No. SC94814

In the
MISSOURI SUPREME COURT

PAUL M. LANG and ALLISON M. BOYER,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the Circuit Court of Jackson County, Missouri
at Independence
Hon. Charles H. McKenzie

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from an action in the Circuit Court of Jackson County by Appellants Paul Lang and Allison Boyer, involving claims of medical malpractice and wrongful death against Respondents Dr. Patrick Goldsworthy, Dr. Aston Goldsworthy, and Patrick L. Goldworthy, D.C. The Circuit Court granted Respondents' Motion to Dismiss based on Appellants' failure to file a health care affidavit pursuant to § 538.225, R.S.Mo. Appellants filed their timely notice of appeal. Both in the Circuit Court and on appeal, Appellants challenge the constitutionality of § 538.225. Specifically, Appellants contend that section 538.225 violates Mo. Const. art. I, § 14; Mo. Const. art. I, § 22; and Mo. Const. art. III, § 40. This Court has exclusive jurisdiction pursuant to Article V, Section 11 of the Missouri Constitution because Appellants bring real and substantial questions regarding the constitutionality of § 538.225.

STATEMENT OF FACTS

The Appellants are the surviving children of decedent Michael Lang. LF 52-53. The Appellants filed Case No. 1016-CV-38278 in the Circuit Court of Jackson County naming Dr. Patrick Goldsworthy, Dr. Aston Goldsworthy, and Patrick L. Goldworthy, D.C., ("Respondents") as defendants. LF 52-59. The Appellants alleged that the Respondents' substandard and negligent chiropractic care caused Michael Lang to suffer a transverse fracture of the spine resulting in his death. *Id.* Counsel for Appellants timely filed affidavits with the Circuit Court of Jackson County identifying Dr. Alan H. Bragman, D.C. as a legally qualified health care provider under § 538.225 R.S.Mo. LF 61-65. Dr. Bragman authored reports outlining his opinions and Appellants produced these reports to Respondents. LF 66-71. Respondents' counsel deposed Dr. Bragman and fully explored his opinions and basis thereof. LF 71-135. Following extensive discovery and briefing, the Circuit Court of Jackson County denied Respondents' Motion for Summary Judgment, finding the existence of disputed facts requiring submission of Appellants' claims to a jury. LF 136. Due to the unavailability of a witness for trial, Appellants were forced to voluntarily dismiss their claims without prejudice. LF 137-138. Following the voluntary nonsuit, Appellants timely refiled the action in the Circuit Court of Jackson County as Case No. 1416-CV-06526. LF 139-146. The claims asserted and the facts alleged in the respective Petitions are, word-for-word, identical. LF 52-59; 139-146.

Respondents waited One Hundred and Eighty Two days after Appellants re-filed their lawsuit to file a Motion to Dismiss on the grounds that Appellants had not complied

with § 538.225, R.S.Mo. LF 27-31. Prior to filing their Motion to Dismiss, Respondents never requested that Appellants re-file their health care affidavits or otherwise notify Appellants of their intention to seek dismissal on such grounds. LF 32-33. Appellants filed a timely opposition to Respondents' Motion to Dismiss arguing that because a dismissal without prejudice would effectively be a final judgment, the statute as applied violated the Missouri Constitution. LF 32-51. Specifically, Appellants explained that § 538.225: 1) Is an arbitrary and unreasonable barrier to Appellants' access to the courts to remedy their legally recognized injury, in violation of Mo. Const. art. I, § 14; 2) Changes Appellants' right to a trial by jury as heretofore enjoyed, in violation of Mo. Const. art. I, § 22; and 3) Constitutes a special law in violation of Mo. Const. art. III, § 40. *Id.*

The Circuit Court of Jackson County granted Respondents' Motion to Dismiss, Appellants timely appealed, and the Western District granted transfer to this Court due to the real and substantial constitutional questions at issue. LF 178-192.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE R.S.MO. § 538.225 VIOLATES ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION IN THAT IT ARBITRARILY OR UNREASONABLY BARS APPELLANTS' FROM PURSUING THEIR RECOGNIZED CLAIMS IN THE COURTS OF MISSOURI.

Mo. Const. art. I, § 14

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

Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 509 (Mo. 1991)

Kilmer v. Mun, 17 S.W.3d 545, 548 (Mo. 2000)

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE R.S.MO. § 538.225 VIOLATES ARTICLE 1, SECTION 22 OF THE MISSOURI CONSTITUTION IN THAT IT MANDATES THAT THE TRIAL COURT DISMISS THE ACTION DESPITE APPELLANTS HAVING A SUBMISSIBLE CASE.

Mo. Const. art. I, § 22

Watts v. Lester E. Cox Med. Centers, 376 S.W.3d 633, 637 (Mo. 2012)

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE R.S.MO. § 538.225 VIOLATES ARTICLE III SECTION 40 OF THE MISSOURI CONSTITUTION IN THAT IT SEPERATES PLAINTIFFS INJURED BY MEDICAL NEGLIGENCE FROM PLAINTIFFS INJURED BY OTHER PROFESSIONAL NEGLIGENCE.

Mo. Const. art. III, § 40

City of Sullivan v. Sites, 329 S.W.3d 691, 693 (Mo. 2010)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE § 538.225, R.S.MO. VIOLATES ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION IN THAT IT ARBITRARILY OR UNREASONABLY BARS APPELLANTS FROM PURSUING THEIR RECOGNIZED CLAIMS IN THE COURTS OF MISSOURI

A. Standard of Review

Appellants are challenging the trial court's Order granting a motion to dismiss on the grounds that the statute compelling dismissal, § 538.225, R.S.Mo. is unconstitutional. The 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. 2008), as modified on denial of reh'g (Aug. 26, 2008). Questions of law, including constitutional challenges to a statute, are reviewed *de novo*. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). A statute is unconstitutional when it clearly contravenes a constitutional provision. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. 2012). Appellants have the burden of demonstrating that the statute at issue violates the constitution. *Franklin Cnty. ex rel. Parks v. Franklin Cnty. Comm'n*, 269 S.W.3d 26, 29 (Mo. 2008).

B. Argument

Article I, Section 14 of the Missouri Constitution guarantees Appellants the right to pursue recognized claims in the courts of Missouri. Both the common law and the statutes of Missouri recognize Appellants' claims for wrongful death based on Respondents' negligent health care. § 538.225, R.S.Mo. violates this "open courts"

provision of the Missouri Constitution by arbitrarily and unreasonably denying Appellants their right to pursue their case in court on grounds other than the merits. This statute was not intended to, and cannot be permitted to prevent individuals from pursuing non-frivolous claims against health care providers. It does not serve any legitimate public purpose to arbitrarily prohibit individuals from pursuing non-frivolous claims. § 538.225, R.S.Mo. violates Article I, section 14 of the Missouri Constitution.

This Court previously held that a prior version of this statute was constitutional because it served only as a mechanism to identify and dismiss at an early stage of litigation frivolous medical malpractice cases. This earlier version of the statute provided that if a plaintiff had failed to file an affidavit as required by § 538.225, the trial court "may" dismiss the case without prejudice. By granting the trial court discretion to determine whether or not a case should be dismissed, the statute ensured that it would not arbitrarily and unreasonably act to dismiss a case, such as Appellants', that had merit. The current version of the statute, however, dictates that the trial court "shall" dismiss the case without prejudice. The trial court is now no longer permitted discretion and instead must arbitrarily and unreasonably dismiss a case for non-compliance even in situations, such as here, where doing so would contravene the intention of the statute by preventing a party from pursuing a clearly meritorious case. In fact, the Circuit Court of Jackson County has specifically held that, based on an exhaustive review of the evidence and facts of the case, Appellants' case presents genuine questions of fact and should be decided by a jury. This mandatory language has pushed the statute beyond its legitimate purpose of culling out only frivolous suits and has rendered it unconstitutional. The trial

court's Order granting Respondents' Motion to Dismiss should be reversed, and this case should be remanded for further proceedings.

i. Appellants Have Preserved Their Constitutional Challenges for Review

Appellants have preserved their constitutional arguments. Just last year in *Mayes v. Saint Luke's Hosp. of Kansas* City, this Court held that in order for a plaintiff to preserve the same constitutional challenges to § 538.225, R.S.Mo. that Appellants make here, the party must first raise them in their opposition to the motion to dismiss. *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260 (Mo. 2014). Here, Appellants raised their constitutional challenges in their opposition to Respondents' Motion to Dismiss and have complied with the requirements as set forth in *Mayes*.

The facts of *Mayes* are almost identical to the facts of this case. The plaintiffs had previously voluntarily dismissed a medical malpractice case after affidavits had been filed, discovery had been conducted, and their experts had been deposed. *Mayes*, 430 S.W.3d 262-4. The plaintiffs then refiled the exact same case but did not refile the healthcare affidavits pursuant to § 538.225. *Id*. After the time to do so expired, defendants filed a motion to dismiss on the grounds that the plaintiffs had failed to file the affidavits as mandated by section 538.225. *Id.* The trial court granted the motion. *Id.* As in this case, the dismissal without prejudice in *Mayes* served as a permanent bar to pursuing the claims because the statute of limitations had passed. *Id*. On appeal, plaintiffs asked this Court to rule that the statute violated "their constitutional rights to open courts or to a trial by jury." *Id.* at 270.

This Court recognized that the constitutional questions presented in *Mayes* had not been previously addressed by the Court because it "has not addressed these issues in the context of the current version of section 538.225." *Id*. As such, the plaintiffs in *Mayes* presented a "real and substantial question." *Id.* This Court recognized that its previous holding in *Mahoney* that § 538.225 is constitutional is no longer controlling. The statute at issue in *Mahoney* was a prior version of section 538.225 that did not mandate dismissal upon failure to file an affidavit but ultimately left the decision in the hands of the trial court: "This Court has previously ruled that a prior version of section 538.225 did not violate the constitutional guarantees to a trial by jury and access to open courts. *Mahoney*, 807 S.W.2d at 509. The version of section 538.225 at issue in *Mahoney* gave the trial court discretion on whether to dismiss an action for failure to comply with the statute. Section 538.225.5, RSMo 1986." *Mayes*, 430 S.W.3d, 270, discussing *Mahoney*, 807 S.W.2d, 509.

Despite the real and substantial constitutional challenges posed by plaintiffs in *Mayes*, this Court ultimately concluded that those claims had not been preserved and would not be ruled upon. *Mayes*, 430 S.W.3d at 268-269. This Court explained that in order to preserve a constitutional challenge to a statute on appeal, a party must timely raise the challenge in the trial court. The purpose of this requirement is "to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue." *Id.* at 266, *citing Winston v. Reorganized Sch. Dist. R-2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 327 (Mo. 1982). The plaintiffs in *Mayes*,

however, failed to raise the constitutional challenges in the trial court despite several opportunities to do so.

First, the *Mayes* plaintiffs did not challenge the constitutionality of § 538.225 in their opposition to defendants' motion to dismiss. *Id.* at 267. Next, after the motion to dismiss was granted, the plaintiffs filed a motion to reconsider yet once again failed to raise any constitutional challenges to the statute. *Id.* The trial court held a full hearing on the motion to reconsider and it was only then that "counsel for the plaintiffs stated in three sentences that application of the affidavit requirement violated his clients' rights to open courts and a certain remedy for every injury and trial by jury." *Id.* This Court found that these three sentences by plaintiffs' counsel did not serve to preserve this argument on appeal because they: "did not call attention to the error at trial and did not give the court the opportunity to rule on the question." *Id.* . *citing Niederkorn v. Niederkorn*, 616 S.W.2d 529, 535 (Mo. Ct. App. 1981).

In concluding that the plaintiffs did not properly preserve their constitutional challenges for review, this Court clarified that had the plaintiffs raised these challenges in their opposition to defendants' motion to dismiss, the challenges would have been preserved:

> To give the court an opportunity to rule on the issue, a party must make a timely objection or request, which is one "made when the occasion for the ruling desired first appears." *Brown v. Thomas*, 316 S.W.2d 234, 237 (Mo. Ct. App. 1958). Here, the occasion for the plaintiffs' desired ruling regarding the constitutional validity of section 538.225 first appeared when the trial court

> was ruling on defendants' motion to dismiss pursuant to section 538.225. When the trial court was considering the motion, it did not have an opportunity to fairly identify and rule on the claims that section 538.225 is unconstitutional because the plaintiffs failed to present these claims to the court.

Mayes, 430 S.W.3d, 267-68

By not asserting the claims in their response to the defendants' motion to dismiss, therefore, the plaintiffs in *Mayes* failed to preserve for appeal the issues of whether section 538.225 violates their constitutional rights to access to open courts and to a trial by jury.

In this case, however, the Appellants have preserved their constitutional claims. Unlike the plaintiffs in *Mayes*, the Appellants in this case asserted their constitutional challenges to the statute in their opposition to defendants' motion to dismiss. LF 32-51. By timely asserting these constitutional challenges in their opposition, Appellants gave the trial court the opportunity to fully and fairly consider the claims before ruling on the motion to dismiss. The Appellants in this case did exactly what plaintiffs in *Mayes* failed to do: Preserve their constitutional challenges to section 538.225 by timely raising them in opposition to Respondents' Motion to Dismiss. The Appellants in this case raised their constitutional challenges at the first opportunity for the ruling and this Court may rule on the merits of those challenges.

ii. The Open Courts Provision of Article I, Section 14 of the Missouri Constitution Prohibits Any Law That Arbitrarily or Unreasonably Bars Appellants from Pursuing a Recognized Claim

Article I, Section 14 of the Missouri Constitution is known as the "open courts" provision and reads in full: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Const. art. I, § 14. It is "a constitutional provision that is mandatory in tone and substance." *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. 2000). This mandatory constitutional provision "'prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.'" *Id.* (quoting *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. 1997)(emphasis in the original).

In *Klimer v. Mun*, this Court engaged in a thorough discussion of the "open courts" provision of the Missouri Constitution, including a review of nine "modern era" cases that addressed Article I, Section 14 challenges to Missouri Statutes. *Kilmer*, 17 S.W.3d, 548. These nine cases offered "a variety of analytical approaches for applying this 'open courts' principle." *Id.* So much variety, in fact, that "some of these cases seem irreconcilable." *Id.* After reviewing these nine cases, this Court set forth a clear standard to apply when determining if a statute violates the "open courts" provision on the Missouri Constitution: "Article I, Section 14 'prohibits any law that *arbitrarily or*

unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.'" (quoting *Wheeler*, 941 S.W.2d, 515(emphasis in the original). This standard is to be "followed in this and subsequent cases and properly balances an individual's constitutional rights to pursue claims in court with the legislature's power to "design the framework of substantive law." *Id.* at 549, 550.

Since *Klimer*, this Court has consistently used this standard. As a result, a party successfully meets its burden in demonstrating a violation of this right when she demonstrates that the three requirements of this standard are met: "An open courts violation is established on a showing that: '(1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.'" *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. 2009), *quoting Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. 2006).

This is the correct test for determining a violation of the "open courts" provision because it balances the legislature's power to modify the law with an individual's right to pursue his claim in court. It strikes this balance by prohibiting the legislature from modifying or abolishing a cause of action, whether common law or statutory, in a way that creates an arbitrary or unreasonable barrier to pursuing that remedy. *Kilmer*, 17 S.W.3d at 550. This Court has repeatedly confirmed that the "open courts" provision prevents the legislature from placing unreasonable hurdles, arbitrary condition precedents, or artificial barriers in the path of a plaintiff attempting to pursue an existing cause of action. *See, Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. 1991)

("[T]his Court draws an important distinction between a statute that creates a condition precedent to the use of the courts to enforce a valid cause of action (which violates the open courts provision) and a statute that simply changes the common law by eliminating a cause of action that has previously existed at common law or under some prior statute"). *See, also, Ambers-Phillips v. SSM DePaul Health Center*, No. SC94322, April 28, 2015 ("Open courts" provision prevents artificial barriers from preventing a plaintiff from pursuing "in the courts the causes of action the substantive law recognizes.")

a. Appellants Enjoy a Recognized Cause of Action

It is undisputed that the first element of the test is met in this case: Appellants have a recognized cause of action. An 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 – in this case, an action for wrongful death for medical negligence – is a recognized cause of action in Missouri, both presently and at common law. "English common law recognized medical negligence as one of five types of 'private wrongs' that could be redressed in court," which "have been tried by juries" in Missouri since the beginning of statehood. *Watts*, 376 S.W.3d, 638(citing 2 W. Blackstone, Commentaries on the Laws of England 122 (1765; 1992 reprint); *Rice v. State*, 8 Mo. 561 (1844)). Today, numerous provisions of Chapter 538, R.S.Mo., titled "Tort Actions Based on Improper Health Care," discuss various procedures for such actions, implicitly recognizing their existence in Missouri. *Kilmer*, 17 S.W.3d at 550.

The Appellants claims are not only recognized and endorsed by the laws of Missouri in general, but the Circuit Court of Jackson County undertook an exhaustive

review of the facts and evidence supporting their claims and determined that the Appellants had a submissible case. Prior to being forced to dismiss their original case without prejudice due to a witness being unavailable for trial, Respondents filed for summary judgment. On February 27, 2013, the trial court in the original case, Case No. 1016-CV-3872, issued its order denying summary judgment. The court determined after an "exhaustive review of the court file and all arguments" that "there are still several issues of fact" and that "the jury must sort this out." LF 136. The court concluded that the Respondents failed to show that they have "a right to judgment [as] a matter of law." LF 136. Appellants have easily and convincingly met the first requirement that they have a recognized cause of action.

b. Section 538.225 Is Restricting Appellants' Cause of Action

It being unmistakable that Appellants have a recognized cause of action, the next element that they must satisfy is to demonstrate that this cause of action is being restricted by the statute. Again, the answer is clear and not in dispute. § 538.225, R.S.Mo. is clearly restricting Appellants' cause of action. The trial court's Order of Dismissal barred Appellants from use of the courts to pursue their cause of action. Although the dismissal is denominated "without prejudice," it serves as a permanent bar to pursuing their cause of action because the Statute of Limitations prohibits the Appellants from re-filing their case.

Mr. Lang passed away more than three years prior to the dismissal in the case on December 7, 2009. LF 142. As recently as last year, this Court held under identical circumstances that refiling the petition "would be a futile act," and that the Order of

Dismissal acts as a final and appealable judgment. *Mayes*, 430 S.W.3d at 266, *citing Nicholson v. Nicholson*, 685 S.W.2d 588, 589 (Mo. Ct. App. 1985). *See also, Mahoney*, 807 S.W.2d at 506("The judgment of dismissal without prejudice under section 538.225.5 is final and appealable."). The trial court, in determining that section 538.225 mandated that it dismiss Appellants' case has barred Appellants form pursuing their cause of action in the courts of Missouri.

c. The Restriction Is Arbitrary and Unreasonable

Section 538.225 is restricting Appellants from pursuing a recognized cause of action in court. The only remaining element Appellants must demonstrate in order to establish that this statute violates their right to open courts is that it did so arbitrarily or unreasonably. Based on the circumstances of this case, and because of its mandatory, rather than discretionary sanction of dismissal, it is clear that section 538.225 is an arbitrary and unreasonable barrier to Appellants' ability to pursue their recognized claims in court.

Section 538.225 no longer adheres to its legitimate purpose of preventing frivolous lawsuits from surviving the early stages of litigation. Instead, it now mandates an automatic dismissal of any case wherein proof of an expert opinion substantiating the allegations is not filed with the court in perfect technical compliance with the statute. It sets forth a formulaic procedural hurdle that is wholly separate from the substantive law of the case and in doing so creates an impermissible and arbitrary barrier preventing Appellants from pursuing their claims in court.

When assessing the constitutionality of a statute, this Court identifies the purpose of the statute to determine if it is a legitimate public purpose. *Mahoney*, 807 S.W.2d, 507. In *Mahoney,* this Court identified the purpose of Chapter 538 as addressing the cost of, and ensuring the integrity of, the healthcare system. *Id.* This Court determined that R.S.Mo. § 538.225 complies with this purpose because it is meant: "to cull at an early stage of litigation suits for negligence damages against health care providers that lack even color of merit, and so to protect the public and litigants from the cost of ungrounded medical malpractice claims." *Mahoney*, 807 S.W.2d, 507. Limiting the costs associated with frivolous suits against health care providers is a legitimate public purpose and a proper exercise of a state's police power. *Id.*

After identifying this legitimate purpose behind the law, this Court determined that the prior version of R.S.Mo. § 538.225 did not violate the "open courts" provision. This was because the law did not apply arbitrarily to bar legitimate medical malpractice cases but instead was narrowly targeted to apply only those cases that lacked merit. Specifically, as it relates to Article 1, Section 14 this Court stated:

> The substantive law requires that a plaintiff who sues for personal injury damages on the theory of health care provider negligence prove by a qualified witness that the defendant deviated from an accepted standard of care. Without such testimony, the case can neither be submitted to the jury nor be allowed to proceed by the court. The affidavit procedure of § 538.225 serves to free the court system from frivolous medical malpractice suits at an early stage of litigation, and so facilitate the administration of those with

> merit. Thus, it denies no fundamental right, but at most merely "[re]design[s] the framework of the substantive law" to accomplish a rational legislative end. *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. 1989); *see also, Ortwein v. Schwab*, 410 U.S. 656, 659, 93 S. Ct. 1172, 1174, 35 L. Ed. 2d 572 (1973). 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. *Blue Cross Hosp. Serv., Inc. of Missouri v. Frappier*, 681 S.W.2d 925, 930 (Mo. 1984)*; see also, Thomas v. Fellows*, 456 N.W.2d 170, 173 (Iowa 1990).

Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 510 (Mo. 1991)

The version of the statute at issue in *Mahoney*, however, did not mandate that the trial court dismiss the case upon the failure to timely file an affidavit. Instead, it simply "empowered" the court to issue a dismissal without prejudice. In contrast, the current version of the law requires that a court "shall" dismiss the case if an affidavit is not filed. Because the current version of the statute removes all discretion from the trial court, it is now unconstitutional. Trial courts can no longer ensure that the law does not arbitrarily or unreasonably bar valid, recognized claims. This is a significant and unconstitutional change to the version that existed in *Mahoney*.

As this court explained, the prior version of the statute was no different than a directed verdict or a summary judgment because it applied only to claims in which the plaintiff had not and could not show that she could present evidence establishing the

substantive merits of the case. *Mahoney* at 508. It worked in tandem with Rule 55.03's requirement that a claim filed in court be "well grounded in fact and is warranted by existing law." *Id.* In short, it offered an alternative method by which a court could timely recognize that a plaintiff in a medical malpractice case did not have a valid cause of action, and empowered the court to act to dismiss these cases in order to reduce the expense and volume of frivolous medical malpractice cases.

The current version of the statute, however, goes well beyond providing a speedy procedure for identifying meritless cases. Unlike the version in *Mahoney*, the purpose of the statute is no longer limited to culling out cases that lack the substantive testimony of an expert, without which, "the case can neither be submitted to the jury nor be allowed to proceed by the court." *Id.* [1] Instead, the new version of the statute creates a mandatory artificial procedural hurdle which demands full compliance before a plaintiff can continue to pursue her claim in court. It unreasonably prohibits non-frivolous claims from proceeding in the courts without complete obedience. Compounding this problem, it fails to account for situations wherein total submission to its requirements is arbitrary or unreasonable under the circumstances by refusing the trial court any discretion and

[1] If the statute was still properly limited to such cases, Appellants would not be prohibited from pursuing their claims. Not only did Appellants previously file affidavits in the Circuit Court of Jackson County, but that court has already determined that the Appellants case should be allowed to proceed and be submitted to the jury.

mandating the sanction of dismissal. Because of these failures, the current version of § 538.225, R.S.Mo. violates the "open courts" provision of the Missouri Constitution.

This Court's holding in *Kilmer v. Mun* confirms that the current version of section 538.225 strays beyond the boundaries of the Missouri Constitution. In *Kilmer*, this Court held that a law that prohibited an individual from pursuing a claim for dram shop liability unless charges were brought against the seller of alcohol violated Article I, Section 14 of the Missouri Constitution. After explaining that dram shop claims were recognized by law, this Court held that the statute at issue violated the "open courts" provision of the Missouri Constitution because it could both arbitrary and unreasonable deny a party the right to pursue these claims. Specifically, this Court held that the law could not stand because it had the potential to deny access to courts based on "other factors unrelated to the merits, yet it is wholly immune from review." *Id.* at 552.

Just like the statute at issue in *Kilmer*, the current version of section 538.225 prevents Appellants from pursuing their claims in court based on factors other than the merits. Due to its now mandatory nature, such a situation is wholly immune to review. In this case, Appellants previously filed affidavits in the Circuit Court. Appellants have also had their claims reviewed by a court and the court has found that it is not frivolous and that it has merit and appellants should be allowed to pursue it. Nonetheless, because of the arbitrary and unreasonable mandate of section 538.225, the same court has no choice but to enter an order prohibiting Appellants from pursuing their claims. Again, the purpose of this law is not to throw a procedural road-block to stand in the way of pursuing recognized and valid claims, but it is to simply provide a procedure to allow a

trial court to assess the merits of claims at the early stages of litigation. The current version of the law is no longer limited to its legitimate purpose and instead arbitrarily bars Appellants from pursuing legitimate claims based on factors unrelated from the merits and immune from review.

iii. The Statue Impermissibly Places Appellants' Right to Access the Courts into the Hands of a Third-Party

In *Cardinal Glennon*, this Court invalidated a statutory prerequisite to filing medical negligence cases requiring a plaintiff to submit the claim to a "professional liability board" for a recommendation prior to filing a lawsuit. *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 110 (Mo. 1979). This was because it "impose[d]" a separate, non-judicial "procedure as a precondition to access to the courts." *Id.* The same is true in this case. Section 538.225 absolutely preconditions the right of a medical negligence plaintiff – a claim Missouri specifically recognizes – on their obtaining (and paying for) an expert witness to pre-opine on the merits of their claims and then complying with the technicality of filing an affidavit within 90 days attesting to this expert's identity and opinion.

In *Kilmer*, this Court invalidated a "dram shop" statute allowing a cause of action only when the liquor licensee first had been convicted in a criminal prosecution for providing liquor to an intoxicated person. *Kilmer*, 17 S.W.3d at 550-54. The statute recognized a "caus[e] of action … by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink … [to] an obviously intoxicated person if the sale of such intoxicating liquor is the

proximate cause of the personal injury or death." *Id.* at 550. Then, however, it made a plaintiff's ability to bring such an action "entirely dependent upon whether or not the county prosecutor has prosecuted and obtained a conviction of their alleged wrongdoer for … selling intoxicating liquor to an obviously intoxicated person." *Id.*

This Court held this violated the "open courts" provision by depriving "dram shop" plaintiffs of a certain remedy for their recognized injury. *Id.* 550-54. Although the statute purported to recognize a remedy, it created a precondition such that "where there is no prosecution and conviction, there is no remedy." *Id.* at 551-552. Thus, the statute empowered "a prosecuting attorney, and not the legislative branch," to "decid[e] whether there is a cause of action under" the dram shop statute. *Id.* at 552. This Court held that this control by a third party "in order for a plaintiff to proceed with a civil action is … both arbitrary and unreasonable." *Id.* "A barrier that subjects a recognized injury to the discretion of [a third party] violates" Mo. Const. art. I, § 14. *Id.* at 554.

The same is true here. In direct violation of the "open courts" guarantee, § 538.225 erects an *arbitrary and unreasonable* barrier to the ability of plaintiffs to access the courts to remedy legally recognized injury by arbitrarily preconditioning access on compliance with paying an expert to pre-opine on their claims and unreasonably prohibiting trial courts from having any discretion whether to allow the plaintiffs' claims despite some technical noncompliance with filing affidavits of counsel. Section 538.225, R.S.Mo., requires any plaintiff bringing a medical negligence case to file the affidavit within 90 days of filing the petition. The plaintiff necessarily must pay for the opinion.

If the plaintiff does not comply, the statute directs the court shall dismiss the action regardless of whether the action is meritorious.

While the pre-2005 version of § 538.225 granted trial courts discretion to absolve plaintiffs of this requirement, the current version does not. Instead, it *mandates* that the court dismiss the petition when the plaintiff does not comply with this technicality. In doing so, § 538.225 singles out medical negligence plaintiffs from among all plaintiffs in negligence actions and withholds their fundamental right to have their claims adjudicated from the court and the jury, instead preconditioning the fundamental right on the "say-so" of a third party.

The existence or lack of a third-party health care provider within 90 days of the plaintiff's petition, rather than the legislature or the judiciary, essentially "decides whether [a plaintiff has] a cause of action" for medical negligence. *Kilmer*, 17 S.W.3d at 552. *Cardinal Glennon* held that delegating that responsibility to another third party – a "Professional Liability Review Board" – violates Mo. Const. art. I, § 14. *Cardinal Glennon*, 538 S.W.2d at 110. But regardless of whom the third party is, art. I, § 14, prohibits this decision from being in any third party's hands. Any such "possibili[ty] invites arbitrary refusals of the right to pursue a claim." *Kilmer*, 17 S.W.3d at 553.

Therefore, § 538.225 violates the "open courts" guarantee of Mo. Const. art. I, § 14. It "imposes" a separate, non-judicial "procedure as a precondition to access to the courts." *Cardinal Glennon*, 538 S.W.2d at 110. The statute "impose[s a] procedural ba[r] to access the courts" and thus is "unconstitutional," especially as it makes a plaintiff's access the courts "depend[ent] on … the actions of a third person." *Weigand*,

296 S.W.3d at 461-62 (quoting *Wheeler*, 941 S.W.2d at 514). The Constitution of Missouri does not allow for this.

As with the professional board precondition in *Cardinal Glennon* and the prosecution/conviction precondition in *Kilmer*, § 538.225 is an arbitrary and unreasonable barrier to medical negligence plaintiffs seeking a remedy for their recognized injury. The statute carves out a subclass from all civil personal injury plaintiffs of those filing actions against health care providers. It treats those plaintiffs differently than all others. For, unlike all other plaintiffs, who all have open, unfettered access to the courts, plaintiffs suing health care providers for professional personal injury first must obtain a third, non-judicial party's opinion permitting them to do so and attest to it on the record. Failure to do so or inability to do so mandatorily deprives them of any remedy for their injury. It violates art. I, § 14, and is invalid.

Other states' courts have held nearly identical "affidavit of merit" statutes to be invalid under nearly identical "open courts" constitutional guarantees. In the past decade, the Supreme Court of Oklahoma twice has held such an affidavit statute invalid under Okla. Const. art. II, § 6.[2] *See Zeier v. Zimmer, Inc.*, 2006 OK 98, 152 P.3d 861; *Wall v. Marouk*, 2013 OK 36, 302 P.3d 775. Numerous other states' courts have reached similar

[2] Oklahoma's "open courts" provision is virtually the same as Missouri's: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

holdings. *See Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wash. 2d 974, 216 P.3d 374, 376-77 (2009); *Zeier*, 152 P.3d at 870 n.53 (citing cases from 14 states holding "affidavit of merit" statutes unconstitutional).

C. Conclusion

Because the statute now mandates dismissal, it has overstepped its constitutional bounds and has arbitrarily and unreasonably prevented Appellants from pursuing a claim that has already survived a motion for summary judgment. Rather than empowering the trial court to make an early determination that Appellants claim does not have merit, it is instead forcing the trial court to dismiss a valid and recognized claim. Appellants have already proven in court that they have a right, based on the specific facts and evidence of this case, to pursue their claim against Respondents. Nonetheless, they find themselves barred from the courts of Missouri for reasons unrelated to the merits and, because of the mandatory nature of the statute, wholly immune from review. This is arbitrary. This is unreasonable. This statute as written and as applied in this case does not meet the constitutional test repeatedly identified by this Court. Section 538.225 seeks to prevent Appellants from pursuing their claim in court in violation of the Missouri's Constitution "open courts" provision. Appellants respectfully ask that this Court reverse the trial court's decision to dismiss this case and to allow it to proceed on the merits.

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE § 538.225, R.S.MO. VIOLATES ARTICLE 1, SECTION 22 OF THE MISSOURI CONSTITUTION IN THAT IT MANDATES THAT THE TRIAL COURT DISMISS THE ACTION DESPITE APPELLANTS HAVING A SUBMISSIBLE CASE

A. Standard of Review

Appellants are challenging the trial court's Order granting a motion to dismiss on the grounds that the statute compelling dismissal, § 538.225, R.S.Mo. is unconstitutional. The standard of review for a trial court's grant of a motion to dismiss is *de novo*. *Lynch*, 260 S.W.3d, 836, as modified on denial of reh'g (Aug. 26, 2008). Questions of law, including constitutional challenges to a statute, are reviewed *de novo*. *Rentschler*, 311 S.W.3d, 786. A statute is unconstitutional when it clearly contravenes a constitutional provision. *Vaughn*, 366 S.W.3d, 517. Appellants have the burden of demonstrating that the statute at issue violates the constitution. *Franklin Cnty. ex rel. Parks*, 269 S.W.3d, 29.

B. Argument

The Missouri Constitution guarantees "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate . . ." Mo. Const. art. I, § 22(a). § 538.225 violates the plaintiffs' right to trial and is invalid because this constitutional provision forever preserves the right to trial by jury as it existed before 1820. Medical negligence was a recognized claim at common law, the merit of which was to be decided only by a jury, and § 538.225 removes that decision from jurors by requiring plaintiffs first to pay an

expert to pre-opine on their claims and, otherwise, mandating the trial court to dismiss the action, regardless of whether the plaintiffs' claims have merit.

A statute depriving a litigant of the right to trial by jury in any action to which the litigant would have been entitled when the Constitution of Missouri first was adopted in 1820 – and in the manner then in place – violates "the right of trial by jury as heretofore enjoyed" guaranteed in Mo. Const. art. I, § 22(a). Section 538.225, R.S.Mo., shifts the primary decision over whether a plaintiff's medical negligence claim has merit from a jury to a non-judicial third party. If a third party does not certify such merit, no jury may determine the merits.

This provision "is one of the fundamental guarantees of the Missouri Constitution." *Watts*, 376 S.W.3d, 637. Its "plain language requires analysis of two propositions to determine if" the affidavit requirement for medical negligence cases in § 538.225 "violates the state constitutional right to trial by jury." *Id.* The first "requires a determination of whether [the plaintiffs'] medical negligence action … is included within 'the right to trial by jury as heretofore enjoyed." *Id.* at 637-638. The second "requires this Court to determine whether the right to trial by jury 'remains inviolate'" under the regimen enacted in § 538.225.

"The phrase 'heretofore enjoyed'" in art. I, § 22(a), "means that '[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted' in 1820." *Id.* at 638(quoting *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. 2003)). "Therefore, if Missouri common law entitled a plaintiff to a jury trial" on its medical negligence claim, regardless

of what some non-judicial party might pre-opine at the time the plaintiff filed its petition, the plaintiff "has a state constitutional right to a jury trial on her claim …." *Id.* And if the third-party opinion precondition "changes the common law right to a jury [trial], the right to trial by jury does not 'remain inviolate' and the [statute] is unconstitutional." *Id.*

In *Watts*, this Court firmly answered the first of the two inquiries: a determination as to the merits of a medical negligence claim unquestionably is part of the plaintiff's "right to trial by jury." *Watts*, 376 S.W.3d at 638-39. "[A]ssess[ing] the state of the common law when the Missouri Constitution was adopted in 1820," this Court noted that "English common law recognized medical negligence as one of five types of 'private wrongs' that could be redressed in court," which "have been tried by juries" in Missouri since the beginning of statehood. *Id.* at 638(citing 2 W. Blackstone, Commentaries on the Laws of England 122 (1765; 1992 reprint); *Rice*, 8 Mo. 561).

A crucial part of this right is that the jury be the primary fact finder to determine the merits of the plaintiff's claims. Art. I, § 22(a), "means that all the substantial incidents and consequences which pertained to the right of trial by jury, are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existed at common law." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 777 (Mo. 2010)(Wolff, J., concurring) (quoting *Lee v. Conran*, 213 Mo. 404, 111 S.W. 1151, 1153 (1908)).

Necessarily, this includes the fundamental function of fact-finding: the "concept of the jury as the fact finder is rooted in Missouri's history …." *Id.* (citations omitted). Early Missouri cases held that a trial court "very properly told the jury it was their

province to find the amount of damage, *if any had been sustained* ….” *Id.* (quoting *Steinberg v. Gebhardt*, 41 Mo. 519, 519 (1867)) (emphasis added). Thus, as medical negligence claims existed at common law, the jury’s determination as to whether the medical negligence plaintiff sustained any of the damage it alleged – i.e. determining the merit of their claims – plainly is part of “the right to trial by jury as heretofore enjoyed,” just as this Court held in *Watts*.

The second inquiry is whether the right “remains inviolate” when § 538.225 requires a plaintiff to obtain a pre-conditional opinion as to the merits of their suit from a non-judicial third party. Plainly, it does not. Rather, the statute removes from the jury the fundamental role of primarily determining whether the plaintiff’s claim has merit. At common law, the jury was the sole finder of fact. If the plaintiff’s claim did or did not have merit, the jury would find so.

Nothing at common law allowed for any additional subjection of this determination to a non-judicial third party in the first instance. But § 538.225 does exactly this. Absent some other procedure existing at common law – such as the election of a bench trial, summary judgment, a directed verdict, an post-trial order, etc. – the merits of all other personal injury plaintiffs’ claims are determined by a jury alone. Conversely, under § 538.225, medical negligence plaintiffs first must obtain a health care professional’s pre-opinion as to the merits of their claims. If no third party provides such a pre-opinion of merit, the statute requires the trial court to dismiss the plaintiff’s petition, barring any jury trial at all.

Thus, unlike as heretofore enjoyed under common law, under § 538.225 the primary arbiter of merit is a non-judicial third party, not a jury – and not even a judge. A plaintiff's failure or inability to comply with § 538.225 mandatorily results in dismissal. This violates Mo. Const. art. I, § 22(a). An action against a health care provider for medical negligence was a recognized cause of action in Missouri at common law. *Watts*, 376 S.W.3d at 638. The right to trial by jury applied to it. *Id.* And one incident of that right was that the *only* finder of fact of whether that action had merit was the jury. *Klotz*, 311 S.W.3d at 777(Wolff., J., concurring) (citations omitted). Thus, under art. I, § 22(a), this right – the right of a medical negligence plaintiff to have the primary determination of the merit of their claims be made by the jury – was "heretofore enjoyed" and must "remain inviolate." *Watts*, 376 S.W.3d at 637-39.

Section 538.225 vitiates the plaintiffs' right to a trial by jury as heretofore enjoyed by granting the primary determination of the merits to a third party. The plaintiff *first must* obtain that third party's opinion that the claims have merit or else cannot *then* proceed to have a jury re-determine that merit. Thus, § 538.225"changes the common law right to a jury [trial], the right to trial by jury does not 'remain inviolate' and [it is] unconstitutional." *Watts*, 376 S.W.3d at 638. For these reasons, § 538.225 violates Mo. Const. art. I, § 22(a).

To the extent Mo. Const. art. I, § 22(a) is found inapplicable to Appellants' claims, Appellants' also assert § 538.225 R.S.Mo. violates the 7th Amendment to the Constitution of the United States. As the Supreme Court of the United States has held, a party has a right under the 7th Amendment to a right to jury trial in a civil actions seeking

damages. *Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 341, 118 S. Ct. 1279, 1281, 140 L. Ed. 2d 438 (1998) ("[T]here is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff. . . As a result, if a party so demands, a jury must determine the actual amount of statutory damages under [the Copyright Act] in order to preserve 'the substance of the common-law right of trial by jury.'")

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE § 538.225, R.S.MO. VIOLATES ARTICLE III SECTION 40 OF THE MISSOURI CONSTITUTION IN THAT IT SEPERATES PLAINTIFFS INJURED BY MEDICAL NEGLIGENCE FROM PLAINTIFFS INJURED BY OTHER PROFESSIONAL NEGLIGENCE

A. Standard of Review

Appellants are challenging the trial court's Order granting a motion to dismiss on the grounds that the statute compelling dismissal, § 538.225, R.S.Mo. is unconstitutional. The standard of review for a trial court's grant of a motion to dismiss is *de novo*. *Lynch*, 260 S.W.3d, 836, as modified on denial of reh'g (Aug. 26, 2008). Questions of law, including constitutional challenges to a statute, are reviewed *de novo*. *Rentschler*, 311 S.W.3d, 786. A statute is unconstitutional when it clearly contravenes a constitutional provision. *Vaughn*, 366 S.W.3d, 517. Here, Appellants have the burden of demonstrating that the statute at issue violates the constitution. *Franklin Cnty. ex rel. Parks*, 269 S.W.3d, 29.

B. Argument

The Missouri Constitution prohibits the general assembly from passing any "special law" for certain purposes or circumstances applicable here:

> Section 40. The general assembly shall not pass any local or special law:
>
> . . . . .
>
> (4) regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts . . .;
>
> . . . . .
>
> (6) for limitation of civil actions;
>
> . . . . .
>
> (28) granting to any corporation, association or individual any special or exclusive right, privilege, or immunity . . .;
>
> . . . . .
>
> (30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

Mo. Const. art. III, § 40. The question of whether the prohibition on special laws is violated where a general law could have been made applicable is a judicial question without regard to any legislative assertion on the subject. Mo. Const. art. III, § 40(30). *See also Borden Co. v. Thomason*, 353 S.W.2d 735, 764 (Mo. 1962). This Court is not limited to the evidence presented on this issue, and may consider and take judicial notice of matters of common knowledge. *Borden Co.*, 353 S.W.2d at 766.

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 Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. 1996)(citations omitted). The threshold test "'. . . is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special but what it excludes.'" *Batek*, 920 S.W.2d at 895(quoting *ABC Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876, 885 (Mo. 1959)). In defining the class, however, in no event may the legislature create a class which is "clearly arbitrary, unreasonable, and unjust." *City of Sullivan*, 329 S.W.3d, 693.

In the case of § 538.225, the legislature has separated out plaintiffs injured by negligent medical care from other plaintiffs injured by professional negligence, although the evidentiary issues and burden of proof at trial is the same – did the defendant deviate from the accepted standard of care recognized in the profession? In order to recover for legal malpractice, for example, the plaintiff must present expert testimony that the defendant attorney failed to exercise the requisite degree of care under the circumstances. Yet, there is no similar requirement that an affidavit be filed as mandated by § 538.225 in medical negligence cases. The classification contained in § 538.225 is under-inclusive – it omits all other plaintiffs injured by professional negligence.

The Supreme Court of Oklahoma, in striking down an almost identical version of the affidavit of merit statute for medical negligence cases, provides a detailed discussion of why such statutes violate the constitutional prohibition against special laws. *See Zeier v. Zimmer, Inc.*, 152 P.2d at 865-869. The fundamental inquiry concerning Oklahoma's

constitutional prohibition against special laws is the same – ". . . whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things." *Id.* at 867. The affidavit of merit requirement impermissibly creates a subset of plaintiffs alleging negligence for the purpose of different procedural and evidentiary treatment. *Id.* at 868. The class of plaintiffs alleging medical negligence constitutes a subset of plaintiffs pursuing negligence claims. *Id.* Because the medical affidavit statute "impacts less than an entire class of similarly situated claimants" the statute is impermissibly under-inclusive and special. *Id.* *Zeier* therefore holds that the affidavit of merit statute violates the constitutional prohibition against "the passing of special laws regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts. *Id.* at 868-869.

Missouri's constitutional prohibition is identical, and prohibits special laws "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts . . ." Mo. Const. art. III, § 40(4). The impact of § 538.225 is evident. Unlike other plaintiffs injured by the professional negligence of others, plaintiffs alleging medical negligence must submit affidavits of merit within 90 days and the court has no discretion to exercise, even where the court has previously denied summary judgment to permit the submission of the claims to a jury. Clearly, the statute changes the rules of evidence and practice before the courts for a sub-class of plaintiffs similarly situated to others not impacted by the statute. This violates the prohibition against special laws contained in the Missouri Constitution. A general

law could be made applicable to medical negligence plaintiffs and others similarly situated that would achieve the legislative purpose of timely disposition of meritless suits.

CONCLUSION

The circumstances and history of this case demonstrate that § 538.225, either by itself or as applied through the statute of limitations, is unconstitutional. First, the statute is an arbitrary and unreasonable barrier to the ability of medical negligence plaintiffs to have access to the courts to remedy their legally recognized injury, in violation of Mo. Const. art. I, § 14. Second, the statute changes such plaintiffs' right to a trial by jury as heretofore enjoyed, in violation of Mo. Const. art. I, § 22. Third, the statute constitutes a special law in violation of Mo. Const. art. III, § 40.

Unlike a prior version of the statute which withstood some degree of constitutional scrutiny, the statute was amended in 2005 to remove any discretion from the trial court by mandating the court "shall" dismiss the action without prejudice. The prior version of § 538.225 granted discretion as to whether dismissal without prejudice was appropriate, the new version does not. This Court has acknowledged that the current version presents "real and substantial" constitutional questions. Those questions are ripe for review in this case and § 538.225 must be declared unconstitutional based on its new mandatory language as displayed by the facts of this case.

Appellants filed the required affidavits with the Circuit Court and the Circuit Court previously denied Defendants' motion for summary judgment, finding the existence of disputed material facts and recognizing Plaintiffs' right to present their claims to a jury. This lawsuit is anything but frivolous. Section 538.225 was intended as

shield against frivolous lawsuits, but under the circumstances, is sought to be used as a sword to prevent Appellants from pursuing legitimate and recognized claims in the courts of Missouri. § 538.225, R.S.Mo. violates Article I, Section 14 of the Missouri Constitution. Alternatively, section 538.225 violates Article I, Section 22(a) and Article III, Section 40 of the Missouri Constitution.

The trial court's Motion to Dismiss should be reversed, and this case should be remanded for further proceedings.

Dated: May 6, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limits of Rule 84.06(b) and that this brief contains 9,107 words.

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CERTIFICATE OF SERVICE

I hereby that on May 6, 2015, I filed a true and accurate Adobe PDF copy of this Brief of the Appellant via the Court's electronic filing system, which notified the following of that filing:

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