SC93012 and SC93254

IN THE SUPREME COURT OF MISSOURI

WANDA MAYES, INDIVIDUALLY AND AS PLAINTIFF *AD LITEM* FOR DECEDENT IRA MAYES, *et al.*,

Plaintiffs/Appellants

vs.

SAINT LUKE'S HOSPITAL OF KANSAS CITY, *et al.*,

Defendants/Respondents.

Appeal from the Circuit Court of Jackson County
The Hon. Charles H. McKenzie, Circuit Judge
Case No. 1116-CV23789 (SC93012)
The Hon. Charles H. McKenzie, Circuit Judge
Case No. 1216-CV28166 (SC93254)

RESPONDENTS' BRIEF

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The trial court did not err in dismissing Case No. 3 as barred by the relevant statutes of limitations, notwithstanding plaintiffs' current arguments regarding the unconstitutionality of the dismissal of Case No. 2 pursuant to §538.225, because

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INTRODUCTION

This brief is being filed in two separate cases—SC93012 and SC93254.

In SC93012, the plaintiffs in a medical-malpractice action appeal from the dismissal of their petition, without prejudice, for failure to timely file the affidavit required by §538.225, RSMo. Cum. Supp. 2006. The underlying action in this appeal is hereinafter referred to as "Case No. 2." Case No. 2 was filed after the same plaintiffs had voluntarily dismissed an action ("Case No. 1") which had asserted the same claims against the same defendants.

In SC93254, the same plaintiffs appeal from the dismissal, with prejudice, of their third medical-malpractice action, which also asserted the same claims against the same defendants (as in Case No. 2 and Case No. 1). The underlying action in this appeal is hereinafter referred to as "Case No. 3."

The appellants in both appeals, who were the plaintiffs in Case No. 1, Case No. 2 and Case No. 3, are hereinafter collectively referred to as "plaintiffs." The respondents in both appeals, who were the defendants in Case No. 1, Case No. 2 and Case No. 3, are collectively hereinafter referred to as "defendants."

STATEMENT OF FACTS

Case No. 1 was filed on March 4, 2010. [Legal File in SC93012 (hereinafter, "L.F. #1"), Vol. I, p. 12 (¶12).] On that same day, plaintiffs filed, in Case No. 1, an affidavit of their attorney (in compliance with §538.225), confirming that plaintiffs had

obtained the medical opinions required by that statute. [Appellants' Brief at p. 5.] Plaintiffs voluntarily dismissed Case No. 1 (without prejudice), on August 24, 2011. [L.F. #1, Vol. I, p. 112; *compare* Appellants' Brief at p. 57 (referencing a date of August 26).]

Case No. 2 was filed on August 31, 2011. [L.F. #1, Vol. I, p. 10.] The petition in that case alleged that the death of plaintiffs' decedent had occurred on March 28, 2008. [L.F. #1, Vol. I, p. 12 (¶8).] That petition asserted the same claims as had been asserted in Case No. 1, against the same defendants. [Appellants' Brief at p. 4, n. 2; L.F. #1, Vol. I, at p. 114.] These consisted of both a wrongful-death claim and a survivorship claim. [L.F. #1, Vol. I, pp. 7-26.] The petition in Case No. 2 alleged medical negligence, generally consisting of an alleged failure by defendants to ensure that the decedent's cardiac-surgery wound did not become infected, after his release from the hospital following that surgery. [L.F. #1, Vol. I, pp. 11-14, 19-25.] This petition also asserted that, if Case No. 2 were dismissed, based on an future failure of plaintiffs to timely file the affidavit required under §538.225, such dismissal would be unconstitutional, by reason of the Missouri Constitution (Art. I, §14 and Art. I, §22(a)). [L.F. #1, Vol. I, p. 17 (¶33).]

In the context of Case No. 2, counsel for both plaintiffs and defendants agreed that the discovery conducted in Case No. 1 was to be treated as having been conducted in Case No. 2. [L.F. #1, pp. 88, 114-115.]

On August 29, 2012, defendants filed a motion to dismiss Case No. 2, without prejudice, on the ground that plaintiffs had failed to timely file the medical-opinion

affidavit required by §538.225. [L.F. #1, Vol. I, pp. 77-79.] In response to that motion, plaintiffs made no argument regarding the constitutionality of that statute, or any requested dismissal pursuant to it. [L.F. #1, Vol. I., pp. 81-92.] Nor did plaintiffs argue that they had "substantially complied" with §538.225. [*Id.*]

On October 24, 2012, the trial court dismissed Case No. 2, without prejudice, based on plaintiffs' failure to file the affidavit required under §538.225. [L.F. #1, Vol. I, pp. 114-115.]

On November 6, 2012, plaintiffs filed a "motion to reconsider" the dismissal of Case No. 2. [L.F. #1, Vol. II, pp. 119-126.] In that motion, plaintiffs made no argument regarding the constitutionality of §538.225, or any dismissal thereunder. [*Id.*] Plaintiffs did make such a constitutional argument, during the oral argument on that motion (for the first time since defendants had moved for dismissal, on the basis of that statute). [Transcript in SC93102 (hereinafter, "Tr."), p. 15, l. 21- p. 16, l. 21.] In the context of that argument, plaintiffs' counsel asserted that these constitutional challenges had been asserted by plaintiffs in their "original lawsuit." [*Id.*]

On November 19, 2012, the trial court (in Case No. 2) denied plaintiffs' motion to reconsider. [L.F. #1, Vol. II, p. 220.]

Case No. 3 was filed on October 30, 2012 (which was more than one year after plaintiffs voluntarily dismissed Case No. 1). [Legal File in SC93254 (hereinafter, "L.F. #2"), Vol. I, p. 6.] Defendants moved to dismiss Case No. 3, on the ground that Case No. 3 was barred by the applicable statutes of limitations. [L.F. #2, Vol. I, pp. 87-94, Vol. II, pp. 167-172.] The trial court dismissed Case No. 3, on that basis. [L.F. #2, Vol. II, p.

247.] In the context of the present appeals, plaintiffs do not assert that Case No. 3 was filed within the limitations periods under the statutes of limitations applicable to either wrongful death claims or survivorship claims. [Appellants' Brief at pp. 54-60.]

ARGUMENT

I. RESPONSE TO POINT I AND II

A. The trial court did not err in dismissing Case No. 2 (without prejudice), due to plaintiffs' failure to timely file the affidavit required by §538.225, notwithstanding plaintiffs' present claim that granting such a dismissal violated their constitutional rights, because plaintiffs failed to preserve that claim for appeal, in that (a) the assertion in plaintiffs' petition in Case No. 2, that any future failure by them to timely file such affidavit would not provide a constitutionally-permissible basis for dismissal of that action, was both conditional and anticipatory, and did not provide the trial court with a practical opportunity to consider that claim as a possible reason to deny defendants' motion to dismiss, and (b) plaintiffs did not thereafter assert any constitutional challenge to the dismissal of Case No. 2, until after that action had been dismissed.

Plaintiffs' primary argument on appeal is that, as applied to plaintiffs (in Case No. 2), the dismissal-without-prejudice remedy set forth in §538.225 violated plaintiffs'

"access to courts" and "right to jury trial" rights under the Missouri Constitution. *See* Mo. Const., Art. I, §14 (access to courts), and Mo. Const., Art. I, §22(a) (jury trial). However, plaintiffs have failed to properly preserve any such challenge for appeal.

Section 538.225 requires a medical-malpractice plaintiff to file an affidavit confirming that the plaintiff has obtained certain medical opinions, within (a) 90 days after the petition is filed, or (b) 180 days after the petition is filed (if the plaintiff demonstrates good cause for extending the 90-day period). In their petition in Case No. 2, plaintiffs included a conditional and anticipatory statement, to the effect that, **if** plaintiffs thereafter failed to timely file the affidavit required by the statute, and **if** such failure were to result in the dismissal of the action (by reason of §538.225) such dismissal **would** constitute a violation of plaintiffs' rights under the two constitutional provisions referred to above. [L.F. #1, Vol. I, p. 17 (¶33).] However, once plaintiffs actually **did** fail to timely file the required affidavit, and defendants moved to dismiss the action (on the basis of this statute), plaintiffs completely failed to bring this finally-ripe constitutional challenge to the trial court's attention, until *after* the trial court had already *granted* the motion to dismiss. [*See* L.F. #1, Vol. I, pp. 77-80 (Motion to Dismiss Case No. 2); L.F. #1, Vol. I, pp. 81-92 (Suggestions in Opposition to Motion); L.F. #1, Vol. II, pp. 119-126 (Motion to Reconsider Dismissal).] Specifically, plaintiffs failed to assert their constitutional arguments, either (a) in their suggestions in opposition to the defendants' motion to dismiss, or (b) in their motion to reconsider the dismissal. [*Id.*] The first time that plaintiffs actually raised these constitutional issues before the trial

court, once those issues became justiciable, was in the oral argument made by plaintiffs in support of their motion to reconsider. [Tr. at pp. 15-16.]

By not providing the trial court with any practical opportunity to identify and rule on these constitutional issues, once facts had arisen that would trigger the applicability of §538.225 (and once defendants had requested such relief), plaintiffs failed to preserve these constitutional issues for appellate review.

As this Court has noted, "[c]onstitutional challenges to the validity of any alleged right or defense asserted by a party to an action must be raised at the earliest opportunity consistent with good pleading and orderly procedure." *State v. Faruqi*, 344 S.W.3d 193, 199 (Mo. banc 2011), quoting *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33 (Mo. banc 2010). The purpose of this rule 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). In addition, a constitutional claim "must be. . . preserved at each step of the judicial process." *State v. Sumowski*, 794 S.W.2d 643, 647 (Mo. banc 1990); *see also State v. Durhman*, 371 S.W.3d 30, 39 (Mo. App. 2012) (constitutional claim must be reasserted at each step of the litigation). Moreover, an attack on the constitutionality of a statute should not be raised as an afterthought, such as in a post-trial motion or on appeal. *Adams by Adams v. Children's Mercy Hospital,* 832 S.W.2d 898, 909 (Mo. banc 1992).

In the present case (Case No. 2), the first time that the plaintiffs mentioned any constitutional concerns as to the constitutionality of the medical-opinion affidavit statute was in their petition—*i.e.*, well before the deadline for plaintiffs to file their affidavit, and

therefore before any potential right on the part of defendants to seek dismissal under the statute could have arisen. That is to say, this reference in plaintiffs' petition was both *anticipatory* and *conditional*. It was also not the assertion of a positive right. It was, at most, a statement describing the constitutional challenges that plaintiffs intended to assert, in the future, **if** they were to fail to comply with the statutory deadline, and **if** defendants were to seek a dismissal under the statute, in response to that failure. The inclusion of such a statement in a petition was not consistent with "good pleading and orderly procedure." *Faruqi*, 344 S.W.3d at 199.

Perhaps more importantly, plaintiffs *failed* to assert this constitutional challenge at the first opportunity that *would* have been consistent with good pleading and orderly procedure—*i.e.*, in response to defendants' motion seeking to dismiss the action on the basis of the statute. By failing to make any mention of this statutory challenge, in response to that motion, plaintiffs *also* failed to satisfy the requirement that constitutional claims be "preserved at each step of the judicial process." *Sumowski* at 647. Furthermore, plaintiffs thereby deprived the trial court of "the opportunity to identify and rule on the issue." *Carpenter, supra*, 250 S.W.3d at 701. In fact, as a practical matter, plaintiffs thereby deprived the trial court of any practical opportunity to identify *any* constitutional issue relating to the relief being sought by defendants' motion (much less the constitutional issues now being raised by plaintiffs). It therefore goes without saying that plaintiffs also deprived the trial court of any practical opportunity to rule on that issue.

It is also true that,

> [i]n order for the issue of the constitutional validity of a statute to be preserved for appellate review, the issue must not only have been presented to the trial court, but the trial court must have ruled thereon.

Estate of McCluney, 871 S.W.2d 657, 659 (Mo. App. 1994). By failing to raise the present constitutional challenges, in response to defendants' motion to dismiss, plaintiffs also failed to obtain an actual ruling by the trial court, with respect to these constitutional claims. For this reason (in addition to these discussed above), plaintiffs must be considered to have waived the constitutional challenges now being asserted by them in the present appeals.

B. The trial court did not err in dismissing Case No. 2 (without prejudice), due to plaintiffs' failure to timely file the affidavit required by §538.225 (confirming that they had obtained the type of medical opinions referred to in that statute), notwithstanding plaintiffs' current argument that the Legislature may not constitutionally require medical-malpractice plaintiffs to obtain such medical opinions, because plaintiffs lack standing to assert such an argument, in that they had already obtained such medical opinions (in connection with Case No. 1), and were therefore not injured *as a result of* the statutory requirement.

The crux of plaintiffs' constitutional challenge in this case is that the Legislature exceeded its constitutional authority, by enacting a statute that requires medical-malpractice plaintiffs to obtain ("presumably, by paying for") a health-care provider's opinions as to negligence and causation, within a prescribed period of time after the filing of any medical-malpractice action. However, plaintiffs do not have standing to assert this challenge, since they had already obtained the requisite opinions, in connection with their original action (which they then voluntarily dismissed).

As this Court has noted, "not just anyone has standing to attack the constitutionality of a statute." *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo. banc 1977). In order to acquire the requisite standing, "a litigant must be 'adversely affected' by the statute he challenges." *State v. Pizzella*, 723 S.W.2d 384, 386 (Mo. banc 1987). Thus, in order to have standing to challenge a statute on constitutional grounds, a

party must show not only that the statute is invalid, but that the party has sustained (or is immediately in danger of sustaining) some indirect injury, as the result of its enforcement. *Harris v. Monroe County,* 716 S.W.2d 263, 266 (Mo. banc 1986); *see also State ex rel. City of Springfield v. Public Service Commission,* 812 S.W.2d 827, 833 (Mo. App. 1991).

> The sum of the matter is, not that his neighbor is hurt, but that a litigant himself must be hurt by the unconstitutional exercise of power before he may vex the judicial ear with complaints.

State v. Williams, 343 S.W.2d 58, 61 (Mo. 1961), quoting *State ex rel. Crandell v. McIntosh,* 103 S.W. 1078, 1082 (Mo. banc 1907).

Plaintiffs are not persons who satisfy this standing requirement.

The specific exercise of legislative power that plaintiffs characterize as unconstitutional is the statutory mandate that a medical-malpractice plaintiff obtain the opinion of a health-care provider, within a prescribed period after filing a medical-malpractice action. Essentially, plaintiffs complain that this exercise of power was unreasonably burdensome, in that (a) medical malpractice plaintiffs must (ordinarily) pay to obtain such an opinion, and (b) such an expense is an unreasonable burden on the continued maintenance of a medical-malpractice action. Plaintiffs further complain that this exercise of power was also arbitrary, in that it would impose the same requirement on a medical-malpractice plaintiff who asserts a claim (such as a medical battery) that does not *require* such a medical opinion, in order to be submissible. However, plaintiffs were not actually hurt (or "adversely affected") by this complained-of exercise of power,

because they had already *obtained* the type of medical opinions that the statute requires, in connection with the first case that they filed against these same defendants (Case No. 1). As plaintiffs' brief acknowledges, when plaintiffs filed Case No. 1, they also filed (on the same day) "separate affidavits of merit for each defendant under §538.225." [Appellants' Brief at p. 5.]

Thus, even if the Legislature's medical-opinion requirement could be considered to impose too great a burden on the maintenance of a medical-malpractice action (in the context of a hypothetical plaintiff who had not already obtained the requisite opinions), the present plaintiffs had already borne that burden, in the context of Case No. 1—which was well before the time that they were required to file an affidavit (in Case No. 2) confirming that they had obtained such opinions. Consequently, the medical-opinion affidavit requirement cannot be considered to have caused *the present* plaintiffs to suffer any adverse consequences (such as dismissal), as a result of being unable to bear the complained-of statutory burden.

Plaintiffs' further complaint, to the effect that their counsel believed that he had an agreement with defense counsel to waive the attorney-affidavit filing requirement, has no relevance to whether plaintiffs actually sustained any direct injury, as result of the Legislature over-stepping its constitutional bounds, by requiring plaintiff to obtain the underlying medical opinion. At most, this complaint by plaintiffs simply indicates that their failure to timely file the statutory affidavit (in Case No. 2) was the result of their counsel's misapprehension of what the agreement with defense counsel entailed—rather than being the result of their counsel's neglect of, or inattention to, the statutory

requirement. In either event, however, plaintiffs' failure to abide by the statutory affidavit-filing deadline cannot be considered to have *resulted from* the Legislature having acted unconstitutionally, in requiring plaintiffs to obtain (for Case No. 2) the type of medical opinion that they had already obtained (for Case No. 1).

Plaintiffs are therefore not persons who were actually harmed by the particular exercise of power of which they now complain (*i.e.*, the specific burden of having to *obtain* a medical opinion) because plaintiffs had already obtained such an opinion. As a consequence, plaintiffs lack standing to assert that this particular exercise of power exceeded the limits imposed on the Legislature by the Missouri Constitution.

II. RESPONSE TO POINT I

The trial did not err in dismissing Case No. 2 (without prejudice), due to plaintiffs' failure to timely file the medical opinion affidavit required by §538.225, notwithstanding plaintiffs' argument that the statute violated their rights under the "access to courts" provision of the Missouri Constitution, because the statute did not place an arbitrary or unreasonable barrier on plaintiffs' right to maintain their medical-malpractice claim, in that (a) plaintiffs have not demonstrated that their claim was one that would have been submissible, without medical expert testimony (and plaintiffs lack standing to argue that the statute *would* be unconstitutional, in the context of such an claim), (b) as this Court has previously held, the statute's affidavit requirement is rationally justified by the ends sought, and is therefore a reasonable barrier to a medical-malpractice plaintiff's access to courts, and (c) this Court's previous decision on this issue was not made under different circumstances than those here, since the previous decision also addressed a constitutional challenge to a dismissal pursuant to the statute.

A. Introduction

Plaintiffs' primary argument regarding the constitutionality of §538.225 is that it violates Article I, §14, of the Missouri Constitution—the so-called "access to courts" provision.

As plaintiffs' brief acknowledges, this Court has upheld the prior version of this statute against a challenge under this same constitutional provision. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). However, plaintiffs contend that the holding in *Mahoney* is no longer valid, for one of four reasons: (1) in those medical-malpractice cases where substantive law would not require a medical opinion for submissibility, the statute would impose an irrational barrier to a plaintiff's remedy; (2) this Court has subsequently adopted a standard for the enforcement of the "access to courts" provision that was not applied, in *Mahoney*; (3) appellate courts in other states have struck down similar statutes, under similar constitutional provisions; and (4) under the version of the statute that was in effect at the time *Mahoney* was decided, there was a possibility that a plaintiff's action would not be dismissed, even if the medical opinion affidavit was not timely filed (whereas dismissal without prejudice is mandated, under such circumstances, by the current version of the statute).

B. "Irrational" Barrier, As to *Other* Plaintiffs

One of plaintiffs' arguments as to why the statute is unconstitutional is that (a) the statute requires a medical-opinion affidavit in all medical-malpractice actions, including those in which a medical expert opinion would not be required for submissibility, and (b) imposing this requirement *in such cases* would create an irrational barrier to the relevant plaintiff's ability to maintain his or her cause of action. However, because plaintiffs failed to assert this argument in response to defendants' motion to dismiss, no record was developed in this case as to whether plaintiffs' own claim would require a medical

opinion for submissibility. Nor did the trial court make any determination as to this issue. Furthermore, plaintiffs' petition does not appear to allege the type of medical-malpractice claim that would be submissible, in the absence of a medical expert opinion as to both negligence and causation. [L.F. #1, at pp. 10 – 26 (Petition in Case No. 2).] *See Ladish v. Gordon*, 879 S.W.2d 623, 628 (Mo. App. 1994) (expert testimony generally required to establish standard of care in medical negligence case); *Dysart v. Werth*, 61 S.W.3d 293, 299 (Mo. App. 2001) (expert testimony generally required to establish causation in medical negligence case).

At the very least, therefore, plaintiffs have failed to demonstrate that theirs was one of those types of medical-malpractice cases that would not require medical expert opinions, in order to be submissible.

Therefore, the essence of this particular constitutional challenge by plaintiffs is that (a) the statute can be construed as applying to a particular category of medical-malpractice plaintiffs (which does not include these plaintiffs), and (b) the statute could not be constitutionally applied to those plaintiffs who fall within that category. This is a constitutional challenge that plaintiffs have no standing to assert.

One of the aspects of constitutional standing is the general rule that

> a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.

State v. Jeffrey, 400 S.W.3d 303, 308 (Mo. banc 2013), quoting *New York v. Ferber*, 458 U.S. 747, 767 (1982); *State v. Von*, 366 S.W.3d 513, 518 (Mo. banc 2012), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Stated differently, "[a]s a general rule, if there is no constitutional defect in the application of a statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *R.J.J. by Johnson v. Shineman*, 658 S.W.2d 910, 914 (Mo. App. 1983). A further gloss on this principle is, as follows:

> If a statute can be applied constitutionally to an individual, that person "will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

State v. Schroeder, 330 S.W.3d 468, 475 (Mo. banc 2011), quoting *State v. Self*, 155 S.W.3d 756, 760 (Mo. banc 2005).

This rule is a functional application of the limitations placed on the two different methods of asserting a constitutional challenge to a statute—*i.e.*, either a "facial" challenge or an "as applied" challenge. In connection with a "facial" challenge to a statute, "the challenger 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), quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987). By contrast, in order to support an "as applied" challenge to a statute, the challenger "must show that the statute operates unconstitutionally as to [the challenger] because of [the challenger's] particular circumstances." *Coyne v. Edwards*, 395 S.W.3d 509, 520 (Mo. banc 2013). Thus,

regardless of whether plaintiffs are asserting "facial" or "as applied" challenges to the statute, they may not argue that the statute might impose an unconstitutional burden on the category of medical-malpractice plaintiffs whose claims do not depend upon medical expert testimony for submissibility, since (a) plaintiffs have not demonstrated that they belong to that category, and (b) plaintiffs' argument only applies to someone who does belong to that category.

C. "Change" In "Access To Courts" Standard

Another of plaintiffs' arguments as to why the statute is unconstitutional is that this Court's holding in *Mahoney* has been impliedly overruled, by this Court's later decision in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). Specifically, plaintiffs claim that *Kilmer* adopted a new standard for determining the constitutionality of statutes, in the context of "access to courts" challenges, and that, in the course of adopting this new standard, this Court indicated that the holding in *Mahoney* was no longer valid.

In *Kilmer*, this Court did note that some of its preceding decisions concerning the enforcement of the "access to courts" provision "seem irreconcilable." *Id.* at 548. Nevertheless, this Court concluded that there was a coherent line of reasoning that could be distilled from various preceding decisions, and that could provide an appropriate standard for determining the constitutionality of statutes, in the context of "access to courts" challenges. *Id.* at 549. This standard, as distilled from these preceding decisions, is that the "access to courts" provision

> prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of actions for personal injury.

Kilmer, 17 S.W.3d at 549 (emphasis in original), quoting *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Holstein, C.J., dissenting).

This Court also identified *Mahoney* as one of its preceding decisions concerning the enforcement of "access to courts" provision. *Kilmer*, 17 S.W.3d at 549. However, this Court proceeded to note that the standard of "reasonableness" had been utilized, in that case, in determining the relevant constitutional issue. *Kilmer*, 17 S.W.3d at 550, n. 17.

Consequently, this Court's opinion in *Kilmer* does not support the conclusion that this Court employed an improper or outdated standard, in deciding *Mahoney*—much less that the holding in that case should be considered incorrect.

D. Decisions In Other States

Another of plaintiffs' arguments as to why the statute is unconstitutional is that decisions in other states have concluded that a similar statute violates a similar constitutional provision. However, plaintiffs have cited only cases from two states, in support of this argument (Oklahoma and Washington).

Plaintiffs' primary authority is the decision of the Oklahoma Supreme Court, in *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006). There, the Oklahoma Supreme Court held, as an initial matter, that the Oklahoma "affidavit of merit" statute violated the

"special law" prohibition of the Oklahoma Constitution. *Zeier*, 152 P.3d at 862-863, 865-869. Having done so, the Oklahoma court nevertheless proceeded to consider (and decide) whether the statute also violated the "access to courts" provision of the Oklahoma Constitution. *Zeier*, 152 P.3d at 863, 869-873. In doing so, its ruling on that issue was necessarily *dicta*, given that the court had already ruled the statute to be unconstitutional (and given that the judgment of the trial court was therefore required to be reversed).

The Oklahoma court also largely based its decision on a number of socio-economic "facts" regarding the consequences of the Oklahoma "affidavit of merit" statute (including the "fact" that the statute "necessarily" conditions a medical malpractice plaintiff's right to maintain an action on an expenditure of between $500 and $5,000). *Zeier*, 152 P.3d at 869-873. None of such facts are in the record before this Court, in the present case—and most (if not all) of them were apparently derived by the Oklahoma court from non-record sources. *See Zeier*, 152 P.3d at 869-873.

As indicated above, there was no opportunity to develop any trial-court record concerning the existence of any analogous facts, in the Missouri context, because plaintiffs failed to raise their constitutional challenges to the statute, in response to the defendants' motion to dismiss.

In any event, because no such facts (relative to the Missouri context) are part of the present record, they may not be considered by this Court as a basis for deciding plaintiff's constitutional challenge. *See State ex rel. Kairuz v. Romines*, 806 S.W.2d 451, 453 (Mo. App. 1991) (appellate court confined to factual record presented to it).

In addition, the Oklahoma Supreme Court apparently applied a legal standard, in deciding the "access to courts" constitutional issue under its statute, that is different than the "arbitrary or unreasonable" standard announced by this Court in *Kilmer*. Specifically, the Oklahoma Supreme Court appears to have interpreted the Oklahoma "access to courts" provision as prohibiting any legislation that would impose a higher cost on medical-malpractice plaintiffs than on other plaintiffs. *Zeier*, 152 P.3d at 872-873. No such standard is applicable, under Missouri law.

For each of these reasons, the decision of the Oklahoma Supreme Court in *Zeier* is unauthoritative, on the Missouri constitutional issue presented in this case.

The only other case relied upon by plaintiffs, relative to this point, is *Putman v. Wenatchee Valley Medical Center, P.S.*, 216 P.3d 374 (Wash. banc 2009). There, the Washington Supreme Court struck down a statute that required a medical-malpractice plaintiff to file, with the petition, a medical expert certification, to the effect that there was a reasonable probability that the defendant violated the applicable standard of care. *Id.* at 378. Specifically, the court held that the statute violated both the "access to courts" and the "separation of powers" provisions of the Washington Constitution. *Id.* at 376-378. Consequently, the court's specific conclusion relative to the "access to courts" provision cannot be considered to have been essential to its holding—which was that the trial court's dismissal of the plaintiff's petition, pursuant to the statute, was required to be reversed. Furthermore, the court's discussion of the "access to courts" issue was perfunctory, and relied chiefly on the fact that the Washington statute required that the medical-expert certificate be filed by a plaintiff at the time the petition was filed. *Id.* at

376-377. The court found this timing requirement to be particularly significant, in that (a) it would preclude an expert from using any discovery results, when preparing the statutory certificate, and (b) previous Washington precedent had established that Washington's "access to courts" provision guaranteed civil plaintiffs the right to obtain discovery. *Id.* Neither of these two propositions is true, in the Missouri context.

The more authoritative decisions from other states support the conclusion that the statute does not violate Missouri's "access to courts" provision.

The most recent of these is *Hebert v. Hopkins*, 395 S.W.3d 884 (Tex. App. 2013). In *Hebert*, the Texas Court of Appeals addressed an "access to courts" challenge to a Texas statute that was arguably more of a barrier to a medical-malpractice plaintiff than the Missouri statute at issue here. Specifically, the Texas statute involved in that case not only required an expert *report* (as opposed to merely an affidavit of counsel confirming the existence of an expert opinion), but also provided for dismissal *with prejudice*, if such a report was not timely submitted to the court (within 120 days after filing suit). *Hebert*, 395 S.W.3d at 888-889, nn. 2, 4. As is true in Missouri, the Texas "access to courts" provision prohibits statutes that arbitrarily or unreasonably abridge a person's right to obtain civil redress for a tortious injury. *See Shah v. Moss*, 67 S.W.3d 836, 841-842 (Tex. 2001). Applying this standard, the court in *Hebert* rejected the plaintiffs' "access to courts" challenge to the statute. *Id.*, 395 S.W.3d at 901; *see also Id.* at 895-900.

In rejecting this challenge, the court also noted that the plaintiffs' "as applied" constitutional argument was flawed, in a way that is very similar to the flaw in the present plaintiffs' argument. There, the plaintiffs had obtained an expert's opinion, and

had filed an expert report reflecting that opinion, before the expiration of the statutory deadline. *Id.* at 888-889. However, the defendants challenged the substantive sufficiency of the opinion reflected in that report—which challenge was eventually sustained by the trial court (after allowing the plaintiffs an opportunity to cure the deficiency). *Id.* at 889-890. On appeal, the court concluded that the plaintiffs' "as applied" constitutional challenge was flawed, in that the plaintiffs had failed to demonstrate that the statutory expert-report requirement had "actually prevented" them from maintaining their claims. *Id.* at 901. Specifically, the court concluded that the plaintiffs had failed to demonstrate that the dismissal of their action was due to the statutory requirement of obtaining expert opinions, rather than being due to their own failure to obtain the type of expert opinions that would satisfy the statutory standards. *Id.*

The same flaw is evident in the present case, given that the dismissal of Case No. 2 (without prejudice) was not due to plaintiffs' inability to obtain (or to afford) the expert opinions needed to submit the statutorily-required affidavit—since these opinions had already been obtained, in connection with Case No. 1—but was simply due to a mistaken understanding on the part of plaintiffs' counsel. As plaintiffs have explained it in their brief, the reason that the affidavit was not timely filed in Case No. 2 is that, when defense counsel agreed to treat the discovery previously conducted in Case No. 1 as having been conducted in Case No. 2, plaintiffs' counsel mistakenly concluded that defendants were thereby waiving plaintiffs' compliance with the statutory affidavit requirement.

The *Hebert* decision also noted that numerous prior Texas appellate decisions have all rejected constitutional challenges to the same statute (as well as its predecessor),

including a decision by the Texas Supreme Court that rejected an "access to courts" challenge to the current version of the statute. *Id.*, 395 S.W.3d at 896-897, citing *Stockton v. Offenbach,* 336 S.W.3d 610, 618 (Tex. 2011).

Other authoritative decisions that have rejected an "access to courts" challenge to a similar statute include *McAlister v. Schick,* 588 N.E.2d 1151, 1157-1158 (Ill. 1992), and *Lohnes v. Hospital of St. Raphael,* 31 A.3d 810, 817-818 (Conn. App. 2011).

E. Significance of Statutory Revision

Plaintiffs' other argument as to why the statute violates the "access to courts" provision of the Missouri Constitution is that the facts presented to this Court in *Mahoney* are distinguishable from those in this case, because the version of the statute considered in *Mahoney* would have given the trial court the discretion *not* to dismiss the action, whereas the current version of the statute mandated dismissal.

The flaw in this argument stems from the fact that, in *Mahoney*, the plaintiffs' petition was *actually dismissed* (without prejudice). It therefore did not matter to the parties in *Mahoney* (or to the issues presented therein) that the statute would have permitted the trial court to decline to dismiss the petition, or that the petitions of *other* hypothetical plaintiffs might not have been dismissed. Consequently, the plaintiffs in *Mahoney* posed (and this Court ruled on) exactly the same functional constitutional challenge as is being urged in this case—that being, that the dismissal of the plaintiffs' action, for failure to file a medical-opinion affidavit, constituted a barrier to their right to maintain their action, and that such barrier violated Missouri's "access to courts"

provision. Consequently, the decision in *Mahoney* cannot logically be characterized as having ruled on a constitutional issue different than the one now posed by plaintiffs.

III. RESPONSE TO POINT II

The trial court did not err in dismissing Case No. 2 (without prejudice), due to plaintiffs' failure to timely file the medical-opinion affidavit required under §538.225, because this requirement did not violate plaintiffs' right to trial by jury under the Missouri Constitution, in that (as this Court has previously held) this statutory requirement is a reasonable condition placed on medical-malpractice actions, given that such actions are ordinarily not submissible, in the absence of the type of medical opinions needed to file such an affidavit.

Plaintiffs also assert that the trial court erred in dismissing Case No. 2, because the medical-opinion affidavit requirement of §538.225 violated plaintiffs' rights under the "right to jury trial" provision of the Missouri Constitution (Art. I, §22(a)). Plaintiffs nevertheless acknowledge that a constitutional challenge, under this same provision, was rejected by this Court, in *Mahoney*.

Plaintiffs seek to distinguish *Mahoney*, in this context, in the same manner as they seek to distinguish that case, in the "access to courts" context—*i.e.*, by reference to the fact that the version of the statute in effect when *Mahoney* was decided would have given the trial court in that case an *option* not to dismiss the action (which option the trial court chose not to exercise). However, as explained above, the same functional constitutional

complaint was asserted in *Mahoney* as is being presented here—*i.e.*, that the Legislature did not have the constitutional power to authorize the dismissal of the plaintiffs' medical-malpractice action, for failure to timely file a medical-opinion affidavit. Thus, the holding in *Mahoney* directly applies to the present case.

It should also be noted that, in the present case, plaintiffs' action must be assumed to fall *outside* of the category of medical-malpractice actions that are submissible, in the absence of medical opinion testimony, because plaintiffs have not demonstrated (and do not claim) otherwise. It should be further noted that, regardless of whether plaintiffs are asserting a "facial" or an "as applied" constitutional challenge, that challenge is without merit, so long as the statute is constitutionally permissible, as applied to plaintiffs and those like them (*i.e.*, those who must present medical opinion testimony, on order to have a submissible medical-malpractice claim). Thus, this Court's decision in *Mahoney* cannot logically be discounted as authority in the present case, on the basis that the *Mahoney* decision relied on the proposition that the statute's affidavit requirement did not impose a burden on medical-malpractice plaintiffs that was any greater than the burden imposed on them by substantive law (in that such proposition is clearly true, at least with respect to the category of medical-malpractice plaintiffs to which the present plaintiffs belong).

The fact that plaintiffs' action must be assumed to require medical opinion testimony is also why plaintiffs' reliance on *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012), is misplaced. In that case, this Court's holding was based on its reasoning that the jury's function, since before the adoption of the Missouri

Constitution of 1820, had included the determination of the amount of damages recoverable in a (personal-injury) medical-malpractice action. *Id.* at 637-638. Thus, what this Court was addressing was whether the statute involved in that case impinged on the traditional substantive-law function of a jury in a medical-malpractice action. In the present case, any such analysis would have to be confined to the limited context of those medical-malpractice actions which require medical opinion testimony, in order to be submissible. Since Missouri juries have *never* been tasked with resolving liability (or damages) issues, in cases that are *not submissible*, it cannot possibly be argued that the statute now at issue impinges on a traditional jury function, by requiring the plaintiff in a medical-malpractice action that requires expert testimony to confirm that he or she has obtained the type of expert opinion needed for submissibility.

IV. RESPONSE TO POINT III

The trial court did not err in dismissing Case No. 2, due to plaintiffs' failure to timely file the medical-opinion affidavit as required by §538.225, (a) because actual compliance with the unambiguous mandatory terms of that statute was required, in that Missouri law does not authorize less-than-actual compliance with an unambiguous statutory requirement, merely because the statute is procedural in nature, and (b) because plaintiffs failed to preserve their "substantial compliance" argument for appeal, in that they did not raise it, until their motion to reconsider the dismissal of Case No. 2.

A. Claim of Error Not Preserved

In summary, plaintiffs' third Point Relied On argues that Case No. 2 should not have been dismissed, because (a) §538.225 should be liberally construed, so as to only require "substantial compliance" with its affidavit-filing deadline, and (b) plaintiffs "substantially complied" with that statute, by filing a statutory affidavit in Case No. 1. However, plaintiffs failed to raise this argument, in their response to defendants' motion to dismiss Case No. 2. [*See* L.F. #1 at pp. 81-92.] The first time that plaintiffs raised this argument, before the trial court, was in their motion to reconsider the order dismissing that case. [*Id.* at pp. 120-121.]

"Introducing new legal theories in a motion for reconsideration. . . does not preserve those newly raised theories for appellate review." *Slavens v. Slavens,* 379 S.W.3d 900, 904 (Mo. App. 2012); *see also Court of 5 Gardens Condominium Association v. 10330 Old Drive, LLC,* 326 S.W.3d 834, 837-838 (Mo. App. 2010). Because plaintiffs first asserted their "substantial compliance" theory in their motion for reconsideration, that argument has not been preserved for appellate review.

B. No "Liberal Construction," Because No Ambiguity

The initial argument encompassed by plaintiffs' third Point Relied On is that §538.225 should be "liberally construed," because it is a procedural statute. The two-fold flaw in this argument is that (a) a statute may only be "liberally construed" (or, for that matter, "construed" at all), if that statute is ambiguous or its meaning is uncertain, and (b)

§538.225 is not ambiguous or uncertain, whether in the abstract or in any relevant particular (nor do plaintiffs even contend that it is).

As this Court has stated, "[i]f the language used is plain and unambiguous, there is no reason for any construction. . . ." *Matter of Bloomer's Estate,* 620 S.W.2d 365, 367 (Mo. banc 1981), quoting *United Airlines, Inc. v. State Tax Commission*, 377 S.W.2d 444, 448 (Mo. banc 1964).

> When the language of a statute is unambiguous and conveys a plain and definite meaning, the courts have no business to look for or to impose another meaning. . . . If a statute is unambiguous, a court should regard it as meaning what it says since the legislature is presumed to have intended exactly what it states directly.

Matter of Bloomer's Estate, 620 S.W.2d at 367, quoting *State ex rel. Collins v. Donelson*, 557 S.W.2d 707, 710 (Mo. App. 1977). Stated somewhat more succinctly,

> [t]here is no room for construction where words are plain and admit to but one meaning. [Citation omitted.] Where no ambiguity exists, there is no need to resort to rules of construction.

Abrams v. Ohio Pacific Express, 819 S.W.2d 338, 340 (Mo. banc 1991).

The words and phrases contained in §538.225 that are particularly relevant here are "shall," "file," "affidavit," and "no later than ninety days after the filing of the petition." *Id.* None of these words or phrases is either ambiguous or uncertain; nor do plaintiffs contend that they are. As a consequence, Missouri law would not countenance any "liberal construction" of that statute.

C. No "Substantial Compliance" Rule for Procedural Statutes

1. Introduction.

Plaintiffs' further argument is that, if a statute is procedural, actual compliance with the mandatory terms of that statute is not required, so long as the conduct of the party whose compliance is mandated by that statute has somehow accomplished the objective that the Legislature apparently sought to achieve, in imposing such mandate. Plaintiffs contend that this premise is supported by a number of Missouri appellate decisions, including decisions by this Court. This contention is incorrect.

2. Plaintiffs' Cases: *Actual* Compliance.

As ostensible support for this contention, plaintiffs have cited a number of Missouri appellate decisions that contain the expression "substantial compliance" (or some similar expression). In about half of these cases, the holding is simply to the effect that the particular conduct of the party who was subject to the statutory procedural requirement in question was sufficient (or adequate) to satisfy the actual terms of the relevant requirement—particularly given the relative uncertainty of the pertinent terms used in such statute or rule. *See In re: Cupples,* 952 S.W.2d 226 (Mo. banc 1997); *State ex rel. Brickner v. Saitz,* 664 S.W.2d 209 (Mo. banc 1984); *State ex rel. Jakobe v. Billings,* 421 S.W.2d 16 (Mo. banc 1967); *Altom Construction Company, LLC v. BB Syndication Services, Inc.*, 359 S.W.3d 146 (Mo. App. 2012); *State v. Rios,* 314 S.W.3d 418 (Mo. App. 2010); *State v. Bewley,* 68 S.W.3d 613 (Mo. App. 2002); *Potts v. State,* 22

S.W.3d 226 (Mo. App. 2000); *City of Cuba v. Williams*, 17 S.W.3d 630 (Mo. App. 2000); *State v. Neely*, 979 S.W.2d 552 (Mo. App. 1998).

In *Cupples*, for example, this Court addressed the question of whether its special master had complied with the provisions of Rule 68.03(d) and Rule 73.01 (as then in effect), which required the special master to "make a record of" any excluded evidence, and to "take and record the evidence in full." *Cupples*, 952 S.W.2d at 232. This Court concluded that the special master had complied with these requirements, by accepting a number of protracted offers of proof from the respondent, and by including in the trial record three exhibits that had been excluded from the evidence. Thus, when this Court's opinion summarized its holding, by stating that the special master had "substantially complied" with the relevant rules, what this Court clearly meant was that the special master had *actually* complied with the relevant rules—or, alternatively, that the special master's conduct constituted adequate compliance, given the relative uncertainty of the combined terms of the two rules in question, which this Court paraphrased as requiring the special master to "take and record the [inadmissible] evidence in full." *Id.* at 232 (brackets in original).

In *State ex rel. Brickner*, this Court addressed whether the trial court in the underlying action had jurisdiction to enter an order approving a supersedeas bond, even though its original order doing so was entered the day after the judgment debtor's notice of appeal was filed (and even though its amended order doing so was entered two days later). The relator contended that the trial court did not have jurisdiction to enter either of these orders, in that Rule 81.09 authorized the trial court to fix the amount of a

supersedeas bond "at or prior to" the time of the filing of a notice of appeal. This Court rejected the relator's argument.

In doing so, this Court first noted that the order entered three days after the filing of the notice of appeal merely "supplemented" the previous order. This Court went on to conclude that "there were no irregularities of sufficient moment to deprive the trial court of jurisdiction to the fix the amount of the bond. . . ." *Id.*, 664 S.W.2d at 212. Thus, what this Court held was that, by entering its order on the day after the day that the notice of appeal was filed (which filing had occurred at 4:37 p.m.), the trial court had at least acted "at" (even if not "prior to") the time the notice of appeal was filed.

This Court also concluded that, even if the trial court had not adequately complied with the relevant rule, the appellate courts had both the jurisdiction and the discretion to approve (and to fix the amount of) the supersedeas bond—which jurisdiction this Court then proceeded to exercise. *Id.* at 212. Consequently, the holding in that case was not to the effect that a party subject to a procedural requirement need not comply with the unambiguous terms of such requirement, so long as that party's conduct satisfies the apparent legislative objective behind that requirement.

In *State ex rel. Jakobe*, the relator claimed that the trial court in the underlying action had erred, when it denied the relator's motion seeking a change of venue (and the disqualification of the trial judge), on the basis that the relator's application and affidavit had not satisfied the requirements of the relevant rule. *Id.*, 421 S.W.2d at 17. That rule required a party seeking either of such remedies to submit an affidavit (attached to its application), stating that (a) the party has just cause to believe that he cannot have a fair

trial on account of the cause alleged, and (b) that the application is made in good faith and not to delay the trial, or to vex or harass the adverse party. *Id.* The relator's application contained the statement that the application was being made in good faith, and not to delay the trial, or to vex or harass the adverse party. *Id.* The affidavit attached to that application stated (a) that the relator had just cause to believe that the relator could not have a fair trial in the trial court, for the reasons stated in the application, and (b) that the facts stated in the application were true. *Id.*

This Court concluded that the application and affidavit had satisfied the relevant rule, even though a portion of what was required by the rule to be stated in the affidavit was actually stated in the application (but was incorporated, by reference, in the affidavit). *Id.* at 18. Although this Court referred to this incorporation-by-reference as "a substantial and sufficient compliance with" the requirements of the relevant rule, this Court also commented that such incorporation "was substantially the same as including the words in the affidavit." *Id.*

Consequently, this case is *also* not authority for the proposition that something less than actual compliance with a procedural rule is required, so long as the party's conduct satisfies the apparent (quasi-legislative) purpose underlying the rule.

In *Altom*, the plaintiffs (a subcontractor and an engineering firm) successfully asserted mechanic liens in the trial court. On appeal, a mortgagee asserted that the plaintiffs had failed to comply with a statute requiring that lien claimants file a "just and true account" of the demand due. *Id.*, 359 S.W.3d at 155, quoting §429.080, RSMo. Cum. Supp. 2007. As the Court of Appeals noted, this "just and true account" standard

had previously been construed as requiring such detail and itemization as would be sufficient to enable the owner to investigate and determine the propriety of the lien claim. *Id.* The Court of Appeals further noted that there was no precise definition for the phrase "just and true," and that (therefore) whether a lien statement meets that standard depends on the facts of each particular case. *Id.* The court then proceeded to conclude that the record in the case provided substantial evidence that the lien statements "present[ed] a just and true accounting." *Id.*

Thus, in *Altom*, the Court of Appeals merely held that the conduct of the party subject to the procedural statute in question (the lien claimants) had actually complied with the relevant statutory requirement, particularly given the lack of a precise definition for the words setting forth the applicable standard with which compliance was required. Conversely, the Court of Appeals did not hold that a procedural statute requires only such conduct, on the part of the party whose compliance is required, as will accomplish the apparent legislature purpose underlying the statute.

In *Rios*, a criminal defendant claimed that the trial court erred in denying his motion for new trial, which was based on a statute stating that the trial court "*may*" grant a new trial, "[w]hen the jury has been separated without leave of the court, after retiring to deliberate upon their verdict. . . ." *Rios*, 314 S.W.3d at 417-418 (emphasis added), quoting §547.020(2), RSMo. 2000. The appellant asserted that "juror separation," within the meaning of §547.020(2), occurred when two of the jurors spent five minutes together in a restroom adjacent to (and only accessible from) the jury deliberation room, during which time they discussed some of the evidence in the case. *Rios* at 418-419. The Court

of Appeals held that, because there had been no contact with any juror by a third party, and no contact among jurors outside the jury deliberation room, no "juror separation" had occurred, within the meaning of the statute. *Id.* at 420.

The Court of Appeals did comment on the purpose of the statute, and quoted a statement from a previous decision, to the effect that a "'sensible' and 'substantial' compliance must be considered to be sufficient to satisfy" it. *Id.* at 418, quoting *State v. Cooper*, 648 S.W.2d 137, 140 n. 5 (Mo. App. 1983). However, the court did not rely on this latter standard, reaching its conclusion. Nor did the court hold that compliance with a mandatory and unambiguous procedural statute occurs, whenever the party whose compliance is required has taken steps which, even though not technically compliant, nevertheless accomplish the legislative purpose underlying the relevant statute. Instead, the court held that "juror separation" within the meaning of §547.020(2) had not occurred, because there was no contact with any juror by a third party, and no contact among jurors outside the jury deliberation room. *Rios*, 314 S.W. 3d at 420.

In *Bewley*, a criminal defendant appealed, on the ground that the trial court had erred in admitting into evidence a video-taped deposition of an alleged child victim, pursuant to §491.680, RSMo. 2000. *Bewley*, 68 S.W.3d at 619-620. That statute allows a videotaped deposition of an alleged child victim (taken outside the presence of the defendant) to be used as substantive evidence, if the court finds

> [t]hat significant emotional or psychological trauma to the child which would result from testifying in the personal presence of the

> defendant exists, which makes the child unavailable as a witness at the time of the preliminary hearing or trial. . . .

Bewley, 68 S.W.3d at 620, quoting §491.680.2. The trial court had made a specific finding that, if the alleged child victim had to testify "in front of" (that is, "in the personal presence of") the defendant, the witness would suffer significant emotional or psychological trauma. *Bewley*, 68 S.W.3d at 620. On appeal, the defendant asserted that the statute also required the trial court to make a *specific* finding that the alleged child victim was thereby rendered "unavailable as a witness at trial." *Id.* The Court of Appeals rejected this assertion, agreeing with the State that the trial court's actual finding (that the victim would suffer emotional and psychological trauma, if required to testify in the personal presence of the defendant) satisfied the statutory requirement. *Id.*

Although the Court of Appeals went on to state that the trial court "substantially complied" with the requirements of the statute (*id.* at 620), the court did not hold anything other than that actual compliance of the statute had occurred. Specifically, the Court of Appeals agreed with the State's assertion that a trial court finding that the victim would suffer emotional and psychological trauma, which would in effect make the victim unavailable as a witness if required to testify in the personal presence of the defendant, satisfies the statute's threshold requirement. *Id.*, 68 S.W.3d at 620.

In *Potts*, a criminal defendant asserted that his appellate counsel had been ineffective, by failing to argue on direct appeal that the trial court had erred in admitting breathalyzer results into evidence. *Potts*, 22 S.W.3d at 230. Specifically, the criminal defendant asserted that the breathalyzer results lacked a proper foundation, because the

State failed to demonstrate complete compliance with Department of Health regulations governing how blood-alcohol tests are to be performed. *Id.* The Court of Appeals rejected this argument, on the basis that the regulation with which the State had arguably failed to demonstrate complete compliance was merely one which governed matters "collateral to" the proper performance of a blood-alcohol test (specifically, a regulation governing where the original records of such tests are to be maintained). *Id.* at 230-232. Although the Court of Appeals commented that only "substantial compliance" with such collateral regulations was required (*id.* at 232), a sufficient basis for the court's holding was its conclusion that the relevant statute only required that blood-alcohol tests be "*performed* according to department regulations," whereas the regulation in question did not regulate how such tests were to be performed. *Id.* at 231 (emphasis in original). Furthermore, the Court of Appeals did not hold that sufficient compliance with the mandatory terms of an unambiguous statutory requirement occurs, so long as there is conduct that accomplishes the legislative purpose underlying that statute.

In *City of Cuba*, the defendant appealed from summary judgment entered in favor of the third-party defendants. *Id.* 17 S.W.3d at 631. In entering summary judgment, the trial court had made a determination that there was "no just cause to delay entering judgment" as to the portion of the action that was being disposed of by the summary judgment. *Id.* In passing, the Court of Appeals noted that the parties to the appeal agreed that this determination was sufficient to allow the appeal, pursuant to Rule 74.01(b), and that "it appears that 74.01(b) was substantially complied with." *City of Cuba*, 17 S.W.3d at 631, n. 1. The court did not hold that anything less than actual compliance with Rule

74.01(b) was sufficient—much less that sufficient compliance with a procedural rule occurs, whenever a party's conduct has accomplished the underlying legislative purpose of the rule in question.

In *Neely*, a criminal defendant asserted that the trial court had erred in admitting into evidence a transcript of the testimony of a witness given during the defendant's preliminary hearing, in that, at the time of that preliminary hearing, the defendant was represented by counsel not licensed to practice law in Missouri. *Neely*, 979 S.W.2d at 556-557. As the Court of Appeals noted, the specific issue on appeal was whether noncompliance with the requirements of Rule 9.03 (requiring that out-of-state counsel file a particular statement, and that designated local counsel enter their appearance) had "substantially depriv[ed]" the defendant of his "right to a fair hearing." *Neely*, 979 S.W.2d at 558. The Court of Appeals concluded that the fact that defendant had been represented by out-of-state counsel (of his choosing) did not substantially deprive him of his right to a fair hearing, particularly given that, at the time of the preliminary hearing, the defendant's out-of-state counsel was in "substantial compliance" with the referenced requirements of Rule 9.03. *Neely*, 979 S.W.2d at 558. Thus, *Neely* did not hold that sufficient compliance with a procedural rule occurs, whenever a party's conduct has accomplished the purpose underlying the rule in question.

3. Plaintiffs' Cases: Express *Statutory* Standard.

Of the remaining decisions cited by plaintiffs, perhaps the most noteworthy are: *Glass v. State*, 2013 WL 1748281 (Mo. App., op. filed April 23, 2013); *Knight v.*

Carnahan, 282 S.W.3d 9 (Mo. App. 2009); and, *Celtic Corporation v. Tinnea*, 254 S.W.3d 137 (Mo. App. 2008). These cases are noteworthy, in that they all reflect a "substantial" compliance standard which is based upon an *express* statutory statement that only "substantial" compliance with particular standards is required.

In *Glass*, the issue presented to the Court of Appeals was whether the trial court erred in denying the appellant's post-conviction motion, which was based on a claim of ineffective assistance of counsel in connection with a guilty plea. *Id.*, 2013 WL 1748281, at *2. Appellant asserted that defense counsel failed to advise him that the information did not set forth the necessary elements of the crime with which he was charged. *Id.* In rejecting that assertion, the Court of Appeals concluded that the information in question complied with the applicable rule, which required the information to be "substantially consistent with the applicable approved charge (reflecting the elements of the offense)." *Id.* at *2-*3, citing Rule 23.01; *see also* Rule 23.01(b) (information "substantially consistent with" the approved charge complies with this rule).

Thus, the *Glass* decision did not involve the recognition of any court-created "substantial compliance" doctrine—much less hold that compliance with a procedural rule is adequate, so long as there has been conduct which accomplishes the underlying purposes of the rule. Instead, the Court of Appeals simply applied a procedural rule which *contained* a "substantially consistent with" standard.

In *Knight*, the Court of Appeals addressed an appeal from the denial of a voter challenge to the Secretary of State's certification of a statewide ballot measure. *Knight*, 282 S.W.3d at 13-14. In the course of its decision, the Court of Appeals commented that,

"[w]hen assessing whether a petition violates implementing statutes, we look only for substantial compliance." *Id.* 282 S.W.3d at 15, citing *Committee for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 510 (Mo. banc 2006). Significantly, the decision of this Court cited for this proposition concerned the standards for compliance reflected in the Missouri statute regulating initiative petitions—§116.040, RSMo. 2000. *See Committee for a Healthy Future*, 201 S.W.3d at 509. As this Court noted in that case, this statute specifically states that an initiative petition is only required to be in "substantially the form" set forth in the statute, and that, if such form "is followed substantially" (and certain other requirements are met) the petition "shall be sufficient, disregarding clerical and merely technical errors." §116.040; *see Committee for a Healthy Future*, 201 S.W.3d at 509.

Thus, what both *Knight* and *Committee for a Healthy Future* held was simply that, under the *express terms* of a particular statute, only "substantial compliance" with its terms was required.

In *Celtic*, the issue on appeal concerned the application of two statutes regulating the form of corporate acknowledgements for real-estate conveyances. *Celtic*, 254 S.W.3d at 143. The first of these (§486.330, RSMo. 2000) dictates the form of such acknowledgements, but also states that acknowledgements need only be in "substantially" the form set forth in that statute. *Id.*, quoting §486.330. The other of these statutes simply provides sample forms of acknowledgement "which may be used," in the context of real-estate transactions. *Celtic*, 254 S.W.3d at 143, quoting §442.210 RSMo. 2000. After reviewing the specific language of the acknowledgment that had

been used in the case before it, the Court of Appeals concluded that it "'substantially' complie[d] with the requirements of both §486.330 and §442.210." *Celtic*, 254 S.W. 3d at 144.

Thus, the decision in the *Celtic* case concerned the proper application of statutes that (a) only required "substantial" conformity with the form set forth in the statute, and (b) provided examples that "may" (but need not) be used, in crafting an acknowledgement. That decision *also* did not hold that compliance with the mandatory and unambiguous requirements of a procedural statute can consist of "substantial compliance" (or anything other than actual compliance).

4. Plaintiffs' Cases: *M.D.L.* and *Kindred*.

Similarly, neither of the other two cases relied upon by plaintiffs holds that something less than actual compliance with the unambiguous requirements of a procedural statute (or rule) will suffice, so long as the conduct of the party who is required to comply with it has satisfied its legislative (or quasi-legislative) purpose.

a. *M.D.L.*

The first of these other cases is *M.D.L. v. S.C.E.*, 391 S.W.3d 525 (Mo. App. 2013). In that case, the Court of Appeals concluded that it had discretion to review an appeal on the merits, even if the respondent's brief did not fully comply with Rule 84.04. *Id.* 391 S.W.3d at 529, n. 2. Prior to doing so, the court had noted that "substantial compliance" with Rule 84.04 was "mandatory." *Id.*

This latter comment did not constitute a holding that *only* "substantial compliance" with Rule 84.04 is required; nor was it anything more than *dicta*, given that the court's holding was merely that it had the discretion to review the issues presented on appeal, notwithstanding the failure of one of the parties to comply with that rule.

Furthermore, the authority cited by the *M.D.L.* decision as support for its "substantial compliance" comment (and the predecessors to such authority) do not indicate that something less than *actual* compliance with Rule 84.04 is required. The only authority cited by the *M.D.L.* decision, as support for this comment, was *Emigi ex rel. Emigi v. Curtis*, 117 S.W.3d 174, 177 (Mo. App. 2003). That decision contains the statement that "[s]ubstantial compliance with Rule 84.04 is mandatory." *Id.*, 117 S.W.3d at 177. In support for this proposition, the *Emigi* decision cites *Gray v. White*, 26 S.W.3d 806, 815 (Mo. App. 1999). *Gray*, in turn, commented that appellate courts are hesitant to dispose of an appeal, for violations of Rule 84.04, but that "substantial compliance with Rule 84.04 is nevertheless required." *Id.*, 26 S.W.3d at 815. As authority for this latter proposition, the *Gray* decision cited *Brancato v. Wholesale Tool Co., Inc.*, 950 S.W.2d 551, 553-554 (Mo. App. 1987). The *Brancato* decision, for its part, acknowledged that appellate courts have discretion to rule on the merits of an appeal, notwithstanding a failure to comply with Rule 84.04, but that the failure to comply with the "Points Relied On" portions of that rule creates significant problems, and that, consequently, appellate courts have no obligation to review a brief that does not conform to that portion of Rule 84.04. *Brancato*, 950 S.W.2d at 553-554.

As its ultimate support for this latter proposition, *Brancato* cited this Court's seminal decision in *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). That decision, in turn, construed the version of Rule 84.04(d) then in effect. *Id.*, 570 S.W.2d at 687. That rule stated that "Points Relied On" were required to state briefly the actions of the trial court for which review was sought, and wherein and why they were claimed to be erroneous, "with citations of authorities thereunder." *Thummel v. King*, 570 S.W.2d at 687, quoting Rule 84.04(d). The rule also stated that, if more than three authorities were cited in support of a particular point, "the three authorities principally relied on shall be cited first." *Thummel v. King*, 570 S.W.2d at 687, quoting Rule 84.04(d). This Court went on to state that the rule's language did not specifically state whether *any* authorities were *required* to be cited, under a "Point Relied On," and that the citation of any such authorities was, therefore, not mandatory. *Id.*

Thus, the seminal authority for the "substantial compliance" proposition referenced in *M.D.L.* is apparently the holding of this Court (in *Thummel v. King*) that, due to its uncertainty, the former version of Rule 84.04(d) did not actually require an appellant to cite any authorities, following a "Point Relied On." Furthermore, it is clear that this Court has never held that something less than *actual* compliance with the unambiguous and mandatory terms of Rule 84.04 is sufficient—notwithstanding that Missouri appellate courts have discretion to address the merits of an appeal, even in the absence of compliance with that rule. *See State ex rel. Director of Revenue v. White*, 796 S.W.2d 629, 630, n. 1 (Mo. banc 1990).

b. *Kindred.*

The only other decision relied on by plaintiffs, as authority for their argument that actual compliance with §538.225 was not required, is *Kindred v. City of Smithville*, 292 S.W.3d 420 (Mo. App. 2009). That case involved the application of §432.070, RSMo. 2000, which provides that the contracts of certain political subdivisions "shall be subscribed by the parties thereto." *Kindred*, 292 S.W.2d at 426, quoting §432.070. In that case, certain property owners had granted an easement to the city, in order to allow the city to install (and maintain) water and sewer lines on their property. *Id.* at 422. That easement was contained in an easement agreement which was presented to the property owners by the city, and which reserved to the property owners the right to connect to any such lines installed on their property (without charge). *Id.* at 422-423. The city's board of aldermen thereafter approved the building of a sewer within the easement. *Id.* at 423. Subsequently, however, the city declined the property owner's request to connect to these sewer lines, and the property owners sued to establish their right to do so. *Id.* at 423. The city claimed that the easement agreement was void, for failure to comply with the "subscription" requirement of §432.070, in that it had only been signed by the property owners. *Kindred, 292 S.W.3d* at 423-426.

The trial court ruled in favor of the property owners, and the Western District of the Court of Appeals affirmed. In doing so, the court first noted that the "easement agreement" was essentially a deed, and that only the signatures of the property owners would have been required to render it valid, as such. *Id.* at 427. The court then concluded that "substantial compliance" with the statute had occurred, and that such

substantial compliance was sufficient to render the easement agreement enforceable against the city. *Id.* at 427-428. The Western District did not analyze the two obvious (and related) alternative grounds for affirming the trial court. The first of these is that any easement granted to the city was presumably merely an easement for use, and would not have entitled the city to *exclusive* use of the land within the easement boundaries (*i.e.*, exclusive of the fee owners of that land). The second of these is that the property owners' reservation of their right to connect to any lines that were installed on their property by the city was at least sufficient to confirm the property owners' right to do so (irrespective of whether the city had entered into an enforceable bi-lateral agreement granting them such a right).

Consequently, the court's "substantial compliance" conclusion was apparently unnecessary to its holding.

Furthermore, the only "substantial compliance" authority cited by the Western District was its own previous decision in *Public Water Supply District No. 16 v. City of Buckner*, 44 S.W.3d 860 (Mo. App. 2001) (hereinafter, "*PWSD*"). In that case, the issue also concerned the application of §432.070 (specifically, its requirement that contracts of certain political subdivisions be signed by an agent of the political subdivision who is authorized to do so), in connection with an agreement between a city and a water supply district. *PWSD* at 861-863. The district claimed that the agreement was void, in that its president had not been authorized to sign the agreement, while the city claimed that the agreement was valid. *Id.* at 863. The parties filed cross-motions for summary judgment. *Id.* The trial court denied the district's motion and granted the city's motion. *Id.*

The Western District held that the trial court did not err in denying the district's motion (but did err in granting summary judgment to the city), in that there was a genuine issue of fact presented by the evidence in the record, as to whether the district's president had been authorized to sign the agreement. *Id.* at 865. Among such evidence was a petition filed by the district, which sought circuit court approval of this same agreement (and attached a copy of it signed by the district's president). *Id.* at 862, 864-865. In reaching its conclusion, the Western District relied, at least in part, on the proposition that "substantial compliance" with §432.070 "may, in some circumstances, be sufficient." *PWSD* at 864.

As authority for this latter proposition, the Western District relied on its previous decision in *Velling v. City of Kansas City*, 901 S.W.2d 119 (Mo. App. 1995). That case also involved the application of §432.070 (RSMo. 1986). In that case, a petition was filed against a city, seeking enforcement of a written employment contract. The trial court dismissed the petition, for failure to state a claim, on the ground that the plaintiff had not alleged that the contract satisfied the requirements of the statute. *Velling* at 120-122. The Western District reversed, concluding that the plaintiff could potentially prove that the contract "substantially complied" with the statute. *Id.* at 124. In doing so, the Western District relied on the previous decision of the Southern District in *Lynch v. Webb City School District No. 92*, 418 S.W.2d 608 (Mo. App. 1967).

In *Lynch*, the Southern District held that a teacher's contract with a school board substantially complied with §432.070 (RSMo. 1959), and a similar statute specifically applicable to teacher contracts (what is currently §168.101, RSMo. 2000). *Lynch*, 418

S.W.2d at 613-614. The Southern District further concluded that only "substantial compliance" with those requirements was required, relying on this Court's decision in *State ex inf. McKittrick v. Whittle*, 63 S.W.2d 100 (Mo. banc 1933).

However, in *McKittrick*, this Court merely stated that "[o]f course, there must be substantial compliance with" the statute permitting a school board to contract with an untenured teacher, at any lawful meeting. *McKittrick*, 63 S.W.2d at 101, citing §9209, RSMo. 1929 (now §168.101, RSMo. 2000—one of the two statutes considered in *Lynch*). This statement was not attributed to any prior appellate decision; nor was it more than a causal remark, made in the course of reaching a conclusion on a completely unrelated issue. That issue arose in the context of a *quo warranto* proceeding to oust a school board member (*i.e.*, a member of the board of directors of a school district), based on the board member having voted in favor of contracting with a close relative of his to be a teacher for the school district, allegedly in violation the nepotism prohibition of Article XIV, §13 of the Missouri Constitution of 1875 (what is now Mo. Const., Art. VII, §6). *McKittrick*, 63 S.W.2d at 101. The specific issue was whether the statute referenced above resulted in the board member being a person who has "the right to name or appoint" a teacher, within the meaning of the constitutional provision. This Court concluded that it did not. Thus, the issue presented in *McKittrick* did not involve the standards for compliance under the referenced statute—much less whether only "substantial compliance" with it was required.

Consequently, the referenced statement in *McKittrick* did not constitute authority for the "substantial compliance" holding in *Lynch*. It also follows that, to the extent that

the *Kindred*, *PWSD* and *Velling* decisions, in turn, ultimately refer back to *Lynch*, as support for the proposition that only "substantial compliance" with §432.070 is required, those decisions rely upon invalid authority.

Furthermore, there is an independent and satisfactory basis for the actual holding in *Lynch* (as well as the statement in *McKittrick*), which is unrelated to whether only "substantial compliance" is required for procedural statutes, in general. This is the principle that *school laws* (unlike other laws) are not to be applied literally or technically. As this Court has explained:

> Our courts have frequently announced and heartedly approved the salutary and time-honored principle that school laws will be construed liberally to aid in effectuating their beneficent purpose, and that, since the administration of school matters usually rests in the hands of plain, honest and well-meaning citizens, not learned in the law, substantial rather than technical compliance with statutory provisions and requirements will suffice.

State ex rel. Reorganized School District R-9 of Grundy County v. Windes, 513 S.W.2d 385, 390 (Mo. 1974), quoting *State ex rel. Reorganized School District v. Robinson*, 276 S.W.2d 235, 240 (Mo. App. 1955). Such a principle would clearly not apply to the specific issue in the present case, in that it does not concern the application or interpretation of *school law*.

5. This Court's "Substantial Compliance" Jurisprudence.

Moreover, this Court has never held that only "substantial" compliance (or anything less than actual compliance) by a party with an otherwise unambiguous and mandatory requirement of a procedural statute or rule is sufficient to satisfy such a requirement. Nor has it ever held that any such "substantial" compliance is sufficient to avoid a mandatory consequence imposed under such statute or rule, as a sanction for failure to satisfy such a requirement.

The one possible qualification to at least the first of the two foregoing propositions consists of a statement in a footnote in this Court's decision in *Green v. Lebanon R-III School District*, 13 S.W.3d 278, 281, n. 5 (Mo. banc. 2000). That footnote addressed a challenge by one set of parties to the briefs filed by the other set of parties, as not in compliance with Rule 84.04(d) and Rule 84.04(i). *Green* at 281, n. 5. In response to that challenge, this Court stated its conclusion that "the briefs substantially comply with the requirements of the rules." *Id.* However, as explained above, Missouri appellate courts have consistently held that they have discretionary power to decide an appeal, irrespective of a party's failure to comply with the specific requirements of Rule 84.04. Given that, in *Green*, this Court decided to reach the merits of the appeal, the existence of this discretionary power would provide at least an independent and sufficient basis for this Court's decision to do so (*i.e.*, its holding), thereby rendering the statement as to "substantial compliance" with Rule 84.04 superfluous. It should also be noted that Rule 84.04 is distinguishable from the statute under consideration here (§538.225), in that Rule

84.04 does not expressly mandate dismissal of an appeal (or any *other* result), as a consequence of a party's failure to comply with it.

6. Any "substantial compliance" rule not applicable to *filing* requirement.

Finally, this Court has indicated that, even if some aspects of a particular statute similar to §538.225 could *conceivably* be satisfied by "substantial" compliance, the specific aspect of this statute with which plaintiffs failed to comply cannot be satisfied by anything other than actual compliance. *Frogge v. Nyquist Plumbing and Ditching Company, Inc.*, 453 S.W.2d 913 (Mo. banc 1970). That case involved the application of a municipal notice-of-suit statute (§79.480, RSMo. 1959), in the context of a personal injury accident. *Frogge* at 914-915. As then in effect, this statute stated that, in order to maintain an action against a fourth-class city, the plaintiff was required to give notice—in writing and to the mayor of that city—within 90 days following the claimed injury. *Id.* at 914-915. That statute also provided that the notice was required to state certain information concerning the claimed injury (such as the place where it occurred, the time when it occurred and the "character and circumstances of the injury"). *Id.* at 915, quoting §79.480. No such notice was served by the plaintiffs in the action, although a copy of the personal-injury petition was served on the city clerk, within the statutory 90-day period. *Id.* at 915.

On appeal, the city asserted that the plaintiffs had not complied with the statute, and therefore could not maintain their action against it. *Id.* at 915-916. This Court

agreed, reasoning that, even if merely "substantial" compliance could constitute sufficient satisfaction of those portions of the statute relating to the *contents* of the required notice, those portions of the statute unambiguously requiring that the notice be given to the mayor (and in writing), within the specified time-frame, could not be satisfied by anything other than strict compliance with its terms. *Id.* at 915. As this Court explained,

> [t]he apparent rule is that the requirements of the statute that notice must be in writing and given to the mayor within the time specified are to be strictly construed [citations omitted], but as to the contents of the notice the statute is to be construed liberally in favor of plaintiff and strictly against the city so that a substantial compliance is sufficient.

Id. at 915, quoting *Quinn v. Graham*, 428 S.W.2d 178, 182 (Mo. App. 1968).

Thus, the rationale employed by this Court in *Frogge* yields the conclusion that plaintiffs may not satisfy (by way of "substantial compliance") that portion of §538.225 which required them to file an affidavit (in Case No. 2), within a specified period after filing their petition therein—even if plaintiffs *could* argue that the *content* of any such timely-filed affidavit might satisfy the statute, so long as it "substantially complied" with the portions of that statute regulating the affidavit's substance.

D. No "Substantial Compliance" in this Action

Even if plaintiffs were correct that a standard of "substantial compliance" is applicable to that portion of §538.225 which requires that a medical-opinion affidavit be

filed "[i]n any [medical-malpractice] action," within a prescribed period of time, plaintiffs did not "substantially comply" with that portion of the statute.

The primary factual premise of plaintiffs' claim to the contrary is the proposition that plaintiffs had filed such an affidavit, in a *previous* action. However, that fact does not tend to demonstrate that plaintiffs took any steps in Case No. 2 that would arguably constitute a partial or incomplete (or, in any other sense, "substantial") compliance with the statutory requirement that they file an affidavit in that case.

The secondary factual premise relied on by plaintiffs, in support of their claim of "substantial compliance," is the proposition that counsel for both plaintiffs and defendants agreed that the discovery conducted in Case No. 1 was to be treated as conducted in Case No. 2. This fact also does not tend to demonstrate that plaintiffs actually took any steps toward filing an affidavit in Case No. 2.

Furthermore, such an agreement by defense counsel did not constitute a *waiver* of defendants' right to insist on plaintiffs' compliance with the statutory filing requirement, in that the statutory affidavit does not constitute "discovery." Nor do plaintiffs actually argue that this agreement *did* effect a waiver of the statutory filing requirement. Instead, plaintiffs are apparently attempting to suggest that their *misapprehension* of the import of their agreement with defendants somehow effectuated (or contributed to effectuating) a "substantial compliance" with the statutory filing requirement. However, the fact that such a misapprehension existed does not tend to demonstrate that plaintiffs actually took any steps toward complying with the statute (whether substantial, or otherwise).

Thus, plaintiffs have not identified any facts in the present record that would support the conclusion that they "substantially complied" with the affidavit-filing requirement of the statute, even if such "substantial compliance" were to be considered sufficient to satisfy that requirement.

V. RESPONSE TO POINTS IV AND V

The trial court did not err in dismissing Case No. 3 as barred by the relevant statutes of limitations, notwithstanding plaintiffs' current arguments regarding the unconstitutionality of the dismissal of Case No. 2 pursuant to §538.225, because plaintiffs do not actually assert any constitutional defect in any law that resulted in the dismissal of Case No. 3, in that plaintiffs' sole constitutional arguments concern the Legislature's power to require plaintiffs to timely file a medical-opinion affidavit in Case No. 2, whereas the dismissal of Case No. 3 resulted from the expiration of both (a) the applicable limitations period, and (b) the savings period following the dismissal of Case No. 1.

In their fourth and fifth Points Relied On, plaintiffs assert that the trial court in Case No. 3 erred, by dismissing that action as barred by the applicable statutes of limitations. The claimed basis for error is that the dismissal of Case No. 3 was *due to* the dismissal of Case No. 2 (which plaintiffs contend was not constitutionally permissible),

thereby making the dismissal of Case No. 3 unconstitutional, for the same reasons that plaintiffs have raised, with respect to the dismissal of Case No. 2.

The basic flaw in plaintiffs' argument is that Case No. 3 was not dismissed *because* Case No. 2 was dismissed. Instead, Case No. 3 was dismissed *because* it was not filed within (a) either of the relevant limitations periods (applicable to wrongful-death and survivorship claims), or (b) one year following the dismissal of Case No. 1. In this connection, it should be noted that plaintiffs do not challenge the conclusion of the trial court, in Case No. 3, that plaintiffs' petition in that action was not filed within either of the relevant limitations periods. It should also be noted that plaintiffs' brief confirms that Case No. 3 was filed more than one year after plaintiffs voluntarily dismissed Case No. 1. [Appellants' Brief at p. 57.]

Furthermore, plaintiffs have acknowledged that Case No. 3 was not eligible to be "saved" from the bar of the applicable statutes of limitations, by either of the Missouri "savings" statutes: §516.230, RSMo. 2000 (survivorship claims); and, §537.100, RSMo. 2000 (wrongful-death claims). This is clearly true, for two reasons. The first is that those statutes would only apply, if Case No. 3 were filed within one year following the non-suit of an action that was actually filed within the relevant statutory limitations period (which was only true for Case No. 1). The second is that neither of the those statutes operate to "save" an action, solely because it is filed within one year after the non-suit of an action that was *itself* "saved" from the statute of limitations (by having been filed within one year of the non-suit of a timely-filed action).

Consequently, plaintiffs' premise, that the dismissal of Case No. 3 was the result of the dismissal of Case No. 2, is fundamentally incorrect.

Furthermore, plaintiffs do not actually assert a constitutional argument, with regard to the statutes that were relied upon by the trial court in dismissing Case No. 3; nor do plaintiffs make any argument that the trial court in Case No. 3 exercised its authority unconstitutionally. Reduced to its essence, the only constitutional complaint urged by plaintiffs, in the context of the present appeals, is that the Legislature cannot constitutionally require a medical-malpractice plaintiff (specifically, a medical-malpractice plaintiff whose cause of action depends upon medical opinion testimony) to obtain such an opinion, within either (a) 90 days after the filing of the plaintiffs' petition, or (b) 180 days after such filing (if the plaintiff shows good cause for extending the 90-day period). Even if this constitutional complaint is valid, it only demonstrates a constitutional defect in the particular statute which contains this requirement.

Stated differently, even if plaintiffs' constitutional argument is correct, the trial court in Case No. 3 could not possibly have committed any error, since *either* (a) the judgment of the trial court in Case No. 2 must be reversed (because §538.225 could not constitutionally authorize the dismissal of that action), in which case Case No. 3 (and its dismissal) would be rendered immaterial, *or* (b) the judgment of the trial court in Case No. 2 must be affirmed (because the dismissal pursuant to §538.225 was constitutional), in which case plaintiffs' only constitutional arguments would necessarily have been ruled against them.

For these reasons, there is no basis for reversing the dismissal of Case No. 3.

VI. CONCLUSION

For the reasons stated herein, both the dismissal of Case No. 2 (without prejudice) and the dismissal of Case No. 3 (with prejudice) must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

That, pursuant to Rule 55.03, the arguments set forth in this document are warranted by the existing law, are supported by the evidence and are not being raised for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and

That the attached brief complies with the limitations contained in Rule 84.06(b) and contains **16,666 words**, excluding the cover, this certification, as determined by Microsoft Word software, including 0 lines of monospaced type; and

That pursuant to Rule 84.06(a)(6), 13 point Times New Roman font on Microsoft Word is used in this document.

/s/ Charles H. Stitt
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And Richard Scott Stuart, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of August, 2013, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Missouri Supreme Court by using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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