaintiffs' counsel to submit an affidavit stating that he had obtained the written opinion of a legally qualified health care provider that each defendant had breached the applicable standard of care or, otherwise, required the trial court to dismiss the action (L.F. I 17). *Inter alia*, the plaintiffs alleged this statute violated: (1) their rights to open courts and to a certain remedy for every injury, in violation of Mo. Const. art. I, § 14; and (2) their right to trial by jury, in violation of Mo. Const. art. I, § 22(a).

Nonetheless, on the same day they filed their petition, the plaintiffs timely filed separate affidavits of merit for each defendant under § 538.225 (L.F. I 96-101, 114; Appx. A1). All three affidavits were based on the written opinion of the plaintiffs'

medical liability, causation, and damages expert, Richard Berg, M.D. (L.F. I 91-101, 114; Appx. A1). Dr. Berg practices internal medicine and infectious disease medicine at Johns Hopkins and Sinai Hospital in Baltimore, Maryland. (L.F. I 138-39; L.F. II 48-49). The plaintiffs also produced Dr. Berg for deposition (L.F. I 114; Appx. A1), copies of which are in both appeals' Legal Files (L.F. I 136-61; L.F. II 46-71).

During his deposition, Dr. Berg rendered his liability, causation, and damages opinions in response to all defendants' counsel's questions (L.F. I 136-61; L.F. II 46-71). As part of his opinions, Dr. Berg testified the defendants breached their standard of care by: (1) not ordering home healthcare for Mr. Mayes (L.F. I 144, 146, 148; L.F. II 54, 56, 58); (2) instructing Mr. Mayes to perform his own "wet-to-dry" dressing changes (L.F. I 144, 146, 148; L.F. II 54, 56, 58); (3) providing Mr. Mayes with incomplete written instructions (L.F. I 144-45; L.F. II 54-55); and (4) providing Mr. Mayes with inadequate oral instructions when he was still under the effects of anesthesia (L.F. 144-45, 151; L.F. II 54-55, 61). Dr. Berg further explained that the breaches in the defendants' standard of care caused Mr. Mayes to develop the infection at his wound site that ultimately resulted in his untimely death. (L.F. I 150; L.F. II 60).

On August 26, 2011, the plaintiffs voluntary dismissed Case #1 without prejudice under Rules 67.01 and 67.02 (L.F. I 112, 114; Appx. A1). Five days later, they re-filed exactly the same cause of action against St. Luke's, MAHL, and Dr. Stuart, with the same allegations, including their constitutional objections (L.F. I 10-26, 114; Appx. A1). The petition was assigned Case No. 1116-CV23789 (L.F. I 114; Appx. A1), which this brief refers to as "Case #2."

As the trial court later found, upon re-filing, all parties "agreed that the discovery conducted in Case #1 was to be used in" Case #2, "including the deposition of Dr. Berg" (L.F. I 114-15; Transcript 6; Appx. A1-2). Relying on this agreement, the plaintiffs did not re-file their § 538.225 affidavits in Case #2, which already had been filed in Case #1 and which the defendants already had received (L.F. I 88-89, 115; Tr. 6; Appx. A2).

Thereafter, Case #2 proceeded as in the normal course: the defendants filed their answers (L.F. I 28-50), the parties took discovery and filed pre-trial motions (L.F. I 5-8, 51-59, 72-76, 102-07), and a jury trial was set and continued, eventually to October 29, 2012 (L.F. I 5, 74). The court set the deadline for filing dispositive motions at August 24, 2012 (L.F. I 72), and for filing motions in limine at October 5, 2012 (L.F. I 74).

On August 29, 2012, after the deadline for filing pretrial motions and two months before trial, the defendants filed a joint motion to dismiss the plaintiffs' petition, arguing the plaintiffs had failed to re-file the § 538.225 affidavits of merit in Case #2 and thus § 538.225 required the court to dismiss the action (L.F. I 77). This also was 275 days after the 90 day deadline § 538.225 imposes in which to file affidavits of merit (L.F. I 77).

The plaintiffs objected, explaining that all parties had agreed to carry over the deposition of Dr. Berg and, as the defendants were well aware of Dr. Berg and his assessments of the case, the plaintiffs substantially had complied with § 538.225 (L.F. I 119-25). On October 24, 2012, without oral argument, the trial court entered a judgment dismissing Case #2 "without prejudice" (L.F. I 114-15; Appx. A1-2). It found that the parties had agreed to use all the discovery conducted in Case #1 upon re-filing, "including the deposition of Dr. Berg" (L.F. I 114-15; Appx. A1-2). "Nonetheless,"

holding that the plaintiffs had "failed to file the affidavits mandated by" § 538.225 timely in Case #2, and the statute therefore mandated the court to dismiss the action, the court ordered the case "dismissed without prejudice" (L.F. I 114-15; Appx. A1-2).

On November 6, 2012, the plaintiffs moved the court to reconsider, re-explaining how they substantially had complied with § 538.225, precluding dismissal (L.F. I 119). At oral argument on the motion, the plaintiffs additionally explained, echoing their petition (L.F. I 14, 17), that § 538.225 violated their right to open courts and a certain remedy for every injury under Mo. Const. art. I, § 14, as well as their right to trial by jury under Mo. Const. art. I, § 22(a) (Tr. 15-16). The court denied reconsideration on November 19, 2012 (L.F. I 220). The plaintiffs timely appealed to this Court (L.F. 222).

C. Proceedings Below: Case #3

Because the trial court's judgment in Case #2 dismissed the action "without prejudice," on October 30, 2012, the plaintiffs again re-filed exactly their same cause of action against St. Luke's, MAHL, and Dr. Stuart on October 30, 2013, restating the same claims and constitutional objections (L.F. II 6-22). Their petition was assigned Case No. 1216-CV28166 (L.F. II 1), which this brief refers to as "Case #3." That same day, the plaintiffs filed three affidavits of merit, one for each defendant, with each stating that the plaintiffs had obtained Dr. Berg's opinion that the respective defendants failed to meet the standard of care and wrongfully caused Mr. Mayes's death (L.F. II 23-28).

On November 6, 2012, the plaintiffs joined a motion to consolidate Case #3 with Case #2 into their motion to reconsider the dismissal of Case #2 (L.F. I 119; L.F. II 29). The trial court denied that motion on November 19, 2012 (L.F. I 220).

Along with their answer (L.F. II 129), on November 15, 2012, Dr. Stuart and MAHL moved to dismiss Case #3, arguing it was barred by the three-year statute of limitations for wrongful death claims contained in § 537.100, R.S.Mo. (L.F. II 87). St. Luke's filed its answer on November 27, 2012 (L.F. II 181), also at the same time moving to dismiss Case #3 as time-barred under the statute of limitations (L.F. II 167).

The plaintiffs objected, arguing that Case #2 was dismissed "without prejudice" and thus Case #3 fell within the savings statute's one-year savings period (L.F. II 193, 195-96). They also explained that applying the statute of limitations so as "not [to] allo[w]" them "to refile" their "cause of action that was dismissed without prejudice for failure to file a medical affidavit of merit violates [their] right to open courts, guaranteed by" Mo. Const. art. I, § 14, and their "right to a trial by jury, guaranteed by" Mo. Const. art. I, § 22(a) (L.F. II 193, 198-99).

On March 14, 2013, the trial court entered a judgment dismissing Case #3 (L.F. II 247; Appx. A4). It held that, as § 537.100 mandated that wrongful death actions be brought within three years of the cause of action accruing and the plaintiffs' action accrued on March 28, 2008, when Mr. Mayes died, Case #3, which had been filed on October 31, 2012, was barred by the statute of limitations (L.F. II 247; Appx. A4).

The plaintiffs timely appealed to this Court (L.F. II 249). On May 16, 2013, the Court ordered the parties to file the same briefs in both that appeal and their previous appeal from the dismissal of Case #2.

Points Relied On

I. The trial court erred in dismissing Case #2 for the plaintiffs' failure to file affidavits of merit required by § 538.225, R.S.Mo. *because* § 538.225 violates the "open courts " guarantee in Mo. Const. art. I, § 14, and is invalid *in that* § 538.225 erects an arbitrary and unreasonable barrier to the ability of plaintiffs injured by medical negligence to have access to the courts to remedy their legally recognized injury by arbitrarily preconditioning their access on technical compliance with paying an expert to pre-opine on their claims and unreasonably prohibiting trial courts from having any discretion whether to allow the plaintiffs' claims despite noncompliance.

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. banc 1979)

Zeier v. Zimmer, 152 P.3d 861 (Okla. 2006)

Wall v. Marouk, 2013 WL 2407160 (Okla. slip op. June 4, 2013)

Mo. Const. art. I, § 14

§ 538.225, R.S.Mo.

§ 538.225, R.S.Mo. (2004)

II. The trial court erred in dismissing Case #2 for the plaintiffs' failure to file affidavits of merit as required by § 538.225, R.S.Mo. *because* § 538.225 violates the plaintiffs' right to trial by jury under Mo. Const. art. I, § 22(a), and is invalid *in that* this constitutional provision forever preserves the right to trial by jury as it existed before 1820, medical negligence was a recognized claim at common law, the merit of which was to be decided only by a jury, and § 538.225 removes the historic primacy of that decision from jurors by requiring plaintiffs first to pay an expert to pre-opine on their claims and, otherwise, mandating the trial court to dismiss the action, regardless of whether the plaintiffs' claims have merit.

Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. banc 2012)

Klotz v. St. Anthony Med. Ctr., 311 S.W.3d 752 (Mo. banc 2010)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

Lee v. Conran, 111 S.W. 1151 (Mo. 1908)

Mo. Const. art. I, § 22(a)

§ 538.225, R.S.Mo.

§ 538.225, R.S.Mo. (2004)

III. The trial court erred in dismissing Case #2 for the plaintiffs' failure to file affidavits of merit required by § 538.225, R.S.Mo. *because* a procedural statute must be liberally construed such that substantial compliance meeting its intent is sufficient, and the plaintiffs substantially complied with § 538.225 so as to meet its intent to notify the defendants of the identity and opinion of an expert who will testify their claims have merit *in that* the plaintiffs filed compliant affidavits of merit in Case #1, the defendants deposed the plaintiffs' expert disclosed in those affidavits, and the defendants agreed to transfer the Case #1 discovery to Case #2.

Brickell v. Kan. City, 265 S.W.2d 342 (Mo. 1954)

Kirkpatrick v. City of Glendale, 99 S.W.3d 57 (Mo. App. 2003)

Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683 (Mo. banc 2010)

P.S. v. Psychiatric Coverage, Ltd., 887 S.W.2d 622 (Mo. App. 1994)

§ 1.010, R.S.Mo.

§ 538.225, R.S.Mo.

IV. The trial court erred in dismissing Case #3 as time-barred under the statute of limitations in § 537.100, R.S.Mo. *because* applying § 537.100 to the plaintiffs solely because of the dismissal of Case #2 due to their failure to meet § 538.225 violates the "open courts " guarantee in Mo. Const. art. I, § 14, and is invalid *in that* § 538.225 erects an arbitrary and unreasonable barrier to the ability of plaintiffs injured by medical negligence to have access to the courts to remedy their legally recognized injury by arbitrarily preconditioning their access on technical compliance with paying an expert to pre-opine on their claims and unreasonably prohibiting trial courts from having any discretion whether to allow the plaintiffs' claims despite noncompliance.

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. banc 1979)

Zeier v. Zimmer, 152 P.3d 861 (Okla. 2006)

Wall v. Marouk, 2013 WL 2407160 (Okla. slip op. June 4, 2013)

Mo. Const. art. I, § 14

§ 537.100, R.S.Mo.

§ 538.225, R.S.Mo.

§ 538.225, R.S.Mo. (2004)

V. The trial court erred in dismissing Case #3 as time-barred under the statute of limitations in § 537.100, R.S.Mo. *because* applying § 537.100 to the plaintiffs solely because of the dismissal of Case #2 due to their failure to meet § 538.225 violates the plaintiffs' right to trial by jury under Mo. Const. art. I, § 22(a), and is invalid *in that* this constitutional provision forever preserves the right to trial by jury as it existed before 1820, medical negligence was a recognized claim at common law, the merit of which was to be decided only by a jury, and § 538.225 removes that decision from jurors by requiring plaintiffs first to pay an expert to pre-opine on their claims and, otherwise, depriving the trial court of discretion to do anything except dismiss the action, regardless of whether the action has merit.

Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. banc 2012)

Klotz v. St. Anthony Med. Ctr., 311 S.W.3d 752 (Mo. banc 2010)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

Lee v. Conran, 111 S.W. 1151 (Mo. 1908)

Mo. Const. art. I, § 22(a)

§ 537.100, R.S.Mo.

§ 538.225, R.S.Mo.

§ 538.225, R.S.Mo. (2004)

Argument

I. The trial court erred in dismissing Case #2 for the plaintiffs' failure to file affidavits of merit required by § 538.225, R.S.Mo. *because* § 538.225 violates the "open courts " guarantee in Mo. Const. art. I, § 14, and is invalid *in that* § 538.225 erects an arbitrary and unreasonable barrier to the ability of plaintiffs injured by medical negligence to have access to the courts to remedy their legally recognized injury by arbitrarily preconditioning their access on technical compliance with paying an expert to pre-opine on their claims and unreasonably prohibiting trial courts from having any discretion whether to allow the plaintiffs' claims despite noncompliance.

Standard of Review

This point alleges error in granting a motion to dismiss due to the constitutional invalidity of the statute ostensibly mandating dismissal. This Court "reviews a trial court's grant of a motion to dismiss *de novo*." *Gurley v. Mo. Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 411 (Mo. banc 2012) (citation omitted). As well, "The issue of whether a statute is unconstitutional is a question of law subject to *de novo* review." *Id.* (citation omitted).

* * *

A statute arbitrarily or unreasonably barring individuals or classes from accessing Missouri courts in order to bring recognized causes of action to remedy a personal injury violates the "open courts" guarantee of Mo. Const. art. I, § 14. Section 538.225, R.S.Mo., requires any plaintiff bringing a medical negligence case to file an affidavit

within 90 days of her petition stating she has obtained the written opinion of a qualified health care provider that her claim is meritorious, disclosing the provider's identity. The plaintiff necessarily must pay for the opinion. If the plaintiff does not comply, the statute requires the court to dismiss the action. Does this violate the "open courts" guarantee?

In Case #2, the trial court dismissed the plaintiffs' wrongful death medical negligence action because the plaintiffs "failed to file the affidavits mandated by Mo. Rev. Stat. § 538.225," which mandated the court to "dismiss the action" (Legal File I 115; Appendix A2). This was error. Section 538.225 (Appx. A9-10) – the present version of the medical negligence "affidavit of merit" statute – violates the "open courts" guarantee of Mo. Const. art. I, § 14 (Appx. A6) and is invalid.

Mo. Const. art. I, § 14, guarantees that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person …." This Court holds that any statute arbitrarily or unreasonably barring an individual or class from redressing their injuries under recognized causes of action violates this provision and is invalid. Actions for medical negligence are recognized causes of action. Nonetheless, § 538.225 erects an arbitrary and unreasonable barrier to such actions, *requiring* dismissal if a plaintiff does not pay for and obtain a "pre-opinion" from a doctor that her cause of action is meritorious, regardless of whether her action *actually* is meritorious.

As other states' courts have held regarding identical constitutional provisions and statutes, § 538.225 violates Mo. Const. art. I, § 14, and is invalid. This Court should reverse the judgment below in Case #2 and remand that case for further proceedings.

A. A statute violates the "open courts" guarantee in Mo. Const. art. I, § 14 when it erects an arbitrary and unreasonable barrier to a plaintiff's access to the courts to remedy its alleged injury in a recognized cause of action.

Mo. Const. art. I, § 14, commonly known as the "open courts" provision, *Kilmer v. Mun*, 17 S.W.3d 545, 547 (Mo. banc 2000), guarantees "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay" (Appx. A6). This provision is not "merely" "an ideal to which our system aspires," but rather "states a constitutional right." *Kilmer*, 17 S.W.3d at 547. It is "a constitutional provision that is mandatory in tone and substance." *Id.* at 548.

Accordingly, this Court strives "to ensure that article I, section 14 retains its vitality while permitting proper deference to legislative enactments." *Id.* at 549. After examining the long history of the "open courts" provision, this Court explained that, "Put most simply, article I, section 14 'prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.'" *Id.* (quoting *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. banc 1997) (Holstein, C.J., dissenting)) (emphasis in the original).

"The test of 'arbitrary or unreasonable' is an important clarification of this Court's [previous] statement … that 'the right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes.'" *Id.* (quoting *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989)). Thus, while "[b]oth the common law and our statutes recognize various legal injuries to person, property and

character and provide remedies for such injuries," and a "statute … may modify or abolish a cause of action that has been recognized by common law or by statute," nonetheless "where a barrier is erected in seeking a remedy for a recognized injury, the question [under art. I, § 14] is whether it is arbitrary or unreasonable." *Id.* at 550.

As such, under this test, even if a new statutory procedure does "not ultimately" wholly "deny access to the court," the "procedural hurdle [can] be enough to violate article I, section 14." *Id.* at 548-49 (citing *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. banc 1979)). Rather, "those statutes that impose procedural bars to access the courts are unconstitutional," especially those that make a plaintiff's access the courts "depend[ent] on … the actions of a third person." *Weigand v. Edwards*, 296 S.W.3d 453, 461-62 (Mo. banc 2009) (quoting *Wheeler*, 941 S.W.2d at 514 (Holstein, J., dissenting)). "An open courts violation is established on a showing that: '(1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.'" *Id.* at 461 (quoting *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006)).

Using this analysis, this Court has held a variety of procedures invalid under art. I, § 14. In *Cardinal Glennon*, which began the "modern era" of "open courts" jurisprudence, *Kilmer*, 17 S.W.3d at 548, the Court invalidated a statutory prerequisite to filing medical negligence cases that a plaintiff submit her claim to a "professional liability board" for a recommendation prior to filing a lawsuit in court. 583 S.W.2d at 110. This was because it "impose[d]" a separate, non-judicial "procedure as a precondition to access to the courts." *Id.*

In *Schumer v. City of Perryville*, the Court invalidated a "condition precedent to a suit" that a minor who was legally incapable of bringing his own action nonetheless must give notice of his claim before suing a municipality, because allowing legal incapacity to bar a person from suit denied minors a remedy for a recognized injury. 667 S.W.2d 414, 417-18 (Mo. banc 1984). In *Straher v. St. Luke's Hosp.*, the Court held applying the statute of limitations for actions against health care providers to minors was similarly invalid. 706 S.W.2d 7, 11-12 (Mo. banc 1986).

Finally, in *Kilmer*, the Court held invalid a statute allowing a "dram shop" cause of action only when the liquor licensee first had been convicted in a criminal prosecution for providing liquor to an intoxicated person. 17 S.W.3d at 550-54. The statute recognized a "caus[e] of action … by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink … [to] an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death." *Id.* at 550. Then, however, it made a plaintiff's ability to bring such an action "entirely dependent upon whether or not the county prosecutor has prosecuted and obtained a conviction of their alleged wrongdoer for … selling intoxicating liquor to an obviously intoxicated person." *Id.*

The Court held this violated the "open courts" provision by depriving "dram shop" plaintiffs of a certain remedy for their recognized injury. *Id.* 550-54. Although the statute purported to recognize a remedy, it created a precondition such that "where there is no prosecution and conviction, there is no remedy." *Id.* at 551-52. Thus, the statute empowered "a prosecuting attorney, and not the legislative branch," to "decid[e] whether

there is a cause of action under" the dram shop statute. *Id.* at 552. The Court held that this control by a third party "in order for a plaintiff to proceed with a civil action is … both arbitrary and unreasonable." *Id.* "A barrier that subjects a recognized injury to the discretion of [a third party] violates" art. I, § 14. *Id.* at 554.

The same is true in this case. Section 538.225 absolutely preconditions the right of a medical negligence plaintiff – a claim Missouri specifically recognizes – on their obtaining (and paying for) an expert witness to pre-opine on the merits of their claims and then complying with the technicality of filing an affidavit within 90 days attesting to this expert's identity and opinion. While the pre-2005 version of § 538.225 (Appx. A11) granted trial courts discretion to absolve plaintiffs of this requirement, the present version at issue in this case (Appx. A9-10) does not. Instead, it *mandates* that the court dismiss any plaintiff's petition when the plaintiff does not comply with this technicality.

In so doing, however, § 538.225 singles out medical negligence plaintiffs from among all plaintiffs in negligence actions and withholds their fundamental right to have their claims adjudicated from the court and the jury and instead preconditions it on the "say-so" of a third party. Moreover, it totally bars entry to the courthouse to any such plaintiff who is financially incapable of obtaining a timely medical opinion.

As with the professional board precondition in *Cardinal Glennon* and the prosecution/conviction precondition in *Kilmer*, and as other states' courts have recognized when analyzing identical statutes under identical constitutional provisions, § 538.225 is an arbitrary and unreasonable barrier to medical negligence plaintiffs seeking a remedy for their recognized injury. It violates art. I, § 14, and is invalid.

B. Section 538.225 violates art. I, § 14, by arbitrarily preconditioning medical negligence plaintiffs' ability to remedy their recognized injury on technical compliance with paying an expert to pre-opine on their claims and unreasonably depriving courts of discretion to allow the plaintiffs' claims despite noncompliance.

Section 538.225 (Appx. A9-10), titled "Affidavit by a health care provider certifying merit of case," provides that, "in any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services," "no later than ninety days after the filing of the petition"

> the plaintiff or the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly cause or directly contributed to cause the damages claimed in the petition.

The court may, "for good cause shown, orde[r] that" the 90-day period "be extended," but only "for a period of time not to exceed an additional ninety days." *Id.* at .5.

The statute defines "legally qualified health care provider" as "a health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant." *Id.* at .2. The affidavit must state the

name, address, and qualifications of the opining health care provider. *Id.* at .3. A separate affidavit is required for each defendant named in the petition. *Id.* at .4.

The consequences for failing to obtain such an opinion and timely filing such an affidavit are dire: "If the plaintiff or his attorney fails to file such affidavit the court *shall*, upon motion of any party, dismiss the action against such moving party without prejudice." *Id.* at .6 (emphasis added). Before its amendment in 2005, however, the dismissal requirement was discretionary, rather than mandatory. It provided, "If the plaintiff or his attorney fails to file such affidavit the court *may*, upon motion of any party, dismiss the action against such moving party without prejudice." § 538.225.5, R.S.Mo. (2004) (Appx. A11) (emphasis added). "May" in the pre-2005 statute denotes discretion, whereas "shall" in the post-2005 statute denotes a mandatory duty. *Jarman v. Eisenhauser*, 744 S.W.2d 780, 781 (Mo. banc 1988).

Thus, as it exists today, § 538.225 makes compliance mandatory, otherwise the trial court must dismiss the action. And the statute's requirement applies to *all* actions against health care providers for damages for personal injury on account of the rendering of or failure to render health care services. § 538.225.1. This includes *res ipsa loquitur* cases, even though such a claim "does not require or allow expert testimony on the standard of care." *Gaynor v. Wash. Univ.*, 261 S.W.3d 650, 654 (Mo. App. 2008).

Even a claim that is technically "battery," not "medical malpractice," falls within the statute. *Devitre v. Orthopedic Ctr. of St. Louis, LLC*, 349 S.W.3d 327, 334-35 (Mo. banc 2011); *see also St. John's Reg'l Health Ctr., Inc. v. Windler*, 847 S.W.2d 168, 171-722 (Mo. App. 1993) (same, but for "false imprisonment" claim). Indeed, this Court

even has held that "nothing in sec. 538.225 exempts a plaintiff from filing an affidavit who shows 'that the medical malpractice … is of that untypical kind that does not require proof of standard of care by expert opinion.'" *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 680-81 n.4 (Mo. banc 2000) (citation omitted).

As such, § 538.225 carves out a subclass from all civil personal injury plaintiffs of those filing actions against health care providers on account of the rendering of or failure to render health care services, however their claims may be styled and whatever allegation they may contain. It treats those plaintiffs differently than all others. For, unlike all other plaintiffs, who all have open, unfettered access to the courts to have the merits of their claims determined under the law by the court and/or a jury, plaintiffs suing health care providers for professional personal injury first must obtain a third, non-judicial party's opinion permitting them to do so and attest to it on the record. Failure to do so or inability to do so – even where expert testimony will not be required to prove the merits of their claims (or even in *res ipsa* cases, where such testimony actually is disallowed, *Spears v. Capital Reg'l Med. Ctr.*, 86 S.W.3d 58, 62 (Mo. App. 2002)) – mandatorily deprives them of any remedy for their injury.

This violates Mo. Const. art. I, § 14. An action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services – in this case, an action for wrongful death for medical negligence – is a recognized cause of action in Missouri, both presently and at common law. "English common law recognized medical negligence as one of five types of 'private wrongs' that could be redressed in court," which "have been tried by juries" in Missouri since the

beginning of statehood. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 638 (citing 2 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 122 (1765; 1992 reprint); *Rice v. State*, 8 Mo. 561 (1844)). Today, numerous provisions of Chapter 538, R.S.Mo., titled "Tort Actions Based on Improper Health Care," discuss various procedures for such actions, implicitly recognizing their existence in Missouri. *Kilmer*, 17 S.W.3d at 550.

This cause of action, however, though recognized by § 538.225, only can be asserted when the plaintiff or her attorney have obtained (and necessarily paid for) and completed the technicality of filing another qualified health care provider's opinion stating that each defendant failed to meet the standard of care and such failure directly caused or contributed to the claimed damages. Therefore, "If the 'certain remedy' guaranteed in article I, section 14 'for every injury to person, property and character' has any meaning, the barrier imposed by [§ 538.225] is invalid." *Kilmer*, 17 S.W.3d at 550. "(1) [the plaintiffs have] a recognized cause of action; (2) … the cause of action is being restricted [by § 538.225]; and (3) the restriction is arbitrary or unreasonable.'" *Snodgras*, 204 S.W.3d at 640 (Mo. banc 2006).

In this case, the plaintiffs assert that they have suffered an injury recognized by Chapter 538, R.S.Mo. because they pleaded that the death of Ira Mayes, their husband and father, directly resulted from the negligence of the defendants (Legal File 11-25). *Cf. Kilmer*, 17 S.W.3d at 550. But there is no certain remedy if their claim is entirely dependent upon whether or not they have paid for and obtained the opinion of another health care provider agreeing with their claims (much as the county prosecutor had to in

Kilmer or the review board in *Cardinal Glennon*) and then completed the technicality of filing an affidavit attesting to this. *Cf. id.*

Thus, while Chapter 538 recognizes the plaintiffs' cause of action, § 538.225 makes it subject to the preconditions of (1) the plaintiff or their attorney paying for and obtaining the opinion of a third-party health care provider agreeing with their claims and (2) completing the technicality of filing an affidavit within 90 days of the petition stating so. "Where these conditions are met, there is a remedy if the [plaintiffs] can prove that [the defendants' conduct complained of caused their] injury. But where there is no [pre-opinion and affidavit], there is no remedy." *Kilmer*, 17 S.W.3d at 551-52.

Accordingly, "Whether an injured party has a remedy" for this recognized cause of action "depends entirely upon the decision of" a third party before pretrial litigation even has begun. *Id.* at 552. "If the" third party agrees with the plaintiffs' claims, "then the injured person may [maintain their] civil action." *Id.* "If, however," the plaintiffs are unable timely to obtain and/or pay for such an opinion, "then the injured party has no redress for the injury that is recognized by" the law of Missouri. *Id.* There may be extenuating circumstances, such as the plaintiff's inability to find or afford such a pre-opinion, "yet [this] is wholly immune from review." *Id.*

As such, under § 538.225, the existence or lack of a third-party health care provider within 90 days of the plaintiff's petition, rather than the legislature or the judiciary, "decides whether [a plaintiff has] a cause of action" for medical negligence. *Id.* This Court already has held that delegating that responsibility to another third party – a "Professional Liability Review Board" – violates Mo. Const. art. I, § 14. *Cardinal*

Glennon, 538 S.W.2d at 110. But regardless of whom the third party is, art. I, § 14, prohibits this decision from being in any third party's hands. Any such "possibili[ty] invites arbitrary refusals of the right to pursue a claim." *Kilmer*, 17 S.W.3d at 553.

"The test this Court applies is whether access to court for a recognized injury is subject to an arbitrary or unreasonable barrier." *Id.* Just as with the board submission in *Cardinal Glennon* and the prosecutor's decision in *Kilmer*, "the prerequisite of [paying for, obtaining, and attesting to a pre-litigation third party medical opinion] in order for a plaintiff to proceed with a civil action is … both arbitrary and unreasonable." *Id.*

Therefore, § 538.225 violates the "open courts" guarantee of Mo. Const. art. I, § 14. It "imposes" a separate, non-judicial "procedure as a precondition to access to the courts." *Cardinal Glennon*, 538 S.W.2d at 110. The statute "impose[s a] procedural ba[r] to access the courts" and thus is "unconstitutional," especially as it makes a plaintiff's access the courts "depend[ent] on … the actions of a third person." *Weigand*, 296 S.W.3d at 461-62 (quoting *Wheeler*, 941 S.W.2d at 514 (Holstein, J., dissenting)). The Constitution of Missouri does not allow for this.

C. Other states' courts have invalidated identical "affidavit of merit" statutes under identical constitutional "open courts" guarantees.

Other states' courts have held nearly identical "affidavit of merit" statutes to be invalid under nearly identical "open courts" constitutional guarantees. In the past decade, the Supreme Court of Oklahoma twice has held such an affidavit statute invalid under

Okla. Const. art. 2, § 6.[3] *See Zeier v. Zimmer*, 152 P.3d 861 (Okla. 2006); *Wall v. Marouk*, 2013 WL 2407160 (Okla. slip op. June 4, 2013).

In *Zeier*, the Oklahoma court analyzed then-63 O.S. Supp.2003 § 1-1708.1E. 152 P.3d at 862. Like the present version of § 538.225, the Oklahoma statute required that, within 90 days of filing its petition, a plaintiff alleging a medical negligence claim file an affidavit stating it: "1) has consulted with a qualified expert; 2) has obtained a written opinion from a qualified expert that the facts presented constitute professional negligence; and 3) has determined, on the basis of the expert's opinion, that the malpractice claim is meritorious and based on good cause." *Zeier*, 152 P.3d at 865. The statute further mandated that, if the plaintiff failed to comply, the trial court must dismiss the plaintiff's action. *Id.* at 863 n.2.

The court held this violated the Oklahoma Constitution's guarantee of open courts. It held this was because "the requirement that a medical malpractice claimant obtain a professional's opinion that the cause is meritorious at a cost of between $500.00 and $5,000.00 creates an unconstitutional monetary barrier to court access." *Id.* at 863. "Although statutory schemes similar to Oklahoma's Health Care Act do help screen out meritless suits, the additional certification costs have produced a substantial and

[3] Oklahoma's "open courts" provision is virtually the same as Missouri's: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

disproportionate reduction in the number of claims filed by low-income plaintiffs." *Id.* at 869 (citation omitted). Moreover, "The affidavit of merit provisions front-load litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price." *Id.* (citation omitted). Additionally, they

> prevent meritorious medical malpractice actions from being filed. The affidavits of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being settled out of court during discovery. Rather than reducing the problems associated with malpractice litigation, these provisions have resulted in the dismissal of legitimately injured plaintiffs' claims based solely on procedural, rather than substantive, grounds.

Id. (citations omitted). The Oklahoma court also observed that such statutes create a floodgate of litigation regarding this additional hurdle to which they subject plaintiffs. *Id.* at 871-72 (posing 22 hypothetical questions in such litigation, with citations).

Like Mo. Const. art. I, § 14, however, the Oklahoma Constitution's "open courts" guarantee "requires that the courts must be open to all on the same terms without prejudice. The framers of the Constitution intended that all individuals, without partiality, could pursue an effective remedy designed to protect their basic and fundamental rights." *Zeier*, 152 P.3d at 872. Most importantly, the guarantee meant that "[a]ccess to courts must be available to all through simple and direct means and the right must be administered in favor of justice rather than being bound by technicalities" such

as withholding the right of access "for nonpayment of some liability or conditioned on coercive collection devices." *Id.* at 872-73 (citations omitted).

Under the affidavit of merit statute, though, "medical malpractice plaintiffs are singled out and must stand the cost of an expert opinion, which may range from $500 to $5000, before they may proceed to have their rights adjudicated." *Id.* at 873 (citations omitted). "A statute that so conditions one's right to litigate impermissibly … closes the court house [*sic*] doors to those financially incapable of obtaining a pre-petition medical opinion." *Id.* Accordingly, the statute created "an unconstitutional monetary barrier to access to the courts guaranteed by" Okla. Const. art. 2, § 6. *Id.*

Several years later, the Oklahoma Legislature attempted to remedy this by amending the statute to apply to "professional" negligence, rather than "medical" negligence, and also to exempt indigent plaintiffs for a fee of $40 that was deferrable but not waivable. *Wall*, 2013 WL 2407160 at *3-*5. The Supreme Court of Oklahoma held that these changes did not cure the statute's unconstitutionality:

> Access to the courts must be available to all comers through simple and direct means and the right must be administered in favor of justice rather than being bound by technicalities. Claimants may not have their fundamental right of court access withheld merely for nonpayment of some liability or conditioned coercive collection devices.
>
> Okla. Const. art. 2, § 6, guarantees the right of individuals to access the courts, and while litigation does not have to be free and entirely at the public expense, at the very least the provision means that justice cannot be

> for sale. The idea that money cannot be used as a bar to deny justice long predates the Oklahoma Constitution, and is one of the fundamental values of our legal system.

Id. at *7.

Other states' courts have held the same. *See, esp., Putman v. Wenatchee Valley Med. Ctr., P.S.*, 216 P.3d 374, 376-77 (Wash. 2009); *Zeier*, 152 P.3d at 870 n.53 (citing cases from 14 states holding "affidavit of merit" statutes unconstitutional).

This Court now should do so, too. Section 538.225 is invalid for violation of Mo. Const. art. I, § 14. The trial court erred in holding the statute bound it to dismiss Case #2. This Court should reverse the trial court's judgment dismissing Case #2 and should remand for further proceedings.

D. *Mahoney* (1991) does not support the constitutionality of § 538.225 today, because the pre-2005 statute did not mandate dismissal for failure to file affidavits of merit, and *Mahoney* was before this Court restated and refined its "open courts" jurisprudence in *Kilmer* (2000).

In *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 509-10 (Mo. banc 1991), this Court held that the version of § 538.225 then in existence (Appx. A11) did not violate the "open courts" guarantee of Mo. Const. art. I, § 14. Observing that the enactment of § 538.225 was "a legislative response to the public concern over the increased cost of health care and the continued integrity of that system of essential services," the Court held the intent of § 538.225 was "to cull at an early stage of litigation suits for negligence damages against health care providers that lack even color of merit,

and so to protect the public and litigants from the cost of ungrounded medical malpractice claims." 807 S.W.2d at 507.

In holding that the pre-2005 version of § 538.225 did not violate medical negligence plaintiffs' right of access to the courts, the Court noted that art. I, § 14 "does not create rights, but is meant to protect the enforcement of rights already acknowledged by law." *Id.* at 510.[4] Thus, it held, as the "substantive law requires that a plaintiff who sues for personal injury damages on the theory of health care provider negligence prove by a qualified witness that the defendant deviated from an accepted standard of care" and, "[w]ithout such testimony, the case can neither be submitted to the jury nor be allowed to proceed by the court," § 538.225 merely "serves to free the court system from frivolous medical malpractice suits at an early stage of litigation, and so facilitate the administration of those with merit." *Id.* Thus, the Court held, § 538.225 "neither denies free access of a cause nor delays thereafter the pursuit of that cause in the courts." *Id.*

While that might have been true before the 2005 amendment to § 538.225, it is no longer true after that amendment. The Court in *Mahoney* was careful to note that, under the version then in effect, the final safeguard was left to the trial court: "It is a judge that decides that the case may not proceed, not a health care provider." 807 S.W.2d at 510. The written medical opinion noted in the affidavit was merely to show "that the claim is

[4] In *Kilmer*, this Court later disagreed with this notion, instead holding emphatically that art. I, § 14, actually *does* "stat[e] a constitutional right" that is "mandatory in tone and substance." 17 S.W.3d at 547-48.

not frivolous," while the ultimate determination of this remained with the court: to determine whether "under the substantive law of medical malpractice the petition cannot succeed," thereby warranting "[t]he sanction of dismissal without prejudice." *Id.*

Under the version of § 538.225 then in effect, this was true: before 2005, the statute provided, "If the plaintiff or his attorney fails to file such affidavit the court *may*, upon motion of any party, dismiss the action against such moving party without prejudice." § 538.225.5 (2004) (Appx. A11) (emphasis added). The trial court retained discretionary final say over whether the action actually was frivolous or not, regardless of whether the plaintiff technically had complied with the affidavit statute.

Today, though, this no longer is true: the statute makes such dismissal mandatory, regardless of the ultimate merits of the plaintiff's case: "If the plaintiff or his attorney fails to file such affidavit the court *shall*, upon motion of any party, dismiss the action against such moving party without prejudice." § 538.225.6 (Appx. A9) (emphasis added). Thus, unlike in *Mahoney*, it no longer can be said that "it is a judge who decides that the case may not proceed." 807 S.W.2d at 510.

Rather, if a plaintiff, for whatever reason – e.g. lack of time, money, or opportunity, or agreement with the defense, as in this case – fails to obtain a healthcare provider's opinion in his or her favor within 90 days, then regardless of whether the claim actually is frivolous or not, the court *must* dismiss it. The final determination of frivolity or merit, and thus whether to dismiss the case, remains with the health care provider, not a judge. The judge is bound to dismiss the action, with no discretion otherwise.

In this case, for example, the plaintiffs *did* obtain the opinion of a qualified health care provider that their claims had merit and, in Case #1, timely filed separate affidavits of merit for each defendant disclosing the identity of their expert, Richard Berg, M.D. (L.F. I 96-101, 114; Appx. A1). They also produced Dr. Berg for deposition (L.F. I 114, 136-61; L.F. II 46-71; Appx. A1). The defendants were well-apprised of Dr. Berg and his opinion; upon the plaintiffs filing Case #2, all parties "agreed that the discovery conducted in the prior lawsuit was to be used in th[e re-filed] lawsuit – including the deposition of Dr. Berg" (L.F. I 114-15; Transcript 6). Plainly, the intent of § 538.225 "to cull at an early stage of litigation suits for negligence damages against health care providers that lack even color of merit," *Mahoney*, 807 S.W.2d at 507, was met, as the plaintiffs' case obviously was not frivolous, as the defendants knew well.

Nonetheless, despite the use of Dr. Berg's discovery in Case #2, and merely because the plaintiffs did not technically re-file their physical affidavits, § 538.225 mandated the court to dismiss their action (L.F. I 114-15; Appx. A1-2). While this would not have been true under the version in effect during *Mahoney*, as the trial court would have had discretion *not* to dismiss the plaintiffs' action, the version now in effect *mandated* the court do so. It took the determination of whether the plaintiffs' case had preconditional merit out of the trial court's hands and put it into those of a third party.

Mahoney's reliance on the trial court as being the ultimate safeguard no longer is true. Now, even non-frivolous suits such as this must be dismissed for noncompliance with the barrier in § 538.225. What was intended to be a shield for defendants from frivolous suits has become a sword for defendants to avoid meritorious suits.

Finally, over time, another of *Mahoney*'s observations as to the relationship between the method of § 538.225 and its purpose has turned out not to be correct. In *Mahoney*, after analogizing the statute to the substantive legal requirement in most medical injury cases that the plaintiff have an expert witness at trial, the Court suggested that the statute would not apply when the plaintiff could "show that the medical malpractice the petition alleges is of that untypical kind that does not require proof of standard of care by expert opinion." 807 S.W.2d at 508.

Later, when plaintiffs with such atypical cases argued that, under this observation in *Mahoney*, they were absolved from the requirements of § 538.225, the courts held this was mere "dicta." *See, e.g.*, *Budding*, 19 S.W.3d at 680 n.4; *Mello v. Giliberto*, 73 S.W.3d 669, 678 (Mo. App. 2002); *Gaynor*, 261 S.W.3d at 654. Instead, "[c]ontrary to" *Mahoney*'s observation, "nothing in sec. 538.225 exempts a plaintiff from filing an affidavit who shows 'that the medical malpractice … is of that untypical kind that does not require proof of standard of care by expert opinion.'" *Budding*, 19 S.W.3d at 680 n.4. Thus, in contrast to *Mahoney*, it has been found that § 538.225 even includes *res ipsa* medical injury cases, despite the fact that such a claim "does not" even "allow expert testimony on the standard of care." *Gaynor*, 261 S.W.3d at 654.

Plainly, then, *Mahoney*'s characterization of § 538.225's relationship to its alleged objectives is both under-inclusive and anachronistic. The statute bears no relation to the substantive legal requirement that medical negligence plaintiffs have an expert witness, as it includes even those cases in which there is no such requirement. And unlike at the time of *Mahoney*, the final say no longer remains with the trial court. The trial court's

role now unreasonably is subordinate to the plaintiff's arbitrary circumstances within 90 days of the petition, as well as the equally arbitrary whims of a non-judicial third party.

This Court should hold that the present version of § 538.225 violates Mo. Const. art. I, § 14. Whatever the statute may have stated at the time of *Mahoney*, the barrier it erects today is arbitrary and unreasonable. To any extent *Mahoney* says otherwise, the Court should overrule it.

II. The trial court erred in dismissing Case #2 for the plaintiffs' failure to file affidavits of merit as required by § 538.225, R.S.Mo. *because* § 538.225 violates the plaintiffs' right to trial by jury under Mo. Const. art. I, § 22(a), and is invalid *in that* this constitutional provision forever preserves the right to trial by jury as it existed before 1820, medical negligence was a recognized claim at common law, the merit of which was to be decided only by a jury, and § 538.225 removes the historic primacy of that decision from jurors by requiring plaintiffs first to pay an expert to pre-opine on their claims and, otherwise, mandating the trial court to dismiss the action, regardless of whether the plaintiffs' claims have merit.

Standard of Review

This point alleges error in granting a motion to dismiss due to the constitutional invalidity of the statute ostensibly mandating dismissal. This Court "reviews a trial court's grant of a motion to dismiss *de novo*." *Gurley v. Mo. Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 411 (Mo. banc 2012) (citation omitted). As well, "The issue of whether a statute is unconstitutional is a question of law subject to de novo review." *Id.* (citation omitted).

* * *

A statute depriving a litigant of the right to trial by jury in any action to which she would have been entitled when the Constitution of Missouri first was adopted in 1820 – and in the manner then in place – violates "the right of trial by jury as heretofore enjoyed" guaranteed in Mo. Const. art. I, § 22(a). Section 538.225, R.S.Mo., shifts the primary decision over whether a plaintiff's medical negligence claim has merit from a

jury to a non-judicial third party. If a third party does not certify such merit, no jury may determine the merits. Does this violate the right to trial by jury as heretofore enjoyed?

In addition to the "open courts" guarantee of Mo. Const. art. I, § 14, as explained in Point I, *supra*, § 538.225 also violates plaintiffs' right to trial by jury under Mo. Const. art. I, § 22(a) (Appx. A7). This provision guarantees, in relevant part, "That the right of trial by jury as heretofore enjoyed shall remain inviolate …."

This provision "is one of the fundamental guarantees of the Missouri Constitution." *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 637 (Mo. banc 2012). Its "plain language requires analysis of two propositions to determine if" the affidavit requirement for medical negligence cases in § 538.225 "violates the state constitutional right to trial by jury." *Id.* The first "requires a determination of whether [the plaintiffs'] medical negligence action … is included within 'the right to trial by jury as heretofore enjoyed." *Id.* at 637-38. The second "requires this Court to determine whether the right to trial by jury 'remains inviolate'" under the regimen enacted in § 538.225.

"The phrase 'heretofore enjoyed'" in art. I, § 22(a), "means that '[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted' in 1820." *Id.* at 638 (quoting *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003)). "Therefore, if Missouri common law entitled a plaintiff to a jury trial" on its medical negligence claim, regardless of what some non-judicial party might pre-opine at the time the plaintiff filed its petition, the plaintiff "has a state constitutional right to a jury trial on her claim …." *Id.* And if

the third-party opinion precondition "changes the common law right to a jury [trial], the right to trial by jury does not 'remain inviolate' and the [statute] is unconstitutional." *Id.*

In *Watts*, after exploring the history of art. I, § 22(a) in great detail, this Court firmly answered the first of the two inquiries: a determination as to the merits of a medical negligence claim unquestionably is part of the plaintiff's "right to trial by jury." 376 S.W.3d at 638-39. "[A]ssess[ing] the state of the common law when the Missouri Constitution was adopted in 1820," the Court noted that "English common law recognized medical negligence as one of five types of 'private wrongs' that could be redressed in court," which "have been tried by juries" in Missouri since the beginning of statehood. *Id.* at 638 (citing 2 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 122 (1765; 1992 reprint); *Rice v. State*, 8 Mo. 561 (1844)).

A crucial part of this right is that the jury be the primary fact finder to determine the merits of the plaintiff's claims. Art. I, § 22(a), "means that all the substantial incidents and consequences which pertained to the right of trial by jury, are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existed at common law." *Klotz v. St. Anthony Med. Ctr.*, 311 S.W.3d 752, 777 (Mo. banc 2010) (Wolff, J., concurring) (quoting *Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908)).

Necessarily, this includes the fundamental function of fact-finding: the "concept of the jury as the fact finder is rooted in Missouri's history …." *Id.* (citations omitted). Early Missouri cases held that a trial court "very properly told the jury it was their province to find the amount of damage, *if any had been sustained* …." *Id.* (quoting *Steinberg v. Gebhardt*, 41 Mo. 519, 519 (1867)) (emphasis added). Thus, as medical

negligence claims existed at common law, the jury's determination as to whether the medical negligence plaintiff sustained any of the damage it alleged – i.e. determining the merit of their claims – plainly is part of "the right to trial by jury as heretofore enjoyed," just as this Court held in *Watts*.

The second inquiry is whether the right "remains inviolate" when § 538.225 requires a plaintiff to obtain a preconditional opinion as to the merits of their suit from a non-judicial third party. Plainly, it does not. Rather, the statute removes from the jury the fundamental role of primarily determining whether the plaintiff's claim has merit. At common law, the jury was the sole finder of fact. If the plaintiff's claim did or did not have merit, the jury would find so.

Nothing at common law allowed for any additional subjection of this determination to a non-judicial third party in the first instance. But § 538.225 does exactly this. Absent some other procedure existing at common law – such as the election of a bench trial, summary judgment, a directed verdict, an post-trial order, etc. – the merits of all other personal injury plaintiffs' claims are determined by a jury alone. Conversely, under § 538.225, *medical negligence* plaintiffs first must obtain a health care professional's pre-opinion as to the merits of their claims. If no third party provides such a pre-opinion of merit, the statute requires the trial court to dismiss the plaintiff's petition, barring any jury trial at all.

Thus, unlike as heretofore enjoyed under common law, under § 538.225 the primary arbiter of merit is a non-judicial third party, not a jury – and not even a judge. A plaintiff's failure or inability to comply with § 538.225 mandatorily results in dismissal.

This violates Mo. Const. art. I, § 22(a).[5] An action against a health care provider for medical negligence was a recognized cause of action in Missouri at common law. *Watts*, 376 S.W.3d at 638. The right to trial by jury applied to it. *Id.* And one incident of that right was that the *only* finder of fact of whether that action had merit was to the jury. *Klotz*, 311 S.W.3d at 777 (Wolff., J., concurring) (citations omitted). Thus, under art. I, § 22(a), this right – the right of a medical negligence plaintiff to have the primary determination of the merit of their claims be made by the jury – was "heretofore enjoyed" and must "remain inviolate." *Watts*, 376 S.W.3d at 637-39.

Section 538.225 fails this command. It vitiates the plaintiffs' right to a trial by jury as heretofore enjoyed by granting the primary determination of the plaintiffs' merits to a third party. The plaintiff *first must* obtain that third party's opinion that her claims have merit or else cannot *then* proceed to have a jury re-determine that merit. Thus, § 538.225 "changes the common law right to a jury [trial], the right to trial by jury does not 'remain inviolate' and [it is] unconstitutional." *Watts*, 376 S.W.3d at 638.

Section 538.225 is invalid for violation of Mo. Const. art. I, § 22(a). The trial court erred in holding it was bound to dismiss Case #2. This Court should reverse the trial court's judgment dismissing Case #2 and remand this case for further proceedings.

---

[5] In *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503 (Mo. banc 1991), this Court held that the version of § 538.225 then in effect did not violate Mo. Const. art. I, § 22(a). In Point I, *supra* at 30-35, Appellants explained that, after the 2005 amendments to § 538.225, *Mahoney* no longer is good law. This applies equally to this Point.

III. The trial court erred in dismissing Case #2 for the plaintiffs' failure to file affidavits of merit required by § 538.225, R.S.Mo. *because* a procedural statute must be liberally construed such that substantial compliance meeting its intent is sufficient, and the plaintiffs substantially complied with § 538.225 so as to meet its intent to notify the defendants of the identity and opinion of an expert who will testify their claims have merit *in that* the plaintiffs filed compliant affidavits of merit in Case #1, the defendants deposed the plaintiffs' expert disclosed in those affidavits, and the defendants agreed to transfer the Case #1 discovery to Case #2.

Standard of Review

This point alleges error in granting a motion to dismiss for misinterpretation of a statute. This Court "reviews a trial court's grant of a motion to dismiss *de novo*." *Gurley v. Mo. Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 411 (Mo. banc 2012) (citation omitted). "Likewise, '[s]tatutory interpretation is an issue of law that this Court reviews de novo.'" *Devitre v. Orthopedic Ctr. of St. Louis, LLC*, 349 S.W.3d 327, 331 (Mo. banc 2011) (citation omitted).

"The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). Still, this Court "suppose[s] the legislature did not contemplate an injustice, and we resolve any obscurity in the language of a statute in favor of an interpretation that is just and fair …." *Chem. Bank & Trust Co. v. Anheuser-Busch, Inc.*, 231 S.W.2d 165, 169 (Mo. 1950).

* * *

The law of Missouri is that procedural rules, including those in statutes, must be liberally construed such that a rule is satisfied when a party engages in sufficiently compliant actions to meet its intent. Section 538.225, R.S.Mo., is a procedural rule intended to ensure a medical negligence suit is not frivolous by notifying the defendant of the identity and opinion of an expert who agrees the plaintiff's claims have merit. In this case, the plaintiffs filed affidavits in Case #1 disclosing the identity and opinion of their expert, who later was deposed. After the plaintiffs re-filed Case #1 as Case #2, the defendants agreed all discovery from Case #1, including the expert's deposition, would be used in Case #2. Did the plaintiffs substantially comply with § 538.225 in Case #2?

In Case #2, the trial court found that, "[u]pon refilling [*sic*]" Case #1 as Case #2, "the parties agreed that the discovery conducted in [Case #1] was to be used in [Case #2] – including the deposition testimony of Dr. Berg," the plaintiffs' expert disclosed in their affidavits filed in Case #1 (Legal File I 114-15; Appendix A1-2). "Nonetheless," because in Case #2 the plaintiffs "failed to file the affidavits mandated by … § 538.225 within the ninety day time limit," and holding the statute thus *required* dismissal, despite the fact that "Defendants have not asserted they have been prejudiced by Plaintiffs' failure to file the required affidavits," the court dismissed the plaintiffs' action (L.F. I 115; Appx. A2).

This was error. By putting all defendants on notice that they had an expert witness who would testify to the merit of their claims, and the defendants agreeing to transfer the discovery related to that witness to Case #2, the law of Missouri is that the plaintiffs substantially complied with the intent of § 538.225, precluding dismissal. This Court should reverse the trial court's judgment in Case #2 and remand for further proceedings.

A. Missouri gives procedural rules a liberal construction to minimize disposition on technical grounds, such that as long as a party substantially meets the rule's intent, it sufficiently has complied.

In Missouri, "we prefer cases to be decided on their merits rather than on technicalities." *McDonald v. City of Kan. City*, 285 S.W.3d 773, 774 (Mo. App. 2009). For, it is well-established that "the interest of justice is best served by a disposition on the merits rather than a technicality." *Fowler v. Laclede Gas Co.*, 488 S.W.2d 934, 935 (Mo. App. 1972). Procedural "technicalities are not to be used to ambush an adverse party" as to avoid a decision on the merits. *Sofka v. Thal*, 662 S.W.2d 502, 509 (Mo. banc 1983).

Accordingly, it long has been the law that all "procedural rules are to be liberally construed to promote justice and minimize the number of cases disposed of on technical grounds." *Martens v. White*, 195 S.W.3d 548, 554 (Mo. App. 2006) (quoting *Geiersbach v. Blue Cross/Blue Shield of Kan. City*, 58 S.W.3d 636, 639 (Mo. App. 2001)). This applies to statutes, too: "procedural statutes are to be liberally construed." *State ex rel. Garrison Wagner Co. v. Schaaf*, 528 S.W.2d 438, 442 (Mo. banc 1975).

This is especially true of any statute creating a procedural hurdle that did not exist at common law: a statutory procedure that "is in derogation of the common law … must be strictly construed against" a defendant "and liberally in favor of a plaintiff with the result that substantial compliance is sufficient." *Kirkpatrick v. City of Glendale*, 99 S.W.3d 57, 60 (Mo. App. 2003); *see also* § 1.010, R.S.Mo. A precondition to suit is such a hurdle. *Brickell v. Kan. City*, 265 S.W.2d 342, 344-45 (Mo. 1954). Thus, where § 82.210, R.S.Mo., preconditioned personal injury claims against cities on first notifying

the city "in writing" within 90 days of injury, a plaintiff's oral statement to the mayor's agent nonetheless met the statute's intent and therefore substantially complied. *Id.*

As such, over the years, this Court and the Missouri Court of Appeals have held that a wide variety of otherwise, ostensibly "mandatory" technicalities in procedural rules and statutes must yield under these principles where a party substantially had complied so as to meet the rule's intent:

- *Glass v. State*, ___ S.W.3d ___, 2013 WL 1748281 at *2-*3 (Mo. App. Apr. 23, 2013) (amended information charging a criminal defendant need not be hyper-specific, but only need substantially meet the intent of Rule 23.01 to apprise the accused of the facts generally constituting the charge).
- *M.D.L. v. S.C.E.*, 391 S.W.3d 525, 528 n.2 (Mo. App. 2013) (where appellate brief is not entirely compliant with mandatory Rule 84.04, as long as court can determine the case on the merits with reasonable certainty and effort, brief will not be stricken).
- *Altom Constr. Co. v. BB Syndication Servs. Inc.*, 359 S.W.3d 146, 155-56 (Mo. App. 2012) (mechanic's lien claimant who did not provide itemized list of incurred expenses nonetheless substantially complied with mandatory requirement of § 429.080, R.S.Mo., for a "just and true account of the amount due" where no evidence indicated stated amount due was knowingly, intentionally, or fraudulently falsified).
- *State v. Rios*, 314 S.W.3d 414, 418 (Mo. App. 2010) ("sensible and substantial" compliance with jury separation statute, § 547.020, R.S.Mo., is all that is required when an allegation of improper jury separation is made).

- *Kindred v. City of Smithville*, 292 S.W.3d 420, 424-28 (Mo. App. 2009) (where contract was not specifically authorized by city in writing and signed by city, contrary to mandatory requirements for municipal contracts in § 432.070, R.S.Mo., city nonetheless substantially complied with statute where it knew of the contract and performed it, meeting intent of statute).
- *Knight v. Carnahan*, 282 S.W.3d 9, 15 (Mo. App. 2009) (as long as initiative petition showed that people had demonstrated their will through their vote, regardless of whether it met all technical requirements in initiative statutes, certification of the statewide ballot question would be upheld).
- *Celtic Corp. v. Tinnea*, 254 S.W.3d 137, 143-44 (Mo. App. 2008) (despite mandatory language for certificate of acknowledgement in corporate real estate conveyance in § 442.210, R.S.Mo., conveyance would not be held void where corporation substantially complied with statute so as to meet its intent).
- *State v. Bewley*, 68 S.W.3d 613, 620 (Mo. App. 2002) (where trial court did not make specific finding that child victim was unavailable as a witness, as required by § 491.680, R.S.Mo., court nonetheless substantially complied by meeting the statute's intent in conducting a hearing and finding the victim would suffer by testifying).
- *Potts v. State*, 22 S.W.3d 226, 230-31 (Mo. App. 2000) (lack of "absolute and literal" compliance with mandatory recordkeeping regulation for breathalyzer machines did not invalidate admission of breathalyzer test results where officers had met intent of regulation by substantially complying with the requirements).

- *City of Cuba v. Williams*, 17 S.W.3d 630, 631 (Mo. App. 2000) (judgment in action involving multiple claims between multiple parties was appealable despite trial court's failure to state the exact language of Rule 74.01(b) where trial court's actions substantially complied with the intent of the rule).
- *State v. Neely*, 979 S.W.2d 552, 557-58 (Mo. App. 1998) (where Arkansas attorney represented Missouri criminal defendant without filling out mandatory forms under Rule 9.03, trial court's colloquy with Arkansas attorney to ensure he was in good standing nonetheless substantially complied with the intent of the rule).
- *Matter of Cupples*, 952 S.W.2d 226, 232 (Mo. banc 1997) (where special master failed to make the full record of proceedings that Rule 68.03 required, he nonetheless substantially complied with the rule, meeting its intent).
- *State ex rel. Brickner v. Saitz*, 664 S.W.2d 209, 212 (Mo. banc 1984) (where § 512.080, R.S.Mo., required trial court to fix supersedeas bond "at or prior to" the time of filing the notice of appeal, trial court who did so one minute *after* notice of appeal was filed nonetheless substantially complied with the intent of the statute).
- *State ex rel. Jakobe v. Billings*, 421 S.W.2d 16, 17-18 (Mo. banc 1967) (where affidavits attached to applications for change of venue and to disqualify judge did not include exact words required by rule, affiant nonetheless substantially complied with rule's intent by swearing the affidavit was true).

The "affidavit of merit" requirement in § 538.225 is no different. While it ostensibly mandates an affidavit be physically filed "[i]n any action against a health care provider for damages for personal injury or death on account of the rendering of or

failure to render health care services" stating that the plaintiff or her attorney has obtained the written opinion of a legally qualified health care provider who agrees the plaintiff's claims have merit, this precondition is in derogation of the common law and must be liberally construed. The law of Missouri is that substantial compliance with its intent is sufficient to meet its terms. The plaintiffs in this case plainly met that burden.

B. The plaintiffs substantially complied with § 538.225 in Case #2 by filing affidavits of merit in Case #1, meeting the intent of the statute by to put the defendants on notice of their expert, whose deposition the defendants agreed to transfer to Case #2.

This Court already has determined the intent of the "affidavit of merit" provisions of § 538.225. The "legislature intended section 538.225 to dismiss medical negligence lawsuits that lack 'even color of merit' and 'to protect the public and litigants from the cost of ungrounded medical malpractice claims.'" *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 686 (Mo. banc 2010) (quoting *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991)). Its desired effect "was to dismiss medical negligence lawsuits that 'lack even color of merit' at an early stage of litigation." *Id.* at 688 (quoting *Mahoney*, 807 S.W.2d at 507). It does this by establishing a "'screening' procedure" "in the early state of suit to detect … frivolousness." *Mahoney*, 807 S.W.2d at 508.

At the same time, § 538.225 "enacts a *procedure* in suits for personal injury or death damages caused by negligent health care providers. It intends no change in our substantive medical malpractice law." *Id.* (emphasis in the original). Thus, § 538.225 is

a "procedural statute," which does "not affect the rights or duties giving rise to the cause of action but instead provide[s] the method for enforcing rights …." *White v. Tariq*, 299 S.W.3d 1, 4 (Mo. App. 2009) (retroactively applying § 538.225 does not violate the bar on retrospective operation of law in Mo. Const. art. I, § 13, because it is a procedural statute, not substantive). It "does not affect the rights or duties giving rise to Plaintiffs' malpractice action, but rather sets forth the pre-trial procedure for cases where the plaintiff fails to timely file a sufficient health care affidavit." *Id.*

Thus, as a procedural statute, § 538.225 must "be liberally construed to promote justice and minimize the number of cases disposed of on technical grounds." *Martens*, 195 S.W.3d at 554 (Mo. App. 2006) (citation omitted); *see also Garrison Wagner*, 528 S.W.2d at 442. Indeed, the Court of Appeals already has held so specifically for § 538.225 and the rest of Chapter 538. *See P.S. v. Psychiatric Coverage, Ltd.*, 887 S.W.2d 622, 627 (Mo. App. 1994) (expressly refusing a "strict statutory construction approach" and declining to construe "legally qualified health care provider" in § 538.225 to exclude professional corporations that provide health care services by licensed practitioners).[6]

[6] Courts in other jurisdictions also have held that "affidavit of merit" statues are subject to liberal construction, rather than strict construction, and substantial compliance with the intent of the statute suffices. *See Beckett v. Beebe Med. Ctr.*, 897 A.2d 753, 757-58 (Del. 2006); *Davis v. Orlando Reg'l Med. Ctr.*, 654 So.2d 664, 665-66 (Fla. App. 1995); *Sisk v. Patel*, 456 S.E.2d 718, 719-20 (Ga. App. 1995); *Cutler v. N.W. Suburban Hosp., Inc.*, 939 N.E.2d 1032, 1043-44 (Ill. App. 2010); *Ericson v. Pollack*, 110 F.Supp.2d 582, 587-88

This is especially true for § 538.225 considering that, as a statute creating a procedural hurdle that did not exist at common law, just like the precondition to suit in *Brickell*, 265 S.W.2d at 344-45, § 538.225's procedure "is in derogation of the common law" and thus "must be strictly construed against" a defendant "and liberally in favor of a plaintiff with the result that substantial compliance is sufficient." *Kirkpatrick*, 99 S.W.3d at 60 (Mo. App. 2003).

In this case, the plaintiffs plainly substantially complied with § 538.225, satisfying its intent of avoiding frivolous medical negligence lawsuits lacking even color of merit. In Case #1, the plaintiffs timely filed separate affidavits of merit for each defendant under § 538.225 (L.F. I 96-101, 114; Appx. A1). All three were based on the written opinion of the plaintiffs' medical liability, causation, and damages expert, Richard Berg, M.D., a physician at Johns Hopkins and Sinai Hospital in Baltimore, Maryland, specializing in internal medicine and infectious disease medicine, whose identity, qualifications, and contact information the affidavits also disclosed (L.F. I 91, 96-101, 138-39, 114; L.F. II 48-49; Appx. A1).

Later in Case #1, the plaintiffs also produced Dr. Berg for deposition (L.F. I 114-15, 136-61; L.F. II 46-71; Appx. A1-2). In the deposition, Dr. Berg explained it was his

---

(E.D.Mich. 2000); *Ellis v. Miss. Baptist Med. Ctr., Inc.*, 997 So.2d 996, 999 (Miss. App. 2008) (strict compliance violated state constitution); *Galik v. Clara Maass Med. Ctr.*, 771 A.2d 1141, 1149 (N.J. 2001); *Harris v. Neuburger*, 877 A.2d 1275, 1277-78 (Pa. Super. 2005); *Cline v. Kresa-Reahl*, 728 S.E.2d 87, 89 (W.Va. 2012).

professional opinion that all three defendants breached their standard of care by: (1) not ordering home healthcare for Ira Mayes (L.F. I 144, 146, 148; L.F. II 54, 56, 58); (2) instructing Mr. Mayes to perform his own "wet-to-dry" dressing changes (L.F. I 144, 146, 148; L.F. II 54, 56, 58); (3) providing Mr. Mayes with incomplete written instructions (L.F. I 144-45; L.F. II 54-55); and (4) providing Mr. Mayes with inadequate oral instructions when he was still under the effects of anesthesia (L.F. 144-45, 151; L.F. II 54-55, 61). Dr. Berg further explained that the breaches in the defendants' standard of care caused Mr. Mayes to develop the infection at his wound site that ultimately resulted in his untimely death (L.F. I 150; L.F. II 60).

Thereafter, the plaintiffs voluntary dismissed Case #1 without prejudice (L.F. I 112, 114; Appx. A1). Five days later, they re-filed exactly the same cause of action against the same defendants with the same allegations (L.F. I 10-26, 114; Appx. A1). As the trial court later found, upon re-filing all parties "agreed that the discovery conducted in the prior lawsuit was to be used in this [re-filed] lawsuit – including the deposition of Dr. Berg" (L.F. I 114-15; Transcript 6; Appx. A1-2). In reliance on this agreement, the plaintiffs did not re-file their § 538.225 affidavits, which already were on file with the court from Case #1 and which the defendants already had (L.F. I 88-89, 115; Tr. 6; Appx. A2). The defendants did "not assert that they have been prejudiced by Plaintiffs' failure to file the required affidavits" separately in Case #2 (L.F. I 115; Appx. A2).

Thus, the plaintiffs substantially complied with § 538.225, readily meeting its intent. The defendants were well on notice that the plaintiffs "ha[d] obtained the written opinion of a legally qualified health care provider," Dr. Berg, "which states that the

defendant[s] … failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use reasonable care directly cause or directly contributed to cause the damages [the plaintiffs] claimed in the petition," § 538.225.1, as Dr. Berg later restated in his deposition. Dr. Berg was a "legally qualified health care provider" because he was "licensed in … [an]other state in the same profession as the defendant[s] and [was] actively practicing … substantially the same specialty as the defendant." *Id.* at .2. The defendants knew his "name, address, and qualifications …." *Id.* at .3. The defendants thus knew well that "one or more qualified and competent health care providers w[ould] testify that the plaintiff[s were] injured due to medical negligence by [the] defendant[s]." *Id.* at .7.

This substantial compliance plainly met the purpose of the statute by ensuring that the plaintiffs' case was "screened" "in the early state of suit to detect … frivolousness." *Mahoney*, 807 S.W.2d at 508. It was plain that the plaintiffs' suit did not "lack 'even color of merit'" and thus "the public and litigants" were "protect[ed] … from the cost of ungrounded medical malpractice claims,'" *id.* at 507, because this demonstrably was not such a case. The desired effect of § 538.225 "to dismiss medical negligence lawsuits that 'lack even color of merit' at an early stage of litigation" was inapposite. *Id.*

To hold otherwise would vitiate the law of Missouri's consistent primacy given to justice over procedural technicalities by requiring a liberal construction of procedural rules. Especially considering that the defendants waited *more than a year* after the filing of Case #2 to object to the technical lack of affidavits separately filed in that case, holding the plaintiffs did not substantially comply with § 538.225 also would abrogate

the rule that procedural "technicalities are not to be used to ambush an adverse party" as to avoid a decision on the merits. *Sofka*, 662 S.W.2d at 509.

In two other reported Missouri opinions, a plaintiff has appealed a dismissal for failure to file a § 538.225 affidavit on the ground that he or she nonetheless "substantially complied" with the statute. In neither one, however, did the plaintiff actually comply in any way that met the statute's intent.

In *State ex rel. Farley v. Jamison*, 346 S.W.3d 397, 398-99 (Mo. App. 2011), "Plaintiff's counsel filed affidavits stating that he had obtained the written opinion of a legally qualified health care provider," stating "that [the defendants] failed to use the care that a reasonably prudent and careful provider would have used under similar circumstances and that failure to use reasonable care directly caused or contributed to produce the damages claimed in Plaintiff's petition." But the "affidavits failed to identify the medical expert and to provide his address and qualifications as required by section 538.225.3." *Id.* at 399. Because § 538.225.3 was clear that the affidavit had to put the defendants on notice of "the name, address, and qualifications of such health care providers to offer such opinion," "the affidavits" did not "'substantially' comply with the requirements of section 538.225." *Id.* at 399-400.

Unlike in *Farley*, in this case the plaintiffs did substantially comply in this manner. The defendants were on full notice of the name, address, and qualifications of Dr. Berg, especially having previously deposed him. *Farley* is inapposite.

Similarly, in *Mello v. Giliberto*, 73 S.W.3d 669, 679-80 (Mo. App. 2002), the plaintiff filed no affidavits at all and identified no specific health care provider. Instead,

she claimed she "substantially complied" with § 528.335 by "assert[ing] that she had the case reviewed by medical personnel who gave her a verbal opinion confirming that the case had merit but who would not complete an affidavit because they were now employed with one of the defendants." *Id.* at 679. The court held that this was patently insufficient: the plaintiff's unsubstantiated "claim that she obtained a verbal opinion from medical personnel does not satisfy the statute." *Id.* at 680. Additionally, the plaintiff went through two years of litigation without any discovery and without once disclosing the identity of any expert in her favor. *Id.*

Again, unlike in *Mello*, in this case the plaintiffs did substantially comply. They provided the defendants with affidavits in Case #1 from an expert deposed in that case and whose deposition the defendants agreed to transfer to Case #2. The defendants were fully apprised of the identity and opinions of Dr. Berg. *Mello* bears no relation.

Despite the lack of technical, separate, new, repeat affidavits filed in Case #2, the plaintiffs substantially complied with the terms of § 538.225 in that case and in reliance on the defendants' agreement. The intent and purposes of the statute were well met. The law of Missouri is that dismissal could not have been warranted. This Court should reverse the trial court's judgment in Case #2 and remand for further proceedings.

IV. The trial court erred in dismissing Case #3 as time-barred under the statute of limitations in § 537.100, R.S.Mo. *because* applying § 537.100 to the plaintiffs solely because of the dismissal of Case #2 due to their failure to meet § 538.225 violates the "open courts " guarantee in Mo. Const. art. I, § 14, and is invalid *in that* § 538.225 erects an arbitrary and unreasonable barrier to the ability of plaintiffs injured by medical negligence to have access to the courts to remedy their legally recognized injury by arbitrarily preconditioning their access on technical compliance with paying an expert to pre-opine on their claims and unreasonably prohibiting trial courts from having any discretion whether to allow the plaintiffs' claims despite noncompliance.

Standard of Review

This Court "reviews a trial court's grant of a motion to dismiss *de novo*." *Gurley v. Mo. Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 411 (Mo. banc 2012) (citation omitted). As well, "The issue of whether a statute is unconstitutional is a question of law subject to *de novo* review." *Id.* (citation omitted).

* * *

In Point I, *supra*,[7] the plaintiffs explained that § 538.225, R.S.Mo., violates the "open courts" guarantee of Mo. Const. art. I, § 14, and thus the statute could not have

[7] The plaintiffs might have tried to sandwich this point in with Point I, *supra*. Rather than risk rejection of a multifarious point for violation of Rule 84.04, *see Thummel v.*

bound the trial court in Case #2 to dismiss their action for failure to comply with the terms of that statute. The plaintiffs hereby incorporate that argument into this point.

But the trial court in Case #3 *also* dismissed *that* action for the plaintiffs' failure to file affidavits of merit in Case #2, only indirectly so via the statute of limitations on medical negligence cases contained in § 537.100, R.S.Mo. (Appendix A8). This, too, was a violation of the plaintiffs' rights under art. I, § 14, that this Court should remedy.

In Case #3, the trial court noted § 537.100 commanded that every wrongful death action "be commenced within three years after the cause of action shall accrue" (Legal File II 247; Appx. A4). As "Plaintiffs' wrongful death claims accrued on March 28, 2008, the date" Ira Mayes "passed away," the court held "Plaintiffs filed this case on October 30, 2012, beyond the accrual date of the three-year statute of limitations" (L.F. II 247; Appx. A4). Accordingly, it dismissed Case #3 (L.F. II 247; Appx. A4).

The statute of limitations only was at issue because the plaintiffs' claims no longer fell under the savings statutes in § 537.100 (for their claims as to Mr. Mayes's wrongful death) and § 516.230, R.S.Mo. (for their survivorship claims). Ordinarily, "when an action is dismissed without prejudice, a plaintiff may cure the dismissal by filing another suit in the same court." *Snelling v. Masonic Home of Mo.*, 904 S.W.2d 251, 252 (Mo. App. 1995). Sections 537.100 and § 516.230 give the plaintiff one year from the date of dismissal to re-file the action, even if then outside the statute of limitations, by each

---

King, 570 S.W.2d 679, 688 (Mo. banc 1978), they elected to parse their constitutional complaints as to Case #3 into separate points relied on, Points IV and V.

providing that if any relevant "action shall have been commenced within the [statute of limitations period], and the plaintiff therein shall take or suffer a nonsuit … such plaintiff may commence a new action from time to time within one year after such nonsuit suffered …."

As the plaintiffs filed Case #3 within a week of Case #2 being dismissed, it might seem that the savings statute avoided the statute of limitations. Indeed, the plaintiffs argued this in their response to the motions to dismiss in Case #3 (L.F. II 195-96). Unfortunately, however, and as the trial court implicitly saw, they were wrong.

It is well-established that "a plaintiff may receive the benefit of the savings statute only once." *Heintz v. Swimmer*, 922 S.W.2d 772, 776 (Mo. App. 1996). "The action giving rise to the benefit of the savings statute may be the first action or a subsequent one, so long as it was filed within the original period of limitations." *Id.* Where the action was *not* filed within the statute of limitations, however, and was the result of a *previous* reliance on the savings statute, the statute of limitations applies to the third or subsequent re-filing. *Britton v. Hamilton*, 740 S.W.2d 704, 705 (Mo. App. 1987). "Once … the provisions of [the savings statute] are invoked, [the] plaintiff then has one year to file his action and the dismissal of an action so filed, does not give rise to any subsequent periods of grace." *Cady v. Harlan*, 442 S.W.2d 517, 519-20 (Mo. 1969).

Accordingly, applying the statute of limitations in § 537.100 in Case #3 so as to dismiss the plaintiffs' action stemmed *solely* from the dismissal of Case #2, which itself had been solely to the plaintiffs' failure to file physical affidavits of merit under the invalid § 538.225 (L.F. I 114-15; Appx. A1-2). A timeline shows this more fully:

Date	Event
March 28, 2008	Mr. Mayes passes away (L.F. I 14, 150; L.F. II 10, 60).
March 4, 2010	The plaintiffs file Case #1, attaching affidavits of merit regarding their expert, Richard Berg, M.D. (L.F. I 91-101, 114; Appx. A1).
August 26, 2011	The plaintiffs voluntarily dismiss Case #1 (L.F. I 112).
August 31, 2011	The plaintiffs file Case #2 (L.F. I 10-26, 114; Appx. A1).
October 24, 2012	Trial court dismisses Case #2 without prejudice solely because, despite the parties' agreement to transfer Dr. Berg's deposition from Case #1 to Case #2, the plaintiffs did not file technical, separate affidavits of merit in Case #2 itself (L.F. I 114-15; Appx. A1-2).
October 30, 2012	The plaintiffs file Case #3 (L.F. II 6-22).
March 14, 2013	Trial court dismisses Case #3, holding that Case #3 was filed beyond the March 28, 2008, accrual date of the three-year statute of limitations in § 537.100 (L.F. 171-72).

As this shows, the plaintiffs only were in the position of filing Case #3 because Case #2 had been dismissed due to their failure to file affidavits of merit in Case #2, though § 538.225 violates Mo. Const. art. I, § 14, and is invalid. Thus, applying the statute of limitations in § 537.100 in Case #3 so as to disallow the plaintiffs from re-filing their action equally violated the Constitution's guarantee that the courts be open to redress their recognized injury. The statute of limitations was at issue only because the plaintiffs failed to comply with an unconstitutional statute in the first place.

This was error. Under the above facts, applying the statute of limitations in § 537.100 to disallow the plaintiffs from re-filing their cause of action simply because the previous action was dismissed for a reason that, itself, violates Mo. Const. art. I, § 14, plainly violates that same provision. Section 538.225 is an arbitrary and unreasonable barrier to medical negligence plaintiffs seeking a remedy for their recognized injury that violates art. I, § 14, and is invalid. Reapplying it vicariously through § 537.100 is equally invalid.

V. The trial court erred in dismissing Case #3 as time-barred under the statute of limitations in § 537.100, R.S.Mo. *because* applying § 537.100 to the plaintiffs solely because of the dismissal of Case #2 due to their failure to meet § 538.225 violates the plaintiffs' right to trial by jury under Mo. Const. art. I, § 22(a), and is invalid *in that* this constitutional provision forever preserves the right to trial by jury as it existed before 1820, medical negligence was a recognized claim at common law, the merit of which was to be decided only by a jury, and § 538.225 removes that decision from jurors by requiring plaintiffs first to pay an expert to pre-opine on their claims and, otherwise, depriving the trial court of discretion to do anything except dismiss the action, regardless of whether the action has merit.

Standard of Review

This Court "reviews a trial court's grant of a motion to dismiss *de novo*." *Gurley v. Mo. Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 411 (Mo. banc 2012) (citation omitted). As well, "The issue of whether a statute is unconstitutional is a question of law subject to *de novo* review." *Id.* (citation omitted).

* * *

In Point II, *supra*, the plaintiffs explained that § 538.225, R.S.Mo., violates the guarantee in Mo. Const. art. I, § 22(a), that "the right to trial by jury as heretofore enjoyed shall remain inviolate." As the plaintiffs explained, the statute thus could not have bound the trial court in Case #2 to dismiss their action for failure to comply with the terms of that statute. The plaintiffs hereby incorporate that argument into this point.

Just as in Point IV, *supra*, the trial court in Case #3 *also* dismissed *that* action for the plaintiffs' failure to file affidavits of merit in Case #2, only indirectly so via the statute of limitations on medical negligence cases contained in § 537.100, R.S.Mo. (Appendix A8). This, too, was a violation of the plaintiffs' rights under art. I, § 22(a). Just as with Points II and IV, this Court should remedy that separate error, too.

The trial court in Case #3 dismissed the action because "Plaintiffs' wrongful death claims accrued on March 28, 2008, the date" Ira Mayes "passed away," the court held "Plaintiffs filed this case on October 30, 2012, beyond the accrual date of the three-year statute of limitations" in § 537.100 (Legal File II 247; Appx. A4). As explained in Point IV, *supra* at 55-56, applying § 537.100 in this manner stemmed *solely* from the dismissal of Case #2 only to the plaintiffs' failure to file physical affidavits of merit under § 538.225 (L.F. I 114-15; Appx. A1-2). But § 538.225 violates Mo. Const. art. I, § 22(a), as explained in Point II, *supra*. Thus, just as with Mo. Const. art. I, § 14, in Point IV, applying the statute of limitations in § 537.100 in Case #3 so as to disallow the plaintiffs from re-filing their action equally violated the Constitution's guarantee that "the right to trial by jury as heretofore enjoyed remain inviolate." Art. I, § 22(a).

Accordingly, applying § 538.225 vicariously through the statute of limitations in § 537.100 to prevent the plaintiffs from re-filing their cause of action simply because the previous action was dismissed for a reason that, itself, violates Mo. Const. art. I, § 22(a), violates that same provision. As § 538.225 changes the common law right to a jury, the right to trial by jury as heretofore enjoyed does not remain inviolate and it is unconstitutional. Reapplying § 538.225 through § 537.100 is equally invalid.

Conclusion

The Court should reverse the trial court's judgment dismissing Case #2 and remand that case for further proceedings. Alternatively, the Court should reverse the trial court's judgment dismissing Case #3 and remand that case for further proceedings.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Mo. #59533
2345 Grand Boulevard, Suite 675
Kansas City, Missouri 64108
Telephone: (816) 753-0800
Facsimile: (877) 684-5717
E-mail: jonathan@sternberg-law.com

/s/Leland F. Dempsey
Leland F. Dempsey #30756
Austin Bradley #65348
Dempsey and Kingsland
City Center Square
1100 Main Street, Suite 1860
Kansas City, Missouri 64105
(816) 421-6868
(816) 421-2610 facsimile
leland@dandklaw.com
austin@dandklaw.com

COUNSEL FOR APPELLANTS

Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b) and that this brief contains 18,136 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I hereby certify that, on June 27, 2013, I filed a true and accurate Adobe PDF copy of this Brief of the Appellant and its Appendix via the Court's electronic filing system, which notified the following of that filing:

Mr. Thomas W. Wagstaff
Wagstaff & Cartmell, LLP
4740 Grand Avenue, Suite 300
Kansas City, Missouri 64112
Telephone: (816) 701-1100
Facsimile: (816) 531-2372
twwagstaff@wcllp.com

Counsel for Respondent
Saint Luke's Hospital of Kansas City

Mr. Charles Henry Stitt
Shaffer Lombardo Shurin
911 Main Street, Suite 2000
Kansas City, Missouri 64105
Telephone: (816) 931-0500
Facsimile: (816) 931-5775
hstitt@sls-law.com

Counsel for Respondents
Mid-America Heart & Lung Surgeons, P.C.
and Richard Scott Stuart, M.D.

/s/Jonathan Sternberg
Attorney