SC93012 and SC93254

IN THE SUPREME COURT OF MISSOURI

WANDA MAYES, *et alia*,

Appellants,

vs.

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

REPLY BRIEF OF THE APPELLANTS

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A. Introduction

In Point I of their opening brief, the plaintiffs explained how the trial court erred in dismissing Case #2 under § 538.225, R.S.Mo., for failure to file an affidavit of merit within 90 days of filing their petition, because that statute violates the "open courts" guarantee of Mo. Const. art. I, § 14 (Brief of the Appellants ("Aplt.Br.") 10, 15-35). They explained this was because the statute's absolute requirement that medical negligence plaintiffs pay for and obtain a non-judicial third party's say-so as a precondition to filing a recognized medical negligence action is an arbitrary and unreasonable barrier to medical negligence plaintiffs' ability to have access to the courts to redress their injury (Aplt.Br.10,15-35).

In Point II of their opening brief, the plaintiffs explained how the dismissal of Case #2 also was error because § 538.225 violates the "right to trial by jury as heretofore enjoyed" guaranteed in Mo. Const. art. I, § 22(a) (Aplt.Br.11,36-40). They explained this was because the statute removes the primary determination of the merits of a medical negligence action from the jury and court and gives it to the pre-opinion of a paid, non-judicial third party (Aplt.Br.11,36-40).

In their briefs, both sets of defendants primarily argue the plaintiffs did not preserve Points I or II for appellate review (Brief of Respondent St. Luke's Hospital ("SLH.Br.") 7-9; Brief of Respondents Mid-America Heart & Lung Surgeons and Richard Scott Stuart ("MAHL.Br.") 4-8). Both concede the plaintiffs raised both points in their petition in Case #2, as well as in the post-judgment proceedings following the

order dismissing the case (SLH.Br.7-9;MAHL.Br.4-8). Nonetheless, both insist the issues remain unpreserved for appeal solely because the plaintiffs did not also restate their constitutional claims in their suggestions in opposition to the defendants' motion to dismiss (SLH.Br.7-9;MAHL.Br.4-8).

The defendants' preservation arguments are without merit. The law of Missouri is that a claim that a statute is unconstitutional is properly preserved for appeal so long as it is raised at the earliest possible opportunity, the opposing parties and the trial court are put on notice of the claim, and the trial court has an opportunity to decide the claim, even if it decides the claim only implicitly. In this case, the plaintiffs *did* raise their claims in Points I and II at the earliest possible time in Case #2: in their petition. They identified the specific constitutional provisions violated and stated the reasons. The defendants were put on notice of the claims and the trial court had an opportunity to decide the claims and, indeed, *did* implicitly decide them. As this Court consistently has held without exception, these constitutional claims raised in the plaintiffs' petition and restated in post-judgment proceedings are preserved for appellate review.

As to the merits of Point I, the defendants agree § 538.225 erects a barrier to medical negligence plaintiffs' access to the courts (SLH.Br.19-24,34-36;MAHL.Br.14-19). Instead, they argue this barrier is reasonable and not arbitrary because it merely is a procedural device for identifying meritorious claims, akin to other, accepted judicial procedures (SLH.Br.19-24,34-36;MAHL.Br.14-19).

The defendants' arguments miss the point. Unlike standard judicial procedures such as motions for directed verdict or summary judgment (which do not bar a plaintiff's

access to the court and, indeed, are dependent on a plaintiff *having* had access to the court), § 538.225 *removes* the oversight of whether a plaintiff's case may go forward from judicial procedure and instead, at the very outset, gives it to a *non*-judicial third party who the plaintiff is forced to pay.

While the version of § 538.225 in effect before 2005 may not have given this power entirely over to the third party, the present version unquestionably makes the plaintiff's ability to bring their action into court *entirely* dependent on his or her go-ahead. As other courts have held under identical constitutional provisions and statutes, and as this Court always has held whenever the ability of a plaintiff to come into court was made wholly dependent on the authorization of a non-judicial third party, § 538.225 violates Mo. Const. art. I, § 14.

As to the merits of Point II, the defendants present differing responses. St. Luke's argues only that the right to trial by jury in Mo. Const. art. I, § 22(a), does not apply to wrongful death cases (SLH.Br.36-39). MAHL argues that § 538.225 does not infringe on a traditional jury function because a case first must be submissible for a jury to determine liability or damages (MAHL.Br.24-26).

Both arguments are without merit. It is well established that "right to trial by jury as heretofore enjoyed," meaning as enjoyed at common law prior to 1820, applies to *all* cases triable by jury and all of a jury's functions at common law, regardless of whether the action existed at common law or the legislature created the statutory form of action at issue subsequent to 1820. As such, the constitutional command to preserve the primacy of the jury's ability to determine the merit or lack of merit of a case applies either way.

Similarly, unlike summary judgment or directed verdict, which do go to the submissibility of a case and are outside the jury's historic primacy, § 538.225 does not. Instead, it goes to whether the plaintiff's case actually has merit, which was the fundamental function of the jury at common law, always has been so in Missouri, and, under art. I, § 22(a), always must remain so.

The defendants' arguments do not refute the facts or law addressed in Points I or II of the plaintiffs' opening brief. Section 538.225 violates Mo. Const. art. I §§ 14 and/or 22(a). The Court should reverse the trial court's judgment dismissing Case #2 and should remand Case #2 for further proceedings.

B. The plaintiffs properly raised and preserved their claims that § 538.225, R.S.Mo., violates both the "open courts" guarantee of Mo. Const. art. I, § 14, and the right to trial by jury guaranteed in Mo. Const. art. I, § 22(a).

Both sets of defendants argue the constitutional claims in Points I and II were not properly preserved for appellate review (SLH.Br.7-9;MAHL.Br.4-8). Both, however, concede the plaintiffs did raise both claims in their petition (SLH.Br.8;MAHL.Br.5). Both also concede the plaintiffs restated the claims in post-judgment proceedings (SLH.Br.8;MAHL.Br.5-6). Nonetheless, they argue lack of preservation solely because the plaintiffs did not *also* restate the constitutional claims in their suggestions in opposition to the defendants' motion to dismiss (SLH.Br.7;MAHL.Br.8).

The defendants' arguments are without merit. The plaintiffs raised their constitution claims in Points I and II at the earliest possible opportunity, in their petition,

and restated them again for the court to decide, which the court did. As a result, the law of Missouri is that they are properly preserved for this Court's review.

There are four requirements in order "[t]o preserve a constitutional question for review in this court …." *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011) (citation omitted). The first two requirements are that "it [1] must be raised at the earliest opportunity; [and 2] the relevant sections of the constitution must be specified …." *Id.* at 712-13.

The earliest possible opportunity for a plaintiff to raise the constitutional invalidity of a statute to which he is being subjected is in his petition. *Willits v. Peabody Coal Co.*, 400 S.W.3d 442, 449-52 (Mo. App. 2013). In this case, the plaintiffs plainly stated both their constitutional challenges to § 538.225 in their petition in Case #2, expressly specifying both Mo. Const. art. I §§ 14 and 22(a) as provisions that the statute violated (Legal File I 17). They stated § 538.225 "violates: Plaintiff's [*sic*] right to open courts and a certain remedy for every injury, guaranteed by Article I, Section 14 of the Missouri Constitution; [and] Plaintiff's [*sic*] rights to trial by jury, guaranteed by Article I, Section 22(a) of the Missouri Constitution" (L.F. I 17).

Citing no authority, MAHL (but not St. Luke's) argues the plaintiffs' statements of their constitutional claims in their petition was ineffective because they were "anticipatory and conditional" (MAHL.Br.5-7) (emphasis removed). It says this is because, "at most," the plaintiffs' claims in the petition were "describing the constitutional challenges that [they] intended to assert, in the future, if" they did not meet the terms of § 538.225 (MAHL.Br.7) (emphasis removed).

Tellingly, however, MAHL cites no example in which any Missouri court held the statement of a constitutional claim in a plaintiff's petition was deemed ineffective for this (or any other) reason. This is because none exists. Manifestly, here, the plaintiffs were not pointing to some future event; they were explaining that § 538.225 *is* unconstitutional for the reasons detailed. Plainly, they stated their constitutional claims with specificity at the earliest possible opportunity, meeting the first two requirements.

The third and fourth requirements to preserve a constitutional claim for review are that "[3] the point must be preserved in the motion for new trial, if any; and [4] it must be adequately covered in the briefs." *Prestige Travel*, 344 S.W.3d at 713 (citation omitted). In other words, the proponent of the constitutional challenge must "preserve [its] argument throughout the appellate process." *Willits*, 400 S.W.3d at 449.

The plaintiffs eminently met these requirements, too. They restated their earlier constitutional challenges in person before the trial court in Case #2 in their argument over their post-judgment motion to reconsider the dismissal of their action (Transcript 15-16). Counsel for the plaintiffs explained in person to the trial court that the plaintiffs had "the right … to have reasonable access to the courts" as "guaranteed by Article I, Section 14, of the constitution [*sic*] of Missouri," as well as "the right to trial by jury" as "guaranteed by Article I, Section 22 (a) of the Missouri constitution [*sic*]" (Tr. 15-16). He stated applying § 538.225 to them "would violate [their] right to a trial by jury as guaranteed under the Missouri constitution [*sic*], and also right [*sic*] to open courts and a certain remedy for every injury" (Tr. 15-16).

After hearing this, the trial court denied their post-judgment motion (L.F. I 220). In so doing, however, it did not "fail to rule on" the issue, as the defendants suggest (MAHL.Br.7-8), but rather "implicitly ruled the application of Section [538.225] was constitutional." *Curtis v. City of Hillsboro*, 277 S.W.3d 707, 712 (Mo. App. 2008).

It is these last two requirements, though, that the defendants actually complain the plaintiffs did not sufficiently meet. St. Luke's puts particular emphasis on the "covered in the briefs" requirement, suggesting that, because the plaintiffs did not restate their constitutional arguments in "the briefs" before the trial court, this violated this requirement (SLH.Br.8-9;MAHL.Br.7).

But the "briefs" requirement means *appellate* briefs. It goes without saying that *not* briefing a raised constitutional issue on appeal would be insufficient for this Court to review the issue. That is what the requirement that the claim be "adequately covered in the briefs," *Prestige Travel*, 344 S.W.3d at 713, means: that the argument be "preserved throughout the *appellate* process." *Willits*, 400 S.W.3d at 449 (emphasis added). Plainly, the plaintiffs met this requirement. Their opening brief restates their constitutional arguments in detail (Aplt.Br.10-11,15-40). The defendants, in turn, respond to those arguments with their own, detailed arguments (SLH.Br.17-39; MAHL.Br.13-25).

These requirements are not meant to be overly onerous or technical, nor have they ever been in practice. The purpose of the earliest-opportunity-preservation requirement is "to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d

697, 701 (Mo. banc 2008). It is "not to prevent parties from litigating issues that arise during the course of a lawsuit if there is no prejudice to the opposing party." *Id.*

In fact, Missouri courts have held constitutional issues preserved when they only briefly were alluded to in a response to a motion. *Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 821 (Mo. App. 2010). Courts even have held constitutional issues preserved for review when *only* raised for the first time post-judgment. *See, e.g.*, *Mesenbrink v. Boudreau*, 171 S.W.2d 728, 730 (Mo. App. 1943); *City of Richmond Heights v. Gasway*, 2011 WL 4368522 at *2 (Mo. App. 2011) (opinion transferring case to this Court). For, "The right to appeal should be liberally construed as appeals are favored in the law. If doubt exists as to the right of appeal, it should be resolved in favor of that right." *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007).

Unsurprisingly, then, counsel for the plaintiffs is unable to find any reported Missouri appellate decision holding a constitutional claim that both was raised in the plaintiff's petition and restated in post-judgment proceedings was not adequately preserved for appeal, nor do the defendants cite any. Similarly, no Missouri court ever has held a constitutional claim raised in a petition and fully briefed on appeal was not preserved for review, nor do the defendants cite any.

Instead, in every constitutional preservation case the defendants cite, either:

- The claim was held to be *preserved*. *See State v. Faruqi,* 344 S.W.3d 193, 199 (Mo. banc 2011), *Carpenter,* 250 S.W.3d at 701, and *Sharp v. Curators of Univ. of Missouri,* 138 S.W.3d 735, 738 (Mo. App. 2003);

- The claim was never presented to the trial court *at all*. *See State v. Durham,* 371 S.W.3d 30, 39 (Mo. App. 2012), *State ex rel. Houska v. Dickhaner,* 323 S.W.3d 29, 33 (Mo. banc 2010), *State v. Sumowski*, 794 S.W.2d 643, 647 (Mo. banc 1990), and *Christiansen v. Fulton State Hosp.*, 536 S.W.2d 159, 160 (Mo. banc 1976);
- The claim was not preserved because the alleged constitutional provision involved was never specified. *See State v. Tatum*, 653 S.W.2d 241, 243 (Mo. App. 1983), and *Kan. City v. Howe*, 416 S.W.2d 683, 686-87 (Mo. App. 1967);
- The claim, while raised earlier, was never restated in post-judgment proceedings. *See St. Louis Cnty. v. Ryan*, 738 S.W.2d 951, 953 (Mo. App. 1987), and *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 909 (Mo. banc 1992);
- The claim, while raised in response to a pretrial motion, was not raised earlier in the proceedings. *See Ortega v. Ortega*, 695 S.W.2d 162, 163-64 (Mo. App. 1985); or
- The claim was preserved but the trial court refused to rule on it, resulting in a reversal and remand for such a ruling. *See Estate of McCluney*, 871 S.W.2d 657, 659 (Mo. App. 1994).

Essentially, the defendants creatively attempt to take general principles of preservation, twist them around, and suggest they mean Points I and II are unpreserved. Manifestly, though, the plaintiffs *did* meet the requirements to raise and preserve their constitutional claims as the law of Missouri consistently has understood them. They raised their claims that § 538.225 violated Mo. Const. art. I §§ 14 and 22(a) in their petition, the very earliest opportunity. They restated them in post-judgment proceedings. The trial court denied post-judgment relief. They now restate them on appeal.

Contrary to the defendants' assertions, this is all that is required for the plaintiffs to have preserved their constitutional claims against § 538.225 for appeal. As the plaintiffs did properly raise and preserve their claims in Points I and II, there is no logical or legal reason for the Court not to review those points in full, on the merits.

C. Should the Court somehow find Points I and II are unpreserved, it should review them anyway, as their merits are well-developed for review in all parties' briefs and are unlikely to be reviewable in any other case.

If, despite that the plaintiffs' constitutional claims in Points I and II were raised at the earliest possible opportunity, restated in post-judgment proceedings, implicitly denied by the trial court, and restated in detail on appeal, the Court nonetheless holds they somehow were not preserved for review, it should review Points I and II nonetheless.

The plaintiffs obviously and clearly stated their two constitutional claims before the trial court in their petition (L.F. I 17). Their arguments in their opening brief comprehensively explore and analyze those claims (Aplt.Br.10-11,15-40). The defendants were able to respond to the plaintiffs' arguments with similarly comprehensively detailed arguments (SLH.Br.17-39;MAHL.Br.13-25).

Thus, the plaintiffs' two constitutional issues of statewide importance are apparent and ready for this Court's *de novo* review. Indeed, outside the peculiar posture and facts of this case, in which the defendants agreed to transfer all discovery from Case #1 to Case #2 but then insisted their agreement was invalid as to § 538.225, this Court is unlikely to have another opportunity to review the validity of that statute under Mo. Const. art. I §§ 14 and 22(a). As advancing judicial economy is an important component

of appellate procedure, *Walton v. City of Berkeley*, 233 S.W.3d 126, 130 (Mo. banc 2007), it should review these constitutional issues now.

D. Alternatively, should the Court find the plaintiffs somehow did not properly raise and preserve their claims in their Points I and II for appellate review, it should review those points for plain error.

Even where there is "failure to raise [an] issue, this Court, in its discretion, may review [the] claims for plain error." *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 808-09 (Mo. banc 2011). "In determining whether to exercise its discretion to provide plain error review, the appellate court looks to determine whether there facially appears substantial grounds for believing that the trial court committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." *Id.* at 809. "Even statutory errors that are evident, obvious, and clear, must result in a manifest injustice or miscarriage of justice." *Id.*

This case satisfies this standard. The trial court's error in dismissing Case #2 under a statute that violates the plaintiffs' fundamental constitutional rights to open courts and trial by jury is evident, obvious, and clear. It works a manifest injustice by destroying the plaintiffs' ability to redress their injury, especially given that the defendants agreed to transfer the affidavits of merit to Case #2 and, thus, the plaintiffs' case manifestly was submissible and had merit.

If the Constitution prohibits this severe end for the plaintiffs' case, then allowing it nonetheless to occur due to appellate procedural technicalities would be a manifest injustice. "[U]npreserved points on appeal – including, and *especially, constitutional*

claims – may be reviewed under the plain error doctrine." *Willits*, 440 S.W.3d at 453 (emphasis added).

Indeed, because of the propensity for manifest injustice in civil cases involving well-developed constitutional issues, Missouri courts regularly have granted them plain error review. *See MB Town Ctr., LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 603 (Mo. App. 2012) (holding constitutional issue was unpreserved but reviewing for plain error); *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 507 n.4 (Mo. App. 2006) (same); *City of Overland v. Wade*, 85 S.W.3d 70, 71-72 (Mo. App. 2002) (same); *Dana Comm'l Credit Corp. v. Cukjati*, 880 S.W.2d 612, 617 (Mo. App. 1994) (same, *sua sponte*); *Hanch v. KFC Nat'l Mgmt. Corp.*, 615 S.W.2d 28, 33 (Mo. banc 1981) (same); *Ragan v. Ragan*, 315 S.W.2d 142, 149 (Mo. App 1958) (same); *McClard v. Morrison*, 281 S.W.2d 592, 594 (Mo. App. 1958) (same).

Should the Court find the plaintiffs' Points I and/or II are unpreserved for appeal, it similarly should grant plain error review here. As their points go to an infringement of basic, fundamental constitutional liberties, "a full adjudication on the merits would be in order lest that infringement, if it exists, go unremedied." *Hanch*, 615 S.W.2d at 33.

E. Section 538.225 violates Mo. Const. art. I, § 14.

In Point I of their opening brief, the plaintiffs explained that § 538.225 violates their right to open courts and a certain remedy afforded for every injury under Mo. Const. art. I, § 14 (Aplt.Br.10,15-35). They showed that, in every previous case in which a statute made a plaintiff's access to the courts wholly dependent on the actions of a non-judicial third person, this Court held the statute to be an arbitrary and unreasonable

procedural barrier to access to the courts (Aplt.Br.17-20). They further showed that, by doing exactly this and depriving trial courts of any ability to say otherwise, § 538.225 is just such an arbitrary and unreasonable procedural barrier to access to the courts (Aplt.Br.21-26). The plaintiffs also showed the absolute requirement for a pre-opinion by an expert additionally is a monetary barrier to the courts (Aplt.Br.26-30).

Finally, they showed this Court's previous decision in *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.3d 503 (Mo. banc 1991), which reviewed and upheld a previous version of § 538.225 that left to the trial court the ultimate decision of whether to let the plaintiffs' case proceed, did not apply to the present version of the statute (Aplt.Br.30-35). This is because the present statute leaves that decision solely to the paid, non-judicial third party (Aplt.Br.30-35).

In response, both sets of defendants agree § 538.225 *does* erect a barrier to medical negligence plaintiffs' access to the courts (SLH.Br.19-24,34-36;MAHL.Br.14-19). Instead, they primarily argue this barrier is "no[t] 'arbitrary or unreasonable'" (SLH.Br.34), because it merely functions as a procedural device for identifying meritorious claims, akin to an attorney's implicit warrant of merit in signing a pleading under Rule 55.03(c), a motion for directed verdict, a motion for summary judgment, or a statute of limitations (SLH.Br.19-24,34-36;MAHL.Br.14-19).

Manifestly, however, unlike the precondition in § 538.225, all of those other procedures are wholly judicial in nature. If an attorney signs a pleading in violation of the warrant in Rule 55.03(c), the opposing party may follow the procedures under Rule 55.03(d) to request sanctions that, ultimately, the court has discretion to impose or not to

impose. *State v. Simmons*, 955 S.W.2d 752, 771 (Mo. banc 1997). Similarly, a request for directed verdict under Rule 72.01 by its very nature must come during trial, depends on a strict evidentiary showing, may be opposed, and is subject to the trial court's ultimate decision and, later, review on appeal. The same is true for a motion for summary judgment under Rule 74.04, which also only can be made after the proceedings have commenced and are effective. Finally, a statute of limitations does not implicate any third party, but merely the passage of time, and also depends on the courts' determination as to whether an action actually is barred by such a statute.

Unlike all these procedures, § 538.225 – especially in its present form – demonstrably gives total control over whether the plaintiff may file its cause of action over to a non-judicial third party. If the plaintiff successfully obtains the medical professional's permission, her filing of her medical negligence case will be effective. Otherwise, it will not. As the plaintiffs showed in their opening brief, in *every* previous case in which a statute made a plaintiff's access to the courts entirely "depend[ent] on the … actions of a third person" outside the judiciary, *Weigand v. Edwards*, 296 S.W.3d 453, 461-62 (Mo. banc 2009), this Court held that the statute violated Mo. Const. art. I, § 14 (Aplt.Br.17-20). *See, e.g., State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 10 (Mo. banc 1979); *Kilmer v. Mun*, 17 S.W.3d 545, 550-54 (Mo. banc 2000).

Both sets of defendants seek to get around this by suggesting that, as the lack of an affidavit under § 538.225 does not invalidate the plaintiff's petition immediately upon its filing, but only 90 days later, this is not the same sort of third-party barrier to the courts

as at issue in *Cardinal Glennon* and *Kilmer*, which would have rendered the petition invalid *ab initio* (SLH.Br.31-34;MAHL.Br.20-21). But this is a distinction without a difference.

As St. Luke's acknowledges, and as is readily apparent, medical negligence cases take much longer than 90 days to litigate (SLH.Br.34). While the plaintiff physically can file a petition without an affidavit of merit, unless the affidavit is filed within 90 days, § 538.225 commands that her petition is *per se* invalid and *must* be dismissed. Under the statute, the failure to obtain the third party's preconditional opinion makes such a petition as if it never were. As a result, § 538.225 makes the ability of the plaintiff to have *actual* access to the courts dependent entirely on the actions of an expensive, non-judicial third party, as opposed to null, *pro forma* "access" by the futile act of filing a petition that, as a matter of law, is barred from every going anywhere.

In this vein, MAHL (but not St. Luke's) argues the plaintiffs lack standing to pursue their claim under Mo. Const. art. I, § 14, because they *did* obtain a third-party medical opinion in Case #1 and therefore were not injured (MAHL.Br.9-12). This, too, is without merit. First, as both defendants allude, this is both a facially *and* as-applied challenge to § 538.225. As MAHL points out, the plaintiffs thus "must establish that no set of circumstances exist under which the [statute] would be valid." *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009) (MAHL.Br.16).

This they do. The plaintiffs' argument is that, in *all respects* and as to any and all medical negligence plaintiffs, the mere requirement to obtain the pre-opinion of an expensive, non-judicial party as a precondition to suit is unconstitutional. It does not

matter whether the plaintiffs could have, did, or did not obtain such an opinion. The point is that the requirement that they obtain the opinion *at all* is an arbitrary and unreasonable barrier to their access to the courts to bring their legally authorized claim for their recognized injury.

Second, this does not deprive the plaintiff of standing for their as-applied challenge. MAHL's acknowledgement that the plaintiffs *did* obtain an opinion that their case had merit plainly detracts from their and St. Luke's' arguments that (1) § 538.225 only creates a "screening procedure" to determine "that the action filed is not frivolous" (SLH.Br.20,22). Here, as MAHL implicitly acknowledges, because the plaintiffs' claims did have a valid affidavit of merit that the defendants did receive, the plaintiffs' case thus should have been "screened" so as to come into court. Especially as to this case, § 538.225 is a demonstrably overinclusive barrier whose arbitrariness as to the plaintiffs is plan.

MAHL's acknowledgement also detracts from the defendants' arguments as to Point III that § 538.225 does not create a procedural technicality that can be substantially met. If § 538.225 truly is meant only to screen out medical negligence actions that are patently frivolous from the outset, and the defendants acknowledge that the plaintiffs' case was not such an action, then the plaintiffs obviously complied with the procedure to meet the statute's intent.

Previously, under the pre-2005 version of § 538.225 at issue in *Mahoney*, the trial court would have had the ability to meet the intent of the statute the defendants advance and "screen in" the plaintiffs' case. And it likely would have done so. Notably, the court

made sure to include in its judgment its express finding the parties had agreed to use all the discovery conducted in Case #1 upon re-filing of Case #2, "including the deposition of Dr. Berg" (L.F. I 114-15). It stated it was dismissing the plaintiffs' action *solely* because 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 (L.F. I 114-15). This leaves every indication that, if § 538.225 had allowed it to do so, it would *not* have dismissed the plaintiffs' action.

Nonetheless, the defendants argue the 2005 change in § 538.225 from "may dismiss" to "shall dismiss" changed nothing substantive vis-à-vis this case or *Mahoney* (SLH.Br.22-25;MAHL.Br.23-24). St. Luke's argues specifically that all the purposes for which this Court in *Mahoney* found the pre-2005 version of § 538.225 was non-arbitrary and reasonable remain the same even after the statute has barred the trial court from doing anything but dismissing an action in which an affidavit of merit was not timely filed, regardless of whether the action *actually* is frivolous or not (SLH.Br.23).

Palpably, however, that makes no sense – especially the idea that "the statute does not give medical personnel authority over who may file a lawsuit" (SLH.Br.23). One main, express point to *Mahoney* was that, under the pre-2005 version of § 538.225, "It [was] a judge that decides that the case may not proceed, not a health care provider." *Mahoney*, 807 S.W.2d at 510. For, back then, the medical opinion merely was meant to show "that the claim is not frivolous," while it remained squarely with the trial 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.*

Now, however, none of this any longer is true. Now, if a plaintiff does not obtain the pre-opinion from a paid expert, the trial court is *disallowed* from making any substantive legal determination. While, at the time of *Mahoney*, the statute may not have delegated to a non-judicial third party the ability to determine whether a medical negligence plaintiff's cause of action was valid, as St. Luke's argues (SLH.Br.22), today it obviously does exactly that, and entirely so, with no room for the trial court to make any substantive determination.

Finally, St. Luke's, which concentrates solely on *Mahoney* in its argument, argues that, as *Mahoney* held, Mo. Const. art. I, § 14 "does not create rights," and implores this Court to hold the same today (SLH.Br.18,21) (citing *Mahoney*, 807 S.W.2d at 510). The plaintiffs explained in their opening brief that, in *Kilmer*, 17 S.W.3d at 547-48, this Court fundamentally restated and reshaped the law related to art. I, § 14 (Aplt.Br.31). The defendants take issue with that notion (MAHL.Br.17-18).

As to whether art. I, § 14, actually states a constitutional right, however, *Kilmer* deeply disagreed with *Mahoney*. Whereas the Court in *Mahoney* held that art. I, § 14, does not state a constitutional right, 807 S.W.2d at 510, the Court in *Kilmer* held that this was wrong and, in fact, the provision actually *does* "stat[e] a constitutional right" that is "mandatory in tone and substance." 17 S.W.3d at 547-48.

F. Section 538.225 violates Mo. Const. art. I, § 22(a).

In Point II of their opening brief, the plaintiffs explained that § 538.225 violates their right to "trial by jury as heretofore enjoyed" under Mo. Const. art. I, § 22(a) (Aplt.Br.11,36-40). They showed this was because, at common law, the primary decision

over whether a plaintiff's medical negligence claim had merit rested with the jury, whereas § 538.225 shifts it to a non-judicial third party in the first instance (Aplt.Br.36-40). As such, this was part of the "right to trial by jury as heretofore enjoyed," which, under § 538.225, does not "remain inviolate," because the plaintiff *first* must obtain the third party's assessment or else cannot *then* proceed to have a jury re-determine that merit (Aplt.Br.36-40).

Each set of defendants presents a different response. St. Luke's primarily responds that "no such right [to trial by jury] exists in a statutory case," citing *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012), and as this case is a statutory wrongful death case, the plaintiffs had no right to trial by jury in it at all (SLH.Br.36-38). This is simply untrue. *Sanders* has no application to constitutionality of § 538.225 under art. I, § 22(a).

In *Sanders*, this Court held the General Assembly could cap the amount of non-economic damages available in a wrongful death case without running afoul of the right to trial by jury, because "[t]he legislature has the authority to choose what remedies will be permitted under a statutorily created cause of action," and thus it could "plac[e] limits on the amount of non-economic damages recoverable under" such an action. 364 S.W.3d at 203-04. This was because "the legislature … has the power to limit recovery in those causes of action." *Id.* at 203 (quoting *Adams*, 832 S.W.2d at 907).

The plaintiffs have no qualm with that holding. Obviously, if the legislature can create and abolish causes of action, it can limit *recovery* in those causes of action. But *Sanders* did *not* hold, contrary to St. Luke's' argument, that "the right to trial by jury" simply *does not exist* in statutory actions.

Rather, this Court has held the opposite: "The fact that an action is brought pursuant to statute, whether in existence at the time of the 1820 Constitution or enacted later, does not exclude the prospect of a right to jury." *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 86 (Mo. banc 2003). In *Diehl*, this Court held that, although a Missouri Human Rights Act case was a statutory action unknown at common law and the legislature could limit a jury's decision as to *recovery* in such an action, it could not bar the MHRA plaintiffs from having the *merits* of their action tried to a jury. *Id.* at 92.

This case is analogous to *Diehl*, not *Sanders*. The legislature may be able to limit a jury's ability to assess the amount of a plaintiff's recovery in a wrongful death case. But it is constitutionally enjoined from barring the plaintiff from having the jury determine the merits of her case. For, where a plaintiff presents a "civil action for damages for a personal wrong," regardless of whether the specific action was known at common law or not, it is of the kind "triable by juries from the inception of the state's original constitution." *Diehl*, 95 S.W.3d at 92. As a result, the legislature cannot shift the primacy of determining merit from the jury to anyone else (Aplt.Br.36-40).

Beyond that, the defendants' only response to Point II is to rehash their invocation of *Mahoney* from Point I, claiming the procedure under § 538.225 is "no more onerous" than standard procedures, such as summary judgment (SLH.Br.38-40;MAHL.Br.24-26). As the plaintiffs already have explained, though, it may well be that the statute prior to 2005 as reviewed in *Mahoney* did not violate the Constitution in this manner. Post-2005, however, it does. Today, § 538.335 makes the plaintiff's ability to have a jury determine the merits of her case entirely dependent on the permission of a non-judicial third party.

For, previously, to go forward to a jury determination, the plaintiff merely needed to satisfy the court, in its discretion, that her case was not frivolous (akin to a microcosmic version of summary judgment proceedings). Now, however, if the plaintiff does not complete the technicality of obtaining a third party's permission within a short amount of time, a jury is absolutely prohibited from ever determining the merits of her claims, regardless of what an overseeing judicial officer otherwise would rule.

Reply of the Appellants as to Point III

In Point III of their opening brief, the plaintiffs explained that, because the defendants had received their affidavits of merit filed in Case #1, had deposed their expert, and agreed to carry the affidavits over to Case #2, they readily met the intent of § 538.225 so as to obviate dismissing their action (Aplt.Br.13,41-53). They explained this was because the law of Missouri is that all procedural statutes must be construed liberally so as to avoid dismissing actions for technical violations (Aplt.Br.43-47). They explained the parties' agreement to carry the Case #1 affidavit and discovery over to Case #2 plainly met the intent of § 538.225 so as to satisfy its terms (Aplt.Br.47-53).

Both sets of defendants initially argue that this point is not preserved for appellate review (SLH.Br.40;MAHL.Br.27). They argue it was first raised in the plaintiffs' post-judgment motion in Case #2, which they say came too late (SLH.Br.40;MAHL.Br.27).

The defendants are entirely wrong: the plaintiffs plainly raised this claim at the earliest possible opportunity, in their suggestions in opposition to the defendants' motion to dismiss (L.F. I 8-10). There, in a section titled "Defendants Motion to Dismiss should be denied because Plaintiffs and Defendants agreed to carry forth the original suit into the refiled suit," they plainly made this argument (L.F. I 88-90). They explained that, "Because the satisfaction of the procedural requirements regarding discovery and expert designations were all carried forward, so was the satisfaction of the procedural requirement regarding health care affidavits" (L.F. I 88). They requested the court deny the motion to dismiss "[b]ecause Plaintiffs fully satisfied the medical affidavit of merit

statute [in Case #1] and … the parties have agreed to carry forth the original suit into this refiled suit" (L.F. I 90).

Later, the plaintiffs preserved this same argument by restating it post-judgment (L.F. I 121-22, 177-78). They then fully briefed it on appeal. Plainly, the plaintiffs properly raised and preserved their argument in Point III that the parties' filing of affidavits in Case #1 and transferring them and the affidavits to Case #2 satisfied § 538.225 so as to preclude dismissal.

St. Luke's (but not MAHL) argues that the plaintiffs' argument in Point III "contradicts their constitutional argument[s]" in Points I and II (SLH.Br.15-16,41). It says this is because, whereas the plaintiffs' constitutional arguments rely on the mandatory nature of § 538.225, in Point III they explain that substantial compliance with the statute's intent is all that is required to meet it to avoid dismissal (SLH.Br.15-16,41).

While this is so, this is not a contradiction. The constitutional points and Point III are brought in the alternative. "Good and orderly pleading in Missouri permits a litigant to set forth two or more statements of a claim alternatively or hypothetically, regardless of the consistency of the alternative or hypothetical claims." *Willits*, 400 S.W.3d at 449. In Point III, the plaintiffs show that, if § 538.225 is merely procedural, then its ostensibly black-letter dismissal requirement only requires substantial compliance so as to meet its intent. Alternatively, if it is not so subject and instead really is mandatory, then they show in Points I and II that the statute is unconstitutional. There is nothing unduly contradictory in this. These are alternative theories that work in tandem.

For example, the defendants' engage in the same, alternative contradiction. In their responses to Points I and II, they insist that § 538.225 merely is a "procedural rul[e] for the courts," a "procedural device," or "a procedural mechanism" – "a procedural statute that 'intends no change in our substantive medical malpractice law rather than a substantive legal requirement'" (SLH.Br.14-15,20,34,50). They assert it is "procedural, not substantive," and "merely a procedural limitation" (SLH.Br.23,27). If this is true, then the statute is subject to liberal construction and application, as "procedural statutes are to be liberally construed" (Aplt.Br.43) (quoting *State ex rel. Garrison Wagner Co. v. Schaaf*, 528 S.W.2d 438, 442 (Mo. banc 1975)), such that substantial compliance with its intent is enough. *State ex rel. Brickner v. Saitz*, 664 S.W.2d 209, 212 (Mo. banc 1984).

Essentially, then, all parties are faced with what really is a consistency: either (1) the statute is procedural, in which case the plaintiffs must prevail on their Point III, or (2) it is not, and is instead mandatory, in which case the statute violates the Constitution of Missouri for the reasons explained in Points I and II. It cannot be both. For one reason or another, the trial court's judgment dismissing Case #2 was error.

MAHL argues there is no such thing as "substantial compliance" with a procedural statute or, even if there were, *this* Court, as opposed to the Court of Appeals, never has recognized it (MAHL.Br.29-50). It purports to examine nearly every case the plaintiffs cited in their argument, rehashing each one as to make it seem as though the ostensibly black-letter requirements of the procedures in those cases did not yield to substantial compliance with its intent. But those cases speak for themselves. All of them, from both this Court and the Court of Appeals, held substantial compliance with the procedures at

issue were sufficient. What is more, outside a few § 538.225 cases in which an expert's identity was never disclosed, the defendants present no contrary authority.

Moreover, MAHL cannot get around the well-established law of Missouri that "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), as "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), which is "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). Neither it nor St. Luke's addresses these clear and certain concepts.

Finally, both sets of defendants argue that, regardless, the plaintiffs *did not* substantially comply with § 538.225 because, although they filed affidavits of merit in Case #1, which the defendants received, and which expert the defendants deposed, they did not complete the extra technicality of filing the affidavits in Case #2 (SLH.Br.45-47;MAHL.Br.50-52). But that is the point: under these circumstances, the plaintiffs *did* satisfy the intent of the statute to ensure the defendants and court were on notice that their claims had merit and were not frivolous. The trial court plainly found that the plaintiffs *did* file a compliant affidavit in Case #1 and make their expert available to the defendants, who was deposed (L.F. I 114-15).

As a result, the law of Missouri is the plaintiffs *did* meet the statute's intent. Merely failing to complete the technicality of filing an additional piece of paper cannot be enough to destroy their patently non-frivolous action and avoid a disposition on the merits. The Court should reverse the dismissal of case #2 and remand.

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,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 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 7,734 words.

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Certificate of Service

I hereby certify that, on September 12, 2013, I filed a true and accurate Adobe PDF copy of this Reply Brief of the Appellants via the Court's electronic filing system, which notified the following of that filing:

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