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No. SC95858

In the
MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL.
DR. PATRICK GOLDSWORTHY, DR. ASTON GOLDSWORTHY and
PATRICK L. GOLDSWORTHY, D.C., P.C.,

Relators,

v.

THE HONORABLE JAMES F. KANATZAR,

Respondent.

PLAINTIFFS'/RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The Plaintiffs are the surviving children of decedent Michael Lang. A2. The Plaintiffs 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. *See* Case No. 1016-CV38278 ("Case No. 1"). The Plaintiffs alleged that the Relators' substandard and negligent chiropractic care caused Michael Lang to suffer a transverse fracture of the spine resulting in his death. *Id.* Counsel for Plaintiffs 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. A17-21; A97. Dr. Bragman authored reports outlining his opinions and Appellants produced these reports to Relators. A22-27. Relators' counsel deposed Dr. Bragman and fully explored his opinions and basis thereof. A28-91. Following extensive discovery and briefing, the Circuit Court of Jackson County denied Relators' Motion for Summary Judgment, finding the existence of disputed facts requiring submission of Plaintiffs' claims to a jury. A92. Due to the unavailability of a witness for trial, Plaintiffs were forced to voluntarily dismiss their claims without prejudice. A93. Following the voluntary nonsuit, Plaintiffs timely refiled the action in the Circuit Court of Jackson County as Case No. 1416-CV-06526. ("Case No. 2"). The claims asserted and the facts alleged in the respective Petitions are, word-for-word, identical.

Respondents waited One Hundred and Eighty Two (182) days after Plaintiffs re-filed their lawsuit to file a Motion to Dismiss on the grounds that Plaintiffs had not complied with § 538.225, R.S.Mo. A12-16. The Circuit Court of Jackson County

granted Relators' Motion to Dismiss, Plaintiffs timely appealed, and the Western District granted transfer to this Court due to the real and substantial constitutional questions at issue. A97. This Court held that the dismissal without prejudice was proper, but suggested that Plaintiffs may be able to re-file their case a second time:

> Section 537.100 permits a plaintiff who has "take[n] or suffer[ed] a nonsuit" to refile an action within one year of the date of the nonsuit. Plaintiffs in this action relied on this savings provision when they refiled their second action more than a year after the original limitations period had expired. It is not clear whether a savings provision like the one in section 537.100 may be used more than once. *See Mayes,* 430 S.W.3d at 266 (noting that the plaintiffs in that case did not argue that their third action was timely filed under section 537.100's savings provision). This Court does not address whether a savings statute could be used a second time by Plaintiffs in this action.

Lang v. Goldsworthy, 470 S.W.3d 748, FN6 (Mo. 2015).

Plaintiffs timely re-filed their case within one year after the dismissal without prejudice. A1. Defendants filed a Motion to Dismiss on the grounds that the Plaintiffs are not entitled to use the savings statute a second time. Defendants' Motion to Dismiss, A11-A17 of Relators' Appendix. Respondent denied that motion and the Western District Court of Appeals denied Relator's request for a preliminary writ of prohibition. Relators' Appendix, A18; A33-34.

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ARGUMENT

I. INTRODUCTION

Relators' insistence that this Court read into section 537.100 a "but only once" limitation ignores the plain language of the statute that a plaintiff can re-file "from time to time within one year" of any timely filed and subsequently dismissed action. It also ignores the special purpose of the Wrongful Death Act which is to protect and preserve human life. It ignores the public policy of Missouri that courts should promote justice by striving to resolve cases on their merits. Finally, it ignores the protections afforded by the Missouri Constitution.

In support of their request, Relators make no attempt to analyze or interpret the language of the statute itself. Instead, they insist that Missouri cases interpreting a separate, non-identical statute should somehow apply to this case by default. This Court, however, recognized that this issue has never been decided when it upheld the trial court's dismissal of Case No. 2 while specifically noting that it may be possible for Plaintiffs to re-file again in reliance on section 537.100. In fact, even Relators admit that this is a question of first impression, never before addressed by a court of Missouri. A proper and independent interpretation of the statutory language is required and reveals only one possible outcome: The plain-language of the statue, consistent with the purpose of the wrongful death act, provides that this case was timely filed.

Section 537.100 unambiguously permits Plaintiffs to proceed in this case. It reads, in full:

> Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him; **and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit**, or after a verdict for him the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, **such plaintiff may commence a new action from time to time within one year after such nonsuit suffered** or such judgment arrested or reversed; and in determining whether such new action has been begun within the period so limited, the time during which such nonresident or absent defendant is so absent from the state shall not be deemed or taken as any part of such period of limitation.

§ 537.100, R.S.Mo. (emphasis added)

By its plain language, this section provides that a case can be refiled from time to time after a nonsuit is suffered whenever the case resulting in a nonsuit was timely filed under this section. It does not contain any language limiting a plaintiff to a single use of this savings provision. Nor does it contain any language limiting a plaintiff to only

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refiling cases that were timely filed pursuant to only the first part or "above" portion of the section. Instead, the section provides that a case is timely filed if it is filed within a year of a nonsuit. In this case, both the first and the second cases filed by Plaintiffs were timely filed pursuant to this section. Because this third suit was timely filed within a year of suffering a nonsuit in the second case, it too is timely filed under this section and cannot be dismissed. The plain-language of the statute provides for this, and no court in Missouri has ever held otherwise. Respondent properly denied the Relators' Motion to Dismiss.

II. STANDARD OF REVIEW

A motion to dismiss is a drastic remedy disfavored by Missouri law. "The law generally favors trial on the merits and the criteria for judging the sufficiency of petitions have been developed to promote this purpose." *Prindable v. Walsh*, 69 S.W.3d 912, 914 (Mo. App. E.D. 2002). Therefore, a motion to dismiss is not to be granted unless "it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Terre Du Lac Assoc., Inc. v. Terre Du Lac, Inc.,* 737 S.W.2d 206, 210 (Mo. App. 1987). The court must "look solely to the adequacy of the Plaintiffs' Petition and whether the facts pleaded and the inferences therefrom state any ground for relief." *Nixon v. Wentzville Park Associates, L.P.*, 77 S.W.3d 659, 660 (Mo. App. 2002). "No attempt is made to weigh any facts alleged as to whether they are credible or persuasive." *Eastwood v. North Central Missouri Drug Task Force*, 15 S.W.3d 65, 67 (Mo. App. W.D. 2000). The court instead treats the plaintiffs' allegations as true, and then determines if, based solely on the pleadings, any possibility of relief exists. *Hess v. Chase*

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Manhattan Bank U.S.A., 2006 WL 768513 (Mo. App. W.D. 2006). A motion to dismiss must therefore be denied if the petition asserts any set of facts that would, if proven, entitle the plaintiff to relief. *Ste. Genevieve School Dist. R-ll, et al. v. Bd. of Aldermen of the City of Ste. Genevieve, et al*, 66 S.W.3d 6, 11 (Mo 2002).

The Relators bear the burden of establishing that the Plaintiffs' petition fails to assert any claims upon which relief can be found. "In a motion to dismiss for failure to state a claim, the burden is on the defendant to establish that the elements pleaded by the plaintiff fail to state a cause of action." *Nisbet v. Bucher*, 949 S.W.2d 111, 113 (Mo. Ct. App. 1997). In contrast to the law of Missouri, the Relators ignore the petition and make no argument to this Court that the pleadings are insufficient. The facts Relators focus on, however, have been pled in paragraph 14 of Plaintiffs' petition: "A previous suit based on the same conduct that was timely filed and was dismissed by the court without prejudice on December 29, 2014 pursuant to R.S.Mo. § 538.225. Plaintiffs are timely refiling this suit less than one year after dismissal pursuant to R.S.Mo. § 537.100." Relators cannot meet their burden of establishing that Plaintiffs are not entitled to rely on section 537.100 to re-file this suit a second time. Respondent properly denied the motion to dismiss.

III. ALL THREE OF RELATORS' ARGUMENTS HAVE BEEN REJECTED BY THIS COURT

Relators assert three arguments as to why § 537.100 does not allow a plaintiff to re-file a suit a second time. The statute does not place any limit on how many times a plaintiff can re-file a case, and therefore none of Relators' arguments involve looking to

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the language of the statute itself. Each one of these arguments, however, has been specifically rejected by this Court. Relators fail to offer any valid reason why the Respondent committed reversible error in denying their motion to dismiss. The preliminary Writ of Prohibition must be set aside.

A. This Court Specifically Left the Door Open for Plaintiffs to File This Case Again and Rely on the Savings Provision of Section 537.100

Relators' argument that this Court held in *Lang v. Goldsworthy* that section 537.100 prohibits Plaintiffs from re-filing this case is wrong. *Lang v. Goldsworthy,* 470 S.W.3d 748 (Mo. 2015). In *Lang,* this Court clearly and unambiguously stated that it was not making such a holding: "This Court does not address whether a savings statute could be used a second time by plaintiffs in this action." *Lang v. Goldsworthy,* 470 S.W.3d 748, FN6 (Mo. 2015). Relators, however, contradict this language and claim that the opinion in *Lang* did address this issue. This is simply not true. Footnote No. 6 specifically cleared up any confusion to the contrary.

In fact, not only did this Court not address this issue in *Lang*, but no court in Missouri has ever addressed whether or not § 537.100 can be used a second time by a plaintiff. Footnote No. 6 in the *Lang* opinion therefore makes it clear that this Court was not intending to weigh-in on this question of first impression of Missouri law. The entire Footnote reads:

> Section 537.100 permits a plaintiff who has "take[n] or suffer[ed] a nonsuit" to refile an action within one year of the date of the nonsuit. Plaintiffs in this action relied on this savings provision when they refiled

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their second action more than a year after the original limitations period had expired. It is not clear whether a savings provision like the one in section 537.100 may be used more than once. *See Mayes,* 430 S.W.3d at 266 (noting that the plaintiffs in that case did not argue that their third action was timely filed under section 537.100's savings provision). This Court does not address whether a savings statute could be used a second time by Plaintiffs in this action.

Lang v. Goldsworthy, 470 S.W.3d 748, FN6 (Mo. 2015).

When read in its entirety, the Footnote is clear: The plaintiffs in *Lang* and *Mayes* might have been able to use the savings provision of section 537.100 but chose not do so. Now, these Plaintiffs have done just that and re-filed their case within one year of the second nonsuit. This Court could have extinguished Plaintiffs' option to do so in *Lang,* but chose not to. Instead, it specifically held this door open to Plaintiffs. Plaintiffs have now stepped through this door and have a right to pursue this case which is timely pursuant to the plain-language of section 537.100. Relators' argument that the decision in *Lang* holds otherwise is simply not true.

B. This Court Recently Held That the Provisions of the Wrongful Death Statute, Including Section 537.100 Must Be Analyzed Independently and Separately From the Provisions of Chapter 516

Relators cite several cases that they insist govern the present action. These cases are all off-point. Not a single one of them addresses section 537.100. Instead, they discuss § 516.230, R.S.Mo., a statute that the Relators concede does not contain identical

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language to section 537.100. Despite the different language between the two statutes, the Relators insist that the holdings interpreting section 516.230 should be applied to section 537.100 by default and with no further analysis. No Missouri Court has ever done this. In fact, this Court recently rejected this argument and held that section 537.100 must be analyzed independently of the statutes found in Chapter 516.

In *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703 (2015), this Court made it clear that the language found in the sections of Chapter 516 is separate and distinct from that found in § 537.100: "Section 516.300, however, provides that: '[t]he provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.'" In other words, the sections and provisions of Chapter 516 have no bearing on the interpretation of section 537.100: "In short, section 516.300 states that the general statutes of limitation and exceptions found in Chapter 516 are not applicable to causes of action that contain their own special statutes of limitation. Section 537.100 is a special statute of limitations for wrongful death. As a result, the fraudulent concealment tolling exception in section 516.280 is not applicable to this case." *Boland,* 471 S.W.3d, at 707.

Cases interpreting section 516.230, therefore, have no bearing on the interpretation of the unique and independent language of section 537.100. The cases cited by Defendants pertain only to Chapter 516 and cannot apply to section 537.100 by default, as Defendants suggest. Section 537.100 is a special statute of limitations entirely separate from Chapter 516 and must be interpreted on its own. Defendants cannot avoid

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a simple analysis of the plain language of section 537.100 by citing cases that interpreted section 516.230. No Missouri court has ever assigned the meaning to 537.100 that Defendants ask this Court to assign. It is a matter of first impression that can only be resolved through the proper rules of statutory interpretation, which start with the plain-language of the statute. Defendants' argument that this Court can make an end-run around these rules via cases addressing Chapter 516 was rejected by this Court in *Boland.*

C. This Court Has Rejected the Argument that Courts Can Supplement the Plain-Language of Section 537.100 with Policy Considerations

Defendants' final argument in favor of dismissing Plaintiffs' claims is a policy argument. Defendants argue that statute of limitations "promote justice" by preventing stale claims from being pursued and if Plaintiffs are allowed to proceed in this case it would "completely defeat the purpose of that statute of limitations." Relators' Brief, at 14. There are two reasons why this argument is wrong. First, it misstates the policy of Missouri. In Missouri, justice is best promoted by having cases determined on their merits. Second, this Court rejected the argument that the plain language of section 537.100 must be interpreted through a lens of policy. In *Boland,* the Court held that when interpreting the statute, it cannot go beyond the plain-language of section 537.100, even in the face of compelling policy reasons to do so.

i. Missouri Law Favors the Disposition of Cases on Their Merits

"Missouri law favors the disposition of cases on their merits when possible. This is for the reason that the purpose of all courts is to do justice, and justice is best served when all litigants have a chance to be heard." *Laurie v. Ezard*, 595 S.W.2d 336, 337 (Mo.

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Ct. App. 1980). In *Laurie*, the trial court dismissed a case that had been pending for nine years, including sixteen months of inactivity, due to lack of prosecution. The court of appeals reversed and held that even when faced with the concerns of trying a case based on events that occurred a decade ago, the trial court abused its discretion: "[T]he ends of justice will be better served by allowing the case to proceed on its merits rather than to be determined without the parties having an opportunity to present evidence and to be otherwise heard." *Ezard* at 338.

Relators' argument that this Court must promote justice by finding a "one time only" limitation in section 537.100 is contrary to Missouri law and policy. Justice is best served when cases, even ones that have been pending for a while, are allowed to be determined on their merits. The plain language of section 537.100 promotes justice by not limiting a plaintiff to only one re-filing after taking or suffering a nonsuit. A plaintiff's claim remains alive until it can be decided on the merits, or until a plaintiff does not re-file within one year after a nonsuit. Relators' argument to the contrary is wrong.

ii. Policy Considerations Cannot Trump the Plain Language of Section 537.100

Even if Relators had presented a compelling policy argument to this Court, which they have not, this Court has held that policy arguments cannot be considered when interpreting the plain language of section 537.100. Again, this issue was directly addressed in *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703 (2015). There, this Court recognized that the case before it involved "tragic and deeply concerning"

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circumstances. The plaintiffs were family members of several patients who passed away while being cared for at Hedrick Medical Center in Chillicothe, Mo. Years later, the plaintiffs learned that these deaths were caused by a nurse at the hospital. The plaintiffs filed suit shortly after learning of the circumstances surrounding the deaths and alleged that the hospital engaged in an illegal cover-up that prevented them from learning the true circumstances of the deaths until more than three years had passed. After the trial court dismissed plaintiffs' case as untimely, the plaintiffs appealed. They argued that under the circumstances and in line with the policy of Missouri, section 537.100 should be read to include either a delayed accrual when the circumstances surrounding the death are unknown, or a tolling period based on fraudulent concealment.

This Court rejected both of these arguments and held that policy concerns cannot be used to amend the plain language of section 537.100. First, the Court held that because there is no delayed accrual exception written into section 537.100, the statute unambiguously provides that a wrongful death case must be filed within three years of death: "The language of section 537.100 is unambiguous, and this Court's precedent is clear: the plaintiff's claims accrued at the decedents' deaths, and section 537.100 does not provide for delayed accrual under these circumstances." *Boland,* at 710.

The Court also rejected the argument that fraudulent concealment can toll the statute of limitations. In doing so, the Court relied on *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958). In *Frazee*, two people were killed when a bus driver fell asleep at the wheel, crashing into another car and sending it off the road. Because the bus driver never stopped after the collision, the family of the deceased did not learn of his identity until

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after the statute of limitations had expired. The plaintiffs argued that because the general statute of limitations chapter provided a tolling provision based on fraud the Court should read such a provision into § 537.100. This Court rejected that argument and held that "it was bound to consider only the plain language of section 537.100 and the legislative intent that language evidenced." *Boland,* at 708, (*citing Frazee*, 314 S.W.2d at 921).

The plaintiffs in *Boland* claimed that *Frazee* was no longer good law because a "major shift" in the rules interpreting the wrongful death statutes had occurred in the half-century since *Frazee* was decided. They argued that the Court was no longer bound by the "letter of the statute," and could instead filter the plain language of the statute through the lens of "the spirit and reason of the law and the plain intention of the legislature." *Boland,* at 710. This Court recognized that it was being asked to hold that the statute's "purposes can be used to override or amend its statutory language," and admitted that the plaintiffs presented a "compelling policy argument" to do so. *Id.* In the end, however, this Court ultimately declined to engage in the "freewheeling" approach to statutory interpretation "that all equitable maxims become a part of all statutory schemes unless expressly written out of the law by the legislature." *Boland,* at 712. The Court held that it was bound by the plain language of section 537.100, even in the face of such tragic and disconcerting facts, because "our function is to interpret the law; it is not to disregard the law as written by the General Assembly." *Id.*

Here, this Court's function is once again to interpret the statute as written. Relators' insistence that it can instead rely on cases interpreting Chapter 516 and read into the statute an "only once" exception based on a policy of preventing stale claims is

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wrong. This Court is bound to look to the plain language of the statute, which unambiguously states that a plaintiff has one year after a timely filed case has suffered a nonsuit to bring the case again. There is no language limiting a re-filing to "only once" or "only if the previous case was filed within three years of the death." This Court should resist Relators' invitation to insert such language into the statute.

IV. THE PLAIN LANGUAGE OF SECTION 537.100 PROVIDES THAT PLAINTIFFS TIMELY FILED THIS CASE

No Missouri Court has ever held that the savings provision of section 537.100 limits itself to only one use per plaintiff. This is an issue of first impression. The plain language of the statute, however, clearly and unambiguously does not limit a plaintiff to a one-time use of its savings provision. As written, the only requirements that a plaintiff must satisfy before she can use the savings provision is that she has suffered a nonsuit in an action that was brought within the time prescribed by the section. The section prescribes that an action is timely when brought within one year of a nonsuit, and therefore an action brought within one year of a nonsuit is an action brought within the time prescribed by the section.

In this case, Plaintiffs filed their first case within three years of Mr. Lang's death. That case was dismissed without prejudice, and plaintiffs filed a second case "within one year after such nonsuit." Because section 537.100 prescribes that any such case is timely filed, Plaintiffs' second case, like the first, was filed "within the time prescribed in this section." Likewise, this third case is also timely because it was filed within one year after Plaintiffs suffered a nonsuit in a case that was filed "within the time prescribed in this

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section." Relators offer no valid reason or argument as to why this Court is free to disregard this plain language of the statute and override or amend the plain language to include an "only once" limitation. Instead, they can only point to cases interpreting Chapter 516, which includes different language and is controlled by different policies than the wrongful death act.

A. The Rules of Statutory Interpretation Require This Court to Look to the Plain Language of the Statute

When interpreting a statute, the Court is required to look at the plain meaning of the language used unless a definition is provided in the statute. "Absent a statutory definition, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Director of Revenue* 303 S.W.3d 563, 565 (Mo. 2010). A court can only ignore the plain language of a statute in two circumstances: 1) The language is ambiguous; or 2) The language would lead to an illogical result. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998) ("A court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result").

The plain language of section 537.100 is clear. It not only does not contain any language limiting the amount of times it can be used, but it specifically provides that a plaintiff may commence a new action "from time to time" so long as the prior action was commenced "within the time prescribed by this section." The section prescribes that suits must be filed "within three years after the cause of action shall accrue," or, for any action that suffers a nonsuit, "within one year after such nonsuit suffered." This case was filed

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within one year after the plaintiffs filed a nonsuit, as such it was filed "within the time prescribed by" section 537.100. By the plain-language of the statute, it is timely. Because Relators cannot escape the clear and unambiguous plain language of the statue they attempt to distract this Court by citing to Missouri cases dealing with another statute that are inapplicable to this situation. As this Court recognized in Footnote No. 6 in *Lang*, however, these cases are not controlling precedence on this issue and it is instead one of first impression.

i. The Plain Language of the Statute is Neither Ambiguous nor Leads to An Absurd Result

There are only two circumstances in which this Court can look past the plain language of the statute and read into it a "one time only" limitation on the savings provision. First, the language of the statute must be found to be ambiguous. Second, it must be shown that the plain language creates an illogical result. As to the first circumstance, the language is clearly not ambiguous. It is straight-forward and sets no limitations on the number of times a plaintiff can use the savings provision. All that is required is that the prior case has been filed within the time prescribed by the section. The section prescribes that a case filed within a year after nonsuit is timely. A plaintiff is free to use the savings provision "from time to time" as long as she commences a case within one year from suffering a nonsuit.

Next, allowing a plaintiff more than one opportunity to have a wrongful death case determined on the merits is not illogical or absurd. Relators claim otherwise and insist the result is illogical because it would disagree with the interpretation of similar (but not

identical) language from Chapter 516. Wrongful death cases, however, are unique from every other civil action in that they involve the loss of a life. Perhaps there is no more sacred of an obligation a government has than to protect the life of its citizens. The Honorable Ronnie L. White put it best when he declared that: “There certainly is no greater societal interest worthy of protection other than the preservation of human life.” *Hoffman v. Union Elec. Co.* 176 S.W.3d 706, 709 -711 (Mo. 2005).

In light of the special emphasis placed on preserving life, it is not illogical to permit a plaintiff more than one non-suit in wrongful death cases. The sacred nature of human life combined with the recognition in Missouri that justice is best served when suits are determined on their merits reveal the logic supporting the plain language of 537.100 that permits a plaintiff to pursue a wrongful death claim within one year of suffering a nonsuit until a resolution is reached on the merits. This is not an absurd result and is instead supported by policies of Missouri in general and the policy of the wrongful death act specifically.

Relators argue that it would, in fact, be absurd for section 537.100 to be found to have no limitations on its savings provision given that section 516.230 has been found to be limited to a single use. Not only does this argument ignore this Court’s holding in *Boland* that section 537.100 must be interpreted separately and independently from Chapter 516, but courts of Missouri have confirmed that limitations on common-law torts do not translate to similar limitations on wrongful death actions. In *Mansfield v. Horner,* the Western District Court of Appeals rejected the argument that limitations placed on

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common law torts must *ipso facto* also apply to wrongful death cases. *Mansfield v Horner*, 443 S.W.3d 627, (MO. App. W.D. 2014).

In *Mansfield,* the defendants insisted that the cap on punitive damages found in section 510.265 also applied to wrongful death cases. Like this case, it presented an issue of first impression. The trial court refused to be the first court in Missouri to apply the caps on punitive damages found in section 510.265 to deny plaintiffs in a wrongful death case their right to the full recovery of damages awarded by the jury. On appeal, the defendants argued that this was an absurd result: "because case law has declared damages for aggravating circumstances to be the functional equivalent of punitive damages, the term 'punitive damages' in section 510.265 must be construed to include damages for aggravating circumstances within its scope." *Mansfield v. Horner*, 443 S.W.3d 627, 660-61 (Mo. Ct. App. 2014).

The Western District disagreed and upheld the trial court's ruling. In doing so, the Western District conceded that Missouri courts have held that "[A]ggravating circumstance damages in wrongful death cases are the equivalent of punitive damages." 925 S.W.2d at 849 (citing *Bennett v. Owens–Corning Fiberglas Corp.*, 896 S.W.2d 464, 466 (Mo. banc 1995)). The court nonetheless held that these cases were insufficient to "support the broad conclusion that our courts have defined 'punitive damages' to include 'aggravating circumstance damages' as a matter of law. *Mansfield v. Horner*, 443 S.W.3d 627, 661 (Mo. Ct. App. 2014). Likewise, in this case, the cases cited by Relators are insufficient to support the broad conclusion that the courts must define "commenced

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within the time prescribed by this section" to mean "commenced within the original statute of limitations," as a matter of law.

The court in *Mansfield* explained that it was not an absurd result to have a cap on punitive damages in non-death cases while at the same time permitting unlimited damages in cases involving a wrongful death:

> The Wrongful Death Act has three objectives: to provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay for the consequences of their actions, and generally to deter harmful conduct which might lead to death. The last objective is the focus of section 510.090's allowance for aggravating circumstance damages: to deter harmful conduct which might lead to death. It is logical and sound that the legislature viewed conduct leading to death as worthy of more serious consequence than other conduct. If section 510.265 is construed to apply to damages for aggravating circumstances without a plain and clear legislative directive to do so, we will be tempering the means by which an objective of section 510.090 is met.

Mansfield v. Horner, 443 S.W.3d 627, 661 (Mo. App. W.D. 2014)

Likewise, in this case it is not an absurd or illogical result to have a cap on the number of times a plaintiff can use the savings statute in non-death cases while at the same time permitting unlimited uses in cases involving a wrongful death. In fact, it is wholly consistent with the legislature's strong desire to protect and preserve human life and the three purposes behind the wrongful death act. Any argument that the result requested by Plaintiffs is absurd or illogical is simply not true. There is nothing absurd or

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illogical about the desire to have cases involving the loss of a human life determined on the merits.

B. *Hebertson v. Bank One, Utah, N.A.*

Although no Missouri court has analyzed the savings provision of Section 537.100, *Hebertson v. Bank One, Utah, N.A.*, 995 P.2d 7 (Ut. Ct. App. 1998) is on-point and instructive. In *Hebertson*, the plaintiff was injured in a fall on December 31, 1998. She filed suit a month before the statute of limitations ran. Her suit was dismissed without prejudice and, relying on the savings statute, she filed a second complaint. After her second complaint was dismissed without prejudice, she initially filed a third complaint, again relying on the savings statute. She decided, however, to appeal the dismissal of her second complaint and dismissed her third complaint without serving it. After the court of appeals upheld the dismissal of her second complaint, she filed a fourth complaint, nearly ten years after the fall occurred.

Defendants moved to dismiss the fourth complaint on the grounds that "the savings statute did not apply beyond a single refiling and the action was thereby barred by the statute of limitations." *Hebertson,* 995 P.2d at 9. The court of appeals recognized that although it had suggested in the past that the savings statute could not be used more than once, it had never squarely addressed the issue and therefore: "[T]his case squarely presents us for the first time with the issue of whether the savings statute permits a plaintiff to file more than one new action after a dismissal not on the merits." *Id.*

The court began its inquiry by first setting forth the fundamentals of statutory interpretation, which are the same as Missouri's: "The best evidence of the true intent and

purpose of the Legislature in enacting an Act is the plain language of the Act . . . where the statutory language is plain and unambiguous, the court will not look beyond it to divine legislative intent". *Hebertson,* at 10. The court then recited the Utah savings statute in full:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Utah Code Ann. § 78–12–40 (1996).

Just as this Court must do here, the court in *Hebertson* proceeded to analyze the plain language of the statute. First, the court recognized that by using the word "if," the statute contemplates that the occurrence of certain conditions will invoke the application of the statute. That is, if these conditions are met, a plaintiff "may commence a new action within one year." The three conditions are as follows: "(1) 'any action is commenced within due time and a judgment thereon for the plaintiff is reversed;' or (2) 'the plaintiff fails in such action [—i.e., any action commenced within due time—] or upon a cause of action otherwise than upon the merits;' and (3) the applicable limitations period has expired." *Id.* at 10. Because the first two conditions are in the disjunctive, a plaintiff needs to only satisfy one of the first two conditions and also the third. The court held that the third is easily satisfied and the first condition does not apply. The question,

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therefore, was whether or not the second condition applied. Because the second action did not fail on the merits, the only question that remained was whether or not the action was commenced "within due time."

Relying on both Webster's Dictionary and Black's Law Dictionary, the court held that "an 'action commenced within due time' refers to an action filed inside the period of time authorized by law." *Id.* The court rejected defendant's narrow interpretation of this requirement as "an action commenced within the time allowed by the statute of limitations." *Id.* at 10-11. The court held that such a narrow view "overlooks that the savings statute itself establishes a time frame within which to file an action, indeed, an action that would be untimely under the statute of limitations." *Id.* at 11. Under the plain language of the statute, therefore, the plaintiff was not limited to only one use of the savings statute:

> The plain language of section 78–12–40 is simply no bar to serial recourse to the savings statute. Therefore, Hebertson's fourth action was timely because it was brought within one year of the failure, not on the merits, of her second action, which had been filed "within due time" under the savings statute. Simply stated, if the Legislature meant to limit the savings statute to a single use per cause of action, it would have avoided general phraseology like "within due time" and stated its intention clearly, a simple thing to do. See, e.g., Ga.Code Ann. § 9–2–61 (Supp.1998) (providing that "this privilege of renewal shall be exercised only once"); Tenn.Code Ann. § 28–1–105 (Supp.1998) (authorizing refiling only for those actions that failed other than

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on the merits and were "commenced within the time limited by a rule or statute of limitation").

Hebertson, 995 P.2d at 11.

C. The Reasoning in *Hebertson* Applies to this Case

The logic used by the court in *Hebertson* is on-point and dispositive of the issue in this case. Like *Hebertson*, this case presents the first time a court has squarely addressed the issue of whether the savings provision prescribed by section 537.100 bars a plaintiff from relying on it more than once. Like the statute at issue in *Hebertson*, section 537.100 sets forth a list of conditions and "if" those conditions are met, the plaintiff "may commence a new action (from time to time) within one year." *Hebertson* at 10. Specifically, the conditions of section 537.100 are: "if [1] any such action shall have been commenced within the time prescribed in this section, and [2] the plaintiff therein take or suffer a nonsuit, or [3] after a verdict for him the judgment be arrested, or [4] after a judgment for him the same be reversed on appeal or error." § 537.100, R.S.Mo. Here, like *Hebertson,* the second, third and fourth conditions are in the disjunctive, so the Plaintiffs must only show that the first condition and one of the next three have been met. Like *Hebertson*, one of the disjunctive conditions has been met: the Plaintiffs have suffered a nonsuit. Thus, like *Hebertson*, the only question is whether or not the Plaintiffs' second complaint was filed timely. In *Hebertson,* the language at issue was "within due time," which the court defined to be the equivalent of "filed inside the period of time authorized by law." The language in section 537.100 is very similar to this as it provides that the case must be filed "within the time prescribed in this section."

Like *Hebertson,* this court must reject Relators' narrow reading of this phrase. "Within the time prescribed in this section" does not mean the same as "within the time prescribed in only the first eighteen words of this section." It does not mean the same as "within the time prescribed above." It does not mean "within three years." These narrow readings offered by Relators suffer from the same fatal logic exposed by the court in *Hebertson:* They overlook the fact that the section itself prescribes a time in which to file after a nonsuit. *Hebertson* at 11 (Defendant's narrow interpretation "overlooks that the savings statute itself establishes a time frame within which to file an action"). Like the statute at issue in *Hebertson,* section 537.100 contains no limitations or instructions that "this privilege of renewal shall be exercised only once," or that the suit must be commenced "within the statute of limitations." *Id.* Put simply, "the terms of the savings statute do not include a 'once per customer' limitation." *Id.* at 12. The only requirement after a non-suit is suffered is that the action was filed within the time prescribed by the statute. The statute prescribes that an action is timely if brought within a year after nonsuit. The statute, as written, provides that Plaintiffs may rely on it to bring this action.

D. Footnote No. 5 in the *Hebertson* Opinion Does Not Nullify Its Logic or Require A Different Outcome In This Case

Relators focus on a footnote in *Hebertson* that cites *Foster v. Pettijohn*, 213 S.W.2d 487 (Mo. 1948) as an example of a case that disagrees with the holding in *Hebertson*. This footnote does not require this Court to reject the sound logic of *Hebertson* and reach a different result in this case. First, the court in *Foster* did not address section 537.100 like this case but instead was limited to section 516.230. As

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discussed above, this Court has ruled that section 537.100 must be analyzed independently and apart from the statutes found in Chapter 516. Section 537.100 contains language distinct from that in 516.230 and therefore it must be interpreted on its own without being bound by *Foster's* interpretation of a unique and separate statute. In fact, the Court in *Hebertson* even recognized that because *Foster* was interpreting a statute "with language distinct from that in our savings statute," its interpretation was "unpersuasive." *Hebertson,* FN 5. Likewise, this Court is interpreting a statute with language distinct from the one at issue in *Foster* and therefore cannot apply *Foster* simply by default.

Furthermore, the court in *Hebertson* recognized that decisions such as *Foster* "turn more on policy considerations than plain meaning. In Utah, courts are not so quick to veer from a statute's plain meaning and undertake a foray into the realm of policy." *Id.*[1] This same reasoning applies here to explain why any reliance on cases interpreting Chapter 516 will be misplaced in this case. As discussed above, this Court held in *Boland* that courts are to take extra caution in avoiding policy considerations when interpreting the plain-language of statutorily created actions such as wrongful death: "It is further noted that, although the result the plaintiffs argue for is appealing, the method

[1] As Relators admit, the holding in *Hebertson* was abrogated by the Utah legislature when it amended the statute to provide that "a new action may be commenced under this section ***only once.***" (emphasis Relators'). Likewise, if an "only once" exception is to be written into section 537.100, such is a task for the General Assembly, not this Court.

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of using a common law equitable maxim to work around the dictates section 537.100 is inherently problematic. Equity should not be deployed in a manner that countermands the clear intent and language of the legislature, ***particularly in regard to a statutorily created cause of action***." *Boland,* at 712 (emphasis added). This Court, like the court in *Hebertson,* cannot veer from the plain language of section 537.100 by creating a "one-time" limitation that is not there. The plain-language of the statute is clear and unambiguous: Anytime a case that has been timely filed under section 537.100 results in a nonsuit, the plaintiff may re-file her case within a year of non-suit. A plaintiff is free to do so "from time to time" without any further limitations.

E. *Hebertson* Addresses the Same Policy Concerns Defendants Raise in this Case

The court in *Hebertson* dismissed the same policy concerns the Defendants raise in this action:

> We reject defendants' contention that our decision will make the course of lawsuits uncertain or open the floodgates on the stream of litigation. Plaintiffs have little natural interest in filing multiple unproductive actions or paying multiple filing fees. Moreover, the savings statute is limited to actions that are not resolved on the merits and to circumstances where an action was originally brought within the limitations period. Further, multiple re-filings in cases such as these are rarely needed because generally plaintiffs will be given the opportunity to simply amend their complaints to remedy these kinds of deficiencies.

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Hebertson at 12.

Even if this court were permitted to consider policy concerns when reading the plain-language of section 537.100, there is nothing compellingly unjust about promoting the disposal of wrongful death cases on their merits. Relators concerns to the contrary are not grounds for overriding the plain-language of the statute.

V. CASES INTERPRETING SECTION 516.230 TO LIMIT A PLAINTIFF TO A ONE-TIME USE ARE NOT CONTROLLING

A. These Cases Rely on Policy as Opposed to the Plain Language of the Statute, Something That Cannot be Done when Interpreting Section 537.100

In interpreting section 516.230 to bar a plaintiff from using the savings statute more than once, this Court relied more strongly on policy than the plain language of the statute. For example, in the case cited by *Hebertson* as reaching a different result based on policy, *Foster v Pettijohn,* this Court relied on the Supreme Court of Oklahoma's decision in *United States Fire Ins. Co. v Swyden*, 53 P.2d 284 (Ok. 1936) to conclude that a plaintiff cannot use the savings statute set forth in section 516.230 more than once. *Foster v. Pettijohn*, 213 S.W.2d 487 (Mo. 1948). Later, this Court reaffirmed that its opinion in *Foster* was heavily influenced by *Swyden* when it upheld *Foster* while specifically praising and "commend[ing] the carefully researched opinion in *United States Fire Ins. Co. v Swyden.*" *Cady v. Harlan*, 442 S.W.2d 517, 520 (Mo. 1969).

As well-researched and as influential to this Court's interpretation of Chapter 516 the opinion in *Swyden* may be, it fails to undertake any analysis of the plain-language of

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the Oklahoma savings statute at issue. Instead, it relies entirely on the policy and purpose behind similar saving statutes across the nation: "The novelty of this question has prompted us to search the digests entirely back to the beginning of reported cases in this country." *Swyden,* 53 P.2d at 286. Right from the beginning, therefore, the holding in *Swyden* takes a drastic departure from what this Court held in *Boland* must be done when interpreting section 537.100: Look to the plain language of the statute above any and all policy arguments.

After a lengthy discussion of other cases interpreting different savings statutes than the one before it, and without a single attempt to analyze or even review the plain-language of the Oklahoma statute at issue, the court in *Swyden* reaches its conclusion based entirely on its view of the policy behind savings statutes in general:

> This is the fourth action on this matter. The first three were voluntarily dismissed by plaintiff, one of them after all of his evidence was in. The third action was both filed and dismissed after the original period of limitation. It was said in the authorities above cited that the purpose of such statutes is not to permit or encourage vexatious or harassing continuation or renewal of litigation. This case is squarely within the rule and the rule is sufficiently established.

U.S. Fire Ins. Co. v. Swyden, 1935 OK 1191, 175 Okla. 475, 53 P.2d 284, 288.

Like *Swyden*, this Court's opinions in *Foster* and *Harlen* rely on the policy behind savings statutes in general as opposed to interpreting the plain language of the statute itself. The policy behind savings statutes, however, is not the issue in this case. This

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Court cannot roam beyond the plain-language of section 537.100 and write an "only once" limitation into the statute based on the perceived policy and purpose of savings statutes in general. On this, *Boland* is on-point and dispositive. No policy argument, no matter how compelling and no matter how applicable to Chapter 516, can justify roaming beyond the plain-language of section 537.100. The cases relied upon by Relators that interpret section 516.230 and praise the policy analysis found in *Swyden* cannot be followed here. The four corners of section 537.100 are clear, unambiguous, and provide that this action has been timely filed. It has been commenced within one year of Plaintiffs' suffering a non-suit in an action that was filed within the time prescribed by the statute. The preliminary Writ of Prohibition must not be made permanent.

B. The Language of Section 516.230 Differs From the Language of Section 537.100 in Two Meaningful Ways

Relators insist that the language found in Chapter 516 is "essentially" or "virtually" identical to section 537.100. In truth, the language between the two statutes differs in two meaningful and significant ways. First, section 516.230 begins by declaring that: "If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370 . . ." Thus, it is clear that this section applies specially only to actions that have already been commenced and is not itself independently setting forth a time to commence a suit. In contrast, section 537.100 begins by stating that a wrongful death action "shall be commenced within three years after the cause of action shall accrue" and then introduces several exceptions, each one beginning with the caveat that the general rule is inapplicable "provided that." The

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savings clause at issue is one of these provisions and has therefore been written into the general rule itself. Unlike section 516.230, therefore, the "savings clause" within 537.100 is not a separate and independent tolling of the statute of limitations of an already commenced action, but it is an explicitly carved-out exception found within the general rule itself.

This distinction between the two is confirmed by the other meaningful difference in statutory language – the intentional exclusion of the comma between "time to time" and "within one year." A comma is defined in Meriam Webster as: "a punctuation mark, used especially as a mark of separation within the sentence." In section 516.230, the legislature used a comma to keep "time to time" and "within one year" separate, conveying that an action can be filed from time to time, but only with the separate requirement that it must be filed within one year of the non-suit of an original action, timely commenced within the time prescribed elsewhere. Section 537.100, however, eliminates this comma and joins "within one year" and "time to time" confirming that these two phrases are part of the same exception carved into the rule itself.

Therefore, this is not a distinction without a difference but confirms that the plain-language of section 537.100 adheres to the strong policy behind the Wrongful Death Act itself, as described above. Relators are unable to explain why, if the effect of the statues is meant to be identical, the legislature would choose to not use identical language. Rather than declaring that the saving statute applies if and only "if any action shall have been commenced," it instead flips this relationship on its head and declares that the savings statute always applies because it is written as a direct exception to the general

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three year limitation. The "savings statute" found in 537.100 is therefore not a separate statute as 516.230 but is instead a permanent and ongoing provision within the time to file suit.

Relators ignore this difference in language, cannot account for it, and therefore ask this Court to overlook it along with them. This Court is not bound by the holdings interpreting the different language of section 516.230. It must perform an independent interpretation of 537.100, beginning with the plain language of the statue itself. There is no "one-time" use written into the statute. Plaintiffs' case was timely filed under the clear language of 537.100 and the Preliminary Writ should not be made permanent.

VI. TO THE EXTENT SECTION 537.100 PREVENTS THESE PLAINTIFFS FROM BRINGING THIS SUIT, IT VIOLATES THE MISSOURI CONSTITUTION

If this Court determines that the statute as written restricts plaintiffs to only one use, then it is unconstitutional as applied in this case. In *Lang,* this Court declined to address these Plaintiffs' constitutional challenges to section 538.225. Instead, it held that because Plaintiffs could still attempt to re-file in reliance on section 537.100, any constitutional challenges were not ripe: "This Court will avoid declaring a constitutional question if the case can be resolved fully without reaching it . . . Plaintiffs have not challenged the constitutional validity of section 537.100 in this appeal, nor do they argue that the statute's savings provisions should be interpreted to permit them to refile their claims. In short, section 538.225 is not the root of Plaintiffs' quandary." *Lang* at 751-752. In other words, if section 537.100 is now interpreted to prevent these Plaintiffs from

pursuing this claim, then it is now the root of their quandary and the constitutional challenges originally brought against 538.225 apply to 537.100. Plaintiff now reasserts those constitutional challenges.

A. If Applied to Prohibit Plaintiffs' Claims in this Case, Section 537.100 Violates Article I, Section 14 of the Missouri Constitution in that it Arbitrarily or Unreasonably Bars Plaintiffs From Pursuing Their Recognized Claims

Article I, Section 14 of the Missouri Constitution guarantees Plaintiffs the right to pursue recognized claims in the courts of Missouri. Both the common law and the statutes of Missouri recognize Plaintiffs' claims for wrongful death based on Relators' negligent health care. If applied to dismiss this action, § 537.100, R.S.Mo. violates this "open courts" provision of the Missouri Constitution by arbitrarily and unreasonably denying Plaintiffs their right to pursue their case in this Court on grounds other than the merits. This statute, on its own or taken together with section 538.225, was not intended to, and cannot be permitted to prevent individuals from pursuing non-frivolous and timely filed claims against health care providers. It does not serve any legitimate public purpose to arbitrarily prohibit individuals from pursuing non-frivolous claims. Because section 538.225 prohibited the trial court from exercising any discretion and instead mandated that Plaintiff's second suit be dismissed without prejudice, section 537.100 cannot now arbitrarily and unreasonably prohibit Plaintiffs from accessing the courts without violating of Article I, Section 14 of the Missouri Constitution. If applied to

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dismiss this action, section 537.100, whether on its own or together with § 538.225, violates Article I, section 14 of the Missouri Constitution.

This Court previously held that a prior version of section 538.225 was constitutional because it served only as a mechanism to identify and dismiss at an early stage of litigation frivolous medical malpractice cases. *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. 1991). This earlier version of the statute provided that if a plaintiff had failed to file an affidavit as required, 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 Plaintiffs', 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 to exercise 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 trial court specifically held that, based on an exhaustive review of the evidence and facts of the case, Plaintiffs' case presents genuine questions of fact and should be decided by a jury. A92. If section 537.100 prevents these Plaintiffs from re-filing this case so that it can be decided on the merits, it is converting a previously mandated (though arbitrary and unreasonable) dismissal without prejudice into an arbitrary and unreasonable denial of access to the courts.

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i. The Open Courts Provision of Article I, Section 14 of the Missouri Constitution Prohibits Any Law That Arbitrarily or Unreasonably Bars Plaintiffs 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*, the 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, the 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.'" *Id* (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

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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*, 459 S.W.3d 901, 909-10 (Mo. 2015) ("Open courts" provision prevents artificial barriers from preventing a plaintiff from pursuing "in the courts the causes of action the substantive law recognizes.")

ii. Plaintiffs Enjoy a Recognized Cause of Action

It is undisputed that the first element of the test is met in this case: Plaintiffs 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. The wrongful death statutes, specifically section 537.080 permits plaintiffs to pursue this cause of action based on wrongful death caused by medical negligence.

The Plaintiffs' claims are not only recognized and endorsed by the laws of Missouri in general, but the Sixteenth Circuit previously undertook an exhaustive review of the facts and evidence supporting their claims and determined that the Plaintiffs had a submissible case. Prior to being forced to dismiss their original case without prejudice due to a witness being unavailable for trial, Plaintiffs survived summary judgment. On February 27, 2013, the Honorable Jack R. Grate issued an order denying summary judgment in the original case, Case No. 1016-CV-3872. The court determined after an "exhaustive review of the court file and all arguments" that "there are still several issues

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of fact" and "the jury must sort this out." A92. The court concluded that the Relators failed to show that they have "a right to judgment [as] a matter of law." *Id.* Plaintiffs have easily and convincingly met the first requirement that they have a recognized cause of action.

iii. Section 537.100 Would Restrict Plaintiffs' Cause of Action if Applied to Dismiss This Case

It being unmistakable that Plaintiffs 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 a statute. Again, the answer is clear and not in dispute. If § 537.100 is applied to dismiss Plaintiffs case and forever prevent re-filing, it would clearly be restricting Plaintiffs' cause of action. It would convert the previous dismissal denominated "without prejudice," into a permanent bar to pursuing their cause of action.

iv. The Restriction Would Be Arbitrary and Unreasonable

If section 537.100 is applied to restrict Plaintiffs from pursuing their recognized cause of action in court, it will be doing so in an arbitrary or unreasonable manner. Based on the circumstances of this case and because of the mandatory rather than discretionary sanction of dismissal Plaintiffs previously suffered pursuant to section 538.225, any permanent barrier to re-filing this suit is an arbitrary and unreasonable barrier to Plaintiffs' 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

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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 Plaintiffs from pursuing their claims in court. If section 537.100 is used to convert a mandatory dismissal without prejudice into a permanent bar to the courts, it will unconstitutionally stretch the legitimate purposes of section 538.225.

In *Mahoney*, the Court identified the purposes of Chapter 538 as both addressing the cost of and ensuring the integrity of the healthcare system. *Mahoney v. Doerhoff Surgical Servs., Inc.,* 807 S.W.2d 503, 509 (Mo. 1991). The Court determined that section 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, the Court determined that the prior version of § 538.225 did not violate the "open courts" provision. This was because the law did not apply arbitrarily to dismiss 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

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> 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 for section 537.100 to prohibit a plaintiff from timely refiling her

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case. Trial courts can no longer ensure that they are not arbitrarily or unreasonably barring valid, recognized claims. This is a significant and unconstitutional change to the version that existed in *Mahoney*.

As the 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.* 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

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mandating the sanction of dismissal. Because of these failures, if section 537.100 is used to forever bar a plaintiff from re-filing a claim that has been dismissed without prejudice pursuant to the current version of section 538.225, it will create a violation of the "open courts" provision of the Missouri Constitution.

This Court's holding in *Kilmer v. Mun* confirms that if section 537.100 is used to forever bar a plaintiff suffering a dismissal without prejudice under the current version of section 538.225, it will be straying beyond the boundaries of the Missouri Constitution. In *Kilmer*, the 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, the court held that the statute at issue violated the "open courts" provision of the Missouri Constitution because it could both arbitrarily and unreasonably deny a party the right to pursue these claims. Specifically, the 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*, Relators are asking this Court to apply 537.100 to bar Plaintiffs from the courts based on factors unrelated to the merits. Due to section 538.225's now mandatory nature, the previous dismissal without prejudice was wholly immune to review. The trial court cannot now convert that previous, arbitrary and mandatory dismissal without prejudice into a permanent bar to the courts without violating Article I, Section 14 of the Missouri Constitution. Plaintiffs previously filed affidavits in the trial court and have re-filed them with this case. Plaintiffs have also had

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their claims reviewed by the Sixteenth Circuit and found that they are not frivolous and instead worthy of a jury trial. Nonetheless, because of the arbitrary and unreasonable mandate of section 538.225, the same court had no choice but to enter an order dismissing Plaintiffs' claims without prejudice.

This dismissal cannot be used along with section 537.100 to forever prohibit Plaintiffs from pursuing their claims. Again, the purpose of section 538.225 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 requires a dismissal without prejudice. By applying section 537.100 as the Relators ask, the trial court would have forever barred Plaintiffs from pursuing legitimate claims based on factors unrelated from the merits and immune from review. Under *Kilmer* this amounts to an arbitrary or unreasonable barrier to the courts and violates Article I, Section 14 of the Missouri Constitution.

v. If Respondent Granted Relators' Motion to Dismiss, It Would Have Impermissibly Placed Plaintiffs' 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). Such a requirement impermissibly "impose[d]" a separate, non-judicial "procedure as a

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precondition to access to the courts." *Id.* The same would be 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. If section 537.100 is then used to bar re-riling, the Plaintiffs' right to access the courts has been placed in the hands of a third party.

This is particularly troubling in this case because Plaintiffs can make a submissible case without the need to rely on expert testimony. In *Mahoney*, there was no dispute that the type of medical negligence at issue required an expert opinion to establish. "Nor is there dispute that the allegations of negligence against the several health care provider defendants are of the kind that require the aid of expert medical testimony to prove the acceptable standard of professional care. In the absence of such expert opinion, the issue of medical malpractice from the breach of that standard of care simply cannot be made out. It will not go to the jury." *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 510 (Mo. 1991). The requirement that a healthcare affidavit be filed, therefore, did not place the plaintiffs' access to courts in the hands of a third party. Without an expert willing to testify to negligence, the laws of evidence prevented them from obtaining a jury trial.

This case, however, falls within the special exception carved out by the Supreme Court of Missouri allowing cases with obvious negligence to be submitted to the jury without expert medical testimony. *Hasemeier v. Smith*, 361 S.W.2d 697, 700 (Mo.

1962). In *Hasemeier,* the Supreme Court recognized that when patients receive a particularly unusual injury during the course of medical treatment, a jury may find negligence without expert testimony. Examples the court gave included a patient who was burned while in surgery on a part of the body not within the area of or affected by the surgery; a patient who suffered a broken back and shoulder during delivery; and a patient who suffered an eye injury during an appendectomy. *Id.* Here, Dr. Goldsworthy killed Mr. Lang by breaking his neck. The negligence is obvious and a layperson can find for the Plaintiffs without the need for medical expert testimony. As such, section 538.225 improperly required Plaintiffs to ask a third-party for permission to pursue their claims or risk dismissal. If this Court turns that dismissal without prejudice into a permanent bar pursuant to section 537.100, as Defendants request, it will be violating the Missouri Constitution.

Again, the decision in *Kilmer* applies here. There, the Supreme 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

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obtained a conviction of their alleged wrongdoer for … selling intoxicating liquor to an obviously intoxicated person." *Id.*

The 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 will be true here if this Court grants Defendants' Motion to Dismiss. In direct violation of the "open courts" guarantee, Plaintiffs' access to court will be arbitrarily preconditioned on their failure to file an affidavit stating they obtained an expert to opine on their claims when such an opinion is not needed to pursue them to trial.

While the pre-2005 version of § 538.225 avoided the potential outcome Defendants seek by granting trial courts discretion to absolve plaintiffs of this requirement when an expert opinion is not needed, the current version does not. Instead, it mandates that the court dismiss the petition when the plaintiff does not comply with this technicality. If such plaintiffs are then prohibited from re-filing pursuant to 537.100, than a third-party health care provider, rather than the legislature or the judiciary, essentially "decides whether [a plaintiff has] a cause of action" for medical negligence.

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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, applying 537.100 to forever bar Plaintiffs claims will violate the "open courts" guarantee of Mo. Const. art. I, § 14. It will "impose" a separate, non-judicial "procedure as a precondition to access to the courts." *Cardinal Glennon*, 538 S.W.2d at 110. It will "impose a procedural ba[r] to access the courts" and thus will be "unconstitutional," especially as it makes Plaintiffs' 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.

Because the medical affidavit statute now mandates dismissal, preventing re-filing in this case in reliance on 537.100 will overstep constitutional bounds and arbitrarily and unreasonably prevent Plaintiffs 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 Plaintiffs claim does not have merit, section 538.225 instead forced the trial court to dismiss a valid and recognized claim. Plaintiffs 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 Defendants. Nonetheless, if this Court interprets section 537.100 as Defendants ask and dismisses this case, they will find themselves forever

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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. Such a result is arbitrary and unreasonable and would violate Article I, Section 14 of the Missouri Constitution. Plaintiffs respectfully ask that this Court to deny Defendants' Motion to Dismiss.

B. If Applied to Prohibit Plaintiffs Claims in this Case, Section 537.100 Violates Article I, Section 22 of the Missouri Constitution in that it Arbitrarily or Unreasonably Denies Plaintiffs their Right to Trial

The Missouri Constitution guarantees "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate . . ." Mo. Const. art. I, § 22(a). This provision "is one of the fundamental guarantees of the Missouri Constitution." *Watts v. Lester E. Cox Med. Centers,* 376 S.W.3d 633, 637 (Mo. 2012). Its "plain language requires analysis of two propositions to determine if [the statute at issue] violates the state constitutional right to trial by jury." *Id*. The first "requires a determination of whether [the plaintiffs' claim] 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. *Id.*

i. Plaintiffs Enjoy a Right to Trial by Jury

Wrongful death cases enjoy a right to trial by jury. In *Briggs v. St. Louis & S.F. Ry. Co.*, the Supreme Court of Missouri 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. The 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, the Supreme Court of Missouri 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, the Supreme Court of Missouri 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.

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To determine if the holding in *Briggs* was still sound and therefore dispositive of the case, the Supreme 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.* The 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, the Supreme 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 Plaintiffs in this case the right to enjoy a trial by jury because they have brought a civil claim for damages. Any suggestions to the contrary are a misstatement of Missouri law.

ii. If Section 537.100 is used to dismiss this Case, Plaintiffs' Right to Trial by Jury Will be Unconstitutionally Denied

The second inquiry is whether the right "remains inviolate" if this Court were to grant Defendants Motion to Dismiss. Plainly, it would not. 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 Defendants are asking this Court to do just that. Absent some other procedure existing at common law – such as the election of a bench trial, summary judgment, a directed verdict, an post-trial

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order, etc. – the merits of all other personal injury plaintiffs' claims are determined by a jury alone. Conversely, under § 538.225, medical negligence plaintiffs must obtain a health care professional's pre-opinion as to the merits of their claims or risk a dismissal without prejudice. Defendants now ask this Court to use Section 537.100 to turn that dismissal into a permanent bar to trial. Such an application of the statute would violate Section I, Article 22 of the Missouri Constitution and Defendants motion must be denied.

C. If Applied to Prohibit Plaintiffs Claims in this Case, Section 537.100 Violates Article III, Section 40 of the Missouri Constitution in that it Separates Plaintiffs Injured by Medical Negligence from Plaintiffs Injured by Other Professional Negligence

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 . . .;
>
> . . . . .
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> (6) for limitation of civil actions;
>
> . . . . .
>
> (28) granting to any corporation, association or individual any special or exclusive right, privilege, or immunity . . .;

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. . . . .

> (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 v. Site*, 329 S.W.3d 691, 693 (Mo. 2010).

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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 are 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.3d 861, at 865-869 (Ok. 2006). 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.

D. The Missouri Constitution Prevents Section 537.100 From Barring Plaintiffs' Claims

The circumstances and history of this case demonstrate that applying 537.100 to forever bar Plaintiffs' claims on the grounds that they were previously dismissed without prejudice pursuant to § 538.225, would be 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.

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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. The Supreme Court of Missouri has acknowledged that the current version presents "real and substantial" constitutional questions. In this case, Plaintiffs filed the required affidavits with this Court and this 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 along with section 537.100 to prevent Plaintiffs from pursuing legitimate and recognized claims in the courts of Missouri.

CONCLUSION

Defendants ask this Court to forever bar these Plaintiffs from pursuing their claims in violation of the plain language of section 537.100, the promotion of justice, the policy of Missouri, and the Missouri Constitution. In support of this draconian request, Defendants cannot offer even a single holding that has applied section 537.100 in the way Defendants ask this Court to. There are no such cases. This is entirely a question of first impression. In fact, the Supreme Court of Missouri unambiguously held that: "It is not

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clear whether a savings provision like the one in section 537.100 may be used more than once . . . This Court does not address whether a savings statute could be used a second time by Plaintiffs in this action."

Because this is an issue of first impression in Missouri, the proper rules of statutory interpretation must be used. This Court cannot, as Defendants demand, simply apply the holdings in Missouri cases analyzing section 516.230 by default. Instead, this Court must follow the plain language of section 537.100 unless it is ambiguous or leads to an absurd result. It is not ambiguous. Nothing in the statute suggests Plaintiffs should be limited to a single use of the savings provision. Instead, it allows a plaintiff to re-file after a nonsuit from time to time so long as the prior case was brought within the time prescribed by the statute. Because the statute prescribes that a case filed within one year from a non-suit is timely, the statute contains no limitations on the amount of times a plaintiff can utilize the savings provision. This does not lead to an absurd result. Permitting a case involving a wrongful death to be tried on the merits promotes both the purposes of the wrongful death statute and the overall pursuit of justice. It is not absurd to offer a plaintiff pursuing a wrongful death claim more opportunity to have her case determined on the merits than in a non-death case. The policy of Missouri favors protecting life.

Defendants cannot escape the plain language of section 537.100. This Court, however, must follow the plain language of the statute over the cases cited by Defendants. This is an issue of first impression in Missouri, and it must be decided by looking at the statute. Not by cases interpreting other statutes or by policy concerns

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raised by Defendants. The statute unambiguously allows Plaintiffs to proceed with this case. This Court should not issue a permanent Writ of Prohibition.

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 17,356 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2016, the foregoing was electronically filed using the Missouri e-Filing system, which will send notice of electronic filing to all registered attorneys of record.

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