

## OPINION SUMMARY

### MISSOURI COURT OF APPEALS EASTERN DISTRICT

MARY ANN THOMAS, Appellant,	)	No. ED98955
	)	
vs.	)	Appeal from the Circuit Court
	)	of St. Louis County
AMY K. MILLER, M.D., Respondent.	)	Filed: June 17, 2014

Mary Ann Thomas appeals from the granting of summary judgment on her claims against Amy K. Miller, M.D., for injuries arising from an abdominoplasty performed after liposuction. The motion for summary judgment was based on Thomas's failure to submit a health care affidavit in accordance with Section 538.225.1. Thomas argues that her claim against Dr. Miller was for battery and, therefore, she was not required to file a health care affidavit. Even if she was so required, Thomas contends, the trial court should have dismissed her case without prejudice instead of entering summary judgment.

AFFIRMED IN PART AND REVERSED IN PART.

Division Two holds: Because the true nature of Thomas's claim against Dr. Miller was for medical negligence—not battery as titled in her petition—a health care affidavit was required. The issue was properly raised in a motion for summary judgment, and matters outside the pleadings were properly considered in determining the true nature of this claim. Nevertheless, entering summary judgment in favor of Dr. Miller was inappropriate. We order the case dismissed without prejudice, as required by Section 538.225.6.

Opinion by: Robert G. Dowd, Jr., J  
Lawrence E. Mooney, P.J. and Sherri B. Sullivan, J., concur.

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