

IN THE SUPREME COURT OF MISSOURI

Marilyn Hink,)	
)	
Appellant,)	
)	
v.)	Case No. SC96371
)	
Loring Helfrich, MD, et al.,)	
)	
)	
Respondents.)	

Appeal from the Circuit Court of Scott County
Thirty-Third Judicial Circuit
Judge David A. Dolan

Brief of Appellant

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I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Circuit Court of Scott County, in which the trial court sustained Respondent's Motion to Dismiss For Failure to File Health Care Affidavit. The sole issue is whether the current version of RSMo. § 538.225 violates the Missouri Constitution. Consequently, this is an appeal involving the validity of a Missouri statute. In addition, the fact that the trial court dismissed Plaintiff's Petition without prejudice does not deprive this Court of jurisdiction. It has long been recognized that a dismissal without prejudice pursuant to RSMo. § 538.225 can be appealed if the plaintiff elects to appeal the dismissal. *See Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 503-04 (Mo. *banc* 1991).

II. STATEMENT OF FACTS

On May 7, 2013, Marilyn Hink (hereinafter “Hink” or “Appellant”) underwent a gall bladder removal surgery (cholecystectomy) performed by Dr. Loring Helfrich (hereinafter “Dr. Helfrich” or “Respondent”), a general surgeon. (LF at 5 and 26.) During this surgery, Plaintiff’s right hepatic duct was injured, which caused bile to leak into the surgical field. (LF at 5 and 26.) As a result of this complication, Plaintiff was admitted to Missouri Delta Medical Center, and subsequently discharged on May 13, 2013. (LF at 5 and 26.) However, on May 15, 2013, Plaintiff presented to the ER at Southeast Hospital, and was immediately transferred to Barnes Hospital in St. Louis. Plaintiff had a complicated course from thereon. She underwent another surgical procedure, called an epaticojejunostomy, on October 2, 2013 at Barnes Hospital. (LF at 6 and 26.) Moreover, she suffered significant internal damage, and continued to suffer from associated problems well beyond the date of her final surgery. (LF at 6 and 26.)

On September 21, 2016, Hink filed her Petition for Damages against Dr. Helfrich asserting Dr. Helfrich was negligent in connection with his treatment of Hink. (LF at 4-12.) Therein, Hink asserted, *inter alia*, that RSMo. § 538.225 was unconstitutional as it violated three sections of the Missouri Constitution: (1) Article I, Section 14 (right to open courts); (2) Article I, Section 22(a) (right to trial by jury); and (3) Article II, Section 1 (separation of powers). (LF at 11.) On March 21, 2017, Dr. Helfrich filed a Motion to Dismiss For Failure to File Health Care Affidavit. (LF at 23-25.) On April 11, 2017, Hink filed her Suggestions in Opposition to Defendant Loring Helfrich, M.D.’s Motion to Dismiss, arguing the Motion to Dismiss should be denied because RSMo. § 538.225 is

unconstitutional. (LF at 26-30.) On April 17, 2017, the Trial Court sustained Dr. Helfrich's Motion to Dismiss, and thereby dismissed the case. (LF at 31; Appendix at A2.) Hink then filed her Notice of Appeal on April 26, 2017. (LF at 32-33.)

III. POINTS RELIED ON

I. The trial court erred in sustaining Dr. Helfrich’s Motion to Dismiss for Failure to File Health Care Affidavit pursuant to RSMo. § 538.225 because RSMo. § 538.225 is unconstitutional in that there are circumstances where it is impossible for the plaintiff to comply with the requirements of RSMo. § 538.225.

Authorities

Mo. Const. Art. I, § 14	7, 9, 12, 13
Mo. Const. Art. I, § 22(a)	12
Mo. Const. Art. II, § 1	12

IV. ARGUMENT

I. The trial court erred in sustaining Dr. Helfrich’s Motion to Dismiss for Failure to File Health Care Affidavit pursuant to RSMo. § 538.225 because RSMo. § 538.225 is unconstitutional in that there are circumstances where it is impossible for the plaintiff to comply with the requirements of RSMo. § 538.225.

A. Standard of Review.

The issue to be decided in this appeal is whether RSMo. § 538.225 violates the Missouri Constitution. Constitutional challenges are reviewed *de novo*. Dieser v. St. Anthony’s Med. Ctr., 498 S.W.3d 419, 431-32 (Mo. *banc* 2016). "Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." Id. "The party raising the constitutional challenge bears the burden of proving the act clearly and undoubtedly violates the constitutional limitations." Id.

B. Framework of Section 538.225.

Section 538.225 has been in existence since 1986. Generally, the statute requires a plaintiff in a medical malpractice case to file an affidavit identifying a qualified expert within 90 days of filing suit. Originally, the statute stated that a court “may” dismiss a medical malpractice claim if the plaintiff failed to file the required affidavit. The constitutionality of this version of the statute was addressed in Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. *banc* 1991). The Mahoney Court found the statute constitutional.

In 2005, the statute was amended. After 2005 and through present day, the statute states that a court “shall” dismiss a medical malpractice claim if the plaintiff fails to file an affidavit stating he or she has obtained a written opinion from a legally qualified health care provider stating: (1) the defendant violated the standard of care; and (2) this violation of the standard of care caused the plaintiff’s damages. RSMo. § 538.225.1; Appendix at A6. In addition, a legally qualified health care provider is defined as “a health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant.” RSMo. § 538.225.2; Appendix at A6. Thus, in order to satisfy RSMo. § 538.225, a plaintiff is required to obtain an opinion from an individual in the same profession and specialty as the defendant that addresses both negligence and causation.

With that said, however, the requirements set forth in RSMo. § 538.225 apply only to the initial affidavit – they do not apply at trial. Klotz v. St. Anthony’s Med. Ctr., 311 S.W.3d 752, 760-61(Mo. *banc* 2010). Thus, at trial, a plaintiff can make a submissible case through expert testimony from individuals that are not in the same profession or specialty as the defendant, so long as they are otherwise qualified to offer such an opinion. Id.

Finally, it is noteworthy that RSMo. § 538.225 is not limited to physicians. Instead, pursuant to RSMo. § 538.205(5), a health care provider is defined as: “any physician, hospital, health maintenance organization, ambulatory surgical center, long-term care facility including those licensed under chapter 198, dentist, registered or

licensed practical nurse, optometrist, podiatrist, pharmacist, chiropractor, professional physical therapist, psychologist, physician-in-training, and any other person or entity that provides health care services under the authority of a license or certificate.” RSMo. 538.205(5); Appendix at A4.

In recent years this Court has faced two challenges to the constitutionality of the current version of RSMo. § 538.225. *See* Mayes v. St. Luke’s Hosp. of Kan. City, 430 S.W.3d 260 (Mo. *banc* 2014) and Lang v. Goldsworthy, 470 S.W.3d 748 (Mo. *banc* 2015). However, this Court ultimately did not address the constitutionality of RSMo. § 538.225 in either Mayes or Lang. As such, the constitutionality of the current version of RSMo. § 538.225 remains uncertain.

C. Section 538.225 Violates the Open Courts Clause of the Missouri Constitution.

Article I, Section 14 of the Missouri Constitution, commonly referred to as the “open courts” clause, guarantees Missouri citizens the right to pursue recognized causes of action in Missouri courts. Specifically, the clause reads as follows: “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.” Appendix at A9. An open courts violation is established by showing: (1) a party has a recognized cause of action; (2) the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable. Dieser, 498 S.W.3d at 433.

The first two elements of the open courts test are clearly present. Medical malpractice is a recognized cause of action, and said cause of action is being restricted by

RSMo. § 538.225. Hence, the issue is whether the restriction set forth in RSMo. § 538.225 is arbitrary or unreasonable.

This case highlights a significant deficiency with RSMo. § 538.225. In cases like this one, where the causation issues are complex and beyond the expertise of the defendant, the plaintiff is literally unable to comply with RSMo. 538.225, even though he or she could make a submissible case at trial.

Here, Dr. Helfrich is a general surgeon. Thus, in order to comply with RSMo. § 538.225, Hink is required to come forth with an affidavit attesting she has obtained two opinions from a general surgeon: (1) Dr. Helfrich was negligent; and (2) Dr. Helfrich's negligence caused Hink's injuries. The first opinion addressing negligence is easily obtainable from a general surgeon. The second opinion addressing causation, on the other hand, is a different story. As noted above, Hink had a complicated course after the May 7, 2013 gall bladder removal surgery with Dr. Helfrich. She suffered significant internal damage that leaves her with pain and other ongoing symptoms. Because of this, the causation issues are beyond the scope of a general surgeon's expertise. However, because Dr. Helfrich is a general surgeon, RSMo. § 538.225 prohibits Hink from obtaining the required causation opinion from anyone other than a general surgeon.¹

¹ At trial, Hink would not be prohibited from submitting a causation opinion through a different specialist, such as a hepatologist or gastroenterologist. See Klotz, 311 S.W.3d at 760-61.

There are countless other scenarios where this predicament can and does arise. For example, when a family practice doctor negligently fails to recognize signs and symptoms of cancer during a routine physical, it is likely the patient (or patient's family if it is a wrongful death case) will not be able to obtain a causation opinion from a family practice doctor. Instead, an oncologist will be required, most of whom do not typically perform annual physicals.²

The most obvious situation where this occurs involves cases where the defendant is not a physician, i.e., where the defendant is a nurse, pharmacist, physical therapist, or other non-physician. Under RSMo. § 538.225, a plaintiff in such a case is required to obtain an opinion from an expert in the same profession and specialty as the defendant that addresses both negligence and causation. However, in the overwhelming majority of such cases, if not all such cases, some sort of physician will be required to address causation. For example, in a case against a nurse, the plaintiff will be able to find a

² In Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683 (Mo. *banc* 2010), this Court held RSMo. § 538.225 does not require the plaintiff's legally qualified health care provider to hold the same board certification as the defendant, so long as he or she routinely performs the procedure at issue in the case. While this case helps certain plaintiffs to overcome the restrictions of RSMo. § 538.225, it will not apply to many situations where the causation issues are beyond the scope of the defendant's expertise. In such cases, far too often the type of specialist capable of addressing causation will not have performed the task or procedure the defendant is accused of performing negligently.

nursing expert to address whether the defendant was negligent, but the plaintiff necessarily will have to seek a causation opinion from a physician, which opens the door to an attack by the defendant nurse that the causation expert does not meet the requirements of a legally qualified health care provider under RSMo. § 538.225.

Simply put, the issue presented in this appeal is not whether the Legislature can require a plaintiff to file an affidavit of merit in a medical malpractice case. The issue is whether the current version of RSMo. § 538.225, as written, violates the constitution. Considering it is impossible for numerous plaintiffs to comply with RSMo. § 538.225, even though these same plaintiffs could make a submissible case at trial, this Court should declare the restrictions of RSMo. § 538.225 arbitrary and unreasonable, and therefore a violation of the open courts clause.

D. Section 538.225 Also Violates the Constitution's Right to Trial by Jury Clause and Separation of Powers Clause.

Article I, section 22(a) of the Missouri Constitution states "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate[.]" Hence, Missouri citizens "are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted in 1820." Dieser, 498 S.W.3d at 433. In addition, Article II, Section 1 states: "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 those departments, shall exercise any

power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.”

As explained above, RSMo. § 538.225 denies certain plaintiffs the ability to pursue viable medical malpractice claims. As such, for the same reasons RSMo. § 538.225 violates the open courts clause of the Missouri Constitution, it also violates the Constitution’s right to trial by jury clause and separation of powers clause.

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Missouri Rule of Civil Procedure 84.06. The type size and style of this brief is in Times New Roman 13-point font in compliance with Missouri Rule 84.06(a)(6). The word count based on the word processing system used to prepare this brief is 2670 words. The word-processing system used in preparing this brief is Microsoft Word.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct electronic copy of the foregoing was served this 29th day of August, 2017, by and through the court's electronic filing system and two paper copies via US Mail, postage prepaid, to:

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