IN THE SUPREME COURT OF MISSOURI

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.	No. SC90613

REPLY BRIEF OF APPELLANTS

Appeal from the Circuit Court of St. Louis County, Missouri
Twenty-First Judicial Circuit
Honorable Tom W. DePriest, Jr., Circuit Judge

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MISINTERPRETED §538.225 RSMO. IN THAT THE TRIAL COURT REQUIRED THE SPRADLINGS' LEGALLY QUALIFIED HEALTH CARE PROVIDER TO HAVE CREDENTIALS BEYOND THOSE REQUIRED BY THE PLAIN WORDING OF THE STATUTE AND TO HAVE ADDITIONAL CREDENTIALS BEYOND THOSE REQUIRED OF AN EXPERT TO MAKE A SUBMISSIBLE CASE OF MEDICAL NEGLIGENCE.

A. The Judgment of Dismissal Without Prejudice under §538.225 is Final and Appealable.

Respondents' brief boldly contends: "the plaintiffs in this case have created a controversy in an effort to obtain an advisory opinion. . . . [t]he plaintiffs' pleadings are plainly intended to set up a test case to challenge the validity of a number of statutes, including section 538.225." Resp. Brief 7. This statement is not only false, but unfounded.

Although Respondents assert that the record shows that the Spradlings violated the statute in order to obtain an advisory opinion from an appellate court, Respondents fail to cite to any part of the record which proves this. The Spradlings did not ask to have their expert challenged. However, once Respondents did so, the Spradlings naturally defended the propriety of their affidavit. The Spradlings filed health care affidavits, responses to the motions to dismiss and argued the merits before the trial court. L.F. 68-73, 81-114, 115-145, 147, 152-154. Further, the Spradlings raised the constitutional challenges at the

first opportunity as required. *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989).

Respondents' mischaracterization of the Spradlings' position is further exemplified by their assertion that the Spradlings have not appealed from a final, appealable judgment because they could simply refile their action in the same circuit which "could easily rectify the cause of their dismissal without prejudice". Resp. Brief 7-8. Where the effect of the order is to dismiss the plaintiff's action and not merely the pleading, the judgment entered is final and appealable. *Mahoney v. Doerhoff Surgical Serv., Inc.*, 807 S.W.2d 503, 506 (Mo. banc 1991). This Court has expressly held that a dismissal without prejudice for failure to comply with §538.225 amounts to an adjudication on the merits and may be appealed. *Id*. As this Court explained:

> It would be redundant as well as futile to put the plaintiffs to the precondition of a new petition. . . . Unless an appeal lies from the judgment, the right to test the constitutionality of the statute that imposes it will be lost to the plaintiffs and the question – although bound to recur – will languish.

Mahoney, 807 S.W.2d at 506.

The trial court's judgment of dismissal without prejudice under §538.225 is final and appealable.

B. The Claim of Error is Properly Preserved and Presented to the Court.

Respondents' argument to dismiss this appeal due to insufficient points on appeal should be disregarded. The points identify the action of the trial court -- the dismissal of

the Spradlings' cause of action. The points identify the statute the trial court misinterpreted and state wherein and why it was a misapplication. As such, the points track Missouri law.

"Technical perfection is not necessary" when drafting a point on appeal. *Parker v. Wallace*, 473 S.W.2d 767, 772 (Mo. App. 1971). All that is required is that the Court be able to determine with reasonable effort what the issue is, and what appellant's position is in regard to that issue. *Id.* An appellate court must "decide a case on its merits," rather than on any alleged technical deficiency. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. banc 1997). It is only where the alleged deficiency impedes disposition of the merits that a point will be ignored. *Id.* This occurs only where the point is so deficient it fails to identify to the Court and opposing counsel what is actually at issue. *Id.; Accord, State ex rel. Nixon v. Koonce*, 173 S.W.3d 277, 281 (Mo. App. W.D. 2005). Simple inspection of the Points Relied On reveal that Respondents' assertion is not accurate.

C. The Only Way to Read Amended §538.225 in a Constitutional Manner is to Apply the Substantially Same Specialty Component to Retired Physicians Only.

The trial court found that the Spradlings' health care affidavit did not comply with §538.225 because the affidavit was not in "substantially the same specialty as the defendant." L.F. 149, 156. Of legal necessity, the trial court's decision turned on how "legally qualified health care provider" is defined. Appellants submit that the trial court

incorrectly concluded that Dr. Mathis' letter of merit was insufficient because he was not in the same speciality as the defendant. L.F. 149, 156.

Respondents' defense of the trial court's logic is simplistic: because the physician whose conduct at issue is a neurosurgeon and the Spradlings' affidavits were based upon review by an interventional radiologist, §538.225 mandated dismissal. But the trial court ignored the constitutional ramifications of such an interpretation. The Spradlings submit that the only way the statute can be read in a constitutional manner is to apply the "substantially same specialty" component of §538.225 to retired physicians only. While Respondents argue that the Spradlings' argument would lead to absurd results, Respondents' argument and the trial court's application has already led to an absurd and unconstitutional result in this case.

It is absurd to argue that the Spradlings' contention is that an active dermatologist or psychiatrist could testify against a defendant brain surgeon. Clearly, a "legally qualified health care provider" would need the foundation to opine that a defendant "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." §538.225.1. A dermatologist, a nurse or a physical therapist would not have the foundation to offer opinions about the care rendered by a brain surgeon. Subsections 1 and 7 of §538.225 guard against the "absurd" result argument that Respondents raise.

Respondents cite to the UM Legislative Update Newsletter for assistance in interpreting the term "legally qualified health care provider". Resp. Brief 19-20, fn 4. This Newsletter does not aid Respondents. Here, Dr. Mathis is licensed in the same profession as Dr. Sprich (both are licensed as medical doctors). L.F. 17-18, 117. Further, both are authorized to practice in substantially the same specialty (i.e. both are credentialed to perform vertebroplasties). L.F. 22, 119.

Respondents next urge that the amendment of §538.225 was intended to change the law of evidence. Respondents argue that the legislature was concerned that health care providers were opining in areas of medicine with which they were not familiar, outside their specialties, and that the language "substantially the same specialty as the defendant" was designed to remedy this! Here, however, Dr. Mathis **does** specialize in the area of medicine at issue. L.F. 117-45. He is not only credentialed to practice the medical procedure at issue, he literally "wrote the book" on the procedure and has performed or assisted in over 3,000 vertebroplasties. L.F. 119, 137. He has authored numerous publications on vertebroplasties and has taught medical doctors, including neurosurgeons, how to perform vertebroplasty. L.F. 67-69, 117-119, 125-145. This is not a case where the Spradlings' malpractice suit is based on an opinion of an unqualified health care provider. Dr. Mathis specializes in the procedure at issue and is a well recognized expert on the standard of care at issue. L.F. 117-145.

Moreover, Respondents' argument concerning the substantive law is not even internally consistent. On the one hand, Respondents argue that §538.225 is procedural

(Resp. Brief 32-33) but also argue that the amendment to §538.225 serves to overrule the substantive law concerning expert testimony in malpractice cases. Resp. Brief 27-28. The pre-2005 cases regarding expert trial evidence in malpractice cases are relevant to the health care affidavit required by §538.225. These cases bear directly on the Spradlings' access to courts argument (discussed below). Here, a procedural statute, §538.225, erects a barrier to the Spradlings' legitimate, common law malpractice claim. Where, as here, it is undisputed that the Spradlings could make a submissible case of medical malpractice, it is error (and unconstitutional) to demand more proof in the early stages of malpractice litigation than what would ultimately be required at trial.[1] The legislature cannot erect a procedural barrier in the way of someone seeking to assert of cause of action that the substantive law allows.

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[1] Respondents also argue that §538.225 does not require plaintiffs to use the health care provider offering the written opinion as a trial expert, and that plaintiffs often use different trial experts as a matter of strategy. Resp. Brief 26, fn 6. Here, however, the Spradlings' claim was dismissed prior to trial even though the parties and the trial court concede that Dr. Mathis possesses sufficient qualifications and foundation to make a submissible case. The effect of §538.225 in this case is to require the Spradlings to hire two experts – one to provide the basis for the affidavit and a second (Dr. Mathis, a renowned expert on the subject procedure) to testify at trial.

Respondents rely heavily on *Budding v. SSM Healthcare System*, 19 S.W.3d 678 (Mo. banc 2000), apparently for the proposition that §538.225 is some evidence of legislative intent regarding the substantive law. Importantly, the affidavit requirement of the previous version of §538.225 was not at issue in *Budding*. There was no suggestion that the plaintiff filed an affidavit, nor that the defendant moved to dismiss the case based on the lack of an affidavit. *Id.*

Instead, the Missouri Supreme Court held broadly that a cause of action for strict liability is not available against a health care provider. *Budding*, 19 S.W.3d. at 680. Denise Budding sued a health care provider in strict liability for allegedly faulty temporomandibular joint implants. *Id*. at 679-80. In overruling several court of appeals cases that had allowed such lawsuits, this Court certainly considered the text of §538.225. *Id*. at 680-82. However, Respondents here fail to point out that there were many other reasons why this Court ruled as it did.

First, the very definition of "health care services" in §538.205(5) covered "transfer to a patient of goods or services." *Budding*, 19 S.W.3d at 680. Second, §538.300 provided that the product liability laws, §§537.760 to 537.765, RSMo., were "not applicable to actions against health care providers." *Id*. at 681 (emphasis added). Third, the common law prior to 1986, when Chapter 538 was enacted, did not allow for strict liability against a health care provider. *Id.*, citing *Hershley v. Brown*, 655 S.W.2d 671 (Mo. App. 1983).

Finally, the significance of §538.225 to the *Budding* decision is missed by Respondents. This Court found that the standard of care that applies to health care providers under Chapter 538 would be undermined by imposing strict liability – which establishes liability without any proof of fault. *Id*. at 682. In the scenario set out in *Budding*, §538.225's requirement of a negligence affidavit truly would be superfluous.

None of the considerations of *Budding* apply here. The Spradlings have not suggested that a lower standard of care controls their Chapter 538 cause of action. The Spradlings have argued consistently that they have a legitimate cause of action under the common law of medical malpractice, and that §538.225 erects an unconstitutional barrier to their pursuit of their claim. Respondents' concession, at page 32 of their brief, that the new statute does not effect a change in the substantive law, makes the Spradlings' point: the new affidavit statute stands in the way of pursuing a claim the common law recognizes. The legislature's procedural barrier imposed by amended §538.225 is unconstitutional because the substantive law recognizes the Spradlings' claim.

D. The Health Care Affidavit Statutes from Other States are unlike Amended §538.225.

Respondents' claim in footnote 3 of their brief that: "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." Resp. Brief 17. This broad statement is false as to some of the statutes, incomplete as to others, and tempered significantly by

court interpretations of the statutes. A brief discussion of each statute illustrates the crucial differences.

Arizona. Interestingly, the Arizona certification statute purports to level the playing field among litigants in medical malpractice cases – unlike Missouri's statute. The same certification requirements applicable to a plaintiff apply to a "party designating a non-party at fault." Ariz. Rev. Stat. §12-2603. The same specialty requirement is part of what the Arizona Supreme Court has determined to be the substantive law of medical malpractice. *Seisinger v. Siebel*, 220 Ariz. 85, 203 P.3d 483, 494 (2009). Thus, the statute does not help Respondents in this case where 1) they admit that §538.225 is procedural and not substantive, and 2) this Court has already declared in *Mahoney* that the affidavit statute is procedural.

Connecticut. The legislature in Connecticut actually sets out the relevant standard of care for a health care provider[2] by statute, and in the same enactment states that a testifying expert should be a "similar health care provider" to the defendant. Conn. Gen. Stat. §52-184c(c). If the defendant is a specialist and is board certified, the expert must be a specialist and board certified – with two important exceptions.

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[2] "[T]hat level of care, skill and treatment which in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. Conn. Gen. Stat. §52-184c(a).

First, if the "defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.'" Conn. Gen. Stat. §52-184c(c). Second, an expert who does not meet the definition of a "similar health care provider" may still testify if he, "to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine." Conn. Gen. Stat. §52-184c(d).

The good faith certification statute, (i.e., the equivalent of an affidavit of merit statute) Conn. Gen. Stat. §52-100a, requires an attorney to obtain a signed opinion of a similar health care provider that the defendant health care provider was negligent. The similar health care provider "shall be selected pursuant to the provisions of [§52-184c]." Presumably, this would include part (d) of that section, described above, which provides that dissimilar health care providers still may testify upon showing their familiarity with the standard of care. Conn. Gen. Stat. §52-184d. While it is conceivable that the Connecticut legislature would allow plaintiffs to use non-similar health care providers to testify at trial but disallow them from certifying a good faith filing by the plaintiff, case law suggests that is unlikely. In *Dias v. Grady*, 292 Conn. 350, 972 A.2d 715, 723 (2009), Connecticut's high court stated:

> As we have explained, requiring a similar health care provider to give an opinion as to causation at the prediscovery stage of litigation pursuant to §52-190a when a similar health care provider is not required to give such an opinion at trial pursuant to §52-184c would bar some plaintiffs who could prevail at trial from even filing a complaint. Because this would be a bizarre result, we reject this claim.

Suffice to say, the Respondents before this Court are seeking just this "bizarre result" on the Spradlings' claim.

Delaware. The affidavit statute in Delaware, Del. Code tit. 18 §6853 differs vastly from §538.225. Delaware's affidavit of merit is not discoverable and is filed under seal with the court. Del. Code tit. 18 §6853(a)(d). A defendant only has the right to have the affidavit examined in camera to determine if it complies with the statute. Del. Code tit. 18 §6853(d).

Further, if the defendant is board certified in a field of medicine, the statute provides that the certifying expert may be board certified "in the same or similar field of medicine" as the defendant. Del. Code tit. 18 §6853(c). By contrast, Missouri's affidavit statute requires the certifying expert to be in "substantially the same specialty" as the defendant. §538.225. One could certainly argue under that, since a vertebroplasty is at issue in this case, Dr. Mathis is in a "similar field of medicine" as Respondents' employee Dr. Sprich.

Florida. The Florida legislature chose to set out the requirements for medical negligence experts in one statute, Fla Stat. §766.102, and the "reasonable grounds"

affidavit in another. Fla Stat. §766.203. An expert is qualified to testify if he or she specializes in the same specialty as the defendant, or specializes in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition at issue and has prior experience treating similar patients. Fla. Stat. §766.102.

It is hard to imagine how Dr. Mathis could be disqualified under the Florida statute, when his experience with the "condition at issue," and more specifically, the procedure at issue, dwarfs that of Respondents' employee Dr. Sprich. L.F. 117-45.

Georgia. Georgia has no requirement that a proposed expert be in defendant's same specialty. Ga. Code Ann. §24-9-67.1. The relevant inquiry is whether the witness has acquired enough recent experience "to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue." Ga. Code Ann. §24-9-67.1(C)(2)(A).

Hawaii. The statute cited by defendants, Haw. Rev. Stat. §671-12.5, pertains to a "medical claim conciliation panel," similar to the arbitration panel struck down by this Court in *State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner*, 583 S.W. 2d 107 (Mo. banc 1979). Even the Hawaii statute allows that: "If the claimant or the claimant's attorney is not able to consult with a physician in the same specialty as the health care professional against whom the claim is made, the claimant or claimants' attorney may consult with a physician who is licensed in this state or in any other state who is

knowledgeable and experienced in a medical specialty that is as closely related as practicable to the medical specialty of the health care professional against whom the claim is made." Haw. Rev. Stat. §671-12.5(a)(1).

If Missouri had such a provision, the Spradlings' claim would proceed.

Maryland. The requirements for a medical expert to testify in Maryland are the same as for such a witness to provide a "certificate of qualified expert." The witness shall have had consultative, clinical, or teaching experience "in the defendant's specialty or a related field of health care, or in the field of health care in which the defendant provided care or treatment to the plaintiff . . . ." Md. Code, Cts. & Jud. Proc. §3-2A-02. If the defendant is board certified, the testifier must be board certified in the same "or a related" specialty as the defendant, unless the defendant's treatment of plaintiff was unrelated to the area in which the defendant was board certified, or if the testifying expert "taught medicine in the defendant's specialty or a related field of health care." Md. Code, Cts. & Jud. Proc. §3-2A-02(C)2(ii)(2).

Considering that many of Dr. Matthis' pupils in vertebroplasty training courses were neurosurgeons, it seems beyond reasonable debate that Dr. Mathis would be qualified under the Maryland rules to testify against Respondents.

Michigan: Michigan not only has a "same specialty" requirement, but requires that an expert be board certified in that specialty if the defendant is so certified. Mich. Comp Laws, §600.2169. Importantly, like Arizona, the Michigan Supreme Court has determined that §600.2169 is an enactment of substantive law. *McDougall v. Schanz*, 461

Mich. 15, 597 N.W.2d 148, 159 (1999). Section 538.225, by Respondents' own admission and this Court's precedent, is procedural.

Nevada. The affidavit of merit required in Nevada must be submitted by a "medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice." Nev. Rev. Stat. §41A.071.

Pennsylvania. Pennsylvania law provides that if the defendant is board certified, a testifying expert shall be board certified "by the same or similar board" as the defendant. 40 Pa. Cons. Stat. §1303.512. There is, however, a reasonable exception that appears nowhere in the Missouri statute:

> A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

40 Pa. Cons. Stat. §1303.512(e) [emphasis added].[3]

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[3] The same subspecialty requirement may also be waived for a testifying expert if the court finds that the expert is trained in the condition at issue in the case. 40 Pa. Cons. Stat. §1303.512(d).

South Carolina. Here again, Respondents cannot possibly rely on the affidavit requirement in South Carolina to buttress the language of §538.225. Dr. Mathis would readily qualify as an affiant under S.C. Code Ann. §15-36-100. He has "actual professional knowledge and experience in the area of practice," S.C. Code Ann. §15-36-100(A)(2)(b), and has practiced and taught in the area of vertebroplasty for several years. *See* S.C. Code Ann. §15-36-100(A)(2)(b)(i)-(iii).

Virginia. In Virginia, the proposed expert witness must have "active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action." Va. Code Ann. §8.01-581.20. Virginia's Supreme Court states that the purpose of this section is to prevent testimony by a witness who has not recently participated in the procedures at issue in the case, and that "it is sufficient if in the expert witness' clinical practice the expert performs the procedure at issue and the standard of care for performing the procedure is the same." *Lloyd v. Kime*, 654 S.E.2d 563, 570 (Va. 2008) (quoting *Sami v. Varn*, 535 S.E.2d 172, 175 (Va. 2000)).

It is axiomatic that the Court must analyze other states' laws with a careful reading of the statute at issue. The above analysis demonstrates that these states are not as analogous as Respondents suggest in their footnote.

II. THE SPRADLINGS' CONSTITUTIONAL OBJECTIONS TO §538.225 AND H.B. 393 ARE PROPERLY BEFORE THIS COURT.

Missouri courts have long recognized that "a constitutional question must be presented at the earliest possible moment 'that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.'" *Callier*, 780 S.W.2d at 641. The rule prevents surprise to the opposing party and permits the trial court an opportunity to fairly identify and rule on the issue. *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008).

The Spradlings fully complied with this rule by raising their constitutional objections to §538.225 and H.B. 393 in their petition and amended petition. L.F. 6-9, 17-21. These constitutional issues were raised again in the Spradlings' response to Defendants' motions to dismiss. L.F. 85, 152. Notably, Respondents never challenged the propriety of the Spradling's constitutional objections prior to the trial court's ruling, thus implicitly accepting that such issues would be raised on appeal.

Clearly, these issues were not raised as an afterthought. At the hearing on this matter, Judge DePriest heard the Spradlings' constitutional arguments. The Spradlings argued before the trial court that applying §538.225 in the manner urged by Respondents would be unconstitutional. They argued that they would be denied access to courts by §538.225 since Respondents (and the trial court) conceded that Dr. Mathis would be qualified to testify at trial and would support a submissible case. To assert that the Spradlings did not argue their constitutional claims before Judge DePriest is belied by the record.

Respondents' reliance on *Strong v. American Cyanamid Co.* and *Land Clearance for Redevelopment Authority of Kansas City* is misplaced. Resp. Brief 29. Contrary to Respondents' strained reading of these cases, the courts in those cases did not reach the constitutional issues because the parties failed to raise the constitutional issues until after trial, and did not reference the article and section of the constitution that the statute allegedly violated. *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 525 (Mo. App. E.D. 2007) (constitutional issue waived when Defendant did not mention the validity of the prejudgment interest statute until it responded to plaintiff's post trial motion and did not cite to the constitution); *Land Clearance for Redevelopment Authority of Kansas City*, 805 S.W.2d 173, 176 (Mo. banc 1991) (constitutional issue regarding statutory interest rate in eminent domain case waived when raised after judgment was entered on the verdict).

Here, the Spradlings raised the constitutional issues in the original petition, in the first amended petition, in response to Defendants' motions and in argument in opposition to Defendants' motions to dismiss. L.F. 6-9, 18-21, 85, 147, 152-54. Further, the Spradlings referenced the articles and sections of the constitution that amended §538.225 violates. L.F. 85. Thus, the Spradlings' constitutional claims were timely raised and properly preserved.

III. THE TRIAL COURT ERRED IN DISMISSING THE SPRADLINGS' CAUSE OF ACTION BECAUSE, IN DOING SO, IT RELIED ON §538.225, WHICH IS UNCONSTITUTIONAL.

A. This Court need not overrule *Mahoney* to find Amended §538.225 Unconstitutional.

Contrary to Respondents' assertion (Resp. Brief 34), the Spradlings do not contend that this Court should overturn *Mahoney*. The Spradlings included extended discussion of *Mahoney* in their initial brief because what saved the old version of the statute has been eviscerated in the current version.

The *Mahoney* court's analysis centered on "frivolous" and "groundless" medical malpractice cases. The foundation of the *Mahoney* court's opinion denying all constitutional challenges was that the prior §538.225 merely aborted, at an early stage, what the substantive law would ultimately eliminate. *Mahoney*, 807 S.W.2 d at 508. It was not the screening procedure of the statute that impeded the progression of the Mahoney plaintiffs' petition to the jury, but their "failure to meet a requirement of subtantive law." *Id*. at 508 (emphasis added).[4] The *Mahoney* court specifically held that the procedure set forth in §538.225 "intends no change in our substantive medical malpractice law." *Id*. Amended §538.225, if applied as Respondents urge, does change the substantive law. Unlike the predecessor statute, it adds a "burden on the ability of a

[4] The *Mahoney* plaintiffs neglected the affidavit provisions of the statute and the defendant health care providers' motions to dismiss for noncompliance were granted. *Mahoney*, 807 S.W.2d at 505.

plaintiff to prove a medical malpractice claim over the burden that the substantive law already prescribes." *See*, *Mahoney*, 807 S.W.2d at 509. Thus, it is unconstitutional.

B. Amended Section 538.225 violates the Missouri Constitution's "Inviolate" Right to Trial by Jury, art. I, §22(a).

Respondents argue that the Spradlings have not set forth any reasons why amended §538.225 should lead to a different conclusion than the Court reached in *Mahoney*. The Spradlings spent ample time distinguishing the Court's analysis in *Mahoney* to the statute at issue here. Appellants' Brief 27-37. In holding that the prior §538.225 statute did not violate the plaintiff's right to jury trial, the *Mahoney* court's analysis focused on the fact that the statute did not change the substantive law. *Mahoney*, 807 S.W.2d at 508-10. By contrast, here, it **is** the screening requirement of amended §538.225 that causes the Spradlings' action to fail, **and not** the Spradlings' failure to meet a requirement of substantive law. In Missouri, "specialty" has never been the threshold for qualification of a testifying medical expert. *See, MacDonald v. Sheets*, 867 S.W.2d 627, 630 (Mo. App. E.D. 1993).

The Spradlings meet the requirements of a submissible case of medical negligence under Missouri substantive law. Unlike the prior version of the statute addressed in *Mahoney*, the "screening" procedure of amended §538.225 is more onerous to the right to trial by jury than either a directed verdict or a summary judgment. *Mahoney*, 807 S.W.2d at 508. Therefore, it is unconstitutional.

C. Amended §538.225 Violates the Spradlings' Right to Open Courts and Certain Remedies, Missouri Constitution, art. I, §14.

Section 538.225, as applied by the trial court in this case, not only violates the guarantee that courts be open "without denial or delay," but also imposes an unreasonable precondition to free access to the courts. Missouri Constitution, art. I, §14; *State ex rel. Cardinal Glennon Memorial Hosp.*, 583 S.W.2d at 107 (invalidated statutory procedure for compulsory non-binding arbitration before a professional liability review board as a prerequisite to filing a malpractice claim); *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. banc 1986) (struck down the two year limitations period on medical malpractice actions as applied to minors, as violative of the constitutional right of access to the courts).

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 and unreasonable. *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006). Art. I, §14 is meant to protect the enforcement of rights already acknowledged by law. The right of access means the right to pursue in the courts the causes of action the substantive law recognizes. *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989).

The Spradlings agree with this Court's opinion that the prior version of §538.225 intended no change in the substantive law. *Mahoney*, 507 S.W.2d at 508-10. The Court also stated that the prior version "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*, 781 S.W.2d at 62.

Yet if the substantive law is not changed, and if, as this Court said in *Mahoney*, the sole purpose of §538.225 is to eliminate frivolous lawsuits from the courts, it would seem there is no possible way the present affidavit statute can survive constitutional muster. The Spradlings demonstrated to the trial court not only that an affidavit could be filed, but that the certifying physician literally "wrote the book" on the very procedure performed – Appellants say negligently – by Respondents' employee, Dr. Sprich. L.F. 115-45.

Amended §538.225 violates the Spradlings' rights under the Missouri Constitution, art. I, §14, because they have a recognized cause of action for medical negligence that the legislation arbitrarily restricts them from pursuing.

Moreover, and perhaps more critically, Respondents misinterpret *Weigand v. Edwards* in analyzing this Court's precedent on Missouri's open courts requirement. Resp. Brief 38. This Court carefully explained in *Weigand* that §452.355 attempts to balance the scales in the context of a motion to modify. *Weigand v. Edwards*, 296 S.W.3d 453 (Mo. banc 2009).

The statute at issue in *Weigand* addresses the situation in which a non-custodial parent is more than $10,000 in arrears on child support. Such a party who files a motion to modify must post a bond equal to the greater of the past due support or the reasonable legal fees of the custodial parent. *Weigand*, 296 S.W.3d at 462. This way, the custodial parent is no worse off by defending against the motion to modify. *Id*. at 459.

Were it otherwise, the non-custodial parent could exert financial pressure on the custodial parent, to the detriment of the child. Mr. Edwards himself admitted he was more than $10,000 behind in his support obligation, which obligation was the result of a final judgment. *Weigand*, 296 S.W.3d at 453. In these circumstances, the bond requirement was neither unreasonable nor arbitrary:

> The legislature's reference in the statute to posting a bond sufficient to meet reasonable legal fees recognizes that to defend the motion to modify effectively the custodial parent will need to employ an attorney. The custodial parent may not be able to afford to hire an attorney, however, because that parent has been meeting the costs of care of the child that should have been paid by the parent who is in arrears. If the custodial parent cannot afford to hire an attorney, that parent will be at a disadvantage in defending an action to modify custody and visitation provisions.

Id. at 453.

The Spradlings disagree with Respondents' claim that the bond requirement of §452.355 is "far more onerous" than the affidavit requirement of §538.225. The petitioner in *Weigand* was significantly in default of a prior, binding court order, and his actions harmed his child and the child's mother. By contrast, Ann Spradling merely presented herself as a patient to Respondents and suffered a lifelong injury. L.F. 21-35.

The delinquent child support statute, according to this Court, operated to level the playing field for the custodial parent, to keep him or her from being further harmed

financially by a situation not of his or her making. The medical malpractice affidavit statute is the opposite. It puts all of the financial pressure on the injured patient, and grants a medical specialist the privilege of being judged only by those in his or her (sometimes narrow) specialty. Further, the statute effectively denies the Plaintiffs discovery, since they are allowed no more than six months to submit an affidavit. Finally, unlike the prior version of §538.225,[5] the trial court now has no discretion – it shall dismiss the case for lack of a compliant affidavit. The legislature's requirements in amended §538.225 are arbitrary and unreasonable.[6]

D. Amended §538.225 violates the Separation of Powers, Missouri Constitution, art. II, §1.

Amended §538.225 violates the constitutional separation of powers. Specifically, the amended statute operates as a barrier which overrides and interferes with the judiciary's traditional function of assessing whether a particular case can proceed to trial. The test this Court applies is whether the statute invites an arbitrary refusal of a right to

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[5] "Upon motion the court may dismiss the action." §538.225, RSMo. 1986 (emphasis added).

[6] Respondents contend that 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. Resp. Brief 38-39. This is incorrect. All parties agree that if the prior statute were applied, the Spradlings' claim would not have been dismissed.

pursue a claim. *Kilmer v. Mun*, 17 S.W.3d 545, 552-53 (Mo. banc 2000) (court held that the dram shop liability statute at issue "violated separation of powers.") The prerequisite of a plaintiff to obtain an affidavit from a physician in the same speciality (as opposed to a physician familiar with the procedure at issue) is arbitrary and unreasonable.

The Spradlings' tort claims in this case are common law claims. In this context, it is the role of the judiciary, not the legislature, to assess the ability of a medical negligence case to proceed on the merits. Amended §538.225 frustrates that judicial function and thus violates the separation of powers guaranteed by the Missouri Constitution.

E. Amended §538.225 Violates the Equal Protection Clause of the Missouri Constitution, art. I, §2; and the Due Process Clause of the Missouri Constitution, art. I, §10.

Under rational basis review, although the Court will start with a presumption of constitutionality, this presumption can be overcome by a clear showing of arbitrariness and irrationality. *Foster v. St. Louis County*, 239 S.W.3d 599, 602 (Mo. banc 2007). The statute will fail an equal protection challenge if its classifications are not rationally related to a legitimate state interest. *Mahoney*, 807 S.W.2d at 512. The Spradlings have made such a showing here.

Amended §538.225 creates a number of arbitrary and irrational classifications between categories of tort victims – those injured by medical negligence and other tort plaintiffs. The legislature here has created a classification system that is irrational and punitive to victims of medical malpractice.

Here, the Spradlings have more evidence of negligence and causation than many non-medical malpractice tort plaintiffs. Their counsel, like counsel for other tort victims, certified a good faith filing under Rule 55.03 when counsel signed the petition. L.F. 16, 34. Unlike the others, the Spradlings set forth the name and credentials of an expert who is fully capable of describing the appropriate standard of care, the Defendants' breach, and explaining how such breach caused Ann Spradling's paralysis. L.F. 68-73. Yet the Spradlings' case was dismissed while other tort claimants' cases proceed with the full range of discovery available under the rules.

This is irrational by any definition.

There is no legitimate, constitutional basis for the legislature's distinction. What supported constitutionality under the prior version of the health care affidavit statute is gone. 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 amended 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 only basis 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 irrational and illegitimate. Even the argument about lowering the number of claims to

keep health care costs under control is not available here. It was neither rational nor reasonable to believe that the same speciality requirement would curtail frivolous malpractice claims.

Respondents and Amicus Curiae contend that the legislature was concerned that health care providers were opining in areas of medicine with which they were not familiar. Resp. Brief 24; Amicus Curiae Brief 7. Not only is there no evidence that malpractice suits were based on the opinions of unqualified health care providers, the passage of §538.225.7 addresses this "foundation" issue.

Moreover, in this case, there is no claim that the Spradlings' claim was based on the opinion of an unqualified health care provider. Physicians from multiple specialties can perform medical procedures. This is certainly the case with vertebroplasty procedures, where the majority of such procedures are performed by radiologists, not neurosurgeons.[7] The issue is whether the physician is familiar with the procedure and the standard of care at issue. Clearly, Dr. Mathis was familiar with vertebroplasty and the standard of care. L.F. 115-45. Thus, amended §538.225 bears no rational or reasonable

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[7] Radiologists perform the majority of Medicare-reimbursed vertebroplasty procedures in the United States. The minority are performed by neurosurgeons and anesthesiologists. Vertebroplasty in the United States: Guidance Method and Provider Distribution, 2001-2003, RSNA 2007, available at http://radiology.rsna.org/content/243/1/166.full.pdf.

basis to what Respondents' claim is the legislature's goal of curtailing "frivolous" malpractice claims.

Further, it is well known that neurosurgeons condemn other neurosurgeons for testifying against one another in medical negligence cases. The American Association of Neurologic Surgeons (AANS) routinely evaluates complaints involving other members' expert witness testimony in medical malpractice lawsuits. AANS frequently suspends members and sanctions them for "unprofessional conduct" when they testify against a fellow neurosurgeon in a medical negligence case.[8] Amended §538.225, as applied here, could innoculate neurosurgeons from being sued in medical negligence cases.[9]

The few neurosurgeons in the United States who perform vertebroplasty and that speciality's active discouragement of litigation testimony illuminate how the "same speciality requirement" of §538.225 imposes an unconstitutional barrier for victims of

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[8] *See* AANS Governance Bulletin available at http://www.aans.org/library/Article.aspx?ArticleID=26320; http://www.nytimes.com/2003/07/06/us/doctors-testimony-under-scrutiny.html?scp=1&sq=American+Association+of+Neurological+Surgeons&st=nyt.

[9] Furthermore, Amended §538.225 arbitrarily provides specialists with more protection than general health care providers. When taken to its logical extreme, some specialists could never be sued because no one would be "qualified" to form the basis of a health care affidavit.

medical malpractice. In the same vein, the "same specialty requirement" would insulate so-called specialists who wander outside their field to perform a procedure to earn more money. In such a scenario, there would be no (or a very limited) pool of health care affidavit experts.[10]

This is the rare situation where "'the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Mahoney*, 807 S.W.2d at 512-13 quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

F. H.B. 393 violates the Clear-Title and Single-Subject Provisions of the Missouri Constitution, art. III, §23.

As the Spradlings argued in their initial brief, H.B. 393's title – "An Act ... relating to claims for damages and the payment thereof," is so unduly "broad and amorphous" that it could describe the majority of all legislation the General Assembly passes. Thus, it violates art. III, §23 of the Missouri Constitution. *See, Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007) (articulating the clear-title test); *St.*

[10] Many other states have an exception to the specialist rule that allows testimony from a non-specialist when the defendant was rendering care outside his speciality. *See* Conn. Gen. Stat. §52-184c(c); Md. Code, Cts. & Jud. Proc. §3-2A-02(c)2(ii)(2).

Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. banc 2008) (articulating the single subject test).

Respondents contend the title is constitutional because it pertains to civil causes of action, a general core purpose and describes procedures for instituting, trying, and collecting claims for civil damages. Resp. Brief 43-44. However, the general public, when presented with the H.B. 393 title, cannot understand the Act to concern a single subject within the meaning of the Missouri Constitution. *See, Home Builders Ass'n v. State*, 75 S.W.3d 267, 269 (Mo. banc 2002) (title must be clear such that "individual members of ... the public [are] fairly apprised of the subject matter of pending laws").

Moreover, nothing in the Act's title indicates that this legislation has to do with changes in the tort laws or legislation relating to health care providers. Indeed, the titles of H.B. 393's predecessors, which amended or repealed similar sections of the Missouri statutory code, were more specific. *See*, e.g., 1986 Mo. Laws 879 ("An Act ... relating to health care providers"); S.B. 280, 92nd Gen. Assembly, Reg. Sess. (Mo. 2003) ("relating to tort reform"). By contrast, H.B. 393 has the phrase "claims for damages and the payment thereof," which does not indicate that H.B. 393 was primarily "tort reform" legislation or legislation relating to actions against health care providers.

Because its title is so general that it obscures the contents of the Act, and because it is so broad that it renders the single subject mandate meaningless, this Court should hold H.B. 393 unconstitutional in its entirety. *See, Home Builders Ass'n*, 75 S.W.3d at 272.

Seeking to avoid this result, Respondents argue that the Spradlings' clear title challenge is untimely under §516.500. Resp. Brief 44-45. However, §516.500 is not applicable here because that statute only governs the timing for raising "procedural" defects in statutes. The Spradlings' clear-title challenge, by contrast, concerns a substantive defect which, like the balance of their constitutional claims, were timely raised below.

CONCLUSION

For all of the reasons discussed, Appellants respectfully request that this Court reverse the judgments of the trial court and reinstate the Spradlings' cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this brief and a disk containing a copy of this brief, pursuant to Rules 84.05(a) and 84.06(g), were served via United States mail, first class, postage pre-paid, this 15th day of March, 2010, to:

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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 contains 7,747 words, exclusive of the material identified in Rule 84.06(b) as determined using the word count program in WordPerfect 13.

The undersigned further certifies that the accompanying disks filed with the brief and served on the other parties were scanned for viruses and the disks are virus-free.

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