No. SC94814

IN THE MISSOURI SUPREME COURT

PAUL M. LANG and ALLISON M. BOYER,

Appellants,

v.

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

Respondents

Appeal from the Circuit Court of Jackson County, Missouri

At Independence

Hon. Charles H. McKenzie

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS FOR MISSOURI HOSPITAL ASSOCIATION AND MISSOURI ORGANIZATION OF DEFENSE LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTERESTS OF THE *AMICI CURIAE*

The Missouri Hospital Association (MHA) is a private, not-for-profit organization established for the purpose of providing its member hospitals representation and advocacy before all branches of government. MHA's 151 members are comprised of every acute care hospital in the state, as well as most federal and state hospitals, rehabilitation and psychiatric care facilities. MHA regularly appears as *amicus curiae* in Missouri courts when significant policy issues affecting its members are at stake.

MHA believes the issues presented in this appeal will have a substantial impact on its members. MHA's member hospitals, employees and affiliated providers represent the majority of prospective defendants affected by the application of §538.225, RSMo. MHA's interest is in preserving fairness and stability in the tort system. Since its initial passage in 1986, §538.225, RSMo has protected hospitals and other health care providers from meritless claims, thereby allowing them to devote increasingly limited resources to the provision of health care. As MHA's mission is to enable hospitals and health care systems to improve the health of their patients and community, the issues in this case bear directly on the interest of the organization and its members.

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1200 lawyers in Missouri who are involved in defending litigation, including medical negligence litigation, involving Missouri citizens and health care providers. Two of MODL's stated goals are to eliminate court congestion and delays in civil litigation and to promote improvements in the administration of justice. To that end, MODL members work to advance and exchange information, knowledge and ideas

among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

In this case, MHA and MODL support the Respondents' position that §538.225, RSMo, requiring an affidavit of merit to be filed in medical negligence cases, is constitutional. This Court previously rejected the same constitutional challenges presented by Appellants in this appeal by holding the prior version of the affidavit requirement was constitutional. Although the statute was amended in 2005, the changes do not affect the prior analysis and holding of this Court in affirming the constitutionality of the statute.

Since 1986, Missouri has required plaintiffs in medical negligence actions to file an affidavit of merit at the outset of each medical negligence case to prevent frivolous lawsuits and the wasting of judicial resources. By limiting frivolous lawsuits, the desire was to bring skyrocketing malpractice insurance premiums under control. In 1991, this Court, in *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, held that the affidavit requirement of §538.225 did not violate a plaintiff's constitutional rights. In 2005, the Missouri Legislature amended §538.225 to ensure that trial judges were

dismissing cases that did not comply with the express provisions of §538.225. The amendment, with support of the plaintiffs' bar and defense bar, required the dismissal of cases that did not comply with §538.225.

MHA and MODL urge this Court to uphold the 2005 version of §538.225, RSMo because it is vital to preventing expensive, prolonged litigation of frivolous claims against Missouri's health care providers.

CONSENT OF THE PARTIES

Respondents have consented to the filing of this brief. Appellants declined to provide consent to the filing of this brief. Filed contemporaneously herewith, in accordance with Rule 84.05(f)(3), is a Motion for Leave to file this brief with the Court.

JURISDICTIONAL STATEMENT

MHA and MODL hereby adopt the Jurisdictional Statement of Respondents.

STATEMENT OF FACTS

MHA and MODL hereby adopt the Statement of Facts of Respondents.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S MOTION TO DISMISS BECAUSE §538.225, RSMO. IS CONSTITUTIONAL AND APPELLANTS FAILED TO PRESERVE THEIR CONSTITUTIONAL CHALLENGES FOR REVIEW.

a. **Historical Evolution of Missouri Affidavit Requirement**

In 1986, the Legislature passed Senate Bill 663, which enacted §538.225 ("Original Version"). The Original Version of the statute provided as follows:

> 1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or his attorney shall file an affidavit with the court stating that he has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.
> 2. The affidavit shall state the qualifications of such health care providers to offer such opinion.

3. A separate affidavit shall be filed for each defendant named in the petition.

4. Such affidavits shall be filed no later than 90 days after the filing of the petition unless the court, for good cause shown, orders that such time be extended.

5. If the plaintiff or his attorney fails to file such affidavit the court may, upon motion of any party, dismiss the action against such moving party without prejudice.

In 1991, this Court upheld the constitutionality of the Original Version of the statute in *Mahoney v. Doerhoff Surgical Service*, 807 S.W.2d 503 (Mo. banc 1991). In the *Mahoney* decision, this Court noted that "[i]n the assessment and adjudication of a constitutional challenge to a statute, a court considers and interprets the purpose intended by the enactment." 807 S.W.2d at 507 (internal citations omitted). Chapter 538 was enacted as a "legislative response to the public concern over the increased cost of health care and the continued integrity of that system of essential service." *Id.* The Original Version of §538.225 was intended to "cull at an early stage of litigation suits for negligence damages against health care providers that lack even the color of merit, and so to protect the public and litigants from the cost of ungrounded medical malpractice claims." *Id.*

As the years passed after the decision in *Mahoney*, it became clear that the intention of the affidavit statute, to "cull at an early stage of litigation" meritless suits was not being accomplished. Judges were hesitant to dismiss medical negligence claims for

fear of being overturned on appeal. The Original Version granted judges, with very little information, discretion either to take the plaintiff's word that he or she had secured opinions sufficient to make a submissible case, or to dismiss the case and be subjected to appellate review for abuse of discretion. Many judges were choosing the former and the intended purpose of the statute was being thwarted. As a result, and as part of a broader tort reform solution, the Legislature adopted a new version of §538.225, in 2005 ("Amended Version"). The Amended Version of the statute provides as follows:

> 1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.
>
> 2. As used in this section, the term "**legally qualified health care provider**" shall mean a health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years

of retirement from actively practicing substantially the same specialty as the defendant.

3. The affidavit shall state the name, address, and qualification of such health care providers to offer such opinion.

4. A separate affidavit shall be filed for each defendant named in the petition.

5. Such affidavit shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended for a period of time not to exceed an additional ninety days.

6. If the plaintiff or his attorney fails to file such affidavit the court shall, upon motion of any party, dismiss the action against such moving party without prejudice.

7. Within one hundred eighty days after the filing of the petition, any defendant may file a motion to have the court examine in camera the aforesaid opinion and if the court determines that the opinion fails to meet the requirements of this section, then the court shall conduct a hearing within thirty days to determine whether there is probable cause to believe that one or more qualified and competent health care providers will testify that the plaintiff was injured due to medical negligence by a defendant. If the court finds that there is no such

> probable cause, the court shall dismiss the petition and hold the plaintiff responsible for the payment of the defendant's reasonable attorney fees and costs.

(emphasis in original).

The Amended Version of the statute bolsters provisions meant to further the original goal of the Legislature in "cull[ing] at an early stage of litigation suits for negligence damages against health care providers that lack even the color of merit." The amendment to §538.225 challenged in this case removes judicial discretion with regard to dismissing cases, and instead makes dismissal without prejudice a mandatory remedy for noncompliance. This change was made to ensure the original intent was carried out and judges dismissed cases without expert support.

b. ***Mahoney's* Rationale Applies to the Amended Version of §538.225, RSMo.**

This Court has previously addressed the constitutionality of an affidavit requirement in medical malpractice actions and found it to be constitutional. The rationale behind the decision in *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. 1991) applies to this case and the Amended Version of §538.225.

The decision in *Mahoney* sets forth a detailed, thorough and rational analysis of each of the issues raised by the Appellants. This Court found that the affidavit requirement was an "exercise of the police power rationally related to the end sought – the preservation of an adequate system of medical care for the citizenry – by the control of ungrounded medical malpractice claims." *Id.* at 508. First, this Court paralleled the

affidavit statute to each attorney's duty under Rule 55.03 to ensure that no frivolous claims may be filed. *Id.* Rule 55.03(c) provides in pertinent part, as follows:

> (c) Representation to the Court. By presenting and maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, or other paper filed with or submitted to the court, an attorney or party is certifying that to the best of a person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that:
>
> > (1) the claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > * * *
> >
> > (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

Rule 55.03(c)(1), (3). This Court expects that "a party who sues for the malpractice of a health care provider has by a reasonable inquiry come to a reasonable belief that the petition is warranted by the proof and the law." *Mahoney*, 807 S.W.2d at 508. Any attorney bringing a medical negligence case in the state of Missouri would necessarily visit with an expert prior to filing the action to meet his obligations under Rule 55.03. This Court, through Rule 55.03, has expressed its desire and intention to cull frivolous

litigation by mandating that attorneys ensure a "reasonable inquiry" has occurred prior to the filing of a lawsuit. The Legislature's enactment of §538.225 does not add to the burden expressed under Rule 55.03; it simply reinforces what type of "reasonable inquiry" is necessary to ensure medical negligence cases filed in this state have merit. Plaintiffs are free to secure a medical opinion prior to filing and if they have a reasonable belief that negligence has occurred but do not have time to secure an opinion before filing, have 180 days after the filing of the case to obtain the same. Given the underlying requirements of Rule 55.03, the requirements of §538.225 are reasonable.

Next, in *Mahoney*, this Court held that the affidavit requirement "intends no change in our substantive medical malpractice law" and does not infringe on the right to a trial by jury. *Id.* Plaintiffs are required to have expert medical testimony to make a submissible case. *Id.* at 510. If a plaintiff cannot provide expert testimony, his or her case will not be heard by a jury, regardless of an affidavit of merit or the lack thereof. When a case is decided by summary judgment or a directed verdict, the jury does not get to consider the case. In both instances, the plaintiff has failed to make a submissible case. Similarly, under §538.225, the plaintiff's failure to secure an affidavit suggests an inability to offer proof on the ultimate issue in the case.

Despite the constitutional right to trial by jury, this Court has found that neither directed verdicts nor grants of summary judgment "are infringements of that constitutional guarantee." *Id.* at 508. If cases decided on summary judgment or directed verdict motions, which result in judgments against the plaintiffs, do not infringe on a constitutional guarantee, then the consequence of not filing an affidavit of merit, a

dismissal without prejudice with the possibility to refile, surely cannot infringe on that right. *See generally Id*. at 508 (explaining that the affidavit requirement does not violate plaintiff's right to a jury trial).

Neither the Original or Amended versions of §538.225 create a new or additional burden on plaintiffs; the statute simply requires the plaintiff to certify at the outset of litigation that each case is nonfrivolous, has merit and deserves the expenditure of judicial resources. The only way under the law that plaintiffs can certify that a medical negligence case has merit is to have the opinion of a qualified health care provider. A similar opinion would be required to submit the case to a jury.

In *Mahoney*, this Court further held that the affidavit requirement did not violate the plaintiff's right to open courts. *Id.* at 510. Medical negligence claims require that a plaintiff prove by a "qualified witness that the defendant deviated from an accepted standard of care." *Id.* Without that testimony, "the case can neither be submitted to a jury nor allowed to proceed by the court." *Id.* Section 538.225's affidavit requirement simply asks a plaintiff to certify that this testimony is available at an earlier stage of the litigation in order to "free the court system from frivolous medical malpractice suits." *Id.*

Just as in 1986, the Legislature in 2005 amended the affidavit requirement under §538.225 in response to "public concern over the increased cost of health care" and to ensure the "continued integrity of the health care system." *Id.* at 507. In order to ensure that the affidavit requirement was followed and courts were not reluctant to dismiss non-compliant actions, the Legislature amended §538.225 to require courts to dismiss cases without prejudice when there was a failure to comply with the statute. The change from a

discretionary remedy to a mandatory remedy does not change this Court's analysis in *Mahoney*. *Mahoney* upheld the affidavit statute because it recognized that it did not place any additional burdens on the plaintiff. *Mahoney* 807 S.W.2d 503 at 508-09. As with the Original Version, the Amended Version of §538.225 does not place additional burdens on plaintiffs and addresses the original intent, preventing frivolous malpractice claims.

Section 538.225 has been in place for decades. This Court should reject Appellants' request to overrule 20 years of precedent, as the affidavit requirement is based on important public policy and sound legal reasoning. The 2005 amendment does not infringe on any substantive rights, as it requires only dismissal *without* prejudice. A plaintiff's inability to secure the required affidavit within 180 days of suit suggests that his or her case lacks merit. Even so, the Amended Version of §538.225 would permit the plaintiff to refile if the requisite opinion is obtained. Thus, the statute preserves judicial economy while adequately and fairly protecting the interest of plaintiffs.

The affidavit requirement under §538.225 touches every medical malpractice case that is filed in this state, and acts as a safeguard to prevent frivolous litigation. The intended purpose of the Amended Version of §538.225 is the same as described in *Mahoney*. Appellants have failed to offer any persuasive arguments that defeat the sound reasoning developed by this Court in 1991. The *Mahoney* decision should be affirmed and applied to the Amended Version of the statute.

c. Appellants Failed to Preserve Their Constitutional Challenge

Appellants have not preserved their constitutional challenges in that they failed to raise them in their Petition for damages, which was the first available opportunity to do so. Appellants rely on this Court's decision in *Mayes v. Saint Luke's Hospital of Kansas City*, 430 S.W.3d 260 (Mo. 2014) to support the proposition that their constitutional challenges were preserved. Appellants' citations to *Mayes* are misleading and misstate the law.

In *Mayes*, this Court said that to "raise a constitutional challenge properly, the party must:

> (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

Id. at 266.

In *Mayes*, the plaintiff failed to "preserve the constitutional question throughout." *Mayes*, 430 S.W.3d at 267-268. In *Mayes*, this Court summarily addressed the "first available opportunity" analysis by stating: "The plaintiffs complied with the first two requirements by filing a petition in case #2 that contained a section labeled 'Constitutional Objections.'" *Mayes*, 430 S.W.3d at 266. Here, Appellants failed to raise

the constitutional objections in either of their Petitions, which was their first available opportunity to do so. See *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. 1996); *Mike Berniger Moving Co. v. O'Brien, Chief of Police*, 234 S.W. 807 (Mo. 1921) (holding: "If the plaintiff desired to challenge the constitutionality of said ordinance, set out in petition, and offered in evidence, it should have done so in its petition, as that was the earliest opportunity for raising said question.").

In *Hollis*, this Court rejected the argument that a constitutional challenge arises only after an adverse action by the Court. *Hollis*, 926 S.W.2d at 684. *Hollis* addressed the prejudgment interest statute under §537.067.1, RSMo. *Id.* at 683-84. This Court found that the appropriate time to raise a constitutional issue is in the original pleadings. *Id.* at 684. Additionally, because the constitutional challenges were attacking a statute, this Court noted that the application of the statute could "hardly have been a surprise to appellants."

Appellants rely on the following quote from *Mayes* to argue that their constitutional challenges are preserved for review:

> 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.

Mayes, 430 S.W.3d at 267. By taking this quote out of the broader context of the case, Appellants attempt to confuse the issues. There are four requirements to preserve a constitutional challenge. Appellants' quotation from *Mayes* is in regard to the fourth

requirement to "preserve the constitutional question throughout for appellate review." *Id.* at 266-67. Appellants confuse the **first opportunity for a desired ruling** with the **first opportunity to raise the constitutional challenge**. These are two distinct and separate requirements and must be treated as such.

Appellants are correct that in this case, the first opportunity for their desired ruling would have been in response to the Defendant's motion to dismiss. While Appellants must raise the constitutional challenge at that point to "preserve the constitutional question throughout for appellate review," they must first have preserved it at the earliest opportunity, in the petition for damages, which they failed to do. *Hollis*, 926 S.W.2d at 684.

d. Appellants' Reliance on *Kilmer* and *Cardinal Glennon* is Misplaced

The Appellants rely heavily on two cases from this Court to support their constitutional challenges. Both cases have unique facts and are inapposite to the issue at bar.

Kilmer v. Mun, 17 S.W.3d 545 (Mo. Banc 2000), is based upon a dram shop claim under §537.053.3, RSMo where plaintiffs sought to recover from a restaurant which served liquor to an intoxicated patron who later caused damage to the plaintiffs. *See* 17 S.W.3d 545 (Mo. 2000). At the time, §537.053.3, RSMo only authorized a claim against the holder of a liquor license if the liquor licensee had been convicted or had received a suspended imposition of sentence for violating section §311.310 by providing liquor to an intoxicated person. *Id.* at 546. In *Kilmer*, the prosecutor had declined to prosecute the

restaurant and the Plaintiffs were not allowed to proceed with their civil claim against it. *Id.*

The plaintiffs argued that §537.053.3 violated the open courts provision of the Missouri constitution. *Id.* at 547. This Court agreed, finding that the open courts 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.* at 550 (internal citations and emphasis omitted). The key was whether the Legislature erected boundaries to claims which are arbitrary or unreasonable. *Id.* In *Kilmer*, the barrier was arbitrary and unreasonable because it relied on an unrelated party to act before a cause of action arose for the Plaintiff. *Id.* A prosecutor was required to both charge and obtain a conviction or guilty pleas before the plaintiffs could file a personal injury case. The plaintiff had **no ability** to control their own destiny, as they could not force a prosecutor into action. Further, the burden of proof in a criminal case (beyond a reasonable doubt) is greater than civil cases (preponderance of the evidence).

In this case, the Amended Version of §538.225 is neither arbitrary nor unreasonable, as it does not create additional burdens on Appellants and does not require Appellants to rely on something or someone outside of their control. In fact, the amendment creates **no** new burdens on plaintiffs from those provisions of the Original Version that this Court already declared constitutional. Plaintiffs are still given 90 (or for good cause shown, 180) days after the filing of a petition to provide a good faith statement to the court showing the case has merit. The only substantive change is to require dismissal if the plaintiff cannot provide an opinion of a qualified health care

provider stating that the claim has merit. Plaintiffs must have expert testimony to make a prima facie case and, therefore, plaintiffs suing for medical negligence must consult with a medical expert at some point in the litigation. Requiring the plaintiffs to consult with medical experts at the outset of a case causes a *de minimus* burden on plaintiffs which is outweighed by the overwhelming benefit to the public by preventing frivolous medical malpractice lawsuits.

The important distinction between *Kilmer* and this case is that the dram shop statute in *Kilmer* created an absolute procedural bar to the filing of plaintiff's cause of action. The Amended §538.225 merely requires the Appellants to obtain the same type of opinion (in writing), which will be required to submit the case to the jury, at an early stage of litigation. If Appellants cannot find an opinion at the outset of the litigation, who is to say they will be able to find one to support their position later? Thus, the affidavit requirement only prevents two types of claims: those without a factual or legal basis, and those in which counsel neglected to comply with the statute. As such, while the analysis of §537.053.3 in *Kilmer* is sound, it does not apply to the realities of §538.225. The fact that the Amended Version mandates dismissal without prejudice as opposed to it being discretionary (as in the Original Version) does not make Appellants' reliance on *Kilmer* any more valid. Unlike the statute in *Kilmer*, whether a case is dismissed under §538.225 is completely within the control of a plaintiff.

The second case relied upon by Appellants is *State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979). *Cardinal Glennon* struck down statutorily mandated Professional Liability Review Boards. *Id.* at

108. To distinguish this case, the Court need look no further than its own decision in *Mahoney*. The *Mahoney* Court distinguished the affidavit requirement from the law in *Cardinal Glennon* because it "does not operate until after the petition is filed and the incidents of jurisdiction to adjudicate are met." *Mahoney*, 807 S.W.2d at 509. *Cardinal Glennon* (and *Kilmer*) addressed pre-filing requirements, which make them unconstitutional. Section 538.225 creates post-filing obligations, which are distinguishable under the *Mahoney* rationale.

e. *Watts* Analysis is Distinguishable

This Court recently overruled *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992) with its decision in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012). This Court found a different provision of the 2005 tort reform legislation, caps on non-economic damages, unconstitutional. *Watts*, 376 S.W.3d at 636. The issues in *Watts* are distinguishable from the issues before the Court in this case.

Under the analysis in *Watts*, this Court determined that the non-economic damages cap violated the plaintiff's right to a trial by jury because, after the jury had deliberated and issued its decision, the Legislature required the Court to adjust the jury's determination of noneconomic damages in accordance with the statutory limits and reduce the award. This Court found that "[t]he individual right to trial by jury cannot 'remain involate' when an injured party is **deprived of the jury's constitutionally assigned role** of determining damages according to the particular facts of the case." *Id.*

at 640 (emphasis added). The Amended Version of §538.225 does not deprive the jury of its constitutionally assigned role.

It is well settled that if a plaintiff cannot present testimony from a qualified expert witness that a defendant deviated from the accepted standard of care, "the case can neither be submitted to a jury nor allowed to proceed by the court." *Mahoney*, 807 S.W.2d at 510. The filing of a case does not automatically entitle Appellants to a determination by a jury. Rule 74.01 relating to summary judgment and Rule 72.01 relating to directed verdicts provide two undeniably constitutional procedures where a case can be disposed of prior to reaching the jury. Section 538.225 is similar to these two procedures. Section 538.225 simply requires plaintiffs to make a showing during the early stages of litigation that they will be able to satisfy a prerequisite to having their case submitted to a jury. If plaintiffs are unable to secure a supportive expert, ultimately the case will never be submitted to a jury and therefore the injured party is not deprived of any substantive rights.

A grant of a directed verdict or summary judgment for a defendant does not violate Appellants' right to a trial by jury. *Mahoney*, 807 S.W.2d at 508 (citing *Smith v. Glynn*, 177 S.W. 848, 849 (Mo. 1915); *Finn v. Newsam*, 709 S.W.2d 889, 892-93 (Mo. App. 1986)). Just as granting judgment as a matter of law does not violate the Appellants' right to a trial by jury, neither does the affidavit requirement under §538.225. The affidavit requirement simply asks the Plaintiffs to make a showing in the early stages of litigation that the case will have the ability to make it to the jury.

The issues presented in *Watts* are distinguishable from the present case, and therefore, the *Watts* analysis is inapplicable.

Conclusion

The Legislature's amendments to §538.225 in 2005 should not alter the analysis of the constitutionality of the affidavit statute as set forth in *Mahoney*. The arguments presented by Appellants have been previously considered by this Court and making the dismissal without prejudice mandatory rather than permissive does not change the legal analysis.

It is important to remember that the mandatory dismissal under §538.225, RSMo is a dismissal without prejudice. 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. If an opinion in compliance with the requirements of §538.225 cannot be obtained in 545 days, the statute is operating as intended. This case was properly dismissed.

Based on the foregoing, *Amici Curiae* Missouri Hospital Association and Missouri Organization of Defense Lawyers respectfully suggest that this Court affirm the judgment in favor of Respondents.

NEWMAN, COMLEY & RUTH P.C.

/s/ Edward C. Clausen

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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 5,278 words.

/s/ Edward C. Clausen
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2015, I filed a true and accurate Adobe PDF copy of this Amici Curiae Brief via the Court's electronic filing system, which notified the following of that filing:

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