MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED 93702

ANN SPRADLING and
GENE SPRADLING,

Appellants,

v.

SSM HEALTH CARE ST. LOUIS d/b/a SSM ST. MARY'S HEALTH CENTER
and SSM MEDICAL GROUP, INC.,

Respondents.

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

BRIEF OF APPELLANTS

JOAN M. LOCKWOOD #42883
STEPHEN R. WOODLEY #36023
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, MO 63101
(314) 241-5620
Fax: (314) 241-4140
Email: jlockwood@grgpc.com

ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal presents the interpretation and application of RSMo. §538.225, a statute amended by the legislature in 2005 during a wave of tort reform. The issue is whether §538.225 requires an affidavit submitted in support of a medical malpractice claim to be based upon the opinion of a health care provider in the same profession **and** practicing substantially the same speciality as the defendant.

Section 512.020 RSMo. provides, in relevant part, that "Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his or her appeal to a court having appellate jurisdiction from any: . . . (5) final judgment in the case." The judgment entered by the trial court disposed of all claims and issues in the case. (L.F. 147-49, 154-58) Further, the judgment is set forth in a formal written document denominated "Judgment," as required by Mo.R.Civ.P. 74.01. (L.F. 158)

Appellants timely filed their Notice of Appeal. (L.F. 159-70) Appellants are aggrieved by the final judgment of the trial court, and have timely taken the proper steps to secure appellate review of the judgment. Id.

The Missouri Court of Appeals, Eastern District, has jurisdiction to hear this appeal. This appeal does involve, in part, the validity of a statute in Missouri. However, this Court could decide the matter without reaching those issues. *Jackson County Board*

of Election Commissioners v. Paluka, 13 S.W.3d 684, 689 (Mo. App. W.D. 2000). Therefore, this appeal is not one in which the Missouri Supreme Court has exclusive appellate jurisdiction. Mo. Const. Art. V, §3. This Court likewise has jurisdiction among the Courts of Appeals because St. Louis County is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District. RSMo. §477.050.

STATEMENT OF FACTS

Plaintiffs Ann and Gene Spradling filed this medical negligence lawsuit on February 9, 2009, and an Amended Petition on February 24, 2009. (L.F. 5; 17) Plaintiffs filed health care affidavits pursuant to §538.225, RSMo. 2005, on July 15, 2009.[1] (L.F. 68-70, 71-73) A separate affidavit was filed as to each defendant named in the Petition, in accordance with the statute. (L.F. 68-70, 71-73)

The medical care at issue involves performance of a vertebroplasty, a procedure whereby cement is injected into vertebral bodies to stabilize fracture sites, which resulted in permanent injury to and paralysis of Ann Spradling. (L.F. 21-22) While the individual who performed the vertebroplasty is a neurosurgeon, it is undisputed that vertebroplasties are performed by medical doctors from various specialities, typically by interventional radiologists, orthopedic surgeons, neurosurgeons or anesthesiologists. (L.F. 118)

Under the prior version of the Affidavit of Merit statute, §538.225 RSMo. 1986, Dr. John Mathis' status to provide the basis for an affidavit of merit would have been unquestioned. However, Respondents claim that the new statute requires every medical malpractice plaintiff to obtain a letter from a health care provider in the defendant's own specialty, under penalty of dismissal without prejudice. (L.F. 74-80; 150-51)

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[1] Upon application of Plaintiffs, the trial court extended the time for Plaintiffs to file their health care affidavit pursuant to §538.225.5. (L.F. 146, 154-157)

A. The medical procedure at issue is one which is performed by medical doctors from various medical specialties and the standard of care is the same regardless of the specialty of the physician doing the procedure.

Vertebroplasty is a medical procedure where bone cement is percutaneously injected into a fractured vertebra in order to stabilize it. Vertebroplasties are performed by medical doctors, typically by interventional radiologists, orthopedic surgeons, neurosurgeons or anesthesiologists. (L.F. 118) The same standard of care applies to a vertebroplasty procedure, regardless of the subspecialty of the physician performing the procedure. (L.F. 118)

B. The April 3, 2008 vertebroplasty procedure permanently injured and paralyzed Ann Spradling.

Ann Spradling suffered a fall in March of 2008 and was diagnosed with compression fractures in her low back. (L.F. 21) In April of 2008, she was admitted to St. Mary's Health Center for a vertebroplasty procedure. (L.F. 21-22) Dr. Sprich, a physician, performed the vertebroplasty on April 3, 2008. (L.F. 22) Following the procedure, Ann Spradling had difficulty moving her left lower extremity and was unable to move her right lower extremity. (L.F. 21-22) The pain and paralysis of her lower extremities is a permanent injury caused by the negligence surrounding the vertebroplasty procedure. (L.F. 17-35; 68-73) Mrs. Spradling was admitted to Lutheran Nursing Home

where she remains an inpatient, unable to perform activities as she did prior to the vertebroplasty procedure. (L.F. 22)

C. John Mathis, M.D., is a qualified medical doctor familiar with the standard of care for vertebroplasty, the procedure at issue.

John M. Mathis, M.D., is the physician who provided the basis for Plaintiffs' health care affidavits in this case. (L.F. 68-73) Dr. Mathis routinely manages the type of issues in this case, is familiar with the facts and circumstances surrounding the care and treatment of Ann Spradling, and routinely manages patients and performs vertebroplasties on patients. (L.F. 69, 72)

Dr. Mathis set forth his credentials in an affidavit that was filed with the trial court in response to Respondents' motions. (L.F. 115-145; 152-53) His curriculum vitae sets forth not only his educational background, training and experience as a medical professional, but also his vast teaching experience, scientific presentations and publications on vertebroplasty and bone cement. (L.F. 117, 120-45)

Dr. Mathis is a board certified medical doctor, licensed to practice medicine in the States of Maryland and Virginia. (L.F. 69, 72, 117) He has been in the active practice of medicine before and during the last five (5) years. (L.F. 117) Dr. Mathis has taught numerous courses, given numerous lectures and scientific presentations, and authored many books, publications and chapters on vertebroplasty and bone cement. (L.F. 117-18, 120-45) He is board certified in both Diagnostic Radiology and Nuclear Medicine

Radiology. (L.F. 118) He completed a fellowship in Interventional Neuroradiology and served as Director of Interventional Neuroradiology at John Hopkins Medical Center. (Id.) Dr. Mathis currently serves as Medical Director of the Centers for Advanced Imaging in Roanoke, Virginia. (L.F. 118)

Dr. Mathis has been doing vertebroplasties since 1993. (L.F. 119) It was Dr. Mathis who introduced the vertebroplasty procedure to the University of Maryland and John Hopkins University, as well as in southwest Virginia, where he now resides. (L.F. 119) Dr. Mathis co-authored the first book on vertebroplasty, Percutaneous Vertebroplasty, 2002, reprinted 2004. (Id.) He was co-author of the American College of Radiology standard of practice of care for vertebroplasty. (Id.) Throughout the course of his career, he has performed or assisted in over 3,000 vertebroplasties and has taught over 50 courses on vertebroplasty. (L.F. 118-19) Dr. Mathis remains in the active practice of medicine which includes performing percutaneous vertebroplasties. (L.F. 119)

Dr. Mathis served as a Medical Consultant for Education for Stryker, a company which manufactures products for use during vertebroplasties. (L.F. 118) Stryker hired Dr. Mathis to teach physicians how to perform vertebroplasties, which he did during the years 2000-2007. (Id.) He has taught medical doctors, including neurosurgeons, how to perform vertebroplasty. (Id.)

Dr. Mathis is currently a consultant for Orthovita, a bone cement company in Malvern, Pennsylvania and a consultant for the Food and Drug Administration with respect to injectable biomaterials in the Orthopedic and Rehabilitation Division of the FDA. (L.F. 118)

Vertebroplasties are performed by medical doctors – typically by interventional radiologists, orthopedic surgeons, neurosurgeons or anesthesiologists. (L.F. 118) Dr. Mathis is familiar with the standard of care for vertebroplasty procedures. (L.F. 118-19) He is familiar with the standard of care that applies to all physicians who perform vertebroplasties, including neurosurgeons. (L.F. 118) The same standard of care applies to a vertebroplasty procedure, regardless of the subspecialty of the physician performing the procedure. (Id.) Moreover, Dr. Mathis is familiar with the medical standard of care that applied to the vertebroplasty procedure performed by Dr. Sprich on Ann Spradling. (L.F. 119)

D. Proceedings Below

Plaintiffs filed their First Amended Petition on February 24, 2009, asserting medical negligence against SSM Medical Group and SSM Health Care St. Louis and their agents, servants and employees including William Sprich, M.D. (L.F. 17-35) Plaintiffs raised constitutional challenges to all of HB 393 and specifically, Section 538.225 in their Petition and First Amended Petition. (L.F. 6-9; 18-21) Both Respondents moved to

strike Plaintiffs' constitutional challenge allegations.[2] (L.F. 52-54, 60-61) Plaintiffs' counsel timely filed affidavits of merit as required for medical negligence cases. (L.F. 68-73, 146, 156) On August 21, 2009, SSM Medical Group filed a Motion to Dismiss for Failure to file a Compliant Health Care Affidavit asserting that Plaintiffs' claim must be dismissed because the written opinion was not from a "legally qualified health care provider" as defined in §538.225.2 because Dr. Sprich, the physician who performed the at issue vertebroplasty is a neurosurgeon and Dr. Mathis does not practice in substantially the same specialty as Sprich. (L.F. 74-80) Plaintiffs opposed the motion. (L.F. 81-145) SSM Medical Group's motion was granted on September 22, 2009. (L.F. 147-49) Only after co-defendant's motion was granted did SSM Health Care St. Louis file its motion to dismiss for failure to file a compliant health care affidavit. (L.F. 150-51) SSM Health Care St. Louis adopted the motion previously filed by SSM Medical Group. (L.F. 150) Plaintiffs responded by adopting their response and answer and all exhibits filed in response to the previously filed co-defendant's motion. (L.F. 0152-53)

On October 1, 2009, the trial court granted SSM Health Care St. Louis' motion to dismiss finding that Plaintiffs' health care affidavit did "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

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[2] Respondents motions to strike Plaintiffs' constitutional challenge allegations were never noticed for hearing nor were they ruled upon.

specialty as the defendant." (L.F. 156) The trial court denominated its Orders dismissing Plaintiffs' claims as Judgments pursuant to Rule 74.01 (a). (L.F. 158) Plaintiffs timely appealed on October 2, 2009. (L.F. 159-70)

POINTS RELIED ON

I. **THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE THE PLAIN WORDING OF SECTION 538.225 RSMO. RENDERS JOHN MATHIS, M.D., A LEGALLY QUALIFIED HEALTH CARE PROVIDER.**

Council Plaza Redevelopment Corp. v. Duffey, 439 S.W.2d 526 (Mo. banc 1969)

Hawkins v. Hawkins, 511 S.W.2d 811 (Mo. 1974)

Nelson v. Crane, 187 S.W.3d 868 (Mo. banc 2006)

II. **THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE THE TRIAL COURT MISINTERPRETED SECTION 538.225 AS REQUIRING A LEGALLY QUALIFIED HEALTH CARE PROVIDER TO HAVE ADDITIONAL CREDENTIALS BEYOND THOSE REQUIRED OF AN EXPERT TO MAKE A SUBMISSIBLE CASE OF MEDICAL NEGLIGENCE.**

§490.065 RSMo.

Hiers v. Lemley, 834 S.W.2d 729 (Mo. banc 1992)

MacDonald v. Sheets, 867 S.W.2d 627 (Mo. App. E.D. 1993)

Swope v. Printz, 468 S.W.2d 34 (Mo.1971)

III. THE TRIAL COURT'S INTERPRETATION OF SECTION 538.225, IF CORRECT, WOULD RENDER SECTION 538.225 UNCONSTITUTIONAL IN THAT SUCH AN INTERPRETATION VIOLATES PLAINTIFFS' RIGHT TO TRIAL BY JURY, ACCESS TO COURTS, THE PRINCIPLE OF SEPARATION OF POWERS AND THE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE MISSOURI AND UNITED STATES' CONSTITUTIONS.

Mo. Const., Art. I, §2

Mo. Const., Art. I, §10

Mo. Const., Art. I, §14

Mo. Const., Art. I, §1

U.S. Const. Amend. XIV, §1

§490.065 RSMo.

§490.065 RSMo.

Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. banc 1991)

Swope v. Printz, 468 S.W.2d 34 (Mo.1971)

IV. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES PLAINTIFFS' RIGHT OF ACCESS TO COURTS AS GUARANTEED BY ARTICLE I, §14 OF THE MISSOURI CONSTITUTION AND PLAINTIFFS' RIGHT TO TRIAL BY JURY AS GUARANTEED IN ARTICLE I, SECTION 22(A) OF THE MISSOURI CONSTITUTION.

Mo. Const., Art. I, §14

Mo. Const., Art. I, §22

U.S. Const. Amend. VII

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow, 36 S.W. 43 (Mo. 1896)

State ex rel. M.D.K. v. Dolan, 968 S.W.2d 740 (Mo. App. E.D. 1998)

V. **THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE SEPARATION OF POWERS AS GUARANTEED BY ARTICLE II, §1 OF THE MISSOURI CONSTITUTION.**

Mo. Const., Art. I, §22

§490.065 RSMo.

VI. **THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AS SET FORTH IN THE UNITED STATES CONSTITUTION, AMENDMENT XIV AND ARTICLE 1, §§2, 10 OF THE MISSOURI CONSTITUTION.**

Mo. Const., Art. I, §2

Mo. Const., Art. I, §10

U.S. Const. Amend. XIV

VII. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT STEMS FROM A LEGISLATIVE BILL THAT VIOLATES ARTICLE III, §23 OF THE MISSOURI CONSTITUTION, WHICH REQUIRES EVERY BILL TO CONTAIN A SINGLE SUBJECT WHICH IS CLEARLY EXPRESSED IN ITS TITLE.

Mo. Const., Art. III, §23

Carmack v. Director, Missouri Dept. of Agriculture., 945 S.W.2d 956 (Mo. banc 1997)

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994)

St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. banc 1998)

VIII. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE LIMITED PURPOSE RULE OF ARTICLE V, §5 OF THE MISSOURI CONSTITUTION AND IT IS VOID FOR VAGUENESS.

Mo. Const., Art. V, §5

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE THE PLAIN WORDING OF SECTION 538.225 RSMO. RENDERS JOHN MATHIS, M.D., A LEGALLY QUALIFIED HEALTH CARE PROVIDER.

A. Standard of Review

The interpretation of a statute is a question of law that is reviewed *de novo*. *Nelson v. Crane*, 187 S.W.3d 868, 869 (Mo. banc 2006).

B. Argument

It is clear that Missouri law permits a plaintiff in a medical negligence case to establish a submissible case through the use of an expert that does not practice in substantially the same specialty as the defendant. Here, Dr. Mathis is a board certified interventional radiologist with extensive experience in performing vertebroplasties and preventing paralysis and the resulting complications experienced by Dr. Sprich during his care and treatment of Plaintiff, Ann Spradling. (L.F. 115-45)

Despite this, Respondents sought to escape liability by requiring strict technical compliance with both paragraphs 1 and 2 of RSMo. §538.225 and disregarding the conjunctive element contained in paragraph 2.

Section 538.225.2[3], with emphasis added to the conjunctive, states:

> 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 speciality as the defendant.

Section 538.225.2 RSMo.

The primary rule in statutory interpretation 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 in their plain and ordinary meaning. *Nelson*, 187 S.W.3d at 869. When a word used in a statute is not defined, courts use the meaning found in a dictionary. *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008). Moreover, when the legislature enacts a statute using a term that has been given a specific meaning in prior court decisions, it is presumed that the legislature acted with knowledge of that prior judicial action. *Cook Tractor Co. Inc., v. Director of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006).

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[3] The entire text of the statute showing the amendments made by the legislature in 2005 is attached in the Appendix at A-07. Deletions to the statute are indicated by strikethroughs. Additions to the statute are indicated by bold type.

By the clear wording and the ordinary grammatical construction, both a practicing physician and a retired physician are "legally qualified." As to retired health care providers, however, they must be within five (5) years of practicing the same specialty as the defendant. Respondents in this case, however, contend that the "same specialty" qualifier applies to both actively practicing physicians and retired physicians.

In Missouri, several cases have declared what the word "or" means in a statute. "Or" is a disjunctive that usually marks an alternative and corresponds to the word "either." *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. banc 1969). The ordinary interpretation of the word "or" is not as a conjunctive, and it never means "and" unless the context requires such construction. While "and," is sometimes construed as "or," and vice versa,

> [t]his construction . . . is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake.

Hawkins v. Hawkins, 511 S.W.2d 811, 813 (Mo. 1974) (quoting 3A C.J.S. And, pp. 451-453). Here, there is no compelling reason to interpret "or" to be used as anything

other than an alternative, and there are numerous reasons why "same specialty" should not be construed to modify "actively practicing" physicians.

1. There is no evidence the Legislature intended "either/or" to mean something different.

Although the legislature has placed greater restrictions on plaintiffs filing lawsuits for medical negligence, there is no evidence that the amendment to §538.225 in 2005 was meant to mean something other than how it can plainly be read. Using the plain language of §538.225, a plaintiff's attorney can certify the merits of a medical malpractice case with a letter from either an actively practicing physician, or a retired physician who was very recently in "substantially" the same specialty as the defendant. By amending §538.225 the legislature may have been addressing a concern that retired physicians were certifying malpractice cases. For example, one might think that a physician still engaged in the practice is better informed as to recent medical issues and less likely to baselessly criticize colleagues with whom he or she has an ongoing professional relationship. Thus, as to retired physicians, the legislature put the additional restriction that a physician be within five years of retirement from practicing in substantially the same specialty as the defendant. See, §538.225.2.

There is no evidence that Respondents can point to that would make it clear and unambiguous that "same specialty" must modify "actively practicing." As stated in *Hawkins*, 511 S.W.2d at 813, Respondents can only meet this burden by showing that

disregarding the disjunctive nature of "or" must be done in order to effectuate the manifest intention of the legislature or where not to do so would be tantamount to a refusal to correct a mistake.

The trial court's interpretation of the term "legally qualified health care provider" is inconsistent with the plain wording of the statute because John Mathis, M.D., is a legally qualified health care provider under the plain wording of the statute (i.e., a "health care provider licensed in . . . any other state in the same profession as the defendant . . .") and the trial court erred in dismissing Plaintiffs' cause of action.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE THE TRIAL COURT MISINTERPRETED SECTION 538.225 AS REQUIRING A LEGALLY QUALIFIED HEALTH CARE PROVIDER TO HAVE ADDITIONAL CREDENTIALS BEYOND THOSE REQUIRED OF AN EXPERT TO MAKE A SUBMISSIBLE CASE OF MEDICAL NEGLIGENCE.

A. Standard of Review

The interpretation of a statute is a question of law that is reviewed *de novo*. Nelson v. Crane, 187 S.W.3d 868, 869 (Mo. banc 2006).

B. Argument

There is no dispute that Dr. Sprich is a neurosurgeon and that Plaintiffs' affidavit was supported by the opinion of an interventional radiologist. (L.F. 75-76) There is no dispute that the alleged malpractice involves health care services, specifically complications during a vertebroplasty procedure, that is not peculiar to neurosurgery. (L.F. 118) Respondents contention that §538.225 requires an affidavit submitted in support of a medical malpractice claim to be based upon the opinion of a health care provider in the same profession and practicing substantially the same specialty as the defendant is inconsistent with Missouri precedent which clearly identifies the manner and method a plaintiff may utilize at trial to build a submissible case of medical malpractice. The practical effect of Respondent's interpretation is the complete disregard for the

allegations of the malpractice at issue in favor of an unnecessarily rigid application of form over substance.

Dr. Mathis is a medical doctor licensed to practice medicine in Maryland and Virginia. (L.F. 117) He is in the active practice of medicine and is board certified in both Diagnostic Radiology and Nuclear Medicine Radiology. (L.F. 69) He participated in fellowships in Interventional Neuroradiology. (L.F. 69) Dr. Mathis has performed or assisted in over 3000 vertebroplasties. (L.F. 119) Dr. Mathis has authored numerous books and publications on vertebroplasty and has taught medical doctors, including neurosurgeons, how to perform vertebroplasty. (L.F. 117-18) Dr. Mathis is familiar with the standard of care for all physicians who perform vertebroplasties, including neurosurgeons. (L.F. 69, 118) Dr. Mathis routinely manages the types of issues involved in this case, is familiar with the facts and circumstances surrounding the care and treatment of Ann Spradling and manages and performs the procedure which is at issue in this case. (L.F. 68-69) The alleged malpractice is not peculiar to Dr. Sprich's speciality of neurosurgery and in fact would be well known to a broad range of physicians who perform vertebroplasty (i.e., radiologists, anesthesiologists, neurosurgeons, orthopedic surgeons). Although Dr. Sprich is a neurosurgeon, the fact remains that the care of Ann Spradling did not require the expertise of a neurosurgeon alone.

Missouri statutory and Missouri case law clearly permits an expert that is not practicing substantially in the same specialty as a defendant to testify as to the standard of care in a medical malpractice case.

By Missouri statute, a witness qualified by "knowledge, skill, experience, training, education or otherwise," may testify as an expert, and give opinions on the care rendered by a defendant-health care provider. §490.065, RSMo. 2000. Moreover, that a physician-expert's primary experience is in a field of specialty other than that of the defendant does not disqualify the expert from testifying against the defendant. As held by the Missouri Supreme Court:

> A physician is generally competent to testify in a specialty field in which he has limited experience and training, even an area that is not his particular specialty. *Swope v. Printz*, 468 S.W.2d 34, 40 (Mo.1971). When an expert from a particular profession is called to testify, it is not normally required that he be a specialist in a particular branch of the profession. *In Interest of C.L.M.*, 625 S.W.2d 613, 615 (Mo. banc 1981).

Hiers v. Lemley, 834 S.W.2d 729, 733 (Mo. banc 1992). All Districts of the Court of Appeals have followed the Missouri Supreme Court's lead on this issue.

In the Eastern District case of *MacDonald v. Sheets*, 867 S.W.2d 627, 630 (Mo. App. E.D. 1993), the alleged malpractice included malpractice committed by an oral

surgeon performing a turbinectomy, the surgeon's post-surgical care, and the surgeon's failure to obtain the patient's informed consent. The expert opinions supporting the alleged malpractice were given by a dentist and an otolaryngologist. Id. at 630-31. Although both experts admitted that they were not qualified to testify regarding the malpractice that allegedly occurred during the actual surgery itself, the experts' opinions related to the post-operative care and the failure to obtain informed consent. The Eastern District found that the trial court erred in finding that the experts were not qualified to testify. *MacDonald*, 867 S.W. 2d at 630-31.

In the case of *Estate of Treece v. Stillie*, 868 S.W.2d 111, 113 (Mo. App. W.D. 1993), the Western District stated:

> Where a physician witness gives opinion testimony about the reasonable standard of medical care, and whether certain conduct of another physician did or did not measure up to that standard, the fact the witness is in a different field of specialization than the defendant is no ground for rejecting his testimony. That fact goes only to the weight to be given the testimony. *Swope v. Printz,* 468 S.W.2d 34, 40 (Mo.1971) (psychiatrist testified to acceptable medical standards in field of thyroid surgery); *Harris v. Bales,* 459 S.W.2d 742, 747-51 (Mo. App.1970) (osteopath qualified to testify as expert on standard of care in case against medical doctor involving reduction of bone

fractures). The test ultimately is whether the expert witness has "sufficient skill, knowledge, or experience in the field or calling as to make it appear that his opinion will probably aid the trier in his search for truth." *Eichelberger v. Barnes Hosp.*, 655 S.W.2d 699, 704 (Mo. App. E.D. 1983).

The alleged malpractice in *Treece* involved the failure of a radiation oncologist to pursue the diagnosis of metastatic cancer of the spine of the decedent. The expert opinion supporting the claim of malpractice was given by an orthopedist. *Treece*, 868 S.W.2d at 113. The Western District affirmed the trial court's admission of the expert testimony of the orthopedist. Id. See also, *Laws v. St. Luke's Hosp.*, 218 S.W.3d 461, 469 (Mo. App. W.D. 2007) (An expert can be qualified to give an opinion by "knowledge, skill experience, training, or education" and a physician expert may opine regarding the standard of care, even if the expert practices in a different field of specialization than the defendant).

Finally, in *Bella v. Turner*, 30 S.W.3d 892, 899 (Mo. App. S.D. 2000), the Southern District cited *Treece* with approval and held that the fact that an expert witness is in a different field of specialization than the defendant is no ground for rejecting the expert's testimony as this fact goes only to the weight to be given the testimony. Id. at 899.

In *Bella*, the plaintiff suffered a heart attack, received treatment, was discharged from the hospital five days later, and was prescribed heparin. *Bella*, 30 S.W.3d at 895. Shortly thereafter, the plaintiff suffered two strokes. Id. The alleged malpractice in the case involved the prescription of heparin by a cardiologist. Id. at 895. The expert opinion regarding both standard of care and causation was supported by a physician that specialized in neurology, who frequently prescribed heparin and who was aware of the specific heparin-induced side-effect at issue, its symptoms, and how it should be treated. Id. at 899. The Southern District found no abuse of discretion in allowing the expert's testimony. Id.

It is quite clear that Missouri law permits 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. Thus, for purposes of the substantive law of medical malpractice, it makes no difference that Dr. Mathis' specialty is different from that of the physician who performed the vertebroplasty on Ann Spradling. In the present case, Dr. Mathis is a board certified physician, specifically an interventional radiologist, with extensive experience in vertebroplasty and the failures and complications experienced by Dr. Sprich. (L.F. 117-45) The trial court erred in that it misinterpreted §538.225 as requiring a legally qualified health care provider to have additional credentials beyond those required of the expert needed to make a submissible case of medical negligence.

III. THE TRIAL COURT'S INTERPRETATION OF SECTION 538.225, IF CORRECT, WOULD RENDER SECTION 538.225 UNCONSTITUTIONAL IN THAT SUCH AN INTERPRETATION VIOLATES PLAINTIFFS' RIGHT TO TRIAL BY JURY, ACCESS TO COURTS, THE PRINCIPLE OF SEPARATION OF POWERS AND THE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE MISSOURI AND UNITED STATES' CONSTITUTIONS.

A. Standard of Review

The interpretation of a statute is a question of law that is reviewed *de novo*. Nelson v. Crane, 187 S.W.3d 868, 869 (Mo. banc 2006) and the standard of review for constitutional challenges to a statute is *de novo*. City of Arnold v. Tourkakis, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

Affirming the trial court's construction of §538.225 would render it unconstitutional. In Sections IV through VIII of this Argument, Plaintiffs will set forth the reasons this section, as well as all of the tort reform bill embodied in HB 393, is unconstitutional. Points I-III argue that by construing "or" to mean "and," the trial court erred in granting Respondents' motions. To hold that a plaintiff in a medical negligence case must file an affidavit from a health care provider of the same specialty as the at issue

defendant, before the action can ever proceed to discovery, is to adopt a reading of §538.225 that is unconstitutional.

The predecessor to the current affidavit statute was §538.225 R.S.Mo. 1986. It was unchanged between 1986 and 2005. The prior version withstood a constitutional challenge in 1991, when the Missouri Supreme Court decided *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). Extended discussion of this opinion is required, for in fact what saved the old version of the statute has been eviscerated in the current version. Simply put, the present version of §538.225, if interpreted as Respondents suggest, cannot be sustained under the Missouri Constitution.[4]

The plaintiff in *Mahoney* asserted that §538.225 infringed the right to trial by jury [Mo. Const., Art. I, §22(a)] and access to the courts [Mo. Const., Art. I, §14]; violated the principle of separation of powers [Mo. Const., Art. II, §1], and denied the plaintiffs the equal protection of the laws and due process of law [U.S. Const. Amend. XIV, §1; Mo. Const., Art. I, §§2, 10]. Addressing these claims, the Missouri Supreme Court began by discussing the purposes of the affidavit requirement:

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[4] This is not to imply that construing the statute as Plaintiffs suggest would cure the constitutional infirmities of §538.225. However, giving the Plaintiffs a choice of experts – an actively practicing physician or a former specialist in the defendants' fields – avoids the constitutional issue for the time being.

> It is readily understood from the history and text of Chapter 538 that the enactment 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. The effect intended for §538.225 within that scheme is to cull at an early stage of litigation suits for negligence 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.

Mahoney, 807 S.W.2d at 507.

Suits lacking even "color of merit," according to *Mahoney*, are frivolous and have no place in the courts. In fact, the word "frivolous" appears no less than nine (9) times in the court's opinion; "groundless" or "ungrounded," six (6) times. The foundation of the court's opinion denying the constitutional challenge is this: the §538.225 procedure was valid because the plaintiff's suit would ultimately be dismissed anyway, so better to pretermit the action before all the expense of discovery and a trial.

(a) Right to Trial by Jury

Plaintiff in *Mahoney* challenged the affidavit requirement as denying his constitutional right to trial by jury, Art. I, §22(a). After first noting that the right to a jury trial in a medical malpractice lawsuit under Chapter 538 was preserved, the Missouri

Supreme Court pointed out that in such a case expert testimony would be required to make out a case of malpractice.

At this point Appellants point out that they do not dispute that Chapter 538 is invoked by the allegations of the Petition filed in this Court. Further, expert testimony to establish the standard of care will likely be required. What is important is what the *Mahoney* court said next about the old version of the statute:

> A petition on file for ninety days, but without possibility of *prima facie* proof of malpractice for want of expert medical testimony, also will not go to the jury. Such a petition has no chance of success under the precedents and is subject to summary disposition . . . . It lacks even color of merit and is frivolous. Thus it is not the "screening" procedure of §538.225 that impedes the progression of their petition to the jury, as the plaintiffs argue, but their failure to meet a requirement of substantive law.

Mahoney, 807 S.W.2d at 508 (emphasis added).

By contrast, after the enactment of HB 393 in 2005, it is exactly the screening requirement of §538.225 that causes a plaintiffs' action to fail, and not the failure to meet a requirement of substantive law. That this is clear is shown by §490.065, RSMo., which was unchanged by HB 393, which allows an expert to testify when qualified by "experience or otherwise." Missouri law on the qualifications of medical experts – again,

unchanged by HB 393 – is that a physician-expert's qualifications relative to those of the defendant go to the weight of the testimony and not admissibility. *Swope v. Printz*, 468 S.W.2d 34, 40 (Mo. 1971). Thus, the Spradlings would readily get this case to the jury upon adequate proof that Dr. Mathis is qualified by experience or otherwise to testify about how a vertebroplasty should be performed. Notably, the affidavit of Dr. Mathis establishes his qualifications and the defense attorneys do not dispute that Dr. Mathis would be qualified to testify as an expert it this case. That he is not a neurosurgeon goes solely to the weight of his testimony.

Returning to *Mahoney*, another reason for holding it did not violate the plaintiff's right to jury trial was that it worked no change in substantive law:

> Rule 55.03 requires of the party or attorney the duty of reasonable inquiry that the petition or other paper filed "is well grounded in fact and is warranted by existing law." Thus, a purpose of Rule 55.03 is to prevent the burdensome cost of frivolous civil suits.

Mahoney, 807 S.W.2d at 508.

Section 538.225, according to the court, "emulates" the purpose of Rule 55.03 in medical malpractice suits. Importantly, the court then stated regarding §538.225:

> It intends no change in our substantive medical malpractice law. Nor does the affidavit give discovery, since neither the

identity of the expert nor the detail of the opinion rendered need be disclosed.

Id.

Under the 2005 version of the statute, neither of these protections remain. The substantive law has in effect been overturned by the enactment of a hurdle that will keep cases from ever getting to the jury. Further, the present statute does give discovery, since the expert's name must now be disclosed.[5]

It can no longer be said, as it was in *Mahoney*, Id. at 509, that the affidavit requirement adds "no 'strings' or burden on the ability of a plaintiff to prove a medical malpractice claim other than the burden the substantive law already prescribes." The current §538.225 undeniably adds additional burdens far beyond what the substantive law requires. If the Respondents' construction of the statute is correct, there is nothing to save this statute from the proscription of Art. I, §22(a) that "the right to trial by jury as heretofore enjoyed shall be inviolate."

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[5] If anything, Rule 55.03 has been watered down by §538.225 RSMo. 2005. No longer will a lawyer's certificate of a good faith filing, as shown by his or her signature, be enough in medical malpractice cases. Opposing lawyers and judges will now get to make their own assessment by exploring the qualifications of plaintiff's expert, before any substantive discovery takes place. See, §538.225.7 RSMo. 2005.

(b) Right of Access to Courts

The *Mahoney* case also upheld §538.225 against an attack under the "open courts" provision of the Missouri Constitution, Art. I, §14, which provides that "the courts of justice shall be open to every person . . . and that right and justice shall be administered without sale, denial or delay." As with the right to trial by jury, the *Mahoney* court's defense of the statute under Art. I, §14 does not save the current version of the affidavit of merit statute.

The *Mahoney* court began by describing what the open courts provision does and does not provide:

> Art. I, §14 does not create rights, but is meant to protect the enforcement of rights already acknowledged by law. The right of access "means simply the right to pursue in the courts the causes of action the substantive law recognizes." . . . The substantive law requires that a plaintiff who sues for personal injury damages on the theory of health care provider negligence prove by a qualified witness that the defendant deviated from an accepted standard of care. Without such testimony, the case can neither be submitted to the jury nor be allowed to proceed by the court. 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 "[re]design[s] the framework of the substantive law" to accomplish a rational legislative end.

Id. at 510 (quoting *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989)).

The court concluded that §538.225 "neither denies free access of a cause nor delays thereafter the pursuit of that cause in the courts." Id. (emphasis added). As is clear, the *Mahoney* court took great comfort in the fact that any case without expert testimony was going to be dismissed anyway. This purportedly was what kept it from denying access to the courts. The 2005 amended §538.225, however, does not effectuate what is otherwise a *fait accompli.* In fact, dismissals under the new statute are completely unrelated to merit, frivolousness, or even bare submissibility. Cases will be dismissed because of the statute, and not because they are frivolous. A plainer case could not be made for a barrier to the courthouse. Respondents cannot say that Plaintiffs have access because they can file their case without an affidavit from a neurosurgeon. Justice – once the case is filed – must be administered "without sale, denial or delay." Mo. Const. Art. I, §14. To require plaintiffs to have the matter reviewed by a neurosurgeon alone, would require a large expenditure and pose a significant hurdle. This is a denial of justice.

The *Mahoney* justifications for §538.225 do not exist in the 2005 amendments, and the affidavit of merit requirement enacted in 2005 violates the Spradling's right of access to the courts if Respondents' interpretation of it is accepted.

(c) Separation of Powers

As with access to courts and trial by jury, *Mahoney* answered the plaintiff's separation of powers[6] argument with the "rid the courts of frivolous suits" rationale. Specifically, the court stated:

> The written opinion affirmed in the affidavit functions not to determine that the medical malpractice claim has "merit," but that the claim is not frivolous. The sanction of dismissal without prejudice that culminates a noncompliance with §538.225, moreover, is a determination that under the substantive law of medical malpractice the petition cannot succeed, and so is frivolous. It is a judge that decides that the case may proceed, not a health care provider.
>
> . . . [The affidavit] facilitates in medical malpractice actions the objective of Rule 55.03 in all civil actions – the elimination from the court system of groundless suits.

Mahoney, 807 S.W.2d at 510 (emphasis added).

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[6] Art. II, §1 of Missouri Constitution.

It cannot be said of the current §538.225 that it merely carries out the "substantive law," or that one who files a affidavit based on a physician in a different speciality as the defendant, "cannot succeed" on the merits. Here, had the defendants failed to file a motion under §538.225.6, or if these motions had been denied by the trial court, there is no reason whatsoever to think that plaintiffs "cannot succeed," or that the action is "frivolous." Under the substantive law, a physician need not be in the same specialty as the defendant or defendants, and "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.

Thus, by Respondent's interpretation of §538.225, the only way that the Spradlings can survive the motions to dismiss is to provide an affidavit from a neurosurgeon at a substantial cost, and if, as *Mahoney* declares, §538.225 works no change in the law, the constitutional guarantee of separation of powers clearly has been violated. If upheld, the trial court's interpretation of §538.225 would put judges across the state in the impossible position of dismissing a case knowing full well that the plaintiffs, under the substantive law, could succeed in obtaining a verdict in their favor.

(d) Due Process and Equal Protection

Plaintiffs in *Mahoney* also challenged the affidavit procedure as a violation of due process and equal protection under the Missouri and United States Constitutions. U.S. Const. Amend. XIV, §1; Mo. Const., Art. I, §§2, 10. Once again, although the court

upheld the statute, its defense of it shines a glaring spotlight on the constitutional infirmities of §538.225, as amended in 2005.

As to the due process challenge, the *Mahoney* court simply cited its discussion under the access to courts section. Thus, Plaintiffs incorporate their argument regarding that section here, and submit that the same ways in which §538.225 violates their access to courts also deny them due process of law. Regarding equal protection review, the *Mahoney* court began by setting forth the appropriate level of judicial scrutiny:

> In terms of equal protection, the presumption of constitutional validity vanishes when the purpose of the legislation is to create classes upon criteria that are inherently suspect or impinges upon a fundamental right . . . . A statute, such as §538.225, however, which neither touches a fundamental right nor burdens a suspect class, will withstand an equal protection challenge if the classification is rationally related to a legitimate state interest.

Mahoney, 807 S.W.2d at 512.

Under this rational basis standard, a classification between medical malpractice claimants and other tort plaintiffs is not offensive to the constitution, so long as there is a rational basis for the classification. "If the question of the legislative judgment remains at least debatable, the issue settles on the side of validity." Id. at 513.

The basis postulated by the *Mahoney* court, i.e., disposition of frivolous medical malpractice suits that would ultimately be dismissed for want of expert testimony, cannot save the present version of the statute. Simply put, a party that is unable to secure a letter of merit from "substantially the same specialty," but is more than capable of presenting sufficient expert testimony to make a submissible case, is barred from pursuing a case without any rational basis whatsoever. Such a plaintiff's case is non-frivolous by definition, because it meets the requirements of the substantive law.

The legislature here has created a classification system that is irrational and punitive to medical malpractice plaintiffs. Consider Mr. and Mrs. Spradling's plight: they have more evidence of negligence and causation than many non-medical malpractice tort plaintiffs. (L.F. 68-70, 71-73, 115-145) Their counsel, like counsel for other tort victims, certified a good faith filing under Rule 55.03. (L.F. 68-70, 71-73) Unlike the others, counsel set forth the name and credentials of an expert who is fully capable of describing the appropriate standard of care, describing the defendants' breach, and explaining how such breach caused Mrs. Spradling's paralysis. (Id.) The Spradling case was dismissed while the other tort claimants' cases proceed with the full range of discovery available under the rules.

There is no legitimate, constitutional basis for the legislature's distinction. What may have existed under the old version is gone. The only bases for the distinction that can be imagined, e.g., driving up costs to plaintiffs as a deterrent to accessing the courts,

or eliminating legitimate cases early, are all irrational and illegitimate. Even the simplistic argument about lowering the number of claims to keep health care costs under control is not available here.

IV. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES PLAINTIFFS' RIGHT OF ACCESS TO COURTS AS GUARANTEED BY ARTICLE I, §14 OF THE MISSOURI CONSTITUTION AND PLAINTIFFS' RIGHT TO TRIAL BY JURY AS GUARANTEED IN ARTICLE I, SECTION 22(A) OF THE MISSOURI CONSTITUTION.

A. Standard of Review

The standard of review for constitutional challenges to a statute is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

In Section III, plaintiffs described how the statute would not survive constitutional muster if it is interpreted to require a legally qualified health care provided to be both in the same profession as the defendant and actively practicing substantially the same speciality as the defendant. The only way the statute could conceivably be found constitutional is if it is found to have effected only a small change. That is, if all the legislature did was to require a plaintiff utilizing a retired health care provider expert to seek out only one that practiced in the defendant's specialty within the last five (5) years, the Spradling affidavit is sufficient and the constitutional issue is not reached.

If upheld, §538.225 is unconstitutional in that it violates plaintiffs' right to trial by jury as guaranteed by Article I, §14 and Article I, §22(a) of the Missouri Constitution by permitting the trial court to make a determination which violates plaintiffs' right of access to courts and right to have the case heard by a jury. Here, Dr. Mathis the physician who provided the health care affidavit, had sufficient credentials and expertise, and familiarity with the standard of care for vertebroplasty, to afford plaintiffs the right and opportunity to make a submissible case and have the matter heard by a jury. (L.F. 115-145) Section 538.225 unduly restricts this right by requiring plaintiffs to obtain the written opinion of a legally qualified health care who is both in the same profession as the defendant and actively practicing substantially the same speciality as the defendant. The result is injured patients who are denied access to the court system by financial barriers, by an arbitrary affidavit requirement that only they must submit. Further, injured patients are denied discovery rights that all other litigants (including defendants in medical malpractice cases) have. In a medical negligence case with multiple defendants, from multiple specialties, a plaintiff would be required to submit multiple affidavits from various medical specialities. The cost of this requirement would deny injured patients access to court and violate their constitutional right to have the case heard by a jury.

(a) Access to Courts Argument

Article I, §14 of the Missouri Constitution provides: "that the courts of justice shall be open to every person, and certain remedy afforded for every injury to person,

property or character, and that right and justice shall be administered without sale, denial or delay." In *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), the Missouri Supreme Court, reviewing its precedent on the constitutionally right to pursue in the courts causes of action that the substantive law recognizes, held:

> Put most simply, Article I, §14 "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.

The Court reiterated this *Kilmer* holding and set forth a three prong test in *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006): "An open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable." Id. at 640 (citing *Kilmer*, 17 S.W.3d at 549-50). Under this standard, the revised health care affidavit requirements in amended §538.225.2 violates Article I, §14, as least as applied to the Spradlings, because they have a recognized cause of action under the substantive law that §538.225.2 arbitrarily restricts them from pursing.

Under Missouri law, Ann and Gene Spradling have a recognized cause of action for medical negligence and loss of consortium as a result of the injuries suffered. Pursuant to that cause of action, they filed a lawsuit in court. (L.F. 5, 17) The circuit

court, however, eliminated their right to proceed with the case, deciding instead that the affidavit was deficient because Dr. Mathis was not a neurosurgeon. (L.F. 147-49, 156) This was in spite of the fact that under the substantive law of medical negligence, plaintiff would make a submissible case from the testimony of John Mathis, M.D. As in *Kilmer*, this is an arbitrary and unreasonable restriction on plaintiffs' access to the courts under Article I, §14.

(b) Right to trial by jury argument

When the United States declared its independence from Britain, one of the grievances identified was "for depriving us in many cases, of the benefit of Trial by Jury." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 340-341, 99 S.Ct. 645, 656-657 (U.S.N.Y., 1979). "Indeed, the right to trial by jury was probably the only one universally secured by the first American state constitutions." Id. To ensure this fundamental right in the Federal Constitution, the founding fathers included the right to trial by jury in the Bill of Rights, setting forth in the Seventh Amendment to the United States Constitution "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const., Amend. VII; Appendix at A-51.

This right to trial by jury has been a fundamental right guaranteed to all Missouri citizens from the earliest days. When the area which would become Missouri was purchased from France, the Missouri Territorial Laws provided for the right to trial by jury. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003). When Missouri

became a state, it enshrined this guarantee in its constitution. The first Missouri Constitution passed in 1820 provided "that the right of trial by jury shall remain inviolate." Article XIII, §8; see also, *State ex rel. Diehl*, 95 S.W.3d at 84-85. Similarly, the 1875 Constitution continued this absolute right to a trial by jury. *State ex rel. Diehl*, 95 S.W.3d at 84-85. Article I, §22(a) of the current Missouri Constitution continues this mandate, stating that "the right of trial by jury as heretofore enjoyed shall remain inviolate." See Appendix at A-30.

In interpreting this fundamental right, the Missouri Supreme Court has indicated the right of trial by jury is broader in the Missouri Constitution than that expressed in the Seventh Amendment to the United States Constitution. *State ex rel. Diehl*, 95 S.W.3d at 84. The use of the words:

> "remain inviolate," is a more emphatic statement of the right than the simply stated guarantee written some 30 years earlier as the 7th Amendment to the United States Constitution that ". . . the right of trial by jury shall be preserved, . . ."

Id.

Missouri thus has "an extremely strong public policy in favor of the right to trial by jury." *State ex rel. M.D.K. v. Dolan*, 968 S.W.2d 740, 746 fn4 (Mo. App. E.D. 1998), citing *Attebery v. Attebery*, 507 S.W.2d 87, 93 (Mo. App. 1974). "Hardly any right is

more firmly rooted in our law and trial by jury should be jealously guarded by the courts and any curtailment should be scrutinized with the utmost care." Id.

If a matter involves a common law claim for legal damages, the right to trial by jury is "beyond the reach of hostile legislation," and is preserved in its ancient, substantial extent as existing at common law." *State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. 1896); *Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. W.D. 1979) (same). For factual elements historically to be decided by the jury, "the jury trial right is to remain inviolate," and cannot be reached by the legislature no matter what type of statute it attempts to pass. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85, 92 (Mo. banc 2003). Under Missouri law, if it involves an issue of fact on a legal claim, the Constitution requires it be decided by the jury. *In re Grading of Independence & Westport Road, Kansas City*, 141 S.W. 1103, 1106-1107 (Mo. 1911).

R.S.Mo. §538.225 infringes on the long-established right to have a jury determine the weight to place on a given expert's testimony. Instead of the jury, §538.225 sets forth a procedure where the trial court makes a determination as to the sufficiency of plaintiff's "legally qualified health care provider" without regard to that expert's familiarity with the standard of care required for the negligence at issue. Section 538.225.2. Under a different section of the same statute, the court may conduct a hearing to determine probable cause "that one or more qualified and competent health care providers will testify that the plaintiff was injured due to medical negligence by a defendant." Section

538.225.7 The factual determination made by the court does not equate with a question of submissibility. Rather, the judge is charged with dismissing the action if the physician upon which the affidavit of merit is based is not of the same speciality as the defendant. Id. The statute, therefore, expressly attempts to take something which has always been a credibility or weight issue for the jury to decide and place it with the trial court.

In this case, all of the evidence confirms that plaintiffs would make a submissible case via the testimony of Dr. Mathis. (L.F. 115-145) Instead, the trial court dismissed the cause of action and a jury was not allowed to consider plaintiffs' claim. (L.F. 147-49, 156) Here, it was for the jury to determine the weight to afford Dr. Mathis' testimony. The fact that Dr. Mathis in a different field of specialization than the defendants is not ground for rejecting his testimony. That fact goes only to the weight to be given the testimony. *Swope v. Printz*, 468 S.W.2d 34, 40 (Mo 1971)

The right to trial by jury is "beyond the reach of hostile legislation," and the right to be preserved as it existed at common law. *State ex rel. St. Louis K & N.W. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. 1896); *Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. W.D. 1979)(Same); *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85, 92 (Mo. banc 2003)(same). The court's refusal to allow the jury to consider plaintiffs' case was therefore error under the Missouri Constitution.

V. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE SEPARATION OF POWERS AS GUARANTEED BY ARTICLE II, §1 OF THE MISSOURI CONSTITUTION.

A. Standard of Review

The standard of review for constitutional challenges to a statute is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

Amended Section 538.225 violates the constitutional separation of powers prescribed in Article II, §1 of the Missouri Constitution which provides:

> "The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

Unlike under the prior versions of the statute, a plaintiff now can survive a motion for summary judgment based on the substantive law, but cannot survive a motion to dismiss based purely on procedure. This bizarre result stems from the fact that the substantive law is unchanged, and it allows any qualified expert under §490.065 to testify at trial, while only specific health care providers can certify the merits of a lawsuit at its inception, and the concluding paragraph of the statute states that the court shall dismiss the action. This is a clear incursion on a co-equal branch of government in violation of the constitutional separation of powers prescribed in Article II, §1 of the Missouri Constitution.

VI. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AS SET FORTH IN THE UNITED STATES CONSTITUTION, AMENDMENT XIV AND ARTICLE 1, §§2, 10 OF THE MISSOURI CONSTITUTION.

A. Standard of Review

The standard of review for constitutional challenges to a statute is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

This is described fully in Section III (d), above, and will not be repeated here except for one point. In addition to creating an improper classification between general tort plaintiffs and medical malpractice plaintiffs, the new statute creates classes within the classes which violates the due process and equal protection clauses of the United States and Missouri Constitutions. Mo. Const., Art. 1, §§2, 10; U.S. Const., Amend. XIV.

First, 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). Where multiple tortfeasors cause injury to a patient, however, 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.

Perhaps even more perniciously, the statute treats plaintiffs who "fail to file" affidavits at all the same as plaintiffs who file timely affidavits only to have the court later find them deficient. See, §538.225.

VII. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT STEMS FROM A LEGISLATIVE BILL THAT VIOLATES ARTICLE III, §23 OF THE MISSOURI CONSTITUTION, WHICH REQUIRES EVERY BILL TO CONTAIN A SINGLE SUBJECT WHICH IS CLEARLY EXPRESSED IN ITS TITLE.

A. Standard of Review

The standard of review for constitutional challenges to a statute is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

As set forth in Arguments III through VI above, R.S.Mo. 538.225 substantively violates the Missouri Constitution. House Bill 393 which enacted this statute violates the requirements in Art. III, §23 of the Missouri Constitution which mandates that a bill have only a single subject and that said subject be clearly expressed in its title. Rather than have a single subject, House Bill 393 repealed nineteen (19) different statutory sections dealing with a myriad of different subjects, from appellate bonds, to venue. It also enacted twenty-three (23) new provisions on a veritable cornucopia of topics. Having failed to comply with the constitutional mandate that a bill have only one subject, clearly identified, it must be stricken.

Article III, §23 of the Missouri Constitution provides: "[n]o bill shall contain more than one subject which shall be clearly expressed in its title . . ." See, Appendix at A-32. This provision imposes two distinct procedural limitations when the General Assembly attempts to pass any legislation: (1) A bill cannot contain more than one subject (single subject requirement); and (2) the subject of the bill must be clearly expressed in its title (clear title requirement). *Carmack v. Director, Missouri Dept. of Agriculture*., 945 S.W.2d 956, 959 (Mo. banc 1997). A similar provision has been part of every Missouri Constitution since 1865. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101 (Mo. banc 1994). Its terms are mandatory, and not directory. Id. at 102.

This constitutional prohibition serves several vital functions. First, it "facilitates orderly legislative procedures," allowing a bill to be more readily understood and intelligently discussed. *Hammerschmidt*, 877 S.W.2d at 101. It also serves to prohibit the practice of logrolling, or combining multiple amendments or revisions which could not pass on their own merits individually. Id. This requirement of a single, clear subject has been called "one of the great equalizers in backroom politics," which serves as "a hurdle that prevents legislators from hijacking the legislative process by attaching an unrelated provision to a proposed bill." Knoll, Alexander R., *Tipping Point: Missouri Single Subject Provision*, Missouri Law Review, Fall 2007.

This constitutional provision also serves to prevent surprise in the legislative process, by ensuring a clever legislator does not insert unrelated amendments to the body

of pending bills. *Hammerschmidt*, 877 S.W.2d at 102. It further ensures the electorate is fairly apprised of the laws their representatives are proposing and enacting. Id. The single subject and clear title rule thus allows the people an opportunity to be heard on the matter at issue. Id. Finally, since the governor cannot line item veto general legislation, it prevents the legislature from forcing the governor into signing provisions with conflicting merits. Id.

The question is then whether House Bill 393, the bill which enacted Revised 538.225 involved a single, clear subject. Even a cursory review of the bill shows it does not meet either of these two mandatory requirements. Section R.S.Mo. 538.225 was one of twenty-three (23) new sections, which replaced nineteen repealed sections, contained in House Bill 393. The title of House Bill 393 was: "AN ACT to repeal sections 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, R.S.Mo., and to enact in lieu thereof twenty-three new sections relating to claims for damages and the payment thereof." Appendix at A-08. The new sections included statutory provisions on items with chapter titles ranging from Not-for-Profit Corporations (R.S.Mo. §355.176) to Appeals and Appellate Procedure for Bonds (R.S.Mo. §512.099). The bill changes the law on interest (R.S.Mo. §408.040), evidence (R.S. Mo. §490.715, medical bills and §537.090, setting forth a rebuttable presumption regarding the value of deceased individuals), venue (R.S.Mo. §508.010), discovery (R.S.Mo. §510.263), the

statute of limitations for certain claims (R.S.Mo. §516.105), and joint and several liability (R.S.Mo. §537.067). It includes changes to Missouri's privilege laws (R.S.Mo. §537.035 regarding Peer Review of medical treatment), and contains a grant of immunity for negligence (R.S.Mo. §538.228). It even includes an amendment regarding how expression of sympathy or "benevolent gestures" should be treated (R.S.Mo. §538.229.1). Appendix at A-8 - A-26.

The various sections and chapters of H.B. 393 address multiple, disparate areas. For instance, §355.176, a section on service and venue of not-for-profit corporations, has absolutely nothing to do with the express subject of the bill, damages and the payment thereof. Interestingly, this same statute was a section in House Substitute for Senate Bill 768 (HSSB 768) which was enacted into law in 1996. It was declared to be unconstitutional as violating Article III, §23, in its entirety, on the grounds that the narrative portion of the bill's title, indicating that it related to "certain incorporated and non-incorporated entities" was too broad and too amorphous to identify a single subject, and that the statute section numbers to be repealed as listed in title of the bill did not sufficiently relate to a single type of entity for the title to satisfy the clear title requirement. See, *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. banc 1998). Grafting this section into House Bill 393 creates constitutional issues for the same reasons.

In *St. Louis Health Care Network*, the Supreme Court found a "clear title" violation in a bill entitled "relating to certain incorporated and non-incorporated entities" under the rationale that "the title . . . could describe any legislation that effects, in any way, business, charities, civic organizations, governments, and government agencies," or, in other words, "most, if not all, legislation passed by the General Assembly." Id. at 148. The court held that a title cannot be so general as to obscure the contents of the act, because to condone such a bill would "render the single subject mandate meaningless." Id. at 147. If it is too broad or to amorphous to readily identify the single subject at issue, it violates the clear mandate of the Constitution. Id. The court held that the title could deal with any number of things, and was thus too broad. Id. at 147-148. The court concluded this problem existed even if it limited the scope of entities to non profit corporations only. Id., citing *Camack* at 960 (holding term "economic development" was too broad and amorphous).

The same rationale applies here. The title of HB 393 is so broad and amorphous in scope that it fails to give notice of its content, which effectively renders the "single subject" requirement meaningless and obscures the actual subject of the legislation. See, *Home Builders Ass'n of Greater St. Louis v. State*, 75 S.W.3d 267 (Mo. banc 2002), where the court held that a bill entitled "relating to property ownership" was overbroad on the same grounds. Id. at 272.

Despite the overbreadth of the subject of the bill, it does not even clearly stay within these overbroad confines.[7] The subject claims of an affidavit requirement in actions against health care providers does not cover the separate title of Appeals and Appellate Procedure as it relates to bonds. It also does not cover changes to Missouri's law of privilege. In *Hammerschmidt*, the title of the bill stated it was repealing eight statutory provisions relating to elections, and enacting eleven new sections "relating to the same subject." Id. at 100, 103. The court held the title indicated the single subject was to amend laws relating to elections. Id. at 103. The bill itself, however, included provisions on not just elections, but also to authorize a county to adopt a county constitution. Id. The fact that the provision required an election for voter approval did not make it a statute dealing with elections. Id. Instead, this statutory provision's purpose was to authorize a new form of county government, which did not conform to the constitutional mandate that it involve a single, clear title. Id.

Similarly, the court in *Carmack v. Director, Missouri Dept. of Agriculture*, 945 S.W.2d 956, 959 (Mo. banc 1997) dealt with a bill entitled "Relating to Economic Development." The court held this title violated the single subject requirement insofar as it amended the rate of compensation paid to owners of livestock slaughterhouses by the

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[7] If the court should find that the 20 plus changes to multiple titles relate to the subject of the bill, that would be additional evidence of the fact it is overbroad and amorphous. *Home Builders Ass'n of Greater St. Louis*, 75 S.W.3d at 270, fn1.

state veterinarian. The reasoning was that five of the six changes in the law related to programs administered by the Department of Economic Development, which was determined to be the core subject. The state veterinarian was an employee of the Department of Agriculture, instead of the Department of Economic Development. Because the section addressed a different subject than the primary core subject of the bill, it was determined to violate Article III, §23. Id. at 961.

The *Carmack* court held that one clear way to determine whether a bill violates the "one subject" rule, is to review what categories the various amendments fall under. Id. at 960. The Missouri Statutes are divided into different categories, or titles. Title XXXVI, "Statutory Actions and Torts" is the Title of the Missouri Code within which tort actions based on improper health care are encompassed. This Title covers Chapters 521 to 538 of the Missouri Statutes. Only eleven of the twenty three statutory changes contained in House Bill 393 fall within this range. Several of the statutes altered by this bill do not fall under the "Statutory Actions and Torts which covers Chapters 521 and 538 of the Missouri Statutes. For example, R.S.Mo. §355.176 which falls under the Title dealing with "Corporations, Associations and Partnerships." Title XXXIII. Likewise, R.S.Mo. §408.040 which is amended by House Bill 393 is found under Title XXVI, "Trade and Commerce." Many of the other changes to the law are found in yet another title, Title XXXV, "Civil Procedure and Limitations." More than half of the amendments contained in House Bill 393 do not relate to the subject of the bill according to the Statutory Scheme

of Missouri. See, Appendix at A-35 - A-50. Having addressed more than one subject in the bill, it violates §23 of the Missouri Constitution. *Carmack* at 961.

House Bill 393 violates both the clear title rule, and the single subject rule of Article III, Section 23 of the Missouri Constitution. Its failure to have a clear single subject as required, mandates it be invalidated. *Home Builders Ass'n of Greater St. Louis v. State*, 75 S.W.3d 267, 271-272 (Mo. banc 2002).

VIII. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION BECAUSE IN DOING SO, THE TRIAL COURT RELIED ON SECTION 538.225, RSMO 2005, WHICH IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE LIMITED PURPOSE RULE OF ARTICLE V, §5 OF THE MISSOURI CONSTITUTION AND IT IS VOID FOR VAGUENESS.

A. Standard of Review

The standard of review for constitutional challenges to a statute is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

B. Argument

HB 393 violates Article V, §5, because only the Missouri Supreme Court has the authority to implement rules of procedure, and any rule may be annulled or amended only by a law "limited to the purpose." HB 393 affects a wide range of Supreme Court rules, including but not limited to, Rule 55.01, 55.03, 55.04, 55.05, 55.11, 55.27, 55.33. Further the §538.225 denies the entirety of the discovery rules available to plaintiffs in tort cases other than medical malpractice, since dismissal is mandatory after only 180 days. §538.225.7 RSMo. 2005.

Moreover, this statute is hopelessly vague. As just one example, where §538.225.1-6 refer to a "legally qualified" health care provider, §538.225.7 refers to a "qualified and competent" health care provider. This latter section also purports to direct

the court to "dismiss the petition," while sub-section 6 states the court shall "dismiss the action." This vagueness should cause the Court to declare the statute unconstitutional.

Finally, several other states have held affidavit of merit statutes similar to Section 538.225 as amended in 2005 unconstitutional. See, *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007) (affidavit of merit required thirty days after filing of complaint violates Rule 3 (commencement of action) of the Arkansas Rules of Civil Procedure); *Putman v. Wenatchee Valley Medical Center, P.S.*, 216 P.3d 374 (Wash. banc 2009) (Certificate of Merit statute unconstitutional as a burden on access to courts and as violation of separation of powers); *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006) (affidavit of merit was unconstitutional special law and imposed a monetary barrier to court access); *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008) (court's rule-making power infringed by certificate of merit statute); *Hiatt v. Southern Health Facilities, Inc.*, 68 Ohio St.3d 236, 626 N.E.2d 71 (1994) (affidavit requirement violated court rule stating pleadings do not require affidavits to be filed).

CONCLUSION

The trial court erred in dismissing Appellants' cause of action because the Spradlings have a submissible case of medical negligence based upon the affidavit of John Mathis, M.D. In ruling that R.S.Mo. §538.225 requires a "legally qualified health care provider" to be in the same profession and practicing in the same specialty as the defendant misinterprets and improperly construes the word "or" in the statute. Moreover, the trial court's interpretation of §538.225 is incorrect in that it requires a legally qualified health care provider to have additional credentials beyond those required of an expert to make a submissible case of medical negligence.

Should this Court decide the trial court did not err in application or interpretation of R.S.Mo. §538.225, it must reverse on the basis that the statute is unconstitutional. Primarily, the statute attempts to arbitrarily deny medical negligence victims the right of access to courts and the right to trial by jury. Further, the statute violates the separation of powers as guaranteed by the Missouri Constitution and violates the due process and equal protection clauses of the United States and Missouri Constitution. Further, House Bill 393 (2005) which enacted the revision to R.S.Mo. §538.225 violates the single clear title provision of the Missouri Constitution. This provision is in place to prevent the lumping of various statutory provisions as occurred in House Bill 393. Finally, §538.225 violates the limited purpose rule of Article V, §5 of the Missouri Constitutional, is void for vagueness, and impermissibly infringes on the court's rule-making power.

For all of the above state reasons, Appellants request that this Court reverse the trial court's dismissal and reinstate Appellants' cause of action.

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

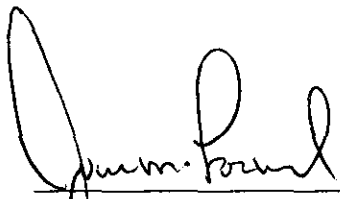
By: _____

Joan M. Lockwood #42883
Stephen R. Woodley #36023
701 Market Street, Suite 800
St. Louis, MO 63101
(314) 241-5620
Fax: (314) 241-4140
Email: jlockwood@grgpc.com

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06(c), this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b) and Local Rule 360, and contains 13,691 words, exclusive of the material identified in Rule 84.06(b) and Local Rule 360, as determined using the word count program in WordPerfect 13. The undersigned also certifies that the accompanying disk has been scanned and found free of viruses.



Joan M. Lockwood #42883

CERTIFICATE OF SERVICE

The undersigned certifies that two hard copies of this brief, including the separately bound appendix and a disk, pursuant to Rules 84.05(a) and 84.06(g) were served via United States mail, first class, postage pre-paid, this 23rd day of December, 2009, to:

Mr. Kenneth W. Bean
Ms. Jaime L. Sitton
Sandberg, Phoenix & von Gontard, P.C.
One City Centre, 15th Floor
515 N. Sixth Street, Suite 1500
St. Louis, MO 63101
Attorneys for Respondent SSM Health Care St. Louis
d/b/a SSM St. Mary's Health Center

Mr. Timothy J. Gearin
Armstrong Teasdale L.L.P.
One Metropolitan Square, Suite 2600
211 N. Broadway
St. Louis, MO 63102-2740
Attorney for Respondent SSM Medical Group, Inc.

Joan M. Lockwood #42883