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' REPLY BRIEF

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I. INTRODUCTION

Respondents and Amici ask this Court not to depart from its opinion in *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 509 (Mo. 1991). This Court's holding in *Mahoney*, however, confirms that the current version of the statute is unconstitutional. The version of § 538.225 at issue in *Mahoney* allowed the courts to ultimately determine whether or not a medical malpractice case had merit. In order to reduce the costs of litigating frivolous lawsuits, the statute created a procedural tool that allowed the courts to make an early determination whether or not a case had any merit. The current version of the statute, however, stripped the judicial branch of its power to determine early on if a case had merit. Instead, it placed an iron-clad procedural hurdle in front of plaintiffs. Failure to wholly comply with this hurdle can, and in this case has, resulted in the arbitrary and unreasonable dismissal with prejudice of a claim that has been found to deserve trial.

By denying the courts all discretion to allow a case to proceed when an affidavit has not been filed, the statute unconstitutionally fails to account for cases wherein the affidavit would not further the legitimate purposes of the statute. These cases include not only Appellants case, wherein the case had been found to have merit and worthy of trial, but also cases involving medical malpractice that is obvious to a layperson and therefore no medical expert testimony is required. Plaintiffs in these cases are constitutionally protected from having the legislature place the arbitrary and unreasonable barrier of filing an unnecessary health care affidavit that serves no purpose, including any of the legitimate purposes of the statute as identified by this Court in *Mahoney*. The previous

version of this statute protected these constitutional rights by leaving the final decision within the discretion

II. REPLY TO RESPONDENTS' STATEMENT OF FACTS

A. Respondents' Claim that Appellants Have "No Evidence" to Support this Case is Not True

Respondents assert in their statement of facts that Appellants have produced "no evidence" to support their claim that Respondents provided substandard and negligent health care to Mr. Lang on December 9, 2009. This is not true. There is zero support for it in the record. In fact, the only support Respondents can cite to for this claim is their own answer to the petition wherein they deny the allegation. By making this representation to this Court, Respondents have violated Rule 84.04(c)'s requirement to provide a fair statement of facts. In truth, the trial court found that evidence did exist to support Appellants claims and they had a right to have a jury decide the case. Respondents have presented their theory of the case as a "fact" in an attempt to convince this Court that Appellants' case is a frivolous lawsuit of the type § 538.225 is meant to prevent. The opposite is true. As applied in this case, § 538.225 mandates the dismissal of a legally meritorious case and ensures that the years of judicial resources dedicated to it will go wasted.

i. Significant Evidence Exists to Support the Merits of Appellants' Case

The petition asserts that Respondents violated the standard of care owed to Mr. Lang and broke his neck on December 5, 2009. LF 54. In support of this allegation, Appellants obtained the opinion of a legally qualified health care provider, Allen H. Bargman, D.C. LF 61-63. In his written opinion, Dr. Bargman identified the evidence establishing that Respondents provided chiropractic treatment to Mr. Lang on December 5, 2009. LF66-67. This evidence includes records from the Jackson County medical examiner and a receipt, discovered by Mr. Lang's family, for treatment dated December 5, 2009. *Id*. At his deposition, Respondents asked Dr. Bargman whether or not the Respondents own failure to produce records confirming Mr. Lang's appointment that day changed his opinion. LF 79. Dr. Bargman explained Respondents' long history of failing to document events and losing or destroying medical records, including: 1) Mr. Lang's wife visited Respondents' office in January of 2010 and was not logged in properly; 2) Respondents' office had known computer glitches which caused records to be lost; and 3) Respondents' had a "computer guy" who had access to the records and is himself a criminal, serving time in jail at the time of the deposition, and had the opportunity to delete the relevant records after Mr. Lang's claims came to light. *Id.*

Dr. Bargman isn't alone in his assessment that evidence existed tending to show that Mr. Lang was seen by Respondents on December 5, 2009. The trial court agreed with him. On February 27, 2013, after undertaking "another exhaustive review of the court file and all arguments," the Honorable Jack Grate determined that "there are still

several issues of fact including, but not limited to whether the patient was treated by the physicians during the relevant time period and whether the treatment received was the cause of the decedent's death." LF 136.

ii. Respondents Ignore This Evidence and Offer an Unfair, Argumentative Statement of Facts

Despite the record to the contrary, Respondents claim that: "2 1/2 years of discovery revealed no evidence that the decedent was seen by the Respondents at any date later than June 12, 2009." Respondents' Brief, at 1. In support, Respondents cite only to their answer to the petition wherein they denied that Mr. Lang received treatment on December 5, 2009. LF 18, *Id.*

An answer to a petition is not evidence and a party cannot assert as fact claims that "rest upon the mere allegations or denials of the party's pleadings." Rule 74.04(c)(2). Instead, "[t]he statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). Compliance with Rule 84.04 is mandatory, and failure to do so is grounds for dismissal of an appeal. *Studt v. Fastenal Co.*, 326 S.W.3d 507, 507-08 (Mo.App.2010). A party on appeal "may not simply recount his or her version of the events, but is required to provide a statement of the evidence." *In re Marriage of Smith*, 283 S.W.3d 271, 273 (Mo.App. E.D. 2009). This requirement assures judicial impartiality, judicial economy, fairness to all parties, and that the appellate court does not become an advocate for the appellant by speculating on facts and on arguments that have not been made." *BBCB, LLC v. City of Independence*, 201 S.W.3d 520, 530 (Mo.App.2006); *Studt at* 508.

In violation of Rule 84.04, Respondents have used the statement of facts as a stage to parade previously rejected arguments as truth. Based on nothing other than their own denial in their answer, they claim that "no evidence" exists to support the merits of Appellants' case. This assertion is not based in reality, has been rejected by the trial court, and cannot in good faith be presented to this Court as a "fact." Appellants object to Respondents' statement of facts as being in violation of Rule 84.04(c).

III. REPLY TO ARGUMENT OF RESPONDENTS AND AMICI

A. Respondents and Amici Wrongly Claim that this Court's only Options are to Either Uphold § 538.225, R.S.Mo. in its Entirety or to Invalidate the Section in its Entirety.

Both Respondents and Amici take the position that this Court cannot side with Appellants without invalidating § 538.225 in its entirety. They ask this Court not to sacrifice the entire statute and the legitimate public purpose which it serves on the altar of a single "hardship." This is a strawman argument and a misstatement of the law. This Court has the ability to find the statute unconstitutional only as it applies to Mr. Lang's family and other plaintiffs so situated. By doing so, this Court can preserve the majority of the statute and the purpose which it serves. In fact, because Appellants' case unquestionably has merit and has been held worthy of proceeding to jury trial, this Court can reinforce, rather than undercut, the policy behind the statute by granting Appellants relief.

The 2005 amendment to § 538.225 that removed discretion from the trial court and mandated dismissal upon failure to file a proper affidavit contradicts the legitimate

purpose of the statute as applied to Appellants. It acts to unreasonably and arbitrarily ban Appellants from pursing their meritorious claim despite permitting years of litigation and the dedication of significant Court resources to the claim. This Court will not be breaking from the precedent of *Mahoney* if it decides in favor of Appellants. Instead, it can confirm that the statute serves a legitimate public purpose yet violates the Missouri Constitution in this case by arbitrarily and unreasonably breaking from this purpose.

i. The Preference is to Permit Statutes Found to be Unconstitutional as Applied to Certain Facts to Survive

Should this Court find § 538.225 unconstitutional as applied in this case, it does not need to, as Respondents argue: "invalidate an entire statute simply because it may view one result of a particular instance of its application as a hardship." Respondents' Brief at 14. This Court consistently recognizes that when a portion of a statute is unconstitutional as it is applies in certain situations, it may remain in effect as to all other situations: "Stated another way, the statute must, in effect, be rewritten to accommodate the constitutionally imposed limitation, and this will be done as long as it is consistent with legislative intent." *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo. 1996).

In *Associated,* the Supreme Court of the United States had declared § 144.610, R.S.Mo., which imposed an additional 1.5% tax on property sold outside of Missouri but stored or used within Missouri, unconstitutional. *Associated,* 918 S.W.2d at 781. Specifically, the Supreme Court of the United States held the statute was unconstitutional only as it applied to tax districts where the sales tax was lower than 1.5%. *Id.* The

question before this Court was whether this ruling resulted in the statute being ivalidated in its entirety. This Court began its analysis by recognizing the legislative intent that statutes be upheld to the fullest extent possible, as found in § 1.140, R.S.Mo., which begins: "The provisions of every statute are severable." *Id.* at 784. In *Associated,* however, the legislature had refused to implement a previous version of the statute that capped the new tax rate at the rate of sales tax within each district. This previous version was nearly identical to the lesser version that would remain if the statute was allowed to survive within the constitutional restraints identified by the Supreme Court of the United States. This Court held that this previous refusal outweighed the legislature's general preference that a statute not be invalidated entirely on the grounds that a portion of it is unconstitutional, and invalidated the statute in its entirety. Unlike *Associated,* in this case the legislature never refused to implement a version of § 538.225 that does not contain the constitutional flaws at issue in this case, and there is no reason why a ruling that the statute is unconstitutional in this case would require a complete invalidation. This is true in most cases, as absent a clear message from the legislature otherwise, the general preference to preserve the statute prevails.

In *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7, (Mo. En Banc 1986), this Court ruled that § 516.105, R.S.Mo. violated the Missouri Constitution's open courts provision as it applied to minors. Ms. Strahler argued that § 516.105 violated the Open Courts provision of the Missouri Constitution as it applied to her and other minors. She argued that because it forced minors such as herself to file suit with in two years of injury, it placed her at the mercy of adults and "effectively extinguishes her common law right and

practical opportunity to seek legal redress for injuries sustained through defendant's alleged negligent treatment." *Strahler*, 706 S.W.2d at 9. This Court agreed.

By finding section 516.105 unconstitutional as applied to minors this Court did not, as Respondents suggest is the only option in this case, invalidate the entire statute. Nor was this Court forced to find that the legislative purpose behind section 516.015 was improper or without merit before it could rule in Ms. Strahler's favor. To the contrary, this Court held: "[W]e fully appreciate the legislative purpose intended by § 516.105, RSMo 1978, and we are unwilling to denominate it as being illegitimate but we think the method employed by the legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price from minor plaintiffs like Carol Strahler and all other minors similarly situated." *Id.* at 11. Thus, the statute was only unconstitutional as it applied to Ms. Strahler and other similarly situated minors because in such instances it became "too severe an interference with a minors' state constitutionally enumerated right of access to the courts to be justified by the state's interest in remedying a perceived medical malpractice case." *Id.* at 12.

ii. § 538.225 Can Survive a Finding that it is Unconstitutional as Applied in this Unique Case

Just as in *Strahler*, the Court in this case can recognize that § 538.225 unconstitutionally interferes with Appellants' right to trial or access to the courts while still recognizing the purpose behind the section as legitimate. These two are not mutually exclusive, contrary to the suggestions of Amici and Respondents. In fact, by ruling in Appellants' favor and finding the statute to be unconstitutional as applied in this case,

this Court would be upholding the ultimate purpose of the statute by preserving fairness and stability in the tort system. § 538.225's purpose is to ensure that only cases that have merit are extensively litigated against healthcare providers. A ruling in Appellants' favor would do just that – ensure that Appellants' case, which has been found to have merit by a court of Missouri and has been extensively litigated therein, be allowed to proceed. The statute is unconstitutional as it applies to this case because it does the opposite by arbitrarily and unreasonably extinguishing Appellants' right to seek legal redress for their injuries.

iii. This Court can limit its Ruling in this Case to the Unique Facts Before it

Respondents warn that a ruling in Appellants' favor by this Court would: "call into question all statutes that require dismissal upon the expiration of the statute of limitations." Respondents' Brief at 13. This is not true. The burden on future constitutional challenges to § 538.225 or any other statute would remain the same and would not be threatened simply because Mr. Lang's family is able to establish that the statute is unconstitutional as applied to them in this case. This Court has repeatedly held that every plaintiff has the burden of establishing a clear constitutional violation regardless of whether or not similar challenges have been upheld.

In *Batek v. Curators of Univ. of Missouri*, the plaintiff used the holding in *Strahler* to challenge the constitutionality of section 516.015 as it applied to her. *Batek v. Curators of Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. 1996). This Court easily rejected the argument because, unlike the plaintiff in *Strahler*, Ms. Batek was not a minor

at the time of her injury: "Because the plaintiff in *Strahler* was a minor when the alleged act of neglect occurred . . . *Strahler* has no direct applicability to the instant case." *Batek*, 920 S.W.2d at 899, FN1. Likewise, in *Hodges v. Southeast Missouri Hosp. Ass'n*, the Missouri Court of Appeals had no difficulty in understanding that the holding in *Strahler* was limited to the specific facts and did not raise doubts as to the constitutionality of the statute as it applies to plaintiffs differently situated. *Hodges v. Se. Missouri Hosp. Ass'n*, 963 S.W.2d 354, 359 (Mo. Ct. App. 1998).

In *Hodges*, the plaintiff was injured by medical malpractice when he was a minor but failed to file suit until after he had turned twenty one. After his case was dismissed on statute of limitations grounds, Mr. Hodges appealed. He argued that because *Strahler* ruled that § 516.105 was unconstitutional as applied to minors, it did not apply to his case and instead he was subject to the tolling provisions of § 516.170, R.S.Mo. The court of appeals rejected this argument and held that he could not rely on *Strahler* because the facts in his case were not identical to the facts in *Strahler*: "The constitutional concerns articulated by *Strahler* are not invoked by applying § 516.105 to the particular circumstances of this case. . . Mr. Hodges has not shown how the operation of § 516.105 was unconstitutional to him after he turned eighteen. Under the particular facts of this case, *Strahler's* judicial invalidation of part, but not all, possible applications of § 516.105 does not prevent the application of § 516.105 to Mr. Hodges' claim." *Hodges v. Se. Missouri Hosp. Ass'n*, 963 S.W.2d at 359.

This Court can rule in favor Appellants and determine that § 538.225 violates their constitutional rights based on the unique facts of this case. Such a holding would not

jeopardize the constitutionality of all statutes of limitations. Nor would it grant future plaintiffs who are differently situated from Appellants in this case constitutional permission avoid the requirements of § 538.225. This Court does not have to compromise the legislature's desire to cull out frivolous medical malpractice cases at an early stage in order to decide this case for Appellants. This Court can simply enter a holding consistent with the reality of this case: Mr. Lang's family is being arbitrarily and unreasonably prevented from pursuing a meritorious and recognized claim and therefore the mandatory nature of the statute violates their rights to open courts and jury trial protected by the Missouri Constitution.

B. Appellants Did Not Have a Constitutionally Valid Reasonable Alternative

Respondents and Amici argue that Appellants cannot challenge section 538.225's mandatory nature because the dismissal is without prejudice. The reality of course, is that as applied to this case the statute mandates a dismissal with prejudice. Respondents and Amici insist that this reality is irrelevant because Appellants had the option of pursuing their claims in the first case and failed to do so by choosing to dismiss the case before trial. This ignores both the facts of this case and the holding in *Starhley*. Appellants have been denied their constitutional rights regardless of their previous dismissal.

i. Respondents Forced Appellants to Dismiss the Previous Case without Prejudice by Refusing to Accommodate the Unavailability of a Necessary Witness at Trial

Both Respondents and Amici claim that Mr. Lang's family brought this situation on themselves by unnecessarily dismissing this case without prejudice on the eve of trial. Appellants, therefore, somehow cannot assert that their constitutional rights have been violated. Amici states that: "If Appellants would not have dismissed their original case on the eve of trial, the only effect of the trial court's decision here would have been to allow the Appellants another 545 days (365 day under the savings statute plus 180 days for a new affidavit) to secure the written opinion of an expert to support their case." Amici Curiae brief, at 23. Likewise, Respondents declare that: "[I]t 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." Respondents' brief, at 15.

Appellants did not dismiss their case as a legal strategy or for an unnecessary reason. As Respondents are aware, Appellants were forced to dismiss their case without prejudice because one of their key witnesses was not available to appear at trial. LF 137-138. Respondents refused to make any accommodations to prevent dismissal. Respondents refused to agree to a preservation deposition. Respondents refused to agree to a continuance. Given this corner that Respondents had backed Appellants into, it was not an "unusual choice" to dismiss without prejudice, it was the only choice. In fact, the only thing "unusual" about the circumstances surrounding dismissal was the total refusal

to make any reasonable accommodations regarding the witness' unavailability. Appellants had no reasonable alternative to dismissal without prejudice, and did not forfeit their constitutional rights by doing so.

ii. The Holding in *Strahler* is Dispositive of These Arguments

While Appellants' dismissal certainly voluntary under Rule 67.02, as a practical matter, it was anything but. Circumstances beyond Appellants' control forced the Appellants to dismiss their case without prejudice. Appellants simply did not have the option to proceed to trial in the first case and Respondents' claim otherwise ignores the realities and uncertainties that often seem to unexpectedly find their way into litigation. This Court's holding in *Strahler* is dispositive on this issue. *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7, (Mo. En Banc 1986).

In *Strahler* the defendants argued that the statute did not unconstitutionally prohibit Ms. Strahler's access to courts or right to trial because she had the option to "recruited a next friend to bring suit" and therefore was free to "initiate her own suit." *Strahler*, 706 S.W.2d at 9-10. This Court rejected this argument and held that this "option" was not a sufficient alternative to her constitutional rights: "We think defendant's contention that plaintiff should not now be heard to complain because she was free to 'initiate her own suit' plainly ignores the disabilities and limitations that childhood, familial relationships, and our legal system place upon a minor of tender years—who has little if any understanding of the complexities of our legal system." *Id.*

at 10. Likewise, in this case, the argument that Mr. Lang's family "could have" chosen not to dismiss their previous suit ignores the realities of litigation.

While both Ms. Strahler and the Appellants in this case may have technically had an alternative available to them on paper, in reality both alternatives were simply not feasible. Certainly neither of these options is feasible enough to force the forfeiture of their constitutionally protected rights to open courts and trial by jury. Respondents and Amici's attempts to blame Mr. Lang's family for refusing to try their case without a key witness are insufficient to overcome the unconstitutionality of § 538.225 as it applies in this case.

C. Appellants Preserved Their Constitutional Challenges to the Statute

Appellants did not waive their constitutional challenges when they failed to plead facts and arguments that did not exist at the time of filing. Both Respondents and Amici insist that nothing has been preserved for review by this Court because Appellants failed to raise their constitutional challenges at their first opportunity to do so. Not so. The first opportunity to raise these challenges could not have been when they filed their petition because a plaintiff is not required to plead facts that have not yet occurred or to anticipate affirmative defenses. Neither was the first opportunity to raise this issues when Respondents filed their answer because Respondents failed to plead § 538.225 in their answer, either as an affirmative defense or otherwise. Instead, the first opportunity to raise these challenges was exactly One Hundred Eighty Two days after the case was filed when Respondents sprang their motion to dismiss upon Appellants and the court.

i. Respondents' and Amici's Authority is Off-Point

Both Respondents and Amici insist that this Court's requirement that a constitutional challenge be raised "at the first available opportunity" requires a plaintiff to insert every possible constitutional argument, real or imagined, into her petition or it will be forever waived. This is not the law and the two cases cited to do not support this position. *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. 1996); and *Mike Berniger Moving Co. v. O'Brien*, 234 S.W. 807 (Mo. 1921).

In *O'Brien,* the plaintiff sought an injunction preventing the enforcement of a city statute but only raised a constitutional challenge to the statute "for the first time in the motion for a new trial." *O'Brien*, 234 S.W. at 812. This Court ruled that because the case was brought for the sole purpose of challenging the enforcement of a statute the plaintiff first had the opportunity to raise constitutional challenges in the petition and failed to do so. *Id.* Likewise, in *Hollis*, the defendants attempted to challenge the constitutionality of a joint and several liability statute but only "first raised this constitutional issue in his motion for new trial." *Hollis*, 926 S.W.2d at 683. In both of these cases, and unlike this case, the constitutional challenges to the statutes were not raised until ***after*** trial. By waiting until the post-trial motions to raise these issues, the parties had failed to preserve the constitutional challenges: "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Land Clearance for Redevelopment Auth. of Kansas City, Missouri v. Kansas Univ. Endowment Ass'n*, 805 S.W.2d 173, 176 (Mo. 1991).

Appellants raised their challenges at the first opportunity to do so and did not, as did the parties in *Hollis* and *O'Brien,* wait until after trial to do so. Unlike these two cases, Appellants were not required to raise these constitutional challenges in their initial pleading because the issue simply did not exist at the time of filing. The Appellants have preserved these issues for review by this Court.

ii. Appellants are not required to Include Allegations in Response to Future Defenses in the Petition

The requirement that litigants raise a constitutional challenge at their first opportunity to do so does not force litigants to raise them ***prior*** to their first opportunity to do so. To require otherwise would force plaintiffs to, out of an overabundance of caution, fill every petition filed in the courts of Missouri with pages of boilerplate language covering any hypothetical or speculative constitutional injury imaginable. Fortunately, this is not the law. Missouri courts hold to the well-established principal that a plaintiff cannot be faulted for failing to include in her petition allegations and facts that pre-emptively respond to arguments and affirmative defenses.

In *Scott v. Clanton*, a child prevailed on a motion for contempt against his father for failure to pay court-ordered child support while the child was in college. *Scott v. Clanton*, 113 S.W.3d 207 (Mo. Ct. App. 2003). On appeal, the father argued that the child had failed to make a prima facie case that he was due child support because he failed to plead that he had complied with the requirements of § 452.340, R.S.Mo. *Scott,* 113 S.W.3d at 211. This section permits children over the age of eighteen to continue to receive child support while in college on the condition that they comply with specific

reporting requirements. *Id.* at 213. The court of appeals held that the child was not required to plead his compliance with § 452.340 in his petition. Instead, it was the father's burden to plead and establish the child's failure to comply with the statute because the failure to comply with a statute that is unrelated to the merits of the underlying claim is most akin to an affirmative defense:

> Furthermore, by placing the burden of pleading this defense upon Father, we remain consistent with the well-established principle that a party, when pleading an action, is not required to anticipate and negate the defenses raised by a defendant:
>
> > [T]he general rule, both under the common-law practice and under modern procedural statutes and rules of practice, is that: 'The plaintiff is not bound in his declaration or complaint to anticipate defenses which the defendant may have to the cause of action asserted against him, and so draw his pleading as to negative their existence or avoid them. The plaintiff may not, and is not bound to, know what justification will be presented by the defendant, and a salutary rule of pleading requires that such matters be left to the answer.
> >
> > The plaintiff is required to state only such facts as will constitute, prima facie, a cause of action.

Scott v. Clanton, 113 S.W.3d 207, 212 (Mo.App.2003); quoting *Personal Finance Co. v. Schwartz*, 170 S.W.2d 701, 703–04 (Mo.App.1943) and 41 AM. JUR., *Pleading*, § 87).

In this case, Appellants were not required to plead or raise their constitutional challenges until Respondents raised the defense of Appellants' failure to comply with § 538.225 for the first time One Hundred Eighty Two Days after filing. In fact, if any party to this litigation has waived their opportunity at relief, it is Respondents. Just as the child in *Scott* was not required to plead his compliance with § 452.340, Mr. Lang's family was not required to anticipate and plead compliance with § 538.225 in order to state a case for medical malpractice against the Respondents. The Respondents, however, are required to plead affirmative defenses. By failing to plead or assert section 538.225 as an affirmative defense, Respondents waived the issue.

iii. Failure to Comply with Section 538.225 is an Affirmative Defense that Respondents Failed to Plead and Thereby Waived

Missouri Courts have defined an affirmative defense as:

> A procedural tool available to defendants which "seeks to defeat or avoid the plaintiff's cause of action and avers that, even if the allegations of the petition are taken as true, the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid the legal responsibility alleged."

Thompson v. Brown and Williamson Tobacco Corporation, 207 S.W.3d 76, 122 (Mo.App.2006) (quoting *Mobley v. Baker*, 72 S.W.3d 251, 257 (Mo.App.2002)).

Respondents claim that because Appellants failed to comply with § 538.225 they are precluded from prevailing in their case even if the allegations in the petition are true. As such, it is an affirmative defense under Missouri law. This is confirmed by the holding in *Scott* that the child's failure to comply with § 452.340 was "an affirmative defense to the pleading, which must have been raised by Father." *Scott* at 212.

Unless a defendant pleads an affirmative defense in its answer accompanied by the specific facts that support the defense, it is waived: "'A pleading that makes a conclusory statement and does not plead the specific facts required to support the affirmative defense fails to adequately raise the alleged affirmative defense, and the alleged affirmative defense fails as a matter of law.'" *Clean the Uniform Co. St. Louis v. Magic Touch Cleaning, Inc*., 300 S.W.3d 602, 612 (Mo. Ct. App. 2009) (quoting *Eltiste v. Ford Motor Co*., 167 S.W.3d 742, 752 (Mo. Ct. App. 2005)).

In *Echols v. Coty of Riverside*, the court of appeals reversed the trial court's reduction of the verdict based on affirmative defenses because the affirmative defenses had not been sufficiently pleaded. *Echols v. City of Riverside*, 332 S.W.3d 207, (Mo. Ct. App. 2010) ("City cited no facts to support its contention that Echols failed to mitigate damages, that affirmative defense must fail"). Reversal was mandatory and the trial court had abused its discretion in granting the relief because it had not been properly pled and "the relief awarded in a judgment is limited to that sought by the pleadings." *Id.*

In this case, Respondents did not simply fail to plead facts supporting the affirmative defense of failure to comply with section 538.225. Instead, Respondents chose to leave the defense entirely out of their answer in order to spring it on Appellants

One Hundred Eighty Two days after filing. The law is clear: by failing to raise it in their answer and plead facts in support, this affirmative defense fails as a matter of law. As in *Echols*, the trail court could not have granted the relief it did because it was outside the pleadings.

iv. Respondents Behavior estops them from arguing that Appellants' Failed to preserve these Challenges

Respondents should be estopped from claiming that Appellants failed to preserve the issues. Had Respondents asserted § 538.225 as an affirmative defense, as they are required to do, Appellants would have then been faced with their first opportunity to raise the constitutional challenge to the statute. Respondents may argue that they could not have pled § 538.225 as an affirmative defense because the facts necessary to support the defense did not exist at the time of filing. That is entirely the point. Appellants are not required to plead constitutional challenges at a point in time when the facts necessary to give rise to those challenges do not exist. Appellants raised their constitutional challenge at their earliest opportunity – in response to Respondents' motion to dismiss. Appellants have preserved this issue.

D. Appellants Enjoy a Right to Trial by Jury in This Wrongful Death Case

Respondents argue that because this cause of action is based on the wrongful death of Mr. Lang, the legislature has the power to restrict or abolish the role of the jury as it sees fit and therefore Appellants do not truly enjoy a right to trial by jury. This is not what this Court held in *Sanders v. Ahmed* and contradicts over 100 years of cases from

this Court. *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. 2012). Appellants have brought a civil action sounding in law and seeking monetary relief alone. As such, this is not a claim of equity and Article I, Section 22 of the Missouri Constitution applies to protect Appellants' right to a trial by jury.

i. The Right to Trial by Jury is Not Limited to Only Causes of Action that Existed at Common Law in 1820

In *Briggs v. St. Louis & S.F. Ry. Co.*, this Court rejected the argument that the Missouri Constitution's guarantee of a trial by jury applies only to causes of action that existed at common law prior to 1820. *Briggs v. St. Louis & S.F. Ry. Co.*, 111 Mo. 168, 20 S.W. 32, 32 (1892), In *Briggs*, the plaintiffs' claim for damages based on his horse's death was created by a statute passed in 1885. *Id.* The defendants' request for a jury trial was denied and the court determined the amount of damages. *Id.* The defendant appealed, claiming that he had a constitutional right to a trial by jury even though not specifically set forth in the statute. This Court agreed, holding that the right to trial by jury found in the Missouri Constitution applied to all actions for damages, even those created by statute: "It is very clear to us that the defendant was entitled to a jury trial in the assessment of the value of the legal services, and the statute could not deprive it of that right. . . .**That constitutional right is implied in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at common law or is one created by statute**." *Briggs v. St. Louis & S.F. Ry. Co.*, 111 Mo. 168, 20 S.W. 32, 33 (1892) (emphasis added).

In 2003, this Court endorsed the holding in *Briggs*, and confirmed that the right to trial by jury has and continues to apply to all civil actions in court for damages. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. 2003). In *Diehl*, the plaintiff brought suit for damages pursuant to the Missouri Human Rights Act. After the trial court denied her right to trial by jury, this court issued a preliminary writ. *Diehl*, 95 S.W.3d at 84. The respondent argued, contrary to the clear holding in *Briggs*, that the plaintiff was not entitled to a jury trial because "the right of jury trial only applies to specific claims that were recognized by the law in 1820 and not to actions—such as the claim under the human rights act involved here—that came into existence after 1820. The employer would limit jury trials to those specific claims triable in common law courts in 1820." *Diehl* at 85.

To determine if the holding in *Briggs* was still sound and therefore dispositive of the case, this Court undertook an in-depth historical analysis of the right to trial by jury in Missouri beginning with the Louisiana Purchase. *Id.* This Court concluded that when the Missouri Constitution was enacted in 1820, the right to trial by jury was determined by the "simple analysis" of "whether the action is a 'civil action' for damages. If so, the jury trial right is to 'remain inviolate." *Id.* In other words: "[T]he right to trial by jury exists in actions at law but not in actions in equity." *Id.* This Court concluded that these legal truths remained consistent throughout the history of Missouri jurisprudence, and should not be disturbed: "In reviewing the cases from the past 183 years, it is quite clear that, ordinarily, a suit that seeks only money damages is an action at law rather than equity." *Diehl* at 86, citing *Bank of Missouri v. Anderson*, 1 Mo. 244 (1822); *Meadowbrook*

Country Club v. Davis, 421 S.W.2d 769, 772 (Mo. banc 1967); *Jaycox v. Brune*, 434 S.W.2d 539, 542 (Mo. 1968); and *State ex rel. Willman v. Sloan*, 574 S.W.2d 421, 422 (Mo. 1978).

In its analysis of whether or not Diehl's claims brought pursuant to the Missouri Human Rights Act qualified as an action at law subject to the protections on Article I, Section 22 of the Missouri Constitution, this Court specifically identified wrongful death actions as one of the many statutorily created actions that enjoy the Missouri Constitution's protections of a right to trial by jury:

> The statutorily based claims by Diehl are conceptually indistinguishable from other statutory actions for damages that traditionally have carried the right to a jury trial because they seek redress for wrongs to a person. ***For instance, a claim for damages for wrongful death is statutory; it has no common-law antecedent.*** Missouri's first wrongful death statute was enacted in 1855. *Sullivan v. Carlisle*, 851 S.W.2d 510, 513–514 (Mo. Banc 1993). Another example is the civil action created by section 287.780 for damages for retaliation against an employee who files a workers' compensation claim. (The workers' compensation claim itself is an administrative proceeding, as will be discussed.) This claim for retaliation did not exist in 1820; the claim for damages under section 287.780 is nonetheless subject to the right of jury trial.
>
> *Diehl* at 88.

As these cases confirm, Article I, Section 22 grants Appellants in this case the right to enjoy a trial by jury because they have brought a civil claim for damages. Respondents' claims to the contrary are a misstatement of Missouri law.

ii. This Court's Holdings in *Sanders* and *Watts* Did Not Overturn 183 Years of Cases

To the extent that the decisions in *Sanders* and *Watts* are being used to support the position that Missouri citizens pursuing statutorily created causes of action for damages do not enjoy the protections of Article I, Section 22, they are being misinterpreted. *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. 2012); *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633 (Mo. 2012). All civil actions at law seeking monetary damages, whether statutorily created or not, enjoy a right to trial by jury inviolate of "the reach of hostile legislation." *Sanders*, 364 S.W.3d at 215; *Watts*, 376 S.W.3d at 640.

In *Sanders*, this Court cited with approval to the portion of the above-quoted language in *Diehl* identifying wrongful death as a statutorily created action for damages. *Sanders* at 203. In doing so, "the principal opinion recognizes that the state constitutional right to a trial by jury applies to Sanders' claim for wrongful death." *Id*, at 214 (dissent). Despite this, Respondents and others are nonetheless using the opinion in *Sanders* to argue that the legislature has the ability to limit or destroy the right to jury trial as it sees fit in any cause of action created by statute, even civil actions sounding in law.

For over one hundred years, from *Briggs* to Diehl, this Court has consistently held that Missouri citizens who pursue actions for damages in the courts of Missouri, like Appellants in this case, have a guaranteed right to a trial by jury under Article I, Section

22 of the Missouri Constitution. This Court's holding in *Sanders* did not render this constitutional right illusory. If such an interpretation of *Sanders* were correct, "then the legislature could abolish common law actions and then reenact them as statutory actions with dramatic limitations on damages. Obviously, this is not the law." *Sanders* at 214 (dissent). Respondents misinterpret the opinions of *Watts* and *Sanders* as holding that Appellants do not enjoy a right to trial as they seek compensation for the death of Mr. Lang. They do, and it has been violated by section 538.225.

III. CONCLUSION

Respondents and Amici insist that the changes made § 538.225 in 2005 are "so minute" that they do "not change this Court's analysis in *Mahoney*." Respondents' brief at 12; Amici brief at 15. The fact that Appellants are forced to seek the relief that they do from this Court proves otherwise. If the 2005 amendments had not expanded the § 538.225 beyond its original and legitimate intent to reduce the resources dedicated to frivolous suits, it would not have required the trial court to dismiss Appellants' claims. Appellants case has not only been litigated for years, but the trial court previously undertook an exhaustive review of the evidence and determined that Appellants had a meritorious case worthy of a jury. Under these circumstances, § 538.225 unreasonably and arbitrarily denied appellants that right.

Neither Amici nor Respondents are able to articulate how this statute has not resulted in an arbitrary or unreasonable outcome in this case. They argue that the statute serves a valid purpose. Even if true, that purpose is not being served in this case. They argue that the statute should not be invalidated in its entirety simply because it causes

Appellants a hardship in this case. This Court does not need to invalidate the entire statute in order to rule in Appellants' favor. They argue that Appellants have failed to preserve their constitutional challenges. Appellants timely raised these challenges at their first opportunity to do so. Finally, they argue that Appellants do not enjoy a right to trial. For over One Hundred Years, this Court has consistently ruled otherwise.

WHEREFORE, for all the reasons stated above, the trial court's Motion to Dismiss should be reversed, and this case should be remanded for further proceedings.

Dated: June 19, 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 7,735 words.

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CERTIFICATE OF SERVICE

I hereby that on June 19, 2015, I filed a true and accurate Adobe PDF copy of this Appellants' Reply Brief via the Court's electronic filing system, which notified the following of that filing:

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