**IN THE SUPREME COURT OF MISSOURI**
**Case No. SC96371**

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**MARILYN HINK**

**Plaintiff/Appellant**

**vs.**

**LORING HELFRICH, M.D.**

**Defendant/Respondent**

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**Appeal from the Circuit Court of Scott County**
**Thirty-Third Judicial Circuit, Division 3**
**State of Missouri**

**Cause No. 16SO-CV01441**

**Honorable David A. Dolan**

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# BRIEF OF RESPONDENT LORING HELFRICH, M.D.

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## PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

On May 5, 2015 Plaintiff/Appellant Marilyn Hink ("Appellant") filed her original Petition (Cause No. 15S0-CV00656) against Defendants Loring Helfrich, M.D. ("Respondent" or "Dr. Helfrich"), Ly Phan, M.D., Missouri Delta Physician Services, and Missouri Delta Medical Center. (L.F. 6). Cause No. 15S0-CV00656 was dismissed without prejudice on September 24, 2015. (L.F. 6).

Appellant refiled her Petition on September 21, 2016 (Cause No. 16SO-CV01441) and requested a summons only as to Dr. Helfrich. (L.F. 1). Appellant alleged that Dr. Helfrich negligently injured her right hepatic duct during a cholecystectomy on May 7, 2013 and, as a result, bile leaked into Appellant's abdomen requiring additional medical treatment. (L.F. 5-7).

In her refiled lawsuit, Appellant filed a motion for an extension of time to file her Affidavit of Merit under Mo. Rev. Stat. § 538.225.5. (L.F. 20-21). By Court Order, Appellant had until March 20, 2017 to file an Affidavit of Merit. (L.F. 22). On March 21, 2017, citing Appellant's failure to file an Affidavit of Merit, Dr. Helfrich filed a Motion to Dismiss. (L.F. 23-25). Appellant filed an opposition to Dr. Helfrich's Motion to Dismiss which solely challenged the constitutionality of Mo. Rev. Stat. § 538.225. (L.F. 26-30). On April 13, 2017, the Motion was argued and Dr. Helfrich's Motion to Dismiss was granted. (L.F. 2). On April 17, 2017, the Court dismissed Appellant's Petition in its entirety. (L.F. 31).

On April 26, 2017, Appellant filled her notice of appeal. (L.F. 32-33).

## ARGUMENT OF RESPONDENT

### I. THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO FILE A HEALTH CARE AFFIDAVIT BECAUSE MO. REV. STAT. § 538.225 IS CONSTITUTIONAL AND APPELLANT HAS FAILED TO ESTABLISH AN INABILITY TO COMPLY WITH ITS REQUIREMENTS.

#### A. Standard of Review

This Court, pursuant to Article V, § 3, has exclusive appellate jurisdiction over challenges to the validity of a state statute. "Constitutional challenges to a statute are reviewed *de novo*." Rentschler v. Nixon, 311 S.W.3d 783, 786 (Mo. banc 2010). A statute is presumed to be constitutional and will not be found unconstitutional unless it clearly and undoubtedly contravenes the constitution. Legends Bank v. State, 361 S.W.3d 383, 385 (Mo. banc 2012). A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. Id. In the assessment and adjudication of a constitutional challenge to a statute, a court considers and interprets the purposes intended by the enactment. Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 507 (Mo. banc 1991), *citing* Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 61 (Mo. banc 1989). Lastly, when the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional. Legends Bank, 361 S.W.3d at 385.

### B. The Legislature Enacted the Affidavit Requirement to Protect the Public from the Significant Costs of Frivolous Medical Malpractice Lawsuits and Its Judgment Deserves Deference.

The prior version of § 538.225, held constitutional in Mahoney v. Doerhoff Surgical Services, Inc., made dismissal by the trial court for failure to file an affidavit discretionary. 807 S.W.2d 503 (Mo. banc1991). The language of the original statute, as enacted in 1986, provided that the trial court "may" dismiss a medical malpractice action for non-compliance by the plaintiff. The Mahoney Court specifically held that § 538.225, in its prior form, did not violate state constitutional rights of access to courts, trial by jury, or the principals of separation of powers. Id. In 2005, Mo. Rev. Stat. § 538.225[1] was amended by the legislature. It remains largely the same with the exception that dismissal by the trial court is required, and not permissive, when a plaintiff fails to timely file the required affidavit. Otherwise, as amended, the statute calls for precisely the same consequence for failure to comply – dismissal without prejudice.

The legislative intent in enacting Chapter 538 has been well established through several cases including, and in particular, Mahoney. Chapter 538 was described as "a legislative response to the public concern over the increased cost of health care and the continued integrity of that system of essential services." Mahoney, 807 S.W.2d at 507. Within that context, the effect intended for section 538.225 is to eliminate those medical

[1] Unless otherwise stated, all citations to Mo. Rev. Stat. § 538.225 are to the 2005 amended statute currently in effect.

malpractice cases "that lack even color of merit" at an early stage in the interest of protecting litigants and the public at large from the unnecessary expense of frivolous lawsuits. Id. Mahoney, and other cases cited therein, recognize that "[T]he preservation of the public health is a paramount end of the exercise of the police power of the state." Id. Chapter 538's objective of maintaining the integrity of the state's health care system represents a "legitimate public purpose" the judiciary must account for when evaluating constitutional challenges. Id. (internal citations omitted).

The protection of the public health is of great importance and well within the realm of legislative authority. It is the legislature, and not the Supreme Court, which "determines the wisdom, social desirability or economic policy underlying a statute." Miss Kitty's Saloon, Inc. v. Missouri Dept. of Revenue, 41 S.W.3d 466, 467 (Mo. banc 2001). "[W]hen the legislature has spoken on the subject, the courts must defer to its determinations of public policy." Budding v. SSM Healthcare System, 19 S.W.3d 678, 682 (Mo. banc 2000). The legislature's intent in enacting Chapter 538 is both clear and rational and its judgement deserves deference.

### C. § 538.225 Does Not Violate the Constitutional Right of Access to Courts Under Article I, § 14 as was Previously Held by this Court in Mahoney.

Article I, § 14 of the Missouri Constitution provides "[that] the courts of justice shall be open to every person….and that right and justice shall be administered without sale, denial or delay." Article I, § 14 does not create rights. Rather, it protects the enforcement of rights already acknowledged by law. Harrell v. Total Health Care, Inc., 781 S.W.2d 58,

62 (Mo. banc 1989) (cited in Mahoney, 807 S.W.2d 503 at 510). The "right of access" (to court) simply means the right to pursue in the courts the causes of action the substantive law recognizes. Id.; Ambers-Phillips v. SSM DePaul Health Center, 459 S.W.3d 901, 909 (Mo. banc 2015).

The constitutionality of § 538.225 under Article I, § 14 was already thoroughly examined by this Court in Mahoney v. Doerhoff Surgical Services, Inc. and the statute was upheld. 807 S.W.2d 503 (Mo. 1991). Its current form is only mildly different from the version upheld in Mahoney as it makes dismissal mandatory, as opposed to permissive, when a plaintiff fails to comply. *See* SSM Health Care St. Louis v. Schneider, 229 S.W.3d 279 (Mo. App. 2007); White v. Tariq, 299 S.W.3d 1 (Mo. App. 2009); Austin v. Schiro, 466 S.W.3d 694 (Mo. App. 2015). Regardless of whether the dismissal is mandatory or permissive, the outcome is exactly the same – a dismissal without prejudice in the event of noncompliance. A review of Mahoney reveals that this Court's ruling did not hinge upon the fact that dismissal was optional or permissive as opposed to mandatory.

Missouri substantive law requires that a plaintiff who files a medical malpractice action prove the defendant health care provider deviated from the standard of care and, as a result, plaintiff suffered damages. Brickey v. Concerned Care of Midwest, Inc., 988 S.W.2d 592, 596 (Mo. App. 1999). As recognized in Mahoney, this must generally be proven through the testimony of qualified expert witnesses. 807 S.W.2d at 510. Without expert testimony, the case will not be submitted to a jury or otherwise be allowed to proceed in court. Id. This Court further explained:

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

Id. (internal citations omitted).

The analysis in Mahoney continues to hold true regardless of the 2005 change to § 538.225. A plaintiff pursuing a claim for medical malpractice must present expert testimony to establish the standard of care. McLaughlin v. Griffith, 220 S.W.2d 319, 320 (Mo. App. 2007). Specifically, here, before this case would be taken to trial, and most certainly before being submitted to a jury, Appellant would be required to secure the testimony of a qualified expert witness to establish negligence on the part of Dr. Helfrich. If she fails to do so, she is subject to summary judgment or a directed verdict. The affidavit of merit requirement, just as it did 26 years ago when this Court ruled in Mahoney, does not deny a fundamental right, does not deny free access to the courts, and does not delay the pursuit of the cause in the courts. Rather, it frees the court system from frivolous medical malpractice suits by challenging the legitimacy of plaintiff's case at an earlier time than that which dispositive motions would be filed. At minimum, the affidavit requirement

only effects the timing of the burden plaintiffs carry with the filing of a lawsuit. It is also certainly less burdensome than summary judgment and directed verdict which end a plaintiff's action with prejudice.

Notably, Missouri is not alone in imposing the requirement of an affidavit of merit or similar prerequisite establishing that a health care professional attests to the merit of the claim being filed. In fact, many states including: Arizona, Delaware, Florida, Georgia, Michigan, Minnesota, Mississippi, Nevada, Ohio, Utah, and Vermont have similar requirements, and all have survived constitutional challenges by their respective courts where said challenges were properly raised and addressed.[2]

Ultimately, § 538.225 does not limit or restrict an injured party's access to the courts – a lawsuit may be filed without the affidavit which may come 90 or 180 days later. The putative medical malpractice plaintiff still has access to the courts and the affidavit is one prerequisite, of many, that must be satisfied prior to trial including: the filing of a petition that states a claim, production of evidence in response to discovery requests, filing of suit prior to the expiration of the statute of limitations, and responding to a motion for summary judgment. The affidavit requirement is merely part of the "framework of the substantive

[2] ARIZ. REV. STAT. § 12-2603 (2009); DEL. CODE ANN. Tit. 18, § 6853 (1989); FLA. STAT. § 766.104 (2008); GA. CODE ANN. § 9-11-9.1 (2007); MICH. COMP. LAWS § 600.2912d (1994); MINN. STAT. § 145.682 (2014); MISS. CODE ANN. § 11-1-58 (2003); NEV. REV. STAT. § 41A.071 (2015); OH ST RCP Rule 10(D)(2); UTAH CODE ANN. § 78B-3-423 (2010); VT. STAT. ANN. Tit. 12, § 1042 (2013).

law." Mahoney, 807 S.W.2d at 510. It is not a barrier to an action so much as a procedural requirement to be satisfied after suit has been initiated.

In reality, the requirements of § 538.225 are quite reasonable when read in conjunction with Rule 55.03(c). This rule, in relevant part, provides as follows:

> (c) **Representation to the Court.** By presenting and maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, or other paper filed with or submitted to the court, an attorney or party is ***certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that***:
>
> * * *
>
> (3) ***The allegations and other factual contentions have evidentiary support***, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(emphasis added). Certainly, for an attorney who has neither attended medical school nor performed surgery, reasonable inquiry into the merit of a potential medical malpractice claim would include consultation with a physician experienced in the procedure. The same would hold true in cases alleging a failure to diagnose cancer, secure informed consent, accurately interpret a radiology study, or correctly analyze a pathology slide. In the context of this procedural requirement for every lawsuit, securing a written opinion in support of

the claim does not impose any significant burden on a plaintiff or otherwise impose any unreasonable limitation upon his or her access to the courts.

Nothing about the current language of § 538.225, or the facts established in the record here, support a deviation from this Court's longstanding precedent. Appellant had nearly four years – between May 7, 2013 and March 20, 2017 – to secure support from a health care provider for her cause of action. During that time, she filed her lawsuit twice and in neither instance was the affidavit requirement an obstacle preventing access to the courts. Her case was dismissed because, for reasons not established within the record, she failed to meet the procedural requirements of § 538.225 within 90 or 180 days of filing suit.

The procedure and outcome for Appellant Marilyn Hink in 2017 are identical, respectively, to those for Linda and Richard Mahoney in 1991. Appellant cites no reason or authority justifying an outcome in this case different from that in Mahoney. The principle of *stare decisis*, much like that of legislative deference referenced *supra*, "must be respected." Boland v. St. Luke's Health System, Inc., 471 S.W.3d 703, 711 (Mo. banc 2015). Thus, the trial court's ruling should be affirmed as § 538.225 remains today a constitutional exercise of legislative authority.

**D. Appellant's Unsupported Argument that Compliance with § 538.225 is Frequently Impossible is Without Merit and Fails to Render the Affidavit of Merit Requirement Arbitrary or Unreasonable.**

As Appellant acknowledged in her opening brief, to establish an open courts violation, it must be shown that: (1) the party has a recognized cause of action; (2) the

cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable. Kilmer v. Mun, 17 S.W.3d 545, 549-550 (Mo. banc 2000). Appellant argues that the existence of a violation is satisfied by the suggestion, without any support, that compliance was impossible for Appellant and will be impossible for "numerous" other medical malpractice plaintiffs. Appellant's Brief, p. 12. A review of the statute's plain language, the facts alleged in the Petition, and this state's longstanding precedent readily demonstrate that this unfounded argument is without merit and should be rejected.

The opinion required by § 538.225 must be rendered by a "legally qualified health care provider" which is defined as follows:

> [A] health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as defendant.

§ 538.225.2. There are no other technical requirements or other specific education or training prerequisites for a health care provider to be "legally qualified" to render an opinion under § 538.225. Rather, *any* health care provider who falls within the scope of the statute is, by definition, "legally qualified" to give the required opinion.

Appellant, with no support whatsoever in the record, suggests that it would be impossible to find a general surgeon to render the opinion, in this case, that Dr. Helfrich's

alleged negligence caused Appellant's damages.[3] This argument is clearly fallacious as it assumes that a physician who has earned a medical degree, completed an internship, completed a residency, likely secured credentials from at least one institution to perform surgery, and met all the requirements for licensure by a state, has his or her medical knowledge confined to an illogically narrow area. In the instant case, Appellant's argument requires this Court to believe that a licensed and experienced general surgeon ***lacks*** the qualifications to opine that:

(1) Dr. Helfrich was negligent in performing a laparoscopic cholecystectomy on Appellant;[4] and

[3] Appellant has presented no evidence to this Court or the trial court of any unsuccessful efforts to secure a favorable opinion regarding her claim of malpractice or that any "legal qualified health care provider" has declined to offer the required opinion as to causation or damages.

[4] Cholecystectomy is recognized by the American College of Surgery as one of the most common surgical procedures performed in the United States. Approximately 917,000 cholecystectomies were performed in 2006 according to recent literature. Angela M. Ingraham, M.D., et al., *A Current Profile and Assessment of North American Cholecystectomy: Results from the American College of Surgeons National Surgical Quality Improvement Program*, 211(2) J. Am. Coll. Surg. 176, 176-186 (2010).

(2) Dr. Helfrich's negligence caused an injury to Appellant's right hepatic duct;[5] and

(3) Appellant required additional medical treatment due to her right hepatic duct injury.

In other words, Appellant argues that a physician qualified and credentialed to perform certain surgical procedures is unqualified to opine as to complications arising from those procedures. This clearly is not representative of the real-life practice of medicine or general knowledge of physicians. Interestingly, as noted in Appellant's Petition, Dr. Helfrich attempted to repair the very injury about which, according to Appellant, general surgeons are unqualified to render opinions. (L.F. 5, ¶ 13). However, Appellant did not allege that Dr. Helfrich was negligent in attempting to perform a procedure for which he was not qualified. (L.F. 7, ¶ 28).

In addition, Appellant also ignores the liberal construction afforded § 538.225 which establishes that compliance is not nearly as challenging as Appellant suggests. Two cases illustrate precisely how Appellant's argument is flawed. *See*, *generally*, Kreutz v. Curators of University of Missouri, 363 S.W.3d 61 (Mo. App. 2011); S*ee also*, *generally*, Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683 (Mo. banc 2010). In Spradling, this Court allowed a radiologist to serve as the affiant for a medical malpractice case against a

[5] The right hepatic duct extends from the right side of the liver to the common hepatic duct. The common hepatic duct then meets the cystic duct which originates at the gallbladder. These ducts can be generically referred to as "bile ducts" as they hold and transport bile.

neurosurgeon. Id. at 685. The defendant physician had challenged the certifying physician as not legally qualified because he was not a neurosurgeon and thus did not practice "substantially the same specialty" as the defendant. Id. at 686. The plaintiff countered with evidence that the certifying physician had performed the procedure at issue more than 3,000 times. Id. at 689. This Court held that the language of the statute does *not* require the reporting health care provider to have the exact same specialty as the defendant physician:

> …the legislature recognized that there may be situations in which the health care provider who gives an opinion as to the standard of care may not have the *exact* board certification as the defendant. Instead, the health care provider may have a different board certification but may practice "substantially the same specialty" because of expertise in the medical procedure at issue.

Spradling, 313 S.W.3d at 689. (Emphasis in original).

The central question therefore is not matching board certifications, but whether the reporting health care provider has expertise or experience in the medical treatment at issue. Id. at 689-690; Kreutz v. Curators of University of Missouri, 363 S.W.3d 61 (Mo. App. 2011). This construction meets the legislative purpose, "to prevent plaintiffs from relying on opinions from health care providers with minimal or no experience in performing the procedure in question." Id. at 690.

Here, Appellant argues § 538.225 prevents her from obtaining the required opinion from anyone other than a general surgeon. Appellant's Brief, p. 10. As this Court made quite clear in Spradling, this is not true. All that was required of Appellant was for her to obtain an opinion from *any* health care provider with expertise or experience in performing cholecystectomies. Certainly, *any* physician who performs cholecystectomies – including but not limited to general surgeons, gastrointestinal surgeons, and hepatobiliary surgeons – will possess the requisite knowledge and training to opine as to the cause of an intraoperative injury to a bile duct.[6] § 538.225 does *not* require a plaintiff to consult with numerous experts to prove his or her entire case at the onset of the action. Rather, it merely requires plaintiff to consult with a physician with expertise or experience in performing the procedure at issue and who can affirm that the case, has merit, i.e. that the defendant health care provider's actions or inactions caused or contributed to cause plaintiff's damage(s). Here, Appellant could potentially have consulted with one of ***multiple different medical specialties*** to obtain that opinion, but the record fails to reflect whether this occurred or whether this was even attempted.

Appellant's argument regarding other health care disciplines, such as nurses and physical therapists, is similarly not meritorious as the statute establishes the necessary

[6] The gallbladder, bile ducts, and associated structures are components of a single physiological system commonly referred to as the "biliary system" or "biliary tree." They are not parts of distinct systems that would be typically be evaluated and treated by multiple different medical specialties.

qualifications to render an opinion. If a specific nurse or physical therapist had the experience or expertise in the performance of the procedure at issue, that nurse or physical therapist is "legally qualified" to render the required opinion. *See* Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683 (Mo. banc 2010). Further, the hypothetical parties referenced by Appellant should not even be considered by this court in determining the constitutionality of the statutory mandate challenged in this case. A party has *no* standing to raise hypothetical situations in which the application of a statute may be unconstitutional. State v. Richard, 298 S.W.3d 529, 533 (Mo. banc 2009). Rather, a person is required to argue that the statute is unconstitutional as to his or her own conduct. State v. Ellis, 853 S.W.2d 440, 446 (Mo. App. 1993). Here, Appellate has not provided a record illustrating § 538.225 is unconstitutional where there is no documentation of any unsuccessful effort on the part of Appellant to secure an opinion from any health care provider with expertise or experience in performing cholecystectomies.

To the extent Appellant is attempting to make an argument that § 538.225 is facially unconstitutional, the high standard required has not been met where a facial challenge to a statute can *only* succeed if it can be proven that "no set of circumstances exists under which the [statute] would be valid." Artman v. State Bd. Of Registration for Healing Arts, 918 S.W.2d 247, 251 (Mo. banc 1996). In this case, where Appellant has conceded that certain medical malpractice plaintiffs can satisfy the statutory requirements, a facial challenge based on other hypothetical medical malpractice plaintiffs must fail.

§ 538.225 neither denies free access of a cause nor delays thereafter the pursuit of that cause in courts. Rather, it serves as a screening process prohibiting cases "that lack

even color of merit" at an early stage, protecting both the public and litigants from the cost of ungrounded medical malpractice claims. Appellant has not demonstrated how her compliance was impossible, nor has she suggested that hers is a case where no expert testimony would be required. Thus Appellant has not carried her heavy burden to prove § 538.225 is clearly and undoubtedly unconstitutional. Legends Bank, 361 S.W.3d at 385. This Court had previously held, and should hold again, that § 538.225 does not violate the constitutional right of access to courts under article I, § 14 and affirm the trial court's judgment in favor of Respondent.

### E. The Alleged Violations of the Right to Trial by Jury and the Principals of Separation of Powers Cited in Appellant's Brief Fail to Comply with Rule 84.04 and Thus Should Not Be Considered.

Failure to comply with the rules of appellate procedure is a proper ground for dismissing an appeal. Shochet v. Allen, 987 S.W.2d 516, 518 (Mo. App. 1999). Rule 84.04(e) requires an appellant's brief to contain an argument section that explains how the principles of law *and the facts of the case* interact. Carroll v. AAA Bail Bonds, 6 S.W.3d 215, 218 (Mo. App. 1999). An appellant has an obligation to cite appropriate and available precedent if appellant expects to prevail, and, if no authority is available to cite, appellant should *explain the reason for the absence of citations*. Thummel v. King, 570 S.W.2d 679, 687 (Mo. banc 1978). Compliance with the briefing rules is mandatory "to ensure that appellate courts do not become advocates for the appellant by speculating facts and arguments that have not been made." Thornton v. City of Kirkwood, 161 S.W.3d 916, 920 (Mo. App. 2005).

Here, Appellant has neither cited relevant precedent nor explained why such authority is not available. Appellant merely argues that § 538.225 violates both Article I, § 22(a) and Article II, § 1 for the same reasons it violates Article I, § 14. Appellant's Brief, p. 13. This argument has no authority, no support, and requires this Court and Respondent to speculate as to how the specific and unique standards for these constitutional provisions apply to the facts of this case. This Court is thus justified in deeming as abandoned Appellant's attempted "arguments."

**F. In the Alternative, If the Court Considers Appellant's Right to Trial by Jury and Separation of Powers Arguments, They Should Be Rejected for the Same Reasons Set Forth in Mahoney.**

**i. The Affidavit of Merit Requirement Does Not Unreasonably Burden a Plaintiff's Right to Trial by Jury.**

Article I, § 22(a) of the Missouri Constitution provides, "that the right of trial by jury as heretofore enjoyed shall remain inviolate…..". Setting aside the requirements of § 538.225, in Missouri, a medical malpractice cause of action will not be submitted to a jury and would be subject to other summary disposition without expert testimony and support. Appellant's claim of medical negligence in the performance of surgery will likely never be submitted to a jury without expert testimony. Simply requiring that the expert be secured within 90 or 180 days of the filing of the petition does nothing to infringe upon Appellant's right to trial by jury any more than her burden to prove negligence by competent and substantial evidence at trial.

Furthermore, dismissal without prejudice in the event of noncompliance with the affidavit requirement, regardless of whether it is mandatory or permissive, is far less burdensome to the right to trial by jury than a directed verdict or a summary judgment and neither have been held to infringe one's constitutional guarantee. *See* Smith v. Glynn, 177 S.W. 848, 849 (Mo. 1915) (as cited in Mahoney, 807 S.W.2d 503 at 508). Directed verdicts and summary judgments are final adjudications, whereas dismissals without prejudice – which is *all* § 538.225 mandates – saves the action for the plaintiff and permits another civil action for the same cause. § 538.225 does not bar a plaintiff from filing or refiling a cause of action. Here, Appellant failed to file a health care affidavit within 180 days of filing her lawsuit thereby failing to comply with § 538.225. Because of this noncompliance, the trial court properly granted Respondent's motion to dismiss without prejudice. Notably, § 538.225 does *not* prohibit Appellant from refiling this cause of action. Rather, her action is now prohibited by the statute of limitations.

This Court's analysis in Mahoney is again instructive. There, this Court held that § 538.225 does not violate Article I, § 22(a) of the Missouri Constitution. Here, this Court has not been presented with any authority or support to hold any differently. Therefore, this Court should again hold that Section 538.225 does not violate Article I, § 22(a) of the Missouri Constitution and affirm the trial court's judgment in favor of Respondent.

**ii. The Affidavit of Merit Requirement Is Not Violative of the Principals of Separation of Powers.**

Article II, § 1 of the Missouri Constitution provides:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in instances in this constitution expressly directed or permitted.

At the heart of the separation of powers doctrine is the attempt to prevent the concentration of unchecked power in the hands of one branch of government. Rhodes v. Bell, 130 S.W. 465, 468 (Mo. 1910). Appellant argues that § 538.225 violates Article II, § 1 for the same reasons it violates Article I, § 14. Appellant's Brief, p. 13. How an alleged inability to file a health care affidavit implicates the separation of powers is unexplained in Appellant's Brief and therefore Respondent is unable to determine whether Appellant's argument is that a judicial function has been delegated to a health care provider or assumed by the legislature. Nonetheless, under the structure of § 538.225, it is the Judge, and not the legislature or any given health care provider, that determines if a claim proceeds. Mahoney, 807 S.W.2d at 510.

§ 538.225 does not delegate judicial authority to health care professionals and there is no Missouri authority that construes the statute as doing such. The statute merely forecloses a plaintiff from proceeding with his or her medical malpractice action unless an affidavit of merit is filed. As discussed in Mahoney, the procedure facilitates medical

malpractice actions, works to unburden the administration of justice, and does not prevent a plaintiff from filing his or her suit first. Id. at 510-511.

This Court has previously held, and should hold again, that Section 538.225 does not violate Article II, § 1 of the Missouri Constitution. Thus, this Court should affirm the trial court's judgment in favor of Respondent.

## CONCLUSION

The Legislature's 2005 amendments to § 538.225 should not alter this Court's prior and precedential analysis of the constitutionality of the affidavit of merit statute. The mandatory dismissal under the current version § 538.225.6 remains a dismissal without prejudice only. Thus, the statute is still a constitutional exercise of legislative authority.

Based on the foregoing, Respondent Loring Helfrich, M.D. respectfully suggests this Court affirm the trial court's judgment in favor of Respondent.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that on this 30th day of October, 2017, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on the following: Douglas Ponder and Jaclyn Zimmermann, Ponder Zimmermann LLC, 20 South Sarah Street, St. Louis, Missouri 63108, Attorneys for Plaintiff/Appellant.

The undersigned further certifies that Respondent's Brief complies with Missouri Rule of Civil Procedure 84.06 in that it contains 5,809 words using 13-point Times New Roman Font, exclusive of the cover, Certificate of Service, Rule 84.06(c) certification, and signature block. Undersigned counsel relied upon the word count generated by Microsoft Word which was used to prepare this brief.

/s/ Ryan J. Gavin