

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI)
)
 ex rel.)
)
 JACQUELYN WUELLING,)
) No: SC90662
 Relator,)
)
 vs.)
)
 THE HONORABLE RICHARD)
 BRESNAHAN,)
)
 Respondent.)

BRIEF OF RESPONDENT, THE HONORABLE RICHARD BRESNAHAN

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JURISDICTIONAL STATEMENT

This is not an appropriate case for the issuance of a writ because the relator has at least two potential alternative remedies from the dismissal without prejudice of portions of her petition -- a direct appeal and the filing of a new petition. The Court has held that a dismissal without prejudice for failure to comply with section 538.225 can be an appealable judgment. *See Spradling v. SSM Health Care St. Louis*, No. SC 90613, 2010 WL 2690377 (Mo. banc June 29, 2010); *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). In the alternative, a plaintiff whose petition is dismissed without prejudice may refile the claim in circuit court. *State v. Burns*, 994 S.W.2d 941 (Mo. banc 1999).

Rather than appealing from the final judgment in this case or refile her claims against these defendants, the relator has sought a writ from this Court. Relief through an extraordinary writ is inappropriate because the respondent trial judge acted well within his jurisdiction in ruling on the motions to dismiss, and the relator does not point to any evidence that she would stand to suffer any harm in proceeding with the established avenues of relief. The Court should deny the relator's petition for an extraordinary writ.

STATEMENT OF FACTS

The relator is the plaintiff in an action pending before the respondent in the Circuit Court of St. Louis County. In her amended petition, the relator alleges that she underwent surgery for repair of an abdominal aortic aneurism. Exhibits at 4 (¶ 11).¹ The relator alleges that, after the surgery, she was admitted to the intensive care unit. Exhibits at 4. She alleges she suffered injuries as a result of the “medical and/or surgical and nursing care and treatment” subsequent to her surgery. Exhibits at 4.

The relator alleges that Defendants Surgical Arts of Saint Louis, Ltd., Thomas B. Charles, M.D., Advanced ICU Care, Inc., Elizabeth J. Babb, M.D., DePaul Health Center, and SSM Health Care of St. Louis d/b/a SSM DePaul Health Center all provided medical and surgical services. Exhibits at 1-2. By contrast, she alleges that Defendant Dennis Quillen, CRNA, was a certified registered nurse anesthetist “practicing in the field of anesthesia.” Exhibits at 2 (¶ 7).

As to each named defendant,² the relator’s counsel filed an identical affidavit stating that he had obtained the written opinion of John D. Emhardt, M.D., to the effect that the defendants “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

¹ Along with her writ petition, the relator filed a packet of exhibits that are sequentially numbered. Record citations herein are to the pages of the relator’s exhibit packet.

² The relator also purports to assert claims against ten Doe defendants. Exhibits at 3.

reasonable care either directly caused or directly contributed to cause injury and damages to plaintiff.” Exhibits at 12, 15, 18, 21. Each affidavit stated that Dr. Emhardt was a specialist practicing in the field of anesthesiology. Exhibits at 12, 15, 18, 21.

All of the defendants (with the exception of Quillen) moved to dismiss pursuant to section 538.225, RSMo, which states in full:

1. 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, 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 caused or directly contributed to cause the damages claimed in the petition.

2. As used in this section, the term “legally qualified health care provider” shall mean 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.

3. The affidavit shall state the name, address, and qualifications of such health care providers to offer such opinion.
4. A separate affidavit shall be filed for each defendant named in the petition.
5. Such affidavit shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended for a period of time not to exceed an additional ninety days.
6. 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.
7. Within one hundred eighty days after the filing of the petition, any defendant may file a motion to have the court examine in camera the aforesaid opinion and if the court determines that the opinion fails to meet the requirements of this section, then the court shall conduct a hearing within thirty days to determine whether there is probable cause to believe that one or more qualified and competent health care providers will testify that the plaintiff was injured due to medical negligence by a defendant. If the court finds that there is no such probable cause, the court shall dismiss the petition and hold the plaintiff responsible for the payment of the defendant's reasonable attorney fees and costs.

Exhibits at 27, 39, 43, 47 (citing § 538.225, RSMo).

In moving to dismiss, the defendants noted that Dr. Charles (for whom Surgical Arts is alleged to be vicariously liable) is a practicing vascular surgeon, and he has never practiced anesthesiology. Exhibits at 27, 37. At no time during which the relator was a patient of Surgical Arts was she treated by any anesthesiologist employed by Surgical Arts. Exhibits at 38. Dr. Babb (for whom Advanced ICU Care is alleged to be vicariously liable) practices exclusively in critical care and internal medicine; she has not been trained as an anesthesiologist and does not practice in the field of anesthesiology. Exhibits at 39-40, 43-44.

The moving defendants noted that section 538.225.2 defines a “legally qualified healthcare provider” who can provide a written opinion as “a healthcare provider licensed in this state or any other state in the same profession as the defendant either actively practicing or within five years of retirement of actively practicing substantially the same specialty as the defendant.” They asserted that Dr. Emhardt, an anesthesiologist, was not a “legally qualified healthcare provider” because he did not practice in substantially the same specialties as the defendants. Exhibits at 28, 40, 44-45, 48-49. Therefore, these defendants stated that the relator’s affidavits did not comply with section 538.225, and the claims against them should be dismissed without prejudice.

SSM noted that it could not be held liable for the alleged negligence of the other moving defendants or any Doe defendants or other employees (like nurses) because the relator’s affidavits were inadequate as to those defendants. Exhibits at 48-49.

On November 29, 2009, the respondent trial court entered an order that “plaintiff’s petition is dismissed without prejudice” as to SSM, Advanced ICU Care, Dr. Babb, Dr. Charles, and Surgical Arts. Exhibits at 101.

Quillen, who is alleged to be practicing in the field of anesthesia, did not file a motion to dismiss. The case remains pending in the circuit court against Quillen. Exhibits at 101.

On January 8, 2010, the relator filed a writ petition in the Missouri Court of Appeals, Eastern District. On January 12, 2010, that petition was denied.

On February 4, 2010, the relator filed a writ petition in this Court. On March 23, 2010, the Court sustained the petition and issued a preliminary writ.

ARGUMENT

In light of the Court's recent holding in *Spradling v. SSM Health Care St. Louis*, No. SC90613, 2010 WL 2690377 (Mo. banc June 29, 2010), the arguments of the relator should be rejected. *Spradling* refutes the relator's claims about statutory construction and demonstrates that a plaintiff's claim in a medical malpractice action must be supported by the opinion of a practitioner who practices "substantially the same specialty" as the defendant, meaning one who repeatedly performs the same procedure as that allegedly performed negligently. The relator made no showing that Dr. Emhardt, an anesthesiologist, was a "legally qualified healthcare provider" as defined in *Spradling*.

On the record before the Court, the respondent cannot be said to have abused his discretion in dismissing the relator's claims against these defendants without prejudice. The Court should quash its preliminary writ and deny the relator's petition.

I. The requested writ should be denied because the relator has at least two potential alternative remedies.

The relator's request for an extraordinary writ of "mandamus and/or prohibition" is barred by the availability of other remedies.

The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance, and only in cases of extreme necessity. *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction. *Id.* Prohibition cannot be used as a substitute for an appeal or to undo erroneous judicial proceedings. *Id.* Prohibition cannot be used to adjudicate

grievances that may be adequately redressed in the ordinary course of judicial proceedings. *Id.*

A writ of prohibition does not issue as a matter of right. *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 895 (Mo. banc 1983). Whether a writ should issue in a particular case is a question left to the sound discretion of the court to which application has been made. *Id.*; *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008) (denying writ of prohibition). Thus, the relator's repeated assertion that she is "entitled" to a writ is categorically wrong.

Prohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party. *State ex rel. Director of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000); *Douglas Toyota III*, 804 S.W.2d at 752. In light of *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), it is clear that prior cases suggesting that mere error of a trial court could be considered "jurisdictional" no longer should be followed. A writ of prohibition will issue to prevent an abuse of discretion, irreparable harm to a party, or an extra-jurisdictional act, and may be appropriate to prevent unnecessary, inconvenient, and expensive litigation. *Wyeth*, 262 S.W.3d at 219.

Writ procedures are not a substitute for the appellate process, and a writ will not issue in a case where a direct appeal is available. *State ex rel. Hilburn v. Staeden*, 62 S.W.3d 58, 61 (Mo. banc 2001).

Similarly, mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal. *State*

ex rel. Poucher v. Vincent, 258 S.W.3d 62, 64 (Mo. banc 2008); *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 2007).

In this case, a writ is unavailable because the relator has the right to seek relief through other means. The Court has held that a dismissal without prejudice for failure to comply with section 538.225 can be an appealable judgment. *See Spradling v. SSM Health Care St. Louis*, No. SC 90613, 2010 WL 2690377 (Mo. banc June 29, 2010); *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). When a final judgment is entered in the circuit court, the relator could file a notice of appeal. Thus, an extraordinary writ is neither necessary nor appropriate.

There is no showing that the relator would be harmed by waiting for the entry of a final judgment in the underlying action. The relator could also seek the entry of a final judgment under Rule 74.01(b) and immediately proceed with regular appellate review of the respondent's order. The relator has provided no evidence that she has attempted to seek such relief.

Further, since her claims as to these defendants were dismissed without prejudice, the relator could simply refile these claims in the circuit court. The only reason for these dismissals was the relator's failure to file complying affidavits from a physician in substantially the same specialty as the allegedly negligent defendants. There is no indication that the relator lacks the ability to obtain complying affidavits from an expert or experts in the appropriate specialties. The relator has a full and fair opportunity to refile her action in the same circuit, asserting the same claims, with three to six months to provide complying affidavits. § 538.225.5. As far as this record reveals, the relator

could rectify the cause of these dismissals without prejudice. *Doe v. Visionaire Corp.*, 13 S.W.3d 674 (Mo. App. 2000). Therefore, she does not require the Court to intervene with an extraordinary writ.

The relator is incorrect in asserting that the respondent abused his discretion in dismissing portions of her petition without prejudice. Writ Petition at ¶ 12. Dismissal without prejudice under section 538.225 is not reviewed for abuse of discretion, but rather for error. *See Gaynor v. Washington Univ.*, 261 S.W.3d 650 (Mo. App. 2008). Relief by a writ would be improper.

Mandamus in particular is not a proper remedy. A litigant asking relief by mandamus must allege and prove that he or she has a clear, unequivocal, specific right to the performance of a legal duty. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 166 (Mo. banc 2006). The writ can only be issued to compel a party to act when it was his or her duty to act without it. *Id.* at 166. The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform. *Id.* There is no authority for the relator's contention that the respondent is under any ministerial duty to set aside an order of dismissal.

II. The requested writ should be denied because the trial court properly dismissed without prejudice.

The relator's Point I should be rejected. Factually, the trial court found that anesthesiology was not substantially the same specialty as those practiced by these defendants, and that Dr. Emhardt did not practice in substantially the same specialty as

the defendants. In the trial court, the relator did not contest these factual findings, and she did not argue that the opinion of Dr. Emhardt would be adequate to satisfy the requirement of a written opinion from a health care provider in substantially the same specialty. Thus the respondent trial court properly dismissed the claims against these defendants without prejudice.

Before the respondent, the relator's argument was that only retired physicians were required to be qualified in substantially the same specialty as the defendant. In its recent decision in *Spradling v. SSM Health Care St. Louis*, No. SC90613, 2010 WL 2690377 (Mo. banc June 29, 2010), the Court explicitly rejected the relator's argument.

The relator failed to file health care affidavits compliant with section 538.225. The current version of this statute was enacted in 2005 as part of Missouri House Bill 393, which aimed to curtail frivolous medical malpractice lawsuits in Missouri. In a malpractice case, section 538.225.1 demands that "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 caused or directly contributed to cause the damages claimed in the petition."

Section 538.225.2 provides the definition of "legally qualified health care provider," stating that the term means "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.”

In moving to dismiss, the defendants argued that the relator’s health care affidavits did not comply with the statutory requirement that the written opinion obtained by the plaintiffs must be from a health care provider in substantially the same specialty as the defendants. In seeking extraordinary relief, the relator continues to declare, contrary *Spradling* and the plain terms of section 538.225.2, that a “legally qualified health care provider” need not have *any* qualification in substantially the same specialty as the provider who is claimed to be negligent. Rather, the relator asserts that a “legally qualified health care provider” can be “physician who is ‘actively practicing,’ or if retired, then the certifying physician must have practiced in the ‘same specialty’ as the defendant.” Writ Petition at ¶ 5. This is nonsense.

Statutory construction is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statute. *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008). The Court’s role is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 680 (Mo. banc 2000).

As the Court has previously held in determining the legislature’s intent in adopting the various provisions of chapter 538, several conclusions are obvious. *Id.* The legislature intended to impose specific limitations on the traditional tort causes of action available against a health care provider. *Id.* The Court found that these limitations

include the requirement in section 538.225 “that the cause of action be dependent upon an affidavit by a ‘legally qualified health care provider’ of failure to exercise reasonable care attributable to the defendant health care provider.” *Id.*

In construing the statute, the Court is not to assume the legislature intended an absurd result. *Id.*

The relator’s contention that a “legally qualified health care provider” as defined in section 538.225.2 need not be “actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant” is absurd and contrary to the clear language of the statute. The relator’s argument violates the longstanding rule that parts of a statute are to be construed in connection with every other part, and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers. *Norberg v. Montgomery*, 173 S.W.2d 387, 389 (Mo. banc 1943). Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all. *Id.*

As the Court recently held in *Spradling*, the phrase “substantially the same specialty as defendant” is as applicable to actively practicing physicians as it is to physicians within five years of retirement from actively practicing and must be applied to both instances of “actively practicing.” 2010 WL 2690377 at *3-4. Any other interpretation of the statute would ignore the legislature’s intent that section 538.225.2 was passed as a tort *reform* statute intended to change the prior state of the law and decrease the filing of frivolous medical malpractice actions.

III. The respondent did not abuse his discretion in holding that Dr. Emhardt is not actively practicing in substantially the same specialty as these defendants.

The relator's Point II should be rejected because it was never asserted in the trial court. The relator's Point II declares that the respondent should be held to have abused his discretion because "the doctor supporting relator's counsel's affidavit was in substantially the same specialty as the defendants." Relator's brief at 18. The relator does not go far enough when she "candidly admits this particular argument could have been better developed before Respondent." Relator's brief at 20. Rather than failing to develop the argument, the respondent never raised it at all.

It would be singularly unfair, to both the respondent and the defendants, to convict the respondent of an abuse of discretion on the basis of an argument that the relator never advanced. Further, there is no factual basis for any claim that Dr. Emhardt is in substantially the same specialty as the defendants.

The relator's argument is contrary to *Spradling*, in which the Court explained the meaning of "substantially the same specialty" in section 538.225.2. By using that phrase, the legislature recognized that there may be situations in which the health care provider who gives an opinion as to the standard of care may not have the exact board certification as the defendant. The health care provider may have a different board certification but must practice "substantially the same specialty" because of an expertise *in the medical procedure at issue*.

In *Spradling*, the plaintiffs filed an affidavit by their reviewing witness, Dr. Mathis, which included his curriculum vitae. Dr. Mathis had performed or assisted in more than 3,000 of the procedures at issue in the case and had given more than 50 lectures and 15 scientific presentations about the procedure. Dr. Mathis had written at least 15 book chapters as well as at least 20 peer-reviewed scientific publications concerning the procedure. He co-authored the first book about the procedure and taught physicians how to perform it.

The Court held, “While Dr. Mathis is a radiologist rather than a neurosurgeon, his experience establishes that he was actively practicing ‘substantially the same specialty’ as the defendant in that he has sufficient experience in performing vertebroplasties. Dr. Mathis is not board certified in the same field of medicine as Dr. Sprich. But under Webster’s dictionary definition of ‘specialty,’ Dr. Mathis has ‘an aptitude or special skill’ in performing vertebroplasties, as evidenced by his performance of or assistance in over 3,000 vertebroplasties. In addition, his publications, lectures, and seminars exhibit his academic interest and expertise in vertebroplasties.” The Court held that Dr. Mathis was the type of “legally qualified health care provider” as intended by the legislature when it used the phrase “substantially the same specialty.” 2010 WL 2690377 at *5.

In this case, by contrast, the relator made no similar showing as to the qualifications of Dr. Emhardt, whose CV was not provided to the respondent. As noted, the relator never advanced this claim in the trial court. As a result, there is no factual basis for the relator’s freshly minted contention that Dr. Emhardt actively practices in substantially the same specialty as these defendants. Indeed, contrary to *Spradling* and

the plain language of section 538.225, the relator incorrectly claims that the specialties of these defendants are *irrelevant*. The Court should reject this effort to read the key words out of section 538.225.2.

The anesthesiologist put forth by the relator in this case has nothing like the qualifications possessed by the plaintiff's doctor in *Spradling*. The relator complains of "medical and/or surgical and nursing care and treatment" subsequent to the surgical repair of her abdominal aortic aneurism. Exhibits at 4. The relator's allegation is that she was under the post-surgical care of an intensive care unit. Exhibits at 4.

The professionals who are alleged to have treated the relator include Dr. Charles, a practicing vascular surgeon who has never practiced anesthesiology (Exhibits at 27, 37), and Dr. Babb, who practices exclusively in critical care and internal medicine, has not been trained as an anesthesiologist, and does not practice in the field of anesthesiology (Exhibits at 39-40, 43-44).

Dr. Emhardt is not a "legally qualified health care provider" as required by section 538.225 because he is not "actively practicing . . . substantially the same specialty" as any of the defendants. The physicians as to whom Dr. Emhardt offered opinions were alleged to be working in the particular area of the post-surgical intensive care of a patient who had undergone surgery for an abdominal aortic aneurism. Dr. Emhardt was not shown to have *any* qualifications or experience to allow him to testify about vascular surgery or critical care. There is no claim that Dr. Emhardt has ever participated in the care of any patient with an abdominal aortic aneurism. Dr. Emhardt does not purport to have any qualifications relating to the surgical repair of such a condition. He does not

assert that he has any experience in an intensive care unit in general or in the post-surgical care of a patient like the relator in particular.

In short, Dr. Emhardt fails to meet the standard that the Court so recently set forth in *Spradling*: “While the legislature did not define ‘substantially the same specialty,’ one who repeatedly performs the same procedure as that allegedly performed negligently qualifies as one who actively practices ‘substantially the same specialty’ as the defendant.” *Spradling*, 2010 WL 2690377 at *1. Unlike the doctor in *Spradling*, Dr. Emhardt was never shown to have any of the qualifications necessary to give opinions about the care allegedly provided by the defendants. If section 538.225 is to have any meaning, the term “actively practicing . . . substantially the same specialty” cannot extend to Dr. Emhardt in this case.

The Court should reject the relator’s Point II.

IV. Section 538.225 is constitutional.

A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution. *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992). When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional. *Id.* A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. *Id.*

In the assessment and adjudication of a constitutional challenge to a statute, a court considers and interprets the purposes intended by the enactment. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991). Chapter 538 is

a legislative response to the public concern over the increased cost of health care and the continued integrity of that system of essential services. *Id.* The effect intended for section 538.225 within that scheme is to cull at an early stage of litigation suits for 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. *Id.* The preservation of the public health is a paramount end of the exercise of the police power of the state. *Id.* The objective of the enactment -- the continued integrity of the health care system -- is a legitimate public purpose to be considered in the assessment of the constitutional challenges. *Id.*

A. *Mahoney* forecloses the relator’s claims based on the right to trial by jury, access to the courts, separation of powers, due process, and equal protection.

The Court should reject the relator’s baseless assertion in Point III that section 538.225 is unconstitutional. In *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991), the Court rejected the very constitutional claims advanced by the relator in Point III.

Mahoney holds that section 538.225 does not violate the right to trial by jury. *Id.* at 509. “The ‘screening’ procedure of § 538.225 and the dismissal without prejudice that culminates a noncompliance are less onerous to the right to trial by jury than a directed verdict or a summary judgment, neither of which are infringements of that constitutional guarantee.” *Id.* at 508.

Similarly, *Mahoney* holds that section 538.225 does not violate the constitutional right of access to the courts. *Id.* at 509-10. The statute also does not violate the constitutional separation of powers, *id.* at 510-11, or the constitutional guarantees of due process of law and equal protection, *id.* at 511-13.

The relator admits that *Mahoney* upheld the constitutional validity of section 538.225. The effort to undermine *Mahoney* is based on two premises that are demonstrably incorrect. The relator claims that requiring a written opinion from an expert in “substantially the same specialty as the defendant” is a change in the *substantive* law, rather than procedure. As a result, the relator claims that section 538.225 imposes a higher standard for the filing of an action against a health care provider than a plaintiff ultimately will have to meet at trial. The relator’s presumptions are wrong, and *Mahoney* mandates that the relator’s constitutional claims be rejected.

B. Evidentiary rules are not substantive.

The relator is mistaken in asserting that the standards for the admission of expert testimony are substantive. Quite to the contrary, it is well settled that rules of evidence are procedural.

Substantive law creates, defines, and regulates rights, while procedural law prescribes the method of enforcing rights or obtaining redress for their invasion; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit. *Wilkes v. Missouri Highway & Transp. Comm’n*, 762 S.W.2d 27, 28 (Mo. banc 1988); *Ambrose v. State Dept. of Public Health &*

Welfare, 319 S.W.2d 271 (Mo. App. 1958). It has been consistently held that evidentiary rules are part of the legal machinery employed in the trial of a case and are regarded as procedural rather than substantive. *State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980); *State v. Walker*, 616 S.W.2d 48, 49 (Mo. banc 1981).

It is well settled that the legislature has plenary power to prescribe or alter rules of evidence, including those involving competency of witnesses. *State v. Williams*, 729 S.W.2d 197, 201 (Mo. banc 1987); *State Bd. of Reg. v. McDonagh*, 123 S.W.3d 146, 154 (Mo. banc 2003). Indeed, as the Court has noted, while the Court is empowered to develop rules of procedure, it is specifically forbidden by the Missouri Constitution to create rules of evidence. *McDonagh*, 123 S.W.3d at 154 n.10; *see* Mo. Const. art. V, § 5. The admission of expert testimony is not determined by rules of civil procedure. *McDonagh*, 123 S.W.3d at 154.

The thrust of the relator's constitutional argument is the contention that the requirement in section 538.225.2 of a written opinion from an expert in "substantially the same specialty as the defendant" is a change in the *substantive* law. This is wrong. Evidentiary rules are procedural, not substantive. *Shafer*, 609 S.W.2d at 157; *Walker*, 616 S.W.2d at 49. Specifying the competency of witnesses is an evidentiary matter within the legislature's plenary power. *Williams*, 729 S.W.2d at 201; *McDonagh*, 123 S.W.3d at 154. The Missouri Court of Appeals has reviewed the amended section 538.225 and found that it relates to pre-trial procedure. *White v. Tariq*, 299 S.W.3d 1, 4 (Mo. App. 2009).

The relator's asserted basis for overturning *Mahoney* is without merit.

C. Section 538.225 does not violate the right to trial by jury.

In arguing that section 538.225 changes the substantive law and violates the right to trial by jury, the relator cites section 490.065, RSMo, and *Swope v. Printz*, 468 S.W.2d 34 (Mo. 1971). Section 490.065, however, is plainly and explicitly a procedural statute, passed by the legislature, governing the admission of expert testimony. *McDonagh*, 123 S.W.3d at 152-54. It permits expert testimony by a witness who is “qualified as an expert by knowledge, skill, experience, training, or education.” § 490.065.1. There is nothing in section 490.065 to forbid the legislature from specifying the particular “knowledge, skill, experience, training, or education” that a witness should possess before offering an opinion in a medical malpractice case. Indeed, as noted, evidentiary rules -- like section 490.065 and section 538.225 -- are within the plenary power of the General Assembly. *McDonagh*, 123 S.W.3d at 154.

Swope, which predates the current section 538.225 by more than thirty years, merely states that the “extent of the experience and competence of a medical expert in the field in which he undertakes to testify goes to the weight, not the admissibility, of his testimony.” *Swope*, 468 S.W.2d at 40. *Swope* says nothing about the legislature’s power to prescribe evidentiary or procedural rules.

The defendants do not deny that actions for medical malpractice are triable by juries. As the Court held in *Mahoney*, the requirement of an affidavit at the outset of a medical malpractice case does not infringe the right of trial by jury. *Mahoney*, 807 S.W.2d at 508-09. The relator has not set forth any reason why the amendment of section

538.225 to specify the qualifications of the reviewing physician would lead to a different conclusion.

D. Section 538.225 does not violate the right to open courts.

Instead of filing complying affidavits based on opinions from a physician or physicians in the same specialty as the allegedly negligent defendants in this case, the relator submitted the affidavit of an anesthesiologist. There is no evidence in the record that the relator lacks the ability to obtain complying affidavits. The relator provided the respondent with no evidence to support the relator's bald assertion before this Court that to obtain complying affidavits would cost "anywhere from \$5,000 to \$20,000, perhaps more." Relator's Brief at 33. There is no evidence that the relator even attempted to consult a physician or physicians in substantially the same specialty as the allegedly negligent defendants. As far as the record reveals, the relator could easily rectify the cause of the dismissal without prejudice in this case. The Court should not indulge the unsupported assumption that it is impossible, or difficult, or even any hurdle at all for the relator to comply with section 538.225. The respondent cannot be said to have abused his discretion on this basis.

Recently, the Court considered whether a statute far more onerous than section 538.225 was arbitrary or unreasonable. In *Weigand v. Edwards*, 296 S.W.3d 453, 462 (Mo. banc 2009), the issue was whether section 452.455.4, RSMo, violated the open-courts requirement by requiring a parent to post a bond before moving to modify child custody when the parent's child-support arrearage was more than \$10,000. The Court noted that the statute did not restrict the ability of the parent who was in arrears from

filing a motion to modify child support. *Id.* Nor did the statute preclude the parent in arrears from defending a motion to modify custody. *Id.* The Court held that the requirement in section 452.455.4 for filing a bond before seeking relief in a motion to modify custody depended solely on the actions of the parent in arrears, unlike the statute in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000), which was infirm because it authorized a dram-shop cause of action only after a liquor licensee had been convicted (by the action of a third party, the county prosecutor) for providing liquor to an intoxicated person. *Id.* The Court held that the prerequisite of filing a bond before prosecuting a motion to modify custody is not an arbitrary and unreasonable barrier prohibited by the open courts provision of the Missouri Constitution. *Id.*

Section 538.225 in its present form does not require a plaintiff to do anything as onerous as posting a bond in the amount of \$10,000 or more before proceeding with an action. Indeed, the current statute does not make a plaintiff in a medical malpractice action do anything more than a plaintiff was required to do before 2005. Requiring review by an expert in “substantially the same specialty as the defendant” is not an arbitrary or unreasonable denial of access to the courts. *Mahoney*, 807 S.W.2d at 509-10.

E. Section 538.225 does not violate the separation of powers.

The relator’s separation-of-powers argument is based on the theory that, under the *substantive* law, an expert witness need not be in the same specialty as the defendant. Relator’s Brief at 34. As noted, evidentiary rules and the qualifications of experts are procedural matters, and they are also within the plenary power of the legislature. *See Shafer*, 609 S.W.2d at 157; *Walker*, 616 S.W.2d at 49; *Williams*, 729 S.W.2d at 201;

McDonagh, 123 S.W.3d at 154. The relator's blanket declaration that section 538.225 somehow violates the separation of powers does not make it so.

As the Court noted in *Mahoney*, rather than invading the province of the judiciary, section 538.225 aids the courts:

In this respect, the affidavit procedure of § 538.225 does no more than aid the court in its inherent function to do those things necessary for the administration of justice in civil actions. It facilitates in medical malpractice actions the objective of Rule 55.03 in all civil actions -- the elimination from the court system of groundless suits. Section 538.225 works to unburden rather than burden the administration of justice, contrary to argument, and so does not unconstitutionally encroach upon that inherent function of the judiciary.

Mahoney, 807 S.W.2d at 510.

F. Section 538.225 does not violate due process or equal protection.

The relator does not purport to cite any cases in which any statutes were struck down for violating the rights to due process and equal protection. The relator's claims on these issues should be rejected for failure to cite relevant authority. Further, the relator fails to cite any part of the record to support the contention that she has suffered any unconstitutional denial of due process or equal protection.

In an equal protection challenge, the first step is to determine whether the challenged statutory classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). If so, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest. Otherwise, review is limited to a determination of whether the classification is rationally related to a legitimate state interest. *Id.* A class receiving heightened scrutiny in equal protection analysis includes race, alienage, national origin, gender, and illegitimacy. *Id.* As for fundamental rights, those requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the Constitution. *Id.* The relator fails to identify any of these suspect classifications or fundamental interests.

As to the rational basis for statutes, there only need be a conceivably rational basis to uphold a regulatory scheme. *Id.* A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data. *Id.*

As the Court has noted, section 538.225 neither touches a fundamental right nor burdens a suspect class, and the distinction it draws between medical malpractice torts and other torts is rational. *Mahoney*, 807 S.W.2d at 512-13. The statute is not unconstitutional on the basis of due process or equal protection. *Id.*

G. The relator's other constitutional claims are unpreserved.

The relator failed to preserve any additional constitutional issues for review, in this proceeding or on appeal. The relator mentioned but did not develop a host of constitutional issues in opposing dismissal in the circuit court. Exhibits at 67-74.

To preserve a constitutional issue for appellate review, a party must not only have presented the issue to the trial court, but the trial court must have ruled on it. *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 525 (Mo. App. 2007). To present a constitutional issue for determination, a party must state facts showing the alleged violation. *Id.* An attack on the constitutionality of a statute is significant enough and important enough that the record touching on such issues should be fully developed and not raised as an afterthought. *Land Clearance for Redevelopment Auth. v. Kansas U. Endowment Ass'n*, 805 S.W.2d 173, 176 (Mo. banc 1991).

The reason for this requirement is to prevent surprise to the opposing party and to permit the trial court an opportunity to fairly identify and rule on the issues. *Strong v. American Cyanamid Co.*, 261 S.W.3d at 525. Thus, merely declaring that a statute should be deemed unconstitutional, without presenting any argument and without obtaining a ruling from the trial court on the issue, is inadequate to preserve any constitutional issue for appellate review. *Id.*

This Court has long held that it is improper for a party merely to declare a statute is void because it conflicts with certain designated sections of the constitution and then fail to develop the record on such a grave charge: "Constitutional questions cannot be raised by such casual and heedless allegations. Such questions are enterprises of great

pith and moment. The mere ipse dixit of counsel will not suffice to set them in motion.” *State ex rel. Wolfe v. Missouri Dental Bd.*, 221 S.W. 70, 73 (Mo. banc 1920) (internal quotations omitted).

In opposing the defendants’ motions to dismiss, the relator made no arguments and cited no authority in support of her many additional constitutional claims, but merely recited several constitutional provisions. In this Court, however, the relator presents extended arguments on vagueness and the single-subject/clear-title issue. Judge Bresnahan never heard any of these new arguments and was not asked to rule on them. Having failed to provide the respondent with any opportunity to address these arguments, the relator should not be permitted to raise them for the first time in this Court.

1. Section 538.225 is not void for vagueness.

Even if it had been preserved, the void-for-vagueness argument in the relator’s point IV would properly be rejected. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957-58 (Mo. banc 1999). The void-for-vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. *Id.* The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Id.* However, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague. *Id.* Moreover, it is well established that if a law is susceptible of

any reasonable and practical construction that will support it, it will be held valid, and the courts must endeavor, by every rule of construction, to give it effect. *Id.* Courts employ greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. *Id.*

The relator makes no effort to meet the stringent requirements of the void for vagueness doctrine. The relator presented no facts to the respondent on this issue, and obtained no ruling on it. This is no basis for the Court to strike down section 538.225.

Further, the Court recently construed section 538.225 and explained its meaning in the *Spradling* case. And the Court has already explained that section 538.225 is not vague for the reasons hypothesized by the relator. In *Spradling*, the Court explained the meaning of subsections 6 and 7 of section 538.225: “Section 538.225.6 governs when the alleged error is a faulty affidavit. Another provision, section 538.225.7, . . . governs when the alleged error is the expert's written opinion.” *Spradling* at n.3. The meaning of section 538.225 is clear.

2. H.B. 393 has a single subject and a clear title.

The relator’s Point V should be rejected because the relator’s challenge to H.B. 393 is untimely. Section 516.500, RSMo, requires a challenge to an alleged procedural defect to be asserted before the adjournment of the next legislative session. A later lawsuit is permitted only if there was no party aggrieved who could have raised the claim within that time, and the complaining party must establish that he or she was the first person aggrieved or in the class of first persons aggrieved, and that the claim was raised not later than the adjournment of the next full regular legislative session following any

person being aggrieved. In this case, the next legislative session after the passage of H.B. 393 adjourned by operation of law on May 30, 2006. Mo. Const. art. III, § 20(a). This action was not commenced until 2009. Accordingly, the single-subject and clear-title claims are barred. *See Rentschler v. Nixon*, No. SC90285, 2010 WL 1332432 (Mo. banc April 6, 2010).

In any event, the relator's Point V is incorrect because the bill that enacted section 538.225 has a single subject and a clear title. Article III, section 23, of the Missouri Constitution imposes two distinct procedural limitations on Missouri legislation. First, a bill cannot contain more than one subject. Second, the subject of the bill must be clearly expressed in the title. *Trout v. State*, 231 S.W.3d 140, 145 (Mo. banc 2007); *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 328 (Mo. banc 2000).

The Court will interpret procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the constitutional limitation. *C.C. Dillon*, 12 S.W.3d at 328.

The purpose of the clear-title requirement is to keep legislators and the public fairly apprised of the subject matter of pending laws. *Trout*, 231 S.W.3d at 144-45. This requirement is violated when the title is underinclusive or too broad and amorphous to be meaningful. *Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007). The only cases in which this Court has found a title to be too broad and amorphous are those in which the title could describe the majority of all the legislation that the General Assembly passes. *Id.* In all other cases, the Court has rejected arguments that a title was overinclusive. *Id.* Recognizing that some bills consist of

multiple and diverse topics within a single, overarching subject, the bill's subject may be clearly expressed by stating some broad umbrella category that includes all the topics within its cover. *Missouri State Med. Ass'n v. Missouri Dep't of Health*, 39 S.W.3d 837, 841 (Mo. banc 2001).

The single-subject analysis turns on the general core purpose of the proposed legislation. *Trout*, 231 S.W.3d at 146. Article III, section 23, dictates that the subject of a bill includes all matters that fall within or reasonably relate to the general core purpose. *Id.* To determine whether a bill violates the single-subject rule, the test is not whether individual provisions of a bill relate to each other, but whether the challenged provision fairly relates to the subject described in the title of the bill, has a natural connection to the subject, or is a means to accomplish the law's purpose. *Id.*

H.B. 393's title is clear, and the bill relates to a single subject:

An Act to repeal §355.176, 408.040, 490.715, 508.010, 508.040, 508.070, 508.120, 510.263, 510.340, 516.105, 537.035, 537.067, 537.090, 538.205, 538.210, 538.220, 538.225, 538.230, and 538.300, Mo. Rev. Stat., and to enact in lieu thereof twenty three new sections relating to claims for damages and the payment thereof.

2005 Mo. Legis. Serv. H.B. 393.

H.B. 393 does not violate the single-subject limitation. The phrase "relating to claims for damages and the payment thereof" contained in the title of H.B. 393 pertains

to civil causes of action, a general core purpose. The bill contains 23 new sections, all of which relate to various causes of action for damages. Each section of H.B. 393 is fairly related and connected to the subject of the bill's title.

The bill also contains a clear title. A title should indicate in a general way the kind of legislation that is being enacted. *Trout*, 231 S.W.3d at 145; *Missouri State Med. Assoc.*, 39 S.W.3d at 841. The title may omit particular details of the bill, as long as neither the legislature nor the public is misled. *Missouri State Med. Assoc.*, 39 S.W.3d at 841. The title to the act is valid if it indicates the general contents of the act, and mere generality of title will not prevent the act from being valid unless it is so obscure or amorphous as to tend to cover up the contents of the act. *C. C. Dillon*, 12 S.W.3d at 329.

The title of H.B. 393 generally describes the nature of the sections set forth in the bill -- procedures for instituting, trying, and collecting claims for civil damages. This is not so overbroad or amorphous that it could comprehend almost all legislation.

The relator's cases are readily distinguishable. In *St. Louis Health Care Network v. State*, 968 S.W.2d 145, 147 (Mo. banc 1998), the title of a bill said it was an act "relating to certain incorporated and non-incorporated entities." The Court held that this title "could refer to anything; it is difficult to imagine a broader phrase that could be employed in the title of legislation." *Id.* In *Home Builders Ass'n v. State*, 75 S.W.3d 267, 270-71 (Mo. banc 2002), a bill's title said it was an act "relating to property ownership," which the Court held "could describe most, if not all, legislation passed by the General Assembly." The title of H.B. 393 ("relating to claims for damages and the payment thereof") is nowhere near as broad. The relator's cases do not assist them.

H. The relator's foreign cases are not on point.

The relator declares that this Court should join the courts of other states, but the foreign cases cited by the relator are irrelevant.

Three of the relator's foreign cases declared states to be unenforceable because they were directly contrary to rules of civil procedure promulgated by the state supreme court. See *Summerville v. Thrower*, 253 S.W.3d 415, 420-21 (Ark. 2007) (statute "directly in conflict" with rules of civil procedure); *Putman v. Wenatchee Valley Med. Ctr.*, 216 P.3d 374, 378-79 (Wash. 2009) (statute "directly conflicts" with rules of civil procedure); *Hiatt v. Southern Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994) (statute "clearly in direct conflict" with rules of civil procedure). Section 538.225 is not in conflict with any of this Court's rules, and the relator has never argued that there is any such conflict.

Another case cited by the relator is *Wimley v. Reid*, 991 So. 2d 135 (Miss. 2008), which holds that Mississippi's Supreme Court has the exclusive constitutional authority to promulgate procedural rules for the courts, and any legislative enactment relating to court procedures is void. The relator has never advanced such an argument in this case.

The relator also purports to rely on *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006), in which an Oklahoma statute was held to be an unconstitutional special law. The relator has never accused section 538.225 of being a special law.

In *Zeier*, the Oklahoma statute was also held to be an invalid barrier to access to the courts because it required a plaintiff to acquire an expert's opinion at a cost of between \$500 and \$5,000 prior to filing a petition. *Id.* at 873. By its terms, section

538.225 is distinguishable in that it does not require *any* expert opinions to be obtained prior to the commencement of an action for damages, and the affidavit of the plaintiff or the plaintiff's counsel may be filed three to six months after the filing of the petition.

§ 538.225.5. Further, the relator in this case has never made any showing that the affidavit required by the current version of section 538.225 is any more or less expensive than the affidavit that this Court authorized in *Mahoney*.

Further, the statutes at issue in the relator's foreign cases are all readily distinguishable from section 538.225 in that they all required plaintiffs in medical malpractice actions to file a certificate of merit either along with their initial pleadings or within thirty days of filing. *Putnam*, 216 P.3d at 378 (certificate of merit filed with initial pleadings); *Hiatt*, 626 N.E.2d at 72 (same); *Wimley*, 991 So. 2d at 136-37 (same); *Zeier*, 152 P.3d at 865; *Summerville*, 253 S.W.3d at 416 (affidavit of reasonable cause within thirty days of filing complaint). As this Court noted in *Mahoney*, section 538.225 is nowhere near as onerous because it does not operate until after the petition has been on file for a period of time, allowing three to six months before any affidavit is required. 807 S.W.2d at 509.

These foreign cases addressing the validity of distinguishable statutes do not aid the relator.

CONCLUSION

The respondent properly dismissed the relator's claims against these defendants on the basis set forth in the Court's recent *Spradling* decision. The relator made no evidentiary showing in the trial court to support her numerous claims in this proceeding. The respondent did not abuse his discretion in enforcing section 538.225 according to its terms. Therefore, the preliminary writ should be quashed, and the writ petition should be denied. The relator can then pursue the proper remedies available to her, including refiling her claims and/or appealing the dismissal after entry of a final judgment.

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The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 9,637, exclusive of the cover, signature block, appendix, and certificates of service and compliance.

The undersigned further certifies that the discs filed with the brief and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.
