IN THE SUPREME COURT OF MISSOURI

ANN SPRADLING and GENE SPRADLING, Plaintiffs/Appellants, vs. SSM HEALTH CARE ST. LOUIS d/b/a SSM ST. MARY'S HEALTH CENTER and SSM MEDICAL GROUP, Defendants/Respondents.	))))))))))))	No. SC90613

BRIEF OF RESPONDENTS SSM MEDICAL GROUP, INC., AND SSM HEALTH CARE ST. LOUIS

Appeal from the Circuit Court of St. Louis County
The Honorable Tom W. DePriest, Jr., Circuit Judge

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JURISDICTIONAL STATEMENT

This appeal should be dismissed for lack of a final judgment. Further, the plaintiffs' points relied on fail to comply with Rule 84.04.

On February 9, 2009, the plaintiffs filed a petition alleging medical malpractice in the Circuit Court of St. Louis County. L.F. at 1. On February 24, 2009, before service on any defendant, the plaintiffs filed a first amended petition. L.F. at 1. The amended pleading, before setting forth any substantive factual allegations, listed "Constitutional Challenge Allegations" declaring that a number of Missouri tort-reform statutes violated several constitutional provisions. L.F. at 17-21 (asserting invalidity of §§ 538.210, 538.225, 490.715, 408.040, 583.300, 537.067, RSMo).

On September 22, 2009, and October 1, 2009, the trial court entered orders dismissing without prejudice on account of the plaintiffs' failure to file an affidavit of a health care provider in compliance with section 538.225, RSMo. L.F. at 147, 154. On October 2, 2009, the plaintiffs filed a notice of appeal to the Missouri Court of Appeals, Eastern District. L.F. at 4, 159. On October 15, after notice from the Court of Appeals that the trial court's orders were not final judgments, the plaintiffs obtained a judgment from the trial court denominating the dismissal without prejudice as a judgment. L.F. at 158. On January 5, 2010, after the filing of the appellants' brief, the Court of Appeals transferred the appeal to this Court because the plaintiffs raised a number of points relied on asserting the invalidity of section 538.225.

Generally, a dismissal without prejudice is not appealable. *State v. Burns*, 994 S.W.2d 941 (Mo. banc 1999). An appeal will lie from a dismissal without prejudice

where the dismissal has the practical effect of terminating the litigation in the form in which it is cast or in the plaintiff's chosen forum. *Id.* This exception is limited to those rare situations in which a dismissal without prejudice is based on an assertedly deficient claim or where the basis of the dismissal without prejudice places a substantial cloud on a party's right to further litigate an issue or claim. *Id.* This exception does not apply where the plaintiff may refile the very same claim in the very same forum. *Id.*

The Court has held that a dismissal without prejudice for failure to comply with section 538.225 can be an appealable judgment. *See Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). Unlike the plaintiffs in *Mahoney*, however, the plaintiffs in this case have created a controversy in an effort to obtain an advisory opinion. The plaintiffs' pleadings are plainly intended to set up a test case to challenge the validity of a number of statutes, including section 538.225. The plaintiffs recite extensive "Constitutional Challenge Allegations" before alleging any facts in an attempt to state a claim for relief. L.F. at 6-9, 17-21. For the Court's convenience, a copy of the plaintiffs' First Amended Petition is included in the appendix to this brief.

The record shows that, rather than complying with section 538.225, the plaintiffs violated the statute in order to obtain an advisory opinion from an appellate court. Instead of filing a complying affidavit from a physician in the same specialty as the allegedly negligent neurosurgeon in this case, the plaintiffs submitted the affidavit of a radiologist. There is no indication that the appellants lack the ability to obtain a complying affidavit from a neurosurgeon. They have a full and fair opportunity to refile their action in the same circuit, asserting the same claims, and with a complying affidavit.

The plaintiffs could easily rectify the cause of their dismissal without prejudice; therefore, they have not appealed from a final, appealable judgment. *See Burns; Doe v. Visionaire Corp.,* 13 S.W.3d 674 (Mo. App. 2000).

As further grounds for dismissal, the appellants' points relied on manifestly fail to comply with Rule 84.04(d)(1), which provides that points relied on must (A) identify the trial court ruling or action that the appellant challenges, (B) state concisely the legal reasons for the appellant's claim of error, and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of error. The rule even provides a simple template for appellants to follow in crafting a point relied on: "The point shall be in substantially the following form: 'The trial court erred in [identify the challenged ruling or action], because [state the legal reasons for the claim of reversible error], in that [explain why the legal reasons, in the context of the case, support the claim of reversible error].'" *Id.*

The plaintiffs' points relied on do not purport to state wherein and why the trial court might have erred. They do not identify the rule that the trial court applied or the one that it should have applied. They do not identify any evidence that might have made the trial court's ruling erroneous. The points merely identify the trial court's ruling, which is inadequate to preserve an issue for this Court's review. (Point III is an exception in that it even fails to identify any ruling of the trial court.)

The requirements of Rule 84.04(d) are not a matter of hypertechnicality. *Buckley v. General Motors Corp.,* 865 S.W.2d 429, 431 (Mo. App. 1993). Properly drafted points on appeal are essential to the proper functioning of the appellate process. *Id.* They serve

to inform the Court and the respondent of the precise issues for review and foster the advocacy essential to our adversary system of justice. *Id.* Defective points relied on invite the Court to become an advocate by speculating on arguments that have not been made. *Id.*; *Reben v. Wilson,* 861 S.W.2d 171, 172 (Mo. App. 1993); *Amparan v. Martinez,* 862 S.W.2d 497, 499 (Mo. App. 1993). The sound policy behind Rule 84.04(d) compels its enforcement.

This appeal should be dismissed.

STATEMENT OF FACTS

Rather than reciting the relevant facts established by the record, the statement of facts in the appellants' brief presents a one-sided argument that the trial court erred. The following facts are established by the record in this case.

On February 9, 2009, Plaintiffs/Appellants Ann and Gene Spradling filed a petition in the Circuit Court of St. Louis County. L.F. at 1. The three-count petition named a single defendant, SSM Healthcare St. Louis d/b/a/ SSM St. Mary's Health Center. L.F. at 5. Before alleging any facts to support a cause of action, the petition set forth "Constitutional Challenge Allegations," asserting that a number of Missouri statutes violated various constitutional provisions. L.F. at 6-9 (¶¶ 5-12) (asserting invalidity of §§ 538.210, 538.225, 490.715, 408.040, 583.300, 537.067, RSMo).

On February 24, 2009, before service on any defendant, the plaintiffs filed an amended petition. L.F. at 1. The amended pleading added three counts against SSM Medical Group[1] and, before setting forth any substantive factual allegations, listed the same "Constitutional Challenge Allegations." L.F. at 17-21. The plaintiffs alleged "professional negligence and carelessness" in connection with a vertebroplasty allegedly performed by William Sprich, M.D. L.F. at 22. Both defendants moved to strike the "Constitutional Challenge Allegations." L.F. at 52, 60.

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[1] This allegation was later amended by interlineation to reflect the defendant's correct name, SSM Medical Group, Inc. L.F. at 66.

On July 15, 2009, the plaintiffs' counsel filed two affidavits stating that he had obtained a written opinion from a John M. Mathis, M.D., stating that Dr. Sprich had failed to use such care as a reasonably prudent health care provider would have used under similar circumstances with respect to the care and treatment of Mrs. Spradling and that Dr. Sprich's alleged failure caused or contributed to cause injury and damage to Mrs. Spradling. L.F. at 68, 71.[2]

The defendants moved to dismiss pursuant to section 538.225, RSMo, which states in full:

> 1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or

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[2] The claim against SSM Healthcare St. Louis d/b/a/ SSM St. Mary's Health Center was based upon the alleged agency/employment of Dr. Sprich and negligent credentialing, but the plaintiffs' affidavits did not mention the hospital or the credentialing claim. L.F. at 68, 72.

directly contributed to cause the damages claimed in the petition.

2. As used in this section, the term “legally qualified health care provider” shall mean a health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant.

3. The affidavit shall state the name, address, and qualifications of such health care providers to offer such opinion.

4. A separate affidavit shall be filed for each defendant named in the petition.

5. Such affidavit shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended for a period of time not to exceed an additional ninety days.

6. If the plaintiff or his attorney fails to file such affidavit the court shall, upon motion of any party, dismiss the action against such moving party without prejudice.

7. Within one hundred eighty days after the filing of the petition, any defendant may file a motion to have the court examine in camera the aforesaid opinion and if the court determines that the opinion fails to meet the requirements of

> this section, then the court shall conduct a hearing within thirty days to determine whether there is probable cause to believe that one or more qualified and competent health care providers will testify that the plaintiff was injured due to medical negligence by a defendant. If the court finds that there is no such probable cause, the court shall dismiss the petition and hold the plaintiff responsible for the payment of the defendant's reasonable attorney fees and costs.

L.F. at 74, 150 (citing § 538.225, RSMo).

In moving to dismiss, the defendants noted that Dr. Sprich is a neurosurgeon and that the plaintiffs' claims were based on Dr. Sprich's allegedly negligent neurosurgical treatment of Mrs. Spradling. L.F. at 75. Dr. Mathis is not a neurosurgeon, but rather is a radiologist. L.F. at 76. Radiology is not substantially the same specialty as neurosurgery, which Dr. Sprich practices and which is at issue in the case. L.F. at 76. Therefore, the defendants argued that the plaintiffs' affidavits did not comply with the statutory requirement that the written opinion obtained by the plaintiffs be from a health care provider in substantially the same specialty as the defendant. L.F. at 76.

In response to the motions to dismiss, the plaintiffs admitted that Dr. Sprich is a neurosurgeon, L.F. at 83 (¶ 9), and that Dr. Mathis is a radiologist, L.F. at 84 (¶ 13).

On September 22, 2009, the trial court entered an order granting the requested dismissal as to Defendant SSM Medical Group, Inc. L.F. at 147. The court found that the language of section 538.225 was clear and unambiguous. L.F. at 148 (¶ 4). The trial court found that, if a plaintiff fails to file a compliant affidavit, then upon motion of any

party, the court "shall" dismiss the action against the party without prejudice. L.F. at 148 (¶ 3). The court found that the plain and ordinary meaning of the statute was that if a party files a motion to dismiss on account of a plaintiff's failure to file a health care affidavit, and a statutorily adequate health care affidavit has not been timely filed, the trial court must dismiss the complaint without prejudice. L.F. at 148 (¶ 5).

The trial court found that the plaintiffs' allegations were based on the actions of Dr. Sprich, a neurosurgeon, in connection with the allegedly negligent neurosurgical treatment of Mrs. Spradling. L.F. at 148 (¶¶ 7, 9). The court found that Dr. Mathis was not a neurosurgeon and was not board certified in neurosurgery, but rather was a radiologist. L.F. at 148 (¶ 10).

The trial court's order concludes with the following findings:

> 11. The Court finds that radiology is not substantially the same specialty as neurosurgery, which is practiced by Dr. Sprich and is at issue in the case.
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> 12. The Court further finds that Dr. Mathis, a radiologist, does not practice in substantially the same specialty as Dr. Sprich, a neurosurgeon.
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> 13. Therefore, the Court finds that Plaintiffs' health care affidavit against SSM Medical Group does not comply with the statutory requirement that the written opinion obtained by Plaintiffs must be from a health care provider "in the same profession as the defendant . . . practicing substantially the same specialty as the defendant." § 538.225.2 RSMo.

> 14. Based on the record before the Court, the Court finds that greater than 90 days have passed since the filing of Plaintiffs' Amended Petition and Plaintiffs have failed to file an affidavit against SSM Medical Group that is compliant with § 538.225 RSMo. Therefore, pursuant to § 538.225.6 RSMo., SSM Medical Group's Motion to Dismiss for Failure to File a Compliant Health Care Affidavit is sustained.

L.F. at 149. The court noted that the dismissal would be without prejudice. L.F. at 149. On October 1, 2009, the trial court entered a substantially identical order dismissing the claims against Defendant SSM Healthcare St. Louis without prejudice. L.F. at 154.

On October 2, 2009, the plaintiffs filed a notice of appeal to the Missouri Court of Appeals, Eastern District. L.F. at 4, 159. On October 15, after notice from the Court of Appeals that the trial court's orders were not final judgments, the plaintiffs obtained a judgment from the trial court denominating its prior orders as judgment. L.F. at 158.

On January 5, 2010, after the filing of the appellants' brief, the Court of Appeals transferred the appeal to this Court.

ARGUMENT

The plaintiffs' arguments should be rejected. The trial court properly dismissed the plaintiffs' claims without prejudice for failure to comply with section 538.225. The plaintiffs' constitutional arguments are not preserved for appellate review, and they have no merit. If this appeal is not dismissed for the reasons set forth in the jurisdictional statement of this brief, the judgment of the trial court should be affirmed.

I. The plaintiffs' Points I and II should be denied because the trial court properly dismissed the petition without prejudice.

The appellants' statement that the interpretation of a statute is a question of law that is reviewed de novo is true enough, as far as it goes. However, the plaintiffs do not appeal from an interpretation; they appeal from a judgment of dismissal without prejudice. This ruling was not an interpretation, but rather a decision on a motion on the basis of the record submitted by the parties. In these circumstances, the Court gives deference to the trial court's factual findings but reviews questions of law de novo. *See State v. Gaw*, 285 S.W.3d 318, 320 (Mo. banc 2009); *State ex rel. Vincent v. D.C., Inc.*, 265 S.W.3d 303, 306 (Mo. App. 2008).

Factually, the trial court found that radiology was not substantially the same specialty as neurosurgery, and that Dr. Mathis, a radiologist, did not practice in substantially the same specialty as Dr. Sprich, a neurosurgeon. L.F. at 149. The plaintiffs do not contest these factual findings on appeal, and they do not argue that the opinion of Dr. Mathis would be adequate to satisfy the requirement of a written opinion from a health care provider in substantially the same specialty.

A. Section 538.225.2 requires a written opinion from a health care provider in substantially the same specialty.

The plaintiffs failed to file health care affidavits compliant with section 538.225, RSMo. The current version of this statute was enacted in 2005 as part of Missouri House Bill 393, which aimed to curtail frivolous medical malpractice lawsuits in Missouri. In a malpractice case, section 538.225.1 demands that "the plaintiff or the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition."

Section 538.225.2 provides the definition of "legally qualified health care provider," stating that the term means "a health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant." Numerous states have passed similar statutes requiring that, in order to file a medical malpractice action, the plaintiff must obtain a report, affidavit, opinion, or certificate of merit from a medical expert who practices in the same specialty as the defendant.[3]

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[3] *See* Ariz. Rev. Stat. Ann. §§ 12-2603, 12-2604; Conn. Gen. Stat. §§ 52-184c, 52-190a; Del. Code Ann. tit. 18 § 6853; Fla. Stat. §§ 766.102(5), 766.203(2); Ga. Code Ann. § 24-

In moving to dismiss, the defendants argued that the plaintiffs' health care affidavits did not comply with the statutory requirement that the written opinion obtained by the plaintiffs must be from a health care provider "practicing substantially the same specialty as the defendant." L.F. at 76. In the trial court, the plaintiffs admitted that Dr. Sprich, the physician they claim was negligent, is a neurosurgeon. L.F. at 83 (¶ 9). They admitted that Dr. Mathis is a radiologist. L.F. at 84 (¶ 13). The plaintiffs do not claim that Dr. Mathis practices substantially the same specialty as Dr. Sprich.

The trial court found that radiology was not substantially the same specialty as neurosurgery and that "Dr. Mathis, a radiologist, does not practice in substantially the same specialty as Dr. Sprich, a neurosurgeon." L.F. at 149. Therefore, the trial court found that the plaintiffs' health care affidavits did not comply with the requirements of section 538.225.2 and dismissed without prejudice. L.F. at 149.

In their brief, the plaintiffs declare, contrary to the plain terms of section 538.225.2, that a "legally qualified health care provider" need not have any qualification in substantially the same specialty as the provider who is claimed to be negligent. Rather, the plaintiffs assert that a "legally qualified health care provider" can be "an actively practicing physician, or a retired physician who was very recently in

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9-67; Haw. Rev. Stat. § 671-12.5(a)(1); Md. Code Ann. Cts. & Jud. Proc. §§ 3-2A-02, 3-2A-04; Mich. Comp. Laws §§ 600.2169, 600.2912d; Nev. Rev. Stat. § 41A.071; Pa. R.C.P. Rule 1042.3, 40 Pa. Cons. Stat. § 1303.512; S.C. Code Ann. §§ 15-36-100, 15-79-125; Va. Code Ann. §§ 8.01-20.1, 8.01-581.20.

'substantially' the same specialty as the defendant." Appellants' Brief at 17. This is nonsense.

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

As the Court has previously held in determining the legislature's intent in adopting the various provisions of chapter 538, several conclusions are obvious. *Id.* The legislature intended to impose specific limitations on the traditional tort causes of action available against a health care provider. *Id.* The Court found that these limitations include the requirement in section 538.225 "that the cause of action be dependent upon an affidavit by a 'legally qualified health care provider' of failure to exercise reasonable care attributable to the defendant health care provider." *Id.*

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

The plaintiffs' contention that a "legally qualified health care provider" as defined in section 538.225.2 need not be "actively practicing or within five years of retirement

from actively practicing substantially the same specialty as the defendant" is absurd and contrary to the clear language of the statute.[4]

The plaintiffs' argument violates the longstanding rule that parts of a statute are to be construed in connection with every other part, and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers. *Norberg v. Montgomery*, 173 S.W.2d 387, 389 (Mo. banc 1943). Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all. *Id.*

The phrase "substantially the same specialty as defendant" is as applicable to actively practicing physicians as it is to physicians within five years of retirement from actively practicing and must be applied to both instances of "actively practicing." Any other interpretation of the statute would ignore the legislature's intent that section 538.225.2 was passed as a tort *reform* statute intended to change the prior state of the law and decrease the filing of frivolous medical malpractice actions.

In *Norberg*, the Court analyzed the following section:

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[4]*See* UM Legislative Update Newsletter, Friday, April 23, 2004 ("Lawsuits must be accompanied by affidavits of merit from those licensed in substantially the same profession and authorized to practice in substantially the same specialty as the defendant."), available at http://www.umsystem.edu/ums/departments/gr/newsletter/040423/story02.shtml.

> Whenever in this act the term of 'accounting officer' shall appear, it shall be deemed to mean the county clerk, county comptroller, county auditor, accountant or other officer or employee keeping the principal records of the county.

173 S.W.2d at 390.

The Court held that the clause at the end of the sentence "keeping the principal records of the county" applied not only to the word employee but also to the words county clerk, county comptroller, county auditor, accountant, and officer because the clause was as much applicable to the other words in the sentence. *Id*. at 390-391; *see Renner v. Director of Revenue*, 288 S.W.3d 763, 766 (Mo. App. 2009) (analyzing a 2005 amendment to the definition of conviction and holding that the last phrase of the definition applied to the all of the potential penalties contained in the definition, not only the last penalty contained in the list).

The plaintiffs' argument would lead to absurd results. They claim that section 538.225.2 is intended to mean that the "legally qualified health care provider" must be either actively practicing ***anything***, or within five years of retirement from actively practicing substantially the same specialty as the defendant. Thus, the plaintiffs contend that the General Assembly intended that an active dermatologist or psychiatrist could give the opinion that a defendant brain surgeon failed to use reasonable care and that such failure caused damages. This would be absurd and inconsistent with the evident purpose of the statute. *See Budding*, 19 S.W.3d at 680; *Norberg*, 173 S.W.2d at 389.

Presumably, under the plaintiffs' logic, the first use of the word "or" in section 538.225.2 would have the same effect. The statute mandates that the affidavit must come from "a health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant." Under the plaintiffs' theory, the expert could be "licensed in this state" to do anything "or any other state in the same profession as the defendant." Thus, according to the plaintiffs, a witness licensed in Missouri as any kind of health care provider (like a nurse or physical therapist) could provide an opinion against a physician, while only an out-of-state witness would even need to be licensed in the same ***profession*** as the defendant. The modifier plainly applies to both elements of the disjunctive phrase.

The statute requires that the health care provider practice in substantially the same specialty as the defendant, regardless of whether the provider is currently practicing the specialty or within five years of retirement from practicing the specialty. The plaintiffs' affidavits are from a physician who does not practice in substantially the same specialty as Dr. Sprich; therefore, the trial court did not err in dismissing the plaintiffs' claims without prejudice so that they can obtain the written opinion of an appropriate expert.

B. The trial court's dismissal is consistent with the intent of the legislature.

The present version of section 538.225 was enacted in 2005 as part of the legislature's larger effort at tort reform. The prior version of section 538.225 required

plaintiffs to file an affidavit from a legally qualified health care provider but did not define who qualified as a legally qualified health care provider.

In determining the final language of section 538.225.2, multiple versions of the statutory amendments were reviewed and revised. One version of a proposed amendment to section 538.225 that the General Assembly considered and rejected was similar to the effect of the plaintiffs' argument in this case:

> The health care provider who offers such opinion shall have education, training, and experience in a like area of expertise, or logical extension of the field of expertise, as the defendant health care provider. In addition, the health care provider must be actively engaged in the practice of medicine or have retired from actively practicing within five years of the date of the written opinion.[5]

Obviously, merely requiring education, training, and experience in some undefined like area of expertise, or some logical extension of the defendant's field of expertise, is a much different standard than requiring an expert in substantially the same specialty. Rather than adopting the lower standard, the legislature adopted the current

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[5] Available at http://www.house.missouri.gov/content.aspx?info=/bills051/biltxt/intro/hb0529i.htm

version of section 538.225. The plaintiffs' argument improperly invites the Court to rewrite section 538.225.2 to read like the version that the General Assembly rejected.

C. The amendment of section 538.225 was intended to change the law.

In order to ascertain the legislature's intent and give effect to that intent, Missouri courts consider both the plain and ordinary meaning of the words used in the amendment and the state of the law at the time of the amendment's enactment. *S.S. v. Mitchell*, 289 S.W.3d 797, 799-800 (Mo. App. 2009). When the legislature amends a statute, it is presumed that the legislature intended to effect some change in the existing law. *Hagan v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998); *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). The legislature is presumed to have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984); *State v. Harris*, 705 S.W.2d 544, 548 (Mo. App. 1986).

The plain and ordinary meaning of section 538.225.2 exhibits the legislature's intent to abandon the prior version of the statute, which allowed affidavits to be based upon the opinion of a health care provider regardless of specialty. The legislature was concerned that health care providers were opining in areas of medicine with which they were not familiar. This concern was valid as the practice of obtaining an opinion concerning one area of medicine from a health care provider that practiced in an unrelated area of medicine was allowed under the prior version of section 538.225.

The state of the law when the 2005 amendment was enacted supports a finding that the legislature intended the amendment to require expert witnesses in medical malpractice cases from substantially the same specialty as the defendant health care provider. Prior to the amendment, a physician could provide a health care affidavit regarding any other medical specialty even if the physician did not practice the same specialty. By adding the language "substantially the same specialty as the defendant," the legislature was addressing the situation in which a physician could provide the basis of a plaintiff's medical malpractice action even if the physician did not specialize in the area of medicine at issue. The goal of section 538.225.2 was to prevent medical malpractice suits based on the opinions of unqualified health care providers. If the plaintiffs' interpretation of section 538.225.2 were accepted, opinions from providers in specialties other than that of the defendant would be allowed. This result would be no different than the prior version of the statute and would render the passage of section 538.225.2 meaningless.

The plaintiffs cite several pre-2005 cases for the irrelevant proposition that Missouri courts have previously allowed "a plaintiff in a medical malpractice case to establish a submissible case through the use of an expert that does not practice in substantially the same specialty as defendant." Appellants' Brief at 20-24.

The plaintiffs' argument suffers from three fatal flaws. First, it mistakenly presumes that the pre-2005 cases about evidence at trial are relevant to the health care affidavit required by section 538.225. Regardless of the evidence that must be presented at trial, section 538.225.2 by its terms requires the written opinion of a health care

provider in the early stages of malpractice litigation. This Court has previously upheld the validity of a procedural affidavit requirement. *See Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). There is no impediment to enforcing the amended 538.225 according to its terms. [6]

Second, the plaintiffs' pronouncements about evidence at trial after the amendment of section 538.225 are premature. As noted in the jurisdictional statement of this brief, the plaintiffs are improperly attempting to use this action as a test case to obtain a ruling on their "Constitutional Challenge Allegations." *See* L.F. at 17-21 (asserting unconstitutionality of numerous statutes). This Court has frequently noted that its role is limited to deciding the issues before it and not making advisory opinions. *Committee for Educational Equality v. State*, 294 S.W.3d 477, 493 (Mo. banc 2009). The plaintiffs' request for the Court to determine the evidence that would be required at trial is premature.

Third, the plaintiffs' argument presumes that the law of evidence remains unchanged by the amendment of section 538.225. This presumption is unfounded. In *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678 (Mo. banc 2000), the issue was whether a health care provider could be strictly liable for a products liability claim for transferring

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[6] The plaintiffs also appear to assume that they are required to use the health care provider offering the written opinion as an expert at trial. Section 538.225 does not impose such a requirement. Indeed, it is often a plaintiff's strategy to have a different expert testify at trial than the health care provider who offered the initial written opinion.

a defective medical device to a patient. The Court noted the requirement that a cause of action against a health care provider is "dependent upon an affidavit by a 'legally qualified health care provider' of failure to exercise reasonable care attributable to the defendant health care provider," citing section 538.225. *Id.* at 680.

The Court went on to hold that, under this provision, the legislature barred claims against health care providers for strict liability: "It is true that nothing in the statute specifically requires the plaintiff to prove negligence or other level of culpability in order to recover. However, in construing the statute, the Court is not to assume the legislature intended an absurd result. It would be an obvious absurdity to require an affidavit of negligence as a condition of proceeding with the cause of action even though negligence need not be proved in order to submit the case to a jury or to obtain a judgment. On that basis alone, it is reasonable to conclude that the legislature intended to eliminate liability of health care providers for strict liability." *Id.* at 681 (citation omitted).

On the basis of this inference, *Budding* went on to overrule a number of cases that had allowed recovery for strict liability. *Id.* at 682 ("To the extent *Bell*, *Brandon*, *Pinkerton* and *Mulligan* are inconsistent with the text and history of chapter 538, they are overruled.").

In this case, the amended section 538.225.2 demands a written opinion from an expert in "substantially the same specialty as the defendant." Similar to *Budding*, in an appropriate case, the Court should hold that it would be absurd to require the reviewer to be in "substantially the same specialty as the defendant" while allowing a plaintiff to use

any physician, regardless of specialty, as an expert to make a submissible case against a health care provider.

This issue has not been decided, but *Budding* clearly shows that, if previous cases are in conflict with the provisions of section 538.225, the cases must yield to the statute. *Budding*, 19 S.W.3d at 682 ("The legislature has spoken with reasonable clarity expressing an intent to eliminate liability of health care providers for strict products liability. . . . As the briefs of the parties point out, appealing public policy arguments can be made both for and against imposing strict liability where a health care provider transfers a defective product to a patient. However, when the legislature has spoken on the subject, the courts must defer to its determinations of public policy."). The plaintiffs' presumption to the contrary should be rejected.

II. The plaintiffs' Points III through VIII should be denied because they were not presented to or decided by the trial court.

The plaintiffs failed to preserve any constitutional issues for appellate review in this action. Here is every word the plaintiffs said on constitutional issues in opposing the defendants' motions to dismiss in the trial court:

> Further, if Section 538.225 were interpreted as defendants suggest, Section 538.225 would be unconstitutional in that Section 538.225 would violate the constitutional separation of powers prescribed by article II, § 1 of the Missouri Constitution; Section 538.225 would violate the right to open courts and certain remedies in the Missouri Constitution,

> article I § 14; Section 538.225 would violate the right to trial by jury guaranteed by article I, § 22(a) of the Missouri Constitution. Finally, House Bill 393, the legislation that amended Section 538.225, unconstitutionally violates the clear title and single subject requirements of article III, § 23 of the Missouri Constitution; it violates the equal protection clause of the Missouri Constitution, article I, § 2; it violates the prohibition against special legislation in article III, § 40 of the Missouri Constitution and it violates the due process clause of the Missouri Constitution, article I, § 10.

L.F. at 85.

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

The reason for this requirement is to prevent surprise to the opposing party and to permit the trial court an opportunity to fairly identify and rule on the issues. *Strong v.*

American Cyanamid Co., 261 S.W.3d at 525. Thus, merely declaring that a statute should be deemed unconstitutional, without presenting any argument and without obtaining a ruling from the trial court on the issue, is inadequate to preserve any constitutional issue for appellate review. *Id.*

This Court has long held that it is improper for a party merely to declare a statute is void because it conflicts with certain designated sections of the constitution and then fail to develop the record on such a grave charge: "Constitutional questions cannot be raised by such casual and heedless allegations. Such questions are enterprises of great pith and moment. The mere ipse dixit of counsel will not suffice to set them in motion." *State ex rel. Wolfe v. Missouri Dental Bd.,* 221 S.W. 70, 73 (Mo. banc 1920) (internal quotations omitted).

In opposing the defendants' motions to dismiss, the plaintiffs made no arguments and cited no authority in support of any constitutional claims. They merely recited several constitutional provisions in the paragraph quoted above. On appeal, however, the plaintiffs' brief launches into a discussion of constitutional issues on page 23 and does not stop until the argument ends on page 57. Judge DePriest never heard any of these new arguments, which occupy more than half of the plaintiffs' brief on appeal. Judge DePriest did not rule on any constitutional issues. Having failed to provide the trial court with any opportunity to address their arguments on these issues, the plaintiffs should not be permitted to raise them for the first time on appeal.

III. The plaintiffs' Points III through VIII should be denied because section 538.225 is constitutional.

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

In the assessment and adjudication of a constitutional challenge to a statute, a court considers and interprets the purposes intended by the enactment. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991). Chapter 538 is a legislative response to the public concern over the increased cost of health care and the continued integrity of that system of essential services. *Id.* The effect intended for section 538.225 within that scheme is to cull at an early stage of litigation suits for damages against health care providers that lack even color of merit, and so to protect the public and litigants from the cost of ungrounded medical malpractice claims. *Id.* The preservation of the public health is a paramount end of the exercise of the police power of the state. *Id.* The objective of the enactment -- the continued integrity of the health care system -- is a legitimate public purpose to be considered in the assessment of the constitutional challenges. *Id.*

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

The Court should reject the plaintiffs' baseless assertion that section 538.225 is unconstitutional. In *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991), the Court rejected most of the very constitutional claims advanced by the plaintiffs in this case.

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

Similarly, section 538.225 does not violate the constitutional right of access to the courts. *Id.* at 509-10. It does not violate the constitutional separation of powers. *Id.* at 510-11. It does not violate the constitutional guarantees of due process of law and equal protection. *Id.* at 511-13.

The plaintiffs admit that *Mahoney* upheld the constitutional validity of section 538.225. Their effort to undermine *Mahoney* is based on two premises that are demonstrably false. They claim that requiring a written opinion from an expert in "substantially the same specialty as the defendant" is a change in the ***substantive*** law, rather than procedure. As a result, they claim that section 538.225 imposes a higher standard for the filing of an action against a health care provider than a plaintiff

ultimately will have to meet at trial. The plaintiffs' presumptions are wrong, and *Mahoney* mandates that the plaintiffs' constitutional claims be rejected.

B. Evidentiary rules are not substantive.

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

Substantive law creates, defines, and regulates rights, while procedural law prescribes the method of enforcing rights or obtaining redress for their invasion; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit. *Wilkes v. Missouri Highway & Transp. Comm'n,* 762 S.W.2d 27, 28 (Mo. banc 1988); *Ambrose v. State Dept. of Public Health & Welfare,* 319 S.W.2d 271 (Mo. App. 1958). It has been consistently held that evidentiary rules are part of the legal machinery employed in the trial of a case and are regarded as procedural rather than substantive. *State v. Shafer,* 609 S.W.2d 153, 157 (Mo. banc 1980); *State v. Walker*, 616 S.W.2d 48, 49 (Mo. banc 1981).

It is well settled that the legislature has plenary power to prescribe or alter rules of evidence, including those involving competency of witnesses. *State v. Williams*, 729 S.W.2d 197, 201 (Mo. banc 1987); *State Bd. of Reg. v. McDonagh,* 123 S.W.3d 146, 154 (Mo. banc 2003). Indeed, as the Court has noted, while the Court is empowered to develop rules of procedure, it is specifically forbidden by the Missouri Constitution to create rules of evidence. *McDonagh,* 123 S.W.3d at 154 n.10; *see* Mo. Const. art. V, § 5.

The admission of expert testimony is not determined by rules of civil procedure. *McDonagh*, 123 S.W.3d at 154.

The whole thrust of the plaintiffs' constitutional argument is the baseless contention that the requirement in section 538.225.2 of a written opinion from an expert in "substantially the same specialty as the defendant" is a change in the ***substantive*** law. This is wrong. Evidentiary rules are procedural, not substantive. *Shafer*, 609 S.W.2d at 157; *Walker*, 616 S.W.2d at 49. Specifying the competency of witnesses is an evidentiary matter within the legislature's plenary power. *Williams*, 729 S.W.2d at 201; *McDonagh*, 123 S.W.3d at 154.

The Missouri Court of Appeals has reviewed the amended section 538.225 and found that it relates to pre-trial procedure. *White v. Tariq*, 299 S.W.3d 1, 4 (Mo. App. 2009). The Court of Appeals specifically found that "the amended Section 538.225 is procedural." *Id.*

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

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

In arguing that section 538.225 changes the substantive law and violates the right to trial by jury, the plaintiffs cite section 490.065, RSMo, and *Swope v. Printz*, 468 S.W.2d 34 (Mo. 1971). Section 490.065, however, is plainly and explicitly a procedural statute, passed by the legislature, governing the admission of expert testimony. *McDonagh*, 123 S.W.3d at 152-54. It permits expert testimony by a witness who is "qualified as an expert by knowledge, skill, experience, training, or education." § 490.065.1. There is nothing in section 490.065 to forbid the legislature from specifying

the particular "knowledge, skill, experience, training, or education" that a witness should possess in a medical malpractice case. Indeed, as noted, evidentiary rules -- like section 490.065 and section 538.225 -- are within the plenary power of the General Assembly. *McDonagh*, 123 S.W.3d at 154.

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

The plaintiffs purport to rely on *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 84 (Mo. banc 2003), which holds that a plaintiff seeking damages under the Missouri Human Rights Act has a right to trial by jury. The issue in *Diehl* was whether claims under that Act were triable by jury at all, and the Court concluded that it was. *Id.* at 92. There is no such issue in this case. The defendants do not deny that actions for medical malpractice are triable by juries.

As the Court held in *Mahoney*, the requirement of an affidavit at the outset of a medical malpractice case does not infringe the right of trial by jury. *Mahoney*, 807 S.W.2d at 508-09. The plaintiffs have not set forth any reason why the amendment of section 538.225 to specify the qualifications of the reviewing physician would lead to a different conclusion.

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

The plaintiffs declare, without citation to the record, that requiring an action against a neurosurgeon to be reviewed by a neurosurgeon denies them access to the courts. This contention is unsupported. Indeed, as noted in the jurisdictional statement of this brief, rather than attempting to comply with section 538.225, it appears that the plaintiffs violated the statute in order to obtain an advisory opinion on the validity of the statute.

Instead of filing a complying affidavit from a physician in the same specialty as the allegedly negligent neurosurgeon in this case, the plaintiffs submitted the affidavit of a radiologist. There is no evidence in the record that the appellants lack the ability to obtain a complying affidavit from a neurosurgeon. There is no evidence in the record that they attempted to consult a neurosurgeon. As far as the record reveals, the plaintiffs could easily rectify the cause of their dismissal without prejudice. The Court should not indulge the plaintiffs' unsupported assumption that it is impossible, or difficult, or any hurdle at all to consult a neurosurgeon, as opposed to a radiologist.

The plaintiffs' reliance on *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), is misplaced. *Kilmer* holds that Article I, section 14, of the Missouri Constitution prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury. *Id.* at 549. *Kilmer* notes that a statute may modify or abolish a cause of action that had been recognized by common law or by statute, but "where a barrier is erected in seeking a remedy for a recognized injury, the question is whether it is arbitrary or unreasonable."

Id. at 550. Kilmer holds that a requirement that a defendant be convicted of a crime before the defendant can be sued for damages is unenforceable: "The prerequisite of a criminal conviction, in order for a plaintiff to proceed with a civil action, is as we have discussed, both arbitrary and unreasonable." *Id.* at 553.

In this case, by contrast, no action by any government official or other third person is required in order for a plaintiff to maintain a cause of action. As the Court held in *Mahoney*, requiring the filing of an affidavit does not bar access to the courts:

> The affidavit procedure of § 538.225 serves to free the court system from frivolous medical malpractice suits at an early stage of litigation, and so facilitate the administration of those with merit. Thus, it denies no fundamental right, but at most merely redesigns the framework of the substantive law to accomplish a rational legislative end. The affidavit procedure neither denies free access of a cause nor delays thereafter the pursuit of that cause in the courts. It is an exercise of legislative authority rationally justified by the end sought, and hence valid against the contention made here.

Mahoney, 807 S.W.2d at 510 (citations, quotations, and internal brackets omitted).

The requirement under the current version of section 538.225 is exactly the same as the one upheld in *Mahoney*, except that it specifies the qualifications of the witness who must review a plaintiff's claims. Evidentiary rules, including rules about the

qualifications of witnesses, are within the plenary power of the General Assembly. *McDonagh*, 123 S.W.3d at 154. The plaintiffs have presented no evidence that the requirement to have claims against a neurosurgeon reviewed by a neurosurgeon is in any way arbitrary or unreasonable.

Recently, the Court considered whether a statute far more onerous than section 538.225 was arbitrary or unreasonable. In *Weigand v. Edwards*, 296 S.W.3d 453, 462 (Mo. banc 2009), the issue was whether section 452.455.4, RSMo, violated the open-courts requirement by requiring a parent to post a bond before moving to modify child custody when the parent's child-support arrearage was more than $10,000. The Court noted that the statute did not restrict the ability of the parent who was in arrears from filing a motion to modify child support. *Id.* Nor did the statute preclude the parent in arrears from defending a motion to modify custody. *Id.* The Court held that the requirement in section 452.455.4 for filing a bond before seeking relief in a motion to modify custody depended on the actions of the parent in arrears, unlike the statute in *Kilmer*, which required the actions of a third person. *Id.* The Court held that the prerequisite of filing a bond before prosecuting a motion to modify custody is not an arbitrary and unreasonable barrier prohibited by the open courts provision of the Missouri Constitution. *Id.*

Section 538.225 in its present form does not require a plaintiff to do anything as onerous as posting a bond before proceeding with an action. Indeed, the current statute does not make a plaintiff in a medical malpractice action do anything more than a

plaintiff was required to do before 2005. The requirement of having review by an expert in "substantially the same specialty as the defendant" is not arbitrary or unreasonable.

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

The plaintiffs' separation-of-powers argument is based on the theory that, under the ***substantive*** law, an expert witness need not be in the same specialty as the defendant. Appellants' Brief at 33. As noted, evidentiary rules and the qualifications of experts are procedural matters, and they are also within the plenary power of the legislature. See *Shafer*, 609 S.W.2d at 157; *Walker*, 616 S.W.2d at 49; *Williams*, 729 S.W.2d at 201; *McDonagh*, 123 S.W.3d at 154. The plaintiffs' blanket declaration that section 538.225 somehow violates the separation of powers does not make it so.

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

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

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

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

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

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

As to the rational basis for statutes, there only need be a conceivably rational basis to uphold a regulatory scheme. *Id.* A legislative choice is not subject to courtroom fact

finding and may be based on rational speculation unsupported by evidence or empirical data. *Id.*

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

The plaintiffs assert, without citation to authority, that plaintiffs who allege injury at the hands of one medical provider will only have to pay for one expert review (assuming the expert finds merit in the case), but that when multiple tortfeasors allegedly cause injury to a patient, "that victim may have to pay for 3, 4, or more reviews by physicians, even if the negligence alleged is common and was committed jointly by all defendants." Appellants' Brief at 45. The relevance of this statement is unknown. The record in this case shows that the treatment of only one physician is at issue, and the plaintiffs' counsel submitted a separate affidavit as to each defendant. L.F. at 68, 71.

G. H.B. 393 does not violate the clear-title and single-subject provisions of the Missouri Constitution.

As noted, the plaintiffs failed to argue any of their constitutional claims to the trial court. This lapse is especially troubling in connection with this point, relating to the passage of H.B. 393, because the bill is not contained in the record on appeal and was never provided to the trial court. It is singularly improper to accuse Judge DePriest of error in connection with H.B. 393 without even showing the provision to him.

Article III, section 23, of the Missouri Constitution imposes two distinct procedural limitations on Missouri legislation. First, a bill cannot contain more than one subject. Second, the subject of the bill must be clearly expressed in the title. *Trout v. State*, 231 S.W.3d 140, 145 (Mo. banc 2007); *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 328 (Mo. banc 2000).

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

The purpose of the clear-title requirement is to keep legislators and the public fairly apprised of the subject matter of pending laws. *Trout*, 231 S.W.3d at 144-45. This requirement is violated when the title is underinclusive or too broad and amorphous to be meaningful. *Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007). The only cases in which this Court has found a title to be too broad and amorphous are those in which the title could describe the majority of all the legislation that the General Assembly passes. *Id.* In all other cases, the Court has rejected arguments that a title was overinclusive. *Id.* Recognizing that some bills consist of multiple and diverse topics within a single, overarching subject, the bill's subject may be clearly expressed by stating some broad umbrella category that includes all the topics within its cover. *Missouri State Med. Ass'n v. Missouri Dep't of Health*, 39 S.W.3d 837, 841 (Mo. banc 2001).

The single-subject analysis turns on the general core purpose of the proposed legislation. *Trout*, 231 S.W.3d at 146. Article III, section 23, dictates that the subject of

a bill includes all matters that fall within or reasonably relate to the general core purpose. *Id.* To determine whether a bill violates the single-subject rule, the test is not whether individual provisions of a bill relate to each other, but whether the challenged provision fairly relates to the subject described in the title of the bill, has a natural connection to the subject, or is a means to accomplish the law's purpose. *Id.*

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

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

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

H.B. 393 does not violate the single-subject limitation. The phrase "relating to claims for damages and the payment thereof" contained in the title of H.B. 393 pertains to civil causes of action, a general core purpose. The bill contains 23 new sections, all of which relate to various causes of action for damages. Each section of H.B. 393 is fairly related and connected to the subject of the bill's title.

The bill also contains a clear title. A title should indicate in a general way the kind of legislation that is being enacted. *Trout*, 231 S.W.3d at 145; *Missouri State Med. Assoc.*, 39 S.W.3d at 841. The title may omit particular details of the bill, as long as

neither the legislature nor the public is misled. *Missouri State Med. Assoc.*, 39 S.W.3d at 841. The title to the act is valid if it indicates the general contents of the act, and mere generality of title will not prevent the act from being valid unless it is so obscure or amorphous as to tend to cover up the contents of the act. *C. C. Dillon*, 12 S.W.3d at 329.

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

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

In any event, the plaintiffs' challenge to H.B. 393 is untimely. Section 516.500, RSMo, requires a challenge to an alleged procedural defect to be asserted before the adjournment of the next legislative session. A later lawsuit is permitted only if there was no party aggrieved who could have raised the claim within that time, and the complaining party must establish that he or she was the first person aggrieved or in the class of first persons aggrieved, and that the claim was raised not later than the adjournment of the

next full regular legislative session following any person being aggrieved. In this case, the next legislative session after the passage of H.B. 393 adjourned by operation of law on May 30, 2006. Mo. Const. art. III, § 20(a). This action was not commenced until 2009. Accordingly, the single-subject and clear-title claims are barred.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed. In the alternative, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 10,659, exclusive of the cover, signature block, appendix, and certificates of service and compliance.

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