SC94814

IN THE MISSOURI SUPREME COURT

PAUL M. LANG and ALLISON M. BOYER,

Appellants

vs.

DR. PATRICK GOLDSWORTHY, DR. ASTON GOLDSWORTHY, and PATRICK L. GOLDSWORTHY, D.C., P.C.

Respondents

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
DIVISION NO. 13
HONORABLE CHARLES H. MCKENZIE, CIRCUIT JUDGE

RESPONDENTS' BRIEF

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STATEMENT OF FACTS

Michael Lang was found dead at his home on December 7, 2009. LF 9. The Jackson County Medical Examiner determined that Michael Lang sustained a "[t]ransverse fracture of C6 vertebral body, with surrounding anterior hemorrhage [and] intramuscular hemorrhage of the upper right back." LF 9. Appellants, Paul Lang and Allison Boyer, are the surviving children of decedent Michael Lang. LF 7. They originally filed suit alleging medical negligence on December 21, 2010. LF 27.

Respondent Dr. Patrick Goldsworthy had provided chiropractic treatment to Michael Lang for many years, but last provided treatment to him on June 12, 2009. LF 16-17. Respondent Dr. Aston Goldsworthy, D.C. never provided chiropractic treatment to the decedent. LF 17. Appellants contend that on or about December 5, 2009, decedent received chiropractic treatment from the Respondents. LF 8. Despite this allegation, 2 ½ years of discovery revealed no evidence that the decedent was seen by the Respondents at any date later than June 12, 2009. LF 18.

After extensive discovery, Appellants voluntarily dismissed their case against Respondents without prejudice on March 22, 2013. LF 20. On June 4, 2013, the Honorable Jack R. Grate, Jr. awarded costs to the Respondents in the amount of $11,458.62 pursuant to RS Mo. § 514.170. LF 20. To date, the Appellants have failed to satisfy the Court's judgment. LF 20.

Appellants filed the present action on March 19, 2014. LF 27. Appellants' Petition for Damages set forth claims for wrongful death/medical malpractice and wrongful death/res ipsa loquitur. LF 28.

Missouri Revised Statute § 538.225.1 provides that:

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

LF 28.

The affidavit required by Chapter 538 "shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended for a period of time not to exceed an additional ninety days." Mo. Rev. Stat. § 538.225.5; LF 28. Appellants did not file the statutorily required affidavit within ninety days after the filing of their second lawsuit and did not move for an additional ninety days in which to file the affidavit. LF 28. Absent a ruling by the court granting plaintiffs an additional ninety days in which to file the required affidavit, Appellants were obligated to file an affidavit within ninety days after the lawsuit was filed. LF 28. Even if Appellants had moved for and received a ninety day extension, the deadline for filing

the required affidavit would have been September 15, 2014, which passed without Appellants having filed the required affidavit. LF 28.

After Appellants failed to file the required affidavit of merit, Respondents filed a motion to dismiss on September 17, 2014, on the basis of Appellants' failure to file the required affidavits. LF 27-31. On December 29, 2014, Jackson County Circuit Court Judge Charles H. McKenzie granted Respondents' Motion to Dismiss. LF 178-181. It is this Order that is the subject of Appellants' appeal. LF 182-183.

POINTS RELIED UPON

I. **THE TRIAL COURT PROPERLY GRANTED THE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANTS FAILED TO PROPERLY PRESERVE THEIR CONSTITUTIONAL CHALLENGES TO MISSOURI REVISED STATUTE § 538.225.**

Mayes v. St. Luke's Hospital of Kansas City, 430 S.W.3d 260 (Mo. 2014)

Hoskins v. Business Men's Assur., 79 S.W.3d 901 (Mo. banc 2002)

Bromwell v. Nixon, 361 S.W.3d 393 (Mo. banc 2012)

Hollis v. Blevins, 926 S.W.2d 683 (Mo. 1996).

II. **THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS BECAUSE MISSOURI REVISED STATUTE § 538.225 DOES NOT VIOLATE THE MISSOURI CONSTITUTION'S OPEN COURTS PROVISION.**

Mo. Rev. Stat. § 538.225 (2005)

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

Weigand v. Edwards, 269 S.W.3d 453, 461 (Mo. banc 2009)

Hart v. Steele, 416 S.W.2d 927, 931 (Mo. banc 1967)

III. **THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS BECAUSE MISSOURI REVISED STATUTE § 538.225 DOES NOT VIOLATE A PLAINTIFF'S RIGHT TO JURY TRIAL.**

Mo. Rev. Stat. § 538.225 (2005)

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

Sanders v. Ahmed, 364 S.W.3d 195, 205 (Mo. banc 2012)

IV. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS BECAUSE MISSOURI REVISED STATUTE § 538.225 IS NOT A SPECIAL LAW.

Jefferson County Fire Protection Dist. Assoc. v. Blunt. 205 S.W. 3d 866 (Mo. banc 2006)

Batek v. Curators of the Univ. of Missouri, 920 S.W.2d 895 (Mo. 1996).

City of St. Louis v. State, 382 S.W.3d 905 (Mo. 2012)

V. THE CONSTITUTIONALITY OF MISSOURI REVISED STATUTE § 538.225 IS SUPPORTED BY THE FACT THAT MANY OTHER STATES HAVE SIMILAR STATUTORY AFFIDAVIT-OF-MERIT REQUIREMENTS FOR MEDICAL NEGLIGENCE CLAIMS THAT HAVE BEEN UPHELD.

Lohnes v. Hosp. of St. Raphael, 31 A.3d 810 (Conn. Ct. App. 2011)

Hebert v. Hopkins, 395 S.W.3d 884 (Tex. Ct. App.-Austin 2013)

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED THE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANTS FAILED TO PROPERLY PRESERVE THEIR CONSTITUTIONAL CHALLENGES TO MISSOURI REVISED STATUTE § 538.225.

A. STANDARD OF REVIEW

In this appeal, Appellants seek review of the trial court's decision to grant Respondents' Motion to Dismiss. This Court has held that "'[t]he standard of review for a trial court's grant of a motion to dismiss is *de novo*.'" *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. App. 2006)(quoting *Moynihan v. Gunn,* 204 S.W.3d 230, 232-33 (Mo. App. 2006)). *De novo* review requires the Court to examine the case at hand "anew." Black's Law Dictionary (10th ed. 2014).

The grounds on which Appellants seek reversal, the constitutionality of Missouri Revised Statute § 538.225, also must be reviewed *de novo*. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2006) (stating "The standard of review for constitutional challenges to a statute is *de novo*."). When beginning the analysis of the constitutionality a state statute, the Court must presume that the statute being examined is constitutional. *State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012) (citing *Dydell v. Taylor*, 332 S.W.3d 848, 852 (Mo. banc 2011)). The Court "will not invalidate a statute unless 'it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution.'" *Id.* (quoting *State v. Richard*, 298

S.W.3d 529, 531 (Mo. banc 2009) (emphasis added)). All doubts are to be resolved in favor of a statute's validity, and a court is to make "every reasonable intendment to sustain the constitutionality of the statute." *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). Appellants, as they are the party challenging the constitutionality of § 538.225, have the "burden of proving the statute clearly and undoubtedly violates the constitution." *State v. Young*, 362 S.W.3d at 390.

B. ARGUMENT

The Appellants assert that the trial court erred in dismissing their case contending that the affidavit requirement in § 538.225 violates their rights under the Missouri Constitution. These claims were not preserved properly in the trial court because the Appellants did not raise these constitutional arguments at the earliest opportunity.

In order to properly raise a constitutional challenge, the party must: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review. *Mayes v. St. Luke's Hospital of Kansas City*, 430 S.W.3d 260, 266 (Mo. 2014)(citing *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004)). The purpose of this rule is "to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue." *Winston v. Reorganized Sch. Dist. R-2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 327 (Mo. banc 1982).

In *Mayes*, the Court noted that the plaintiffs had raised the constitutional question at the first available opportunity by setting forth these challenges in their petition. Mayes, 430 S.W.3d at 266. Appellants in the present action made no such constitutional challenge at the time they filed either of their petitions.

To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process. *See Hoskins v. Business Men's Assur.*, 79 S.W.3d 901, 903 (Mo. banc 2002). Typically, when the constitutional claim is raised by the plaintiff, the earliest opportunity to raise a constitutional claim is in the petition. *See, e.g., Bromwell v. Nixon,* 361 S.W.3d 393, 400 (Mo. banc 2012). This Court has rejected the argument that a constitutional issue arises only after an adverse action by the Court. See *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. 1996). Because Appellants failed to raise their constitutional challenges at the first available opportunity, the additional elements set forth in *Mayes* need not be examined.

Since the Appellants brought no constitutional challenge to § 538.225 in either of their petitions, they failed to raise the arguments at the earliest opportunity. Therefore, these constitutional challenges have been waived by Appellants and are not properly before this Court.

II. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS BECAUSE MISSOURI REVISED STATUTE § 538.225 DOES NOT VIOLATE THE MISSOURI CONSTITUTION'S OPEN COURTS PROVISION.

(APPELLANTS' FIRST POINT)

A. STANDARD OF REVIEW

In response to Appellants' first point, Respondents have previously articulated the appropriate standard of review in this matter. *See supra*, Point I.A. In the interest of economy, Respondents will not restate those principles herein. Instead, Respondents submit that the exact same standard of review applies to Appellants' second point, and thus incorporate their prior discussion by reference as though fully set forth herein.

B. ARGUMENT

Section 538.225 of the Revised Statutes of Missouri requires a plaintiff in a medical malpractice case to file an affidavit with the trial court stating that plaintiff has obtained a written opinion of a legally qualified health care provider, to the effect that: (1) the defendant failed to use such care as a reasonably prudent and careful health care provider would have used under similar circumstances; and (2) such failure directly caused or directly contributed to cause the damages claimed in the petition. Mo. Rev. Stat. § 538.225.1. Under this statute, plaintiff's affidavit must be filed no later than ninety days after the filing of the petition unless the Court, for good cause shown, orders that such time be extended for a period of time not to exceed an additional ninety days.

Mo. Rev. Stat. § 538.225.5. Missouri case law and § 538.225 require dismissal of the action if the affidavit is not timely filed. *SSM Health Care St. Louis, d/b/a St. Joseph Health Center v. Schneider*, 229 S.W.3d 279, 281 (Mo. Ct. App. 2007) (holding "dismissal of the action is mandatory, not discretionary, where a plaintiff or his attorney does not timely file an adequate health care affidavit.").

The validity of Missouri's statute requiring an affidavit of merit be filed in all medical negligence cases has been examined by this Court and has been upheld as constitutional. *See Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991).

Article I, Section 14 of Missouri's state constitution provides "the courts of justice shall be open to every person" and therefore facilitates access to the Missouri state court system. It must be noted however, this provision "does not create rights"; rather, it preserves citizens' rights to "'pursue in the courts the causes of action the substantive law recognizes.'" *Mahoney,* 807 S.W.2d at 510 (quoting *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989)). Furthermore, this constitutional provision does not act as a floodgate, as it "does not entitle access to the courts for any and all grievances or concerns one might have." *Weigand v. Edwards*, 269 S.W.3d 453, 461 (Mo. banc 2009).

The intersection of § 538.225 and Article I, Section 14 does not automatically create an unconstitutional result as Appellants have asserted in their brief.

i. The Missouri Supreme Court has already determined that § 538.225 does not violate the Missouri Constitution's open court provision; that decision, reached in Mahoney, is controlling upon this case.

This Court previously evaluated the effect of § 538.225 as it relates to Article I, Section 14, and clearly held that the open courts provision of the state constitution is not violated by § 538.225.

In *Mahoney*, the Court examined the statute's purpose, stating that "[i]t 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." *Mahoney*, 807 S.W.2d at 507. Because protection of the public health is "paramount," the statute's objective "bespeaks a legitimate public purpose that is given account in the assessment of the constitutional challenges." *Id.* Therefore, when evaluating the constitutionality of this statute, great deference is given by this Court to the public policy furthered by this statute. Additionally, the Court has noted this statute also serves the public's interest in reducing the number of frivolous suits filed with the trial courts and the resulting superfluous cost of processing meritless cases. *Id.* at 508. The furtherance of this second important public policy must also be considered when evaluating whether § 538.225 is constitutional.

In *Mahoney,* this Court concluded that § 538.225 simply requires verification of testimony that will eventually be necessary to submit a medical malpractice case to a jury. *Id.* at 510. "Thus, it denies no fundamental right, but at most merely '[re]design[s] the framework of the substantive law' to accomplish is rational legislative

end." *Id.* Therefore, the Court held that § 538.225 functions not to determine the merit of the action for filing but that the action already filed is not frivolous." *Id.* at 511. Therefore, this Court has found that § 538.225 does not construct any barrier to bringing a lawsuit, or to accessing the court system, but rather implements necessary analysis of a suit that has already entered the court's arena.

Because the *Mahoney* decision was issued in 1991 and § 538.225 was amended in 2005, the Court was analyzing an earlier, albeit nearly identical, version of § 538.225. The changes adopted by the legislature in 2005 are so minute, especially as it relates to the issue of open courts, that *Mahoney* must be applied by this Court to the case at hand as binding precedent. The change to the statute with which Appellants take issue, involves subpart six, which previously allowed for a permissive dismissal of a suit by the trial court for non-compliance with the affidavit requirement. The new, and operative, version of the statute has made dismissal without prejudice by the trial court mandatory by replacing "may" with "shall" in this subpart. The resulting dismissal in both instances remained unchanged, a dismissal without prejudice is the final result under both versions; only the amount of discretion able to be exercised by the trial court has been changed. Because a dismissal under the statute is without prejudice, a plaintiff is not prohibited from re-filing his case and therefore still has access to the court system after a mandatory dismissal without prejudice resulting from a failure to file a health care affidavit.

The key point regarding the legislature's alteration of § 538.225 is that absolutely no part of the Court's analysis in *Mahoney* was based on the fact that the statute was

permissive, rather than mandatory. The Court's analysis related to the intersection of the statute and the open courts provision of the Missouri Constitution, is just as valid today as it was in 1991.

Specifically in response to allegations that the affidavit requirement violated the open courts provision, this Court stated:

> The affidavit procedure neither denies free access of a cause nor delays thereafter the pursuit of that cause in the courts. It is an exercise of legislative authority rationally justified by the end sought, and hence valid against the contention made here.

Id. at 510. This analysis is not changed by the mandatory nature of the statue, as the policies furthered by the statute remain unchanged by the 2005 revision to the statute. If anything, the efficiency of promulgating these important polices has been enhanced by the revision.

This Court would set a dangerous precedent if it were to determine that an otherwise valid law violated the Missouri Constitution simply because it mandated action, rather than merely authorizing it. For instance, such a ruling would call into question all statutes that require dismissal upon the expiration of the statute of limitations. Statutes of limitations are applied to virtually every cause of action and have been consistently upheld. *See*, *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 20 (Mo. banc 1995). This Court has been clear that the General Assembly has the power to set such limits. In fact, the Court has stated that statutes of limitations are "favored in

the law," and that any exceptions are to be "strictly construed and are not to be enlarged by the courts upon consideration of apparent hardship." *Id.* Similarly, this Court should not invalidate an entire statute simply because it may view one result of a particular instance of its application as a hardship.

For the reasons stated, the 2005 modification to § 538.225 does not represent a major change in the policies guiding, nor the results achieved when applying, the statute, and this Court should follow the precedent set by *Mahoney*. The doctrine of *stare decisis* is "the cornerstone of our legal system." *State v. Byers,* 396 S.W.3d 366, 368 (Mo. App. 2012). "Where the same or an analogous issue was decided in an earlier case, such case stands as authoritative precedent unless and until it is overruled." *Id.* at 369. Here, *Mahoney* is authoritative precedent, and it is dispositive as to Appellants' constitutional argument regarding Article I, Section 14 of the Missouri Constitution.

ii. *§ 538.225 does not create any arbitrary or unreasonable barriers between medical malpractice claimants and the court system.*

This Court has established a three part test to evaluate whether a statute violates the open courts provision: "(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." *Weigand*, 296 S.W.2d at 461 (quoting *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006)). Respondents do not dispute the fact that appellants have a recognized cause of action; therefore, it is only the second and third elements of this test that must be evaluated.

In order to be successful in their appeal, Appellants must establish that their "cause of action is being restricted." *Id.* As previously discussed, a dismissal under § 538.225 is not restrictive, as Appellants would lead the Court to believe. Rather, it is a dismissal without prejudice and allows for the same case to be re-filed after such a dismissal. The restriction alleged by Appellants results not from § 538.225, which they are challenging in this appeal, but from a wholly separate statute – Missouri Revised Statute § 537.100. Section 537.100 establishes the statute of limitations for wrongful death cases by stating that such suits "shall be commenced within three years after the cause of action shall accrue." It is this statutory time constraint, not § 538.225, preventing Appellants from re-filing their case against Respondents. In this case, it is only because Plaintiffs made the unusual choice of dismissing their original case nearly two and a half years after filing that they could not re-file their case effectively, as the statute of limitations had lapsed. Therefore, any restriction Appellants may face is the product of their own litigation strategy and not § 538.225. Therefore, Appellants' assertion that their cause of action has been restricted by § 538.225 and that they have satisfied element two of this test is clearly unfounded.

The third prong of this test evaluates the character and nature of an alleged restriction. A procedural statute does not violate the "open courts" provision in Article I, § 14 of the Missouri Constitution unless it erects an "arbitrary or unreasonable" barrier to pursuing a recognized cause of action. *Kilmer v. Mun,* 17 S.W.3d 545, 550 (Mo. banc 2000). The affidavit-of-merit statute is neither arbitrary nor unreasonable. The Missouri Supreme Court has previously interpreted arbitrary to mean not related to

some "rational basis." *Board of Education of City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1, 10 (Mo. banc 2008). Under this definition, the statute clearly cannot be considered arbitrary, as it rationally and directly relates to important issues of public policy – public health and a reduction of frivolous lawsuits. Similarly, unreasonable means "not guided by reason; irrational or capricious." Black's Law Dictionary (10th ed. 2014). The policy behind the statute is anything but irrational or capricious. The burden to establish that the statute at issue is unreasonable and/or arbitrary falls upon Appellants. This burden has not been met.

The elements of this Court's test for an open courts provision violation have not been established by Appellants. As such, the open courts provision has not been violated by the trial court's proper application of § 538.225 to the underlying case.

iii. The affidavit requirement of § 538.225 does not impose upon a plaintiff any additional requirement to access the court system, as expert testimony is almost always required in medical malpractice cases.

As previously discussed, the affidavit-of-merit statute, § 538.225, requires verification of testimony that will eventually be necessary to submit a medical malpractice case to a jury, rather than constructing an artificial restriction. *Mahoney,* 807 S.W.2d at 510.

The affidavit requirement of § 538.225 clearly parallels the requirements that a valid malpractice case must satisfy in order to be submitted to a jury. "In the great majority of malpractice cases a submissible case may only be made by expert medical testimony for otherwise a jury may not know (or guess) whether the defendant's acts

did or did not conform to the required standards." *Hart v. Steele,* 416 S.W.2d 927, 931 (Mo. banc 1967). Thus, it is extremely unlikely that medical malpractice plaintiffs are able to meet their burden of proof through lay testimony alone. *Id.* Given that medical expert testimony is necessary to make a submissible case in nearly every medical malpractice action, it is logical to require an early showing that the plaintiff can meet this burden. Generally, medical records that are readily available to plaintiffs and their counsel will provide the necessary foundation for this inquiry. Thus, these are not cases where months of discovery will be necessary to determine whether a valid action exists; such a showing is possible within the 180 day window the statute provides.

In this case, and in the "great majority" of medical malpractice cases, expert testimony is necessary. *See Hart,* 416 S.W.2d at 931. In fact, Appellants do not argue that they would be able to submit their case to a jury absent expert testimony. Appellants' case, like nearly all medical negligence cases, would have required expert testimony in order to be submissible. Requiring an affidavit-of-merit to establish the existence of such testimony in the early phases of litigation is completely logical—and therefore, it does not in any way preclude a claimant's access to the court system.

iv. The Missouri cases holding statutes unconstitutional under the "open courts" provision are distinguishable because the challenged statutes all rendered the cases invalid at the moment of filing.

The Missouri authorities cited by the Appellants fail to support their argument that the affidavit-of-merit statute violates the open courts provision of the Missouri Constitution. Appellants have relied on two cases in making this argument.

Appellants first rely upon *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979). In *Cardinal Glennon,* this Court invalidated a statutory requirement that medical malpractice claims be sent to non-binding arbitration before the claim could be filed. *Mahoney,* 807 S.W.2d at 509 (citing *Cardinal Glennon,* 583 S.W.2d at 110). As the Court recognized in *Mahoney,* § 538.225 is distinguishable from the statute at issue in *Cardinal Glennon* because it "does not operate until after the petition is filed and the incidents of jurisdiction to adjudicate are met." *Id.*

The second case relied on by Appellants is distinguishable for similar reasons. In *Kilmer v. Mun,* 17 S.W.3d 545 (Mo. banc 2000), the Court invalidated a statute preventing suits against sellers of alcohol for "dram shop" liability unless criminal charges had been brought in Missouri against the potential defendant. *Id.* at 552. The Court invalidated that statute because it left the decision as to whether a cause of action existed to one person (the prosecutor); because it denied recourse to anyone who had been injured by someone who bought liquor in another state (in that the seller could not

be prosecuted in Missouri); and because it gave the executive branch full authority to decide when a cause of action existed, violating the separation-of-powers doctrine. *Id.* at 552-53.

Kilmer is distinguishable for the same reason as *Cardinal Glennon.* The statute provided a complete barrier to a cause of action, rather than dictating procedure after an action has been filed. *See Mahoney,* 807 S.W.2d at 509.

In addition, there is a significant difference between the unilateral authority granted to the prosecutor by the statute at issue in *Kilmer* and the affidavit-of-merit requirement of § 538.225. Under the disallowed dram shop statute, the prosecutor had the sole power to prevent a cause of action that might have otherwise been viable. Under § 538.225, any qualified health care provider can provide the foundation for the affidavit. Thus, the existence of the claim is not subject to the whims of one individual. Plus, the testimony of a medical expert is necessary in a medical malpractice case anyway, while the blessing of the prosecutor would be otherwise unnecessary to a civil claim.

Furthermore, the affidavit-of-merit statute does not deny liability to a class of persons the way the dram shop statute did. That statute precluded a claim against an out-of-state seller of alcohol because that person could not be prosecuted in Missouri. *Kilmer,* 17 S.W.3d at 552. Finally, the affidavit-of-merit statute does not grant authority over causes of action to the executive branch, thereby implicating the separation-of-powers concerns expressed by this Court in *Kilmer. See id.* at 552-53.

For all of these reasons, the cases relied upon by Plaintiffs do not support the argument that § 538.225 unconstitutionally restricts the right of access to the courts.

C. CONCLUSION

In summary, appellants have not successfully established that in applying § 538.225 the trial court violated their ability to access the judicial system. A nearly identical version of § 538.225 has previously been evaluated by this Court on the same grounds and no such violation was found. That binding precedent should be followed. Appellants have not been able to satisfy the three-pronged test that is used by this Court to evaluate open court provision violations. Additionally, it is clear that but for the testimony of an expert, appellants would not be permitted to submit their case to a jury and therefore the statutory requirement of an affidavit related to expert testimony does not prevent Appellants' access to the Court. Finally, the *Cardinal Glennon* and *Kilmer* cases relied upon by the Appellants involve statutes that provide much different restrictions than § 538.225. For these reasons, it is clear that the affidavit requirement of § 538.225 imposes no barrier to court access and Appellants' first point on appeal must be denied.

III. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS BECAUSE MISSOURI REVISED STATUTE § 538.225 DOES NOT VIOLATE A PLAINTIFF'S RIGHT TO JURY TRIAL. (APPELLANTS' SECOND POINT)

A. STANDARD OF REVIEW

In response to Appellants' first point, Respondents have previously articulated the appropriate standard of review in this matter. *See supra*, Point I.A. In the interest of economy, Respondents will not restate those principles herein. Instead, Respondents submit that the exact same standard of review applies to Appellants' third point, and thus incorporate their prior discussion by reference as though fully set forth herein.

B. ARGUMENT

Article I, Section 22(a) of the Missouri Constitution provides Missouri citizens a right to trial by jury in causes of action recognized in common law and specifically reads, "the right to trial by jury as heretofore enjoyed shall be inviolate." In order to establish that their right to jury trial has been violated, Appellants must first establish the following: (1) that their claim enjoys a "right to trial by jury;" and (2) that this right is violated by the affidavit requirement of § 538.225.

i. The effect of § 538.225 on a claimant's right to jury trial has been evaluated by the Mahoney Court and § 538.225 was upheld as constitutional.

Appellants argue in their second point on appeal that their right to jury trial was violated by the dismissal of their case without prejudice by the trial court for their failure to comply with § 538.225. The Court in *Mahoney* considered this same issue regarding the intersection of § 538.225 and § 22(a). For the reasons discussed in the previous section, *Mahoney* is controlling and should be applied to Appellants' arguments, which are nearly identical to the arguments advanced by the appellants in *Mahoney*. The slight change to the language of § 538.225 after 2005 does not affect the analysis that the Court applied to the constitutionality of the statute as it relates to Article I, § 22(a) of the Missouri Constitution.

Regarding the right to a trial by jury, the *Mahoney* Court concluded that § 538.225 is designed to identify meritless claims at an early stage and to prevent the submission of such meritless claims to a jury. *Id.* at 508. Respondents contend that the present action is precisely the type of suit which § 538.225 was designed to preclude, since a medical negligence case without expert testimony is meritless and unable to be submitted to a jury. "The affidavit condition of § 538.225 is a reasonable means to hinder a plaintiff whose medical malpractice petition is groundless from misuse of the judicial process in order to wrest a settlement from the adversary by the threat of the exaggerated cost of defense this species of litigation entails." *Id.* The goal of the legislature in enacting § 538.225 was clearly to prevent meritless suits, not to prevent jury trials.

The *Mahoney* Court found that the affidavit-of-merit statute creates a "screening procedure" that parallels the requirement of Missouri Supreme Court Rule 55.03, which applies to all civil matters. *Id.* Rule 55.03 requires that "allegations and other factual contentions have evidentiary support." Rule 55.03(c)(3). Section 538.225 simply expands on that rule by requiring the attorney to consult with a health-care provider, who affirms that "the petition is warranted by the proof and the law." *Mahoney,* 807 S.W.2d at 508. The sanction of dismissal without prejudice helps to further the goal of both provisions, to avoid needless costs in defending frivolous suits. *Id.*

Another important point noted by the Court in *Mahoney* is that § 538.225 is a procedural statute that "intends no change in our substantive medical malpractice law." *Id.* This procedure is "less onerous to the right to trial by jury than a directed verdict or summary judgment," particularly given that the dismissal mandated is one without prejudice. *Id.* Of course, neither directed verdicts nor summary judgments offend the Missouri Constitution. *Id.* The *Mahoney* Court, therefore, concluded that § 538.225 did not violate the constitutional guarantee of a right to trial by jury. *Id.* at 509. Similarly, the trial court's application of the statute does not violate Appellants' right to jury trial in any manner.

ii. Appellants are unable to establish the elements required for a showing that their right to jury trial has been violated.

In order to properly establish that a violation of their right to jury trial has occurred, Appellants must establish that their claims enjoy a "right to trial by jury" and that this right is violated when § 538.225 is applied. Appellants have failed to

successfully establish both elements of this test, and therefore cannot prove their right to jury trial has been affected.

In arguing that § 538.225 violates their right to a trial by jury under Article I, § 22(a) of the Missouri Constitution, Appellants rely heavily on the Missouri Supreme Court's decision in *Watts v. Lester E. Cox Medical Centers*. 376 S.W.3d 633 (Mo. banc 2012). The *Watts* decision is distinguishable from the present action since in *Watts,* the jury had already rendered a decision. *Id.* The Court held that the damage cap effectively required the Court to disregard the jury's determination of non-economic damages. The Court noted that "[t]he individual right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case." *Id.* at 640.

In the present action, it is important to remember that the Appellants' case had no right to be submitted to a jury in the absence of testimony from a qualified medical expert. See *Mahoney,* 807 S.W.2d at 510. In light of this fact, there is no deprivation of a substantive right. The same can be said of a directed verdict or summary judgment in favor of a defendant. Neither of these results violate the plaintiffs' right to trial by jury. See *Mahoney*, 807 S.W.2d at 508 (citing *Smith v. Glynn*, 177 S.W. 848, 849 (Mo. 1915); *Finn v. Newsam*, 709 S.W.2d 889, 892-93 (Mo. App. 1986)). The same can be said of the affidavit requirement.

Watts is further distinguished by the fact that it was a standard medical malpractice case—not a wrongful death case. *See id.* at 635. In *Sanders v. Ahmed,* the Court reached the opposite conclusion as *Watts* in a wrongful death case and held that

the statutory damages cap was constitutional. 364 S.W.3d 195, 205 (Mo. banc 2012). The Court explained that Article I, § 22(a), preserved the right to a trial by jury as it had existed before 1820, when the constitution was adopted. *Id.* at 203. Wrongful death is a statutory cause of action that did not exist as part of the common law. *Id.* "The legislature has the power to define the remedy available if it creates the cause of action." *Id.* (quoting *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N, LLC,* 361 S.W.3d 364, 376 (Mo. banc 2012)). Similarly, the legislature has the power to limit "the substance of the claims themselves," and to "set out the parameters of a statutory cause of action." *Id.* (quoting *Overbey,* 361 S.W.3d at 376). In the affidavit-of-merit statute, the legislature laid out a procedure for "any action against a health care provider for damages for personal injury or death." § 538.225.1 (emphasis added).

Thus, even if a statute violates the constitutional right to a trial by jury when applied to a standard medical malpractice case, which Respondents strongly argue that § 538.225 does not in this instance for the reasons set forth in *Mahoney*, the same statute does not necessarily violate the state constitution in a wrongful death case. *See Watts,* 376 S.W.3d at 640; *Sanders,* 364 S.W.3d at 205. Given that the legislature has unfettered ability to "set out the parameters of a statutory cause of action," *Sanders,* 364 S.W.3d at 203, the legislature could not violate Article I, § 22(a) by prescribing a particular procedure for a wrongful death action.

The underlying action at issue is based on the death of Michael Lang. As such, it is a statutory cause of action for wrongful death. *See* Mo. Rev. Stat. § 537.080

(2000). Because Appellants' case is based on a cause of action that did not exist in 1820, wrongful death, the legislature has the power to define the parameters of the claim, regardless of whether the legislative action restricted the role of the jury. Because wrongful death is a statutory cause of action, Appellants are unable to satisfy the first element of the state's test for jury trial violations. Second, Appellants cannot establish that their right to jury trial has been violated by § 538.225. Their right to a jury trial in a wrongful death case does not lie in common law, but is subject to the will of the legislature.

C. CONCLUSION

For the reasons stated, the affidavit-of-merit statute does not violate the constitutional right to a trial by jury. The *Mahoney* Court thoroughly examined this very issue and concluded that § 538.225 effects only the procedure of medical negligence claims and does not affect substantive law, nor impede any right to come before a jury. Further, because Appellants have brought a claim for wrongful death, they cannot satisfy the elements necessary to prove their right to jury trial has been impeded.

IV. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS BECAUSE MISSOURI REVISED STATUTE § 538.225 IS NOT A SPECIAL LAW.

(APPELLANTS' THIRD POINT)

A. STANDARD OF REVIEW

In response to Appellants' first point, Respondents have previously articulated the appropriate standard of review in this matter. *See supra*, Point I.A. In the interest of economy, Respondents will not restate those principles herein. Instead, Respondents submit that the exact same standard of review applies to Appellants' fourth point, and thus incorporate their prior discussion by reference as though fully set forth herein.

B. ARGUMENT

Appellants contend that § 538.225 is unconstitutional in that it violates Article III, Section 40 of the Missouri Constitution. Article III, § 40 provides that "the general assembly shall not pass any local or special law." Article III, § 40 sets forth thirty types of "special laws" that the legislature may not pass.

Ordinarily, a statute is regarded as a "special law" if it does not have a uniform operation. 73 Am. Jur. 2d Statutes § 4. A special law "confers special privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." *Id.* Nothing in § 538.225 meets this definition.

i. *An examination of the history of "special laws" supports the assertion that § 538.225 is not a special law.*

In order to fully respond to Appellants' contention, a brief history into the origin of special laws is appropriate. Such an analysis was well articulated by the Missouri Supreme Court in *Jefferson County Fire Protection Dist. Assoc. v. Blunt*. 205 S.W. 3d 866 (Mo. banc 2006). In *Jefferson County*, the Court noted that special laws are "statutes that apply to localities rather than to the State as a whole and statutes that benefit individuals rather than the general public." *Id.* at 868 (citing Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the 19th Century United States*, 46 Am. J. Legal Hist. 271 (2004)).

Prior to the mid to late 1800's, state legislatures primarily enacted special legislation and very little general legislation. *Id.* Special legislation made up 87% of state legislation passed in Missouri before 1859. *Jefferson County*, 205 S.W. 3d at 868 (citing Christopher L. Thompson, Note, *Special Legislation Analysis in Missouri and the Need for Constitutional Flexibility*, 61 Mo. L. Rev. 185, 192 (1996)).

Examples of special laws included:

> Laws to divorce specific couples, to validate invalid marriages, to control certain animals in certain places, to change interest rates at individual banks, to grant charters incorporating businesses, to provide for special punishments (e.g., whipping wife beaters) in specific counties, to create special local courts and judges, to change the terms in wills and trusts, to alter the course of judicial proceedings in individual cases, to create local

tax laws and special tax exemptions, to authorize cities and counties to sell bonds to fund railroads that were never built, and more.

Jefferson County, 205 S.W.3d at 268-269 (citing Ireland, *supra* at 285-292).

This Court in *Jefferson County* noted that there were numerous problems with special legislation. Problems included the volume of legislation, and the fact that the legislation was "often hastily and sloppily drafted." *Jefferson County*, 205 S.W.3d at 869 (citing Ireland, *supra* at 273-74). Special legislation took away from the time legislators were able to spend on general legislation. *Id.* (citing Ireland, *supra* at 277, 279). Special legislation led to the practice of "log rolling, whereby a legislator could count on other legislators to vote for his special legislation in return for him voting for their special legislation. *Id.* (citing Ireland, *supra* at 273). The "prevalence of special legislation led to extremely powerful lobbyists and sometimes outright corruption." *Jefferson County*, 205 S.W.3d at 269 (citing Ireland, *supra*, at 277). Problems with special legislation occurred throughout the country, leading forty-six states, including Missouri, to enact constitutional prohibitions against special legislation. *Jefferson County*, 205 S.W.3d at 269 (citing *Municipal Corporations – Legislative control – Statute Applicable to a Single County Does Not Violate Constitutional Prohibition Against Special Legislation*, 76 Harv. L. Rev., 652 (1963)).

The Missouri Constitutional Convention of 1875 unanimously voted to ban the practice of special legislation. *Jefferson County*, 205 S.W.3d at 869 (citing Five Debates of the Missouri Constitutional Convention of 1875, 60). It was further determined at the convention that the Missouri Supreme Court had the right to review legislation to

determine if it was special legislation, rather than the legislature. *Jefferson County*, 205 S.W.3d at 269. The prohibition against special legislation was included in the constitution of 1875 as approved by the voters. *Id.* at 870. This prohibition was also a part of the Missouri Constitution of 1945. *Id.*

ii. *Section 538.225 is both open ended and incorporates similarly situated individuals; therefore it cannot be considered a special law nor a violation of Appellants' state constitutional rights.*

A law is deemed to be special "if it is based on close-ended characteristics, such as historical facts, geography, or constitutional status." *Jefferson County*, 205 S.W.3d at 870 (citing *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997)). Section 538.225 is open-ended in that the class of persons who fall under its requirements is not fixed. Rather, each time a new personal injury or wrongful death suit is filed against a health care provider, new plaintiffs fall within the class.

Additionally, a law may not include less than all who are similarly situated. If it does, it is deemed "special" and therefore invalid. *City of Springfield v. Smith*, 19 S.W.2d 1 (Mo. 1929). Special laws are those that apply to a "fixed subclass." *City of Springfield v. Sprint Spectrum*, L. P., 203 S.W.3d 177 (Mo. banc 2006).

Nothing about § 538.225 creates a fixed subclass. Rather, the statute governs all plaintiffs who bring actions against a health care provider "for damages for personal injury or death on account of the rendering of or failure to render healthcare services." Mo. Rev. Stat § 538.225. This is not a fixed class of Missouri citizens. Rather, there are

new members of the class any time a new action is brought against a health care provider for damages for personal injury or death.

Appellants correctly point out that a special law is directed at a class which "includes less than all who are similarly situated . . . but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." *Batek v. Curators of the Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. 1996). Section 538.225, however, is not a special law because it applies to all plaintiffs who bring actions for personal injury or wrongful death against a health care provider. The law does not attempt to single out any particular such plaintiffs, as would constitute a special law. A special law subject to limitations imposed by the state constitution is a law that includes less than all who are similarly situated; a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis. *City of St. Louis v. State*, 382 S.W.3d 905 (Mo. 2012). Section 538.225 applies to all plaintiffs bringing suit against health care providers for personal injury or wrongful death.

A law based on open-ended characteristics is not facially special and is presumed to be constitutional. *Jefferson County*, 205 S.W.3d at 870 (citing *State ex rel City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993)). A law is not a special law if the classification is "made on a reasonable basis." *Id.* (citing *Blaske v. Smith and Entzeroth, Inc.*, 821 S.W.2d 822, 831 (Mo. banc 1991)). "The test for whether a statute with an open-ended classification is special legislation under Article III, § 40 of the Missouri Constitution is similar to the rational basis test used in equal protection analysis." *Id.* (citing *Blaske*, 821 S.W.2d at 832). "The burden is on the party challenging the

constitutionality of the statute to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose." *Id.* (citing *Treadway v. State*, 988 S.W.2d 508, 511 (Mo. banc 1999)).

Section 538.225 is far from arbitrary and is rationally related to an important legislative purpose. Chapter 538 of the Missouri Revised Statutes governs "tort actions based on improper healthcare." The purpose of Chapter 538 has been well articulated:

> 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 healthcare and the continued integrity of that system of essential services. The effect intended for § 538.225 within that scheme is to cull and early stage of litigation suits for negligence damages against healthcare providers that lack even color of merit, and so to protect the public and litigants from the cost of ungrounded medical malpractice claims. The preservation of the public health is paramount in the exercise of the police power of the state.

Mahoney, 807 S.W.2d 503, 507.

Section 538.225's classification is made on a reasonable basis to ensure that frivolous medical negligence cases are dismissed at an early stage before the necessity of costly discovery. Furthermore, the classification is reasonable in light of the fact that medical negligence cases almost always require expert testimony to proceed to a jury. Section 538.225 simply ensures that plaintiffs have retained an expert at an early stage in the litigation to avoid unnecessary time and expense. Section 538.225 clearly sets forth a

reasonable and non-arbitrary framework for furthering this legitimate legislative purpose. Therefore, it cannot be deemed to be a special law.

Appellants rely exclusively on the Oklahoma case of *Zeier v. Zimmer, Inc.*, 152 P.2d 861 (Ok. 2006), to support their argument that § 538.225 is a special law. In *Zeier*, the Oklahoma Supreme Court held a similar affidavit of merit statute was unconstitutional for being a special law. See *Zeier v. Zimmer, Inc.*, 152 P.2d at 865-869. The Court in *Zeier* made a distinction between all personal injury plaintiffs and plaintiffs who bring actions for medical negligence. No Missouri court has ever held such an open-ended law as § 538.225 to be a special law. No law as broad of application as § 538.225 has ever been declared unconstitutional on these grounds in Missouri.

Furthermore, the Oklahoma Supreme Court in *Zeier* wholly ignored the reality that even in the absence of the affidavit-of-merit requirement, the plaintiff's cause of action required expert testimony in order to proceed to trial. The same is true in the present action.

While the Missouri Constitution prohibits "special laws", Appellants fail to cite any cases where Missouri courts have struck down a law under this provision. In fact, in all of the cases cited by the Plaintiffs, the courts affirmed that the laws at issue were constitutional and did not violate the provision against "special laws." Finally, Chapter 538 in its entirety deals with actions against health care providers, and no part of this Chapter has ever been held to be a special law.

Appellants' arguments are not persuasive in this regard. In the absence of any authority to the contrary, this Court should follow the precedent set forth by the Missouri

Supreme Court in *Mahoney* discussed above, and continue to uphold the constitutionality of § 538.225.

C. CONCLUSION

Section 538.225 in no way meets the definition of a special law. The statute is clearly open-ended and applies to similarly situated individuals in the same manner. For these reasons, Appellants' argument should be rejected.

V. THE CONSTITUTIONALITY OF MISSOURI REVISED STATUTE § 538.225 IS SUPPORTED BY THE FACT THAT MANY OTHER STATES HAVE SIMILAR STATUTORY AFFIDAVIT-OF-MERIT REQUIREMENTS FOR MEDICAL NEGLIGENCE CLAIMS THAT HAVE BEEN UPHELD.

A. STANDARD OF REVIEW

Respondents have previously articulated the appropriate standard of review in this matter. *See supra*, Point I.A. In the interest of economy, Respondents will not restate those principles herein. Instead, Respondents submit that the exact same standard of review applies to Respondents' fifth point, and thus incorporate their prior discussion by reference as though fully set forth herein.

B. ARGUMENT

The following twenty-six states have statutes or rules similar to the affidavit of merit required in § 538.225:

Arizona: Ariz. Rev. Stat. Ann. § 12-2603; **Colorado:** Colo. Rev. Stat. § 13-20-602; **Connecticut:** Conn. Gen. Stat. § 52-190a; **Delaware:** Del. Code Ann., Title 18, § 6853; **Florida:** Fla. Stat. § 766.104; **Georgia:** Ga. Code Ann. § 9-11-9.1; **Illinois:** Il. Stat. Chapter 735 § 5/2-622; **Maryland:** Md. Code Ann. § 3-2a-04, **Michigan:** Mich. Comp. Laws Ann. § 600.2912d; **Minnesota:** Minn. Stat. Ann. § 145.682, **Mississippi:** Miss. Code Ann. § 11-1-58; **Nevada:** Nev. Rev. Stat. § 41A.071; **New Jersey:** N.J. Stat. Ann. § 2A:53A-27; **New York:** N.Y. C.P.L.R. § 3012a; **North Carolina:** N.C. Gen. Stat. § 1A-1, Rule 9(j); **North Dakota:** N.D. Cent. Code § 28-01-46; **Ohio:** Ohio Civ. R. 10; **Pennsylvania:** Pa. R. Civ. P. 1042.3; **South Carolina:** S.C. Code Ann. § 15-36-100; **Tennessee:** Tenn. Code Ann. § 29-26-122; **Texas:** Tex. Civ. Prac. & Rem. Code § 74.351; **Utah:** Utah Code Ann. § 78B-3-423; **Vermont:** Vt. Stat. Ann. Title 12, § 1042; **Virginia:** Va. Code §8.01-20.1; **West Virginia:** W. Va. Code Ann. § 55-7B-6; and **Wyoming:** Wy. Stat. § 9-2-1519.

Missouri's affidavit-of-merit requirement is neither unique in form nor draconian in application. Among the twenty-six states that have such requirements, fourteen (Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Maryland, Michigan, Minnesota, Nevada, North Dakota, Tennessee, Utah, and Vermont) mandate a dismissal where the plaintiff fails to file the affidavit of merit. The result in these fourteen states is akin to the result of mandatory dismissal without prejudice in Missouri for failure to comply with § 538.225.

Many of these statutes and rules have been upheld in the face of various constitutional challenges. *See, e.g., McAlister v. Schick,* 588 N.E.2d 1151, 1153-56 (Ill. 1992) (rejecting challenges based on due process, equal protection, and the separation-of-powers doctrine); *Hebert v. Hopkins,* 395 S.W.3d 884, 898-902 (Tex. Ct. App.–Austin 2013) (rejecting challenge based on equal protection, separation-of-powers doctrine, open courts provision of state constitution, and right to trial by jury); *Lohnes v. Hosp. of St. Raphael,* 31 A.3d 810, 817-19 (Conn. Ct. App. 2011) (rejecting challenge based on open courts provision of state constitution and due process argument); *Jilly v. Rayes,* 209 P.3d 176, 178-79 (Ariz. Ct. App. 2009) (rejecting challenge based on separation-of-powers doctrine); *Oglesby v. Consol. Rail Corp.,* 2009 Ohio 1744, 2009 WL 1143121, at **3-4 (Ohio Ct. App. March 31, 2009) (slip op.) (rejecting challenges based on equal protection and the right to trial by jury); *N.J. State Bar Ass 'n v. State,* 902 A.2d 944, 959-60 (N.J. Super. A.D. 2006) (rejecting challenge based on separation-of-powers doctrine); *Barlett v. N. Ottawa Cmty. Hosp.,* 625 N.W.2d 470, 476 (Mich. Ct. App. 2001) (rejecting challenges based on equal protection and due process); *Peterson v. Columbus Med. Ctr. Foundation, Inc.,* 533 S.E.2d 749, 755 (Ga. Ct. App. 2000) (rejecting challenges based on due process and equal protection); *Royle v. Fla. Hospital-E. Orlando,* 679 So. 2d 1209, 1212 (Fla. Ct. App. 1996) (rejecting challenge based on right of access to courts where case was dismissed with prejudice); *Henke v. Dunham,* 450 N.W.2d 595, 598 (Minn. Ct. App. 1990) (rejecting equal protection challenge).

The *Lohnes* and *Hebert* cases are noteworthy for their similarities to the issues raised by the Appellants in the present action. In *Lohnes,* the Connecticut court

assessed a challenge based on an open courts state constitutional provision. The court wrote that the provision "has been viewed as a limitation on the legislature's ability to abolish common-law and statutory rights that existed in 1818." *Lohnes,* 31 A.3d at 817-18. In that sense, the provision has similarities to the Missouri open courts provision. The *Lohnes* court held that the affidavit-of-merit statute did not violate the constitutional provision. A medical malpractice plaintiff is "in no way is deprived of his right to legal recourse" by the statute. *Id.* at 818. The plaintiff "merely is required to document ... that there is evidence to support such a claim before bringing suit." *Id.* "There is nothing onerous or insurmountable about this requirement." *Id.* As such, the statute "is merely a procedural limitation that neither eliminates nor unreasonably burdens the plaintiff's right to legal recourse." *Id.*

Finally, the recent decision in *Hebert* rejected the same arguments made here, as well as other constitutional challenges. The Texas court was assessing challenges to a statute that gives a medical malpractice plaintiff 120 days to file an expert report, subject only to a thirty day extension. *Hebert,* 395 S.W.3d at 895. Thus, the Texas statute is more onerous than § 538.225, which only requires an affidavit from the plaintiff or the plaintiff's attorney, and which allows as many as 180 days for it to be filed.

The *Hebert* court considered the mandatory nature of the statute, whether the open courts provision of the Texas state constitution was violated, and whether the constitutional right to jury trial was violated. In rejecting the argument that the statute's mandatory nature removed power from the judiciary, the court wrote that "in actuality, the courts retain the judicial power to determine whether a timely served report is

adequate in this regard and to render a decision accordingly." *Hebert,* 395 S.W.3d at 900. In rejecting the argument that the statute violated the "open courts" provision of the Texas Constitution, the court held that the plaintiffs had "failed to prove how the provisions of chapter 74, as opposed to their own failure to provide an adequate report, prevented them from pursuing their claims." *Id.* at 901. Finally, the court stated that the statute did not offend the right to a trial by jury because that right "is not an absolute right in civil cases, but is subject to certain procedural rules." *Id.* at 902 n.15.

The same analysis applies to the arguments raised by the Appellants here. The affidavit-of-merit statute does not deny access to the courts. It simply prescribes a procedure that must be followed after a litigant has already gained access to the courts. The statute does not deny a right to a trial by jury. Rather, it prescribes a procedure that a plaintiff must follow to aid the court's determination as to whether the case is one that will eventually go to a jury. As such, § 538.225 does not violate any constitutional provisions.

In contrast to this long line of cases upholding affidavit-of-merit statutes, Appellants have identified only two states where courts struck down affidavit-of-merit statutes. *Zeier v. Zimmer,* 152 P.3d 861 (Okla. 2006); *Wall v. Marouk*, 302 P.3d 775 (Okla. 2013); and *Putman v. Wenatchee Valley Med. Ctr.,* P.S., 216 P.3d 374 (Wash. 2009)). In both states, courts struck down statutes that required filing the affidavit of merit at the time of filing the petition. *See Zeier,* 152 P.3d at 863 and *Putnam,* 216 P.3d at 378. In contrast, § 538.225 puts no pre-conditions on filing; it simply requires the filing of an affidavit of merit within ninety days after filing—with a

possible extension to 180 days. § 538.225.5. This Court found that distinction to be important. *See Mahoney,* 807 S.W.2d at 509. But even if this Court considers *Zeier, Wall* and *Putman* to be somewhat on point, they represent a small minority of the decisions in cases challenging affidavit-of-merit statutes.

Clearly, the strong weight of authority nationally is in line with what this Court already decided in *Mahoney* - affidavit-of-merit statutes are constitutional.

C. CONCLUSION

Section 538.225 cannot be considered a violation of the Missouri Constitution because it is aligned with and congruent with similar legislation of a majority of the states. To invalidate this statute would be improper and unharmonious with the development of medical malpractice litigation law throughout the country.

CONCLUSION

Appellants failed to preserve their constitutional challenges to § 538.225 since they did not raise these challenges at the earliest opportunity – time the petition was filed. Therefore, their assertions that § 538.225 violates the Missouri Constitution should not be considered by this Court. However, even when Appellants' constitutional challenges are evaluated, there is no basis to conclude that § 538.225 violates any provision of the Missouri Constitution.

The Court in *Mahoney* rejected the identical arguments the Appellants make regarding challenges to the open courts provision and right to trial by jury provision of the Missouri Constitution. The Appellants' case required expert testimony to be submitted to a jury and nothing about requiring them to file an affidavit from a legally qualified health care provider after the case is filed blocks access to the courts or their right to trial by jury. The fact that § 538.225 was changed in 2005 to mandate a dismissal without prejudice in the event the affidavit is not filed, does not change the analysis set forth in *Mahoney*.

Additionally, § 538.225 does not meet the definition of a special law, as Appellants contend. The classification of medical negligence cases is not arbitrary. Rather, this classification is related to the vital legislative purpose of protecting public health and discouraging meritless lawsuits. Furthermore, the statute is open-ended in that new members of the class are created each time a valid suit against a health care provider is filed. Section 538.225 meets none of the definitions to be a special law.

Lastly, twenty-six states have affidavit-of-merit requirements similar to Missouri's. Fourteen of those states mandate dismissal when the affidavit is not properly submitted. Nothing about Missouri's statute is unique or harsh in its application compared to that of other jurisdictions.

In light of Appellants' failure to preserve their constitutional challenges and subsequent failure to assert any valid constitutional arguments, the trial court's Order granting Respondents' Motion to Dismiss must be affirmed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that to the best of my knowledge, information and belief and after reasonable inquiry, this brief complies with the limitations of Rule 84.06(b). There are 11,109 words in this brief.

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