Appeal No. SC96371

IN THE SUPREME COURT OF MISSOURI

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MARILYN HINK,

Plaintiff-Appellant

v.

LORING HELFRICH, M.D., *et al.*,

Defendants-Respondents

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

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# BRIEF OF AMICUS CURIAE MISSOURI ORGANIZATION OF DEFENSE LAWYERS

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## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes



## Rules

## INTERESTS OF THE AMICUS CURIAE

*Background and Purpose of the Organization*

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1,300 attorneys involved in defending civil litigation, including medical malpractice cases filed against Missouri-based health care providers.

Two of MODL's stated goals are to eliminate court congestion and delays in civil litigation, and to promote improvements in the administration of justice. To that end, MODL members work to advance and exchange information, knowledge, and ideas among themselves, the public, and the legal community to enhance the skills of civil defense lawyers and elevate the standards of trial practice in this state.

The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individual Missouri citizens. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients, so as to maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

*The Organization's Interest in This Particular Case*

In this case, MODL supports the position of Dr. Helfrich and the other Respondents regarding the constitutionality of Section 538.225 RSMo, which requires an affidavit of merit to be filed in medical negligence cases.

As further discussed in this brief, this Court has previously rejected the same constitutional challenges Ms. Hink presents in this appeal, specifically holding that the

prior version of § 538.225 was constitutional. Though the statute was amended in 2005, the changes do not affect this Court's previous analysis or its holding sustaining the statute as constitutional.

Since 1986, Missouri has required plaintiffs in medical negligence actions to file an affidavit of merit at an early stage to prevent frivolous lawsuits and the wasting of judicial resources. In 1991, this Court in *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, held that the affidavit requirement of § 538.225 did not violate a plaintiff's constitutional rights. In 2005, the legislature amended § 538.225 to ensure that trial judges were dismissing cases that did not comply with it. The amendment, with support from the plaintiffs' bar and defense bar, required the dismissal of cases that did not comply with § 538.225.

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

## CONSENT OF THE PARTIES

Respondents have consented to the filing of this brief by MODL; Ms. Hink has refused to consent. Consistent with Rule 84.05(f)(3), MODL has contemporaneously filed a motion for leave with this Court.

## STATEMENT OF FACTS

MODL adopts the statement of facts set forth in Respondents' brief.

## ARGUMENT

### 1. Section 538.225 does not violate the open courts provision because it serves the important and recognized purpose of preventing meritless litigation.

A statute's restriction of a cause of action does not necessarily place the statute in violation of the open courts provision. To the contrary, there is no violation unless the statute "*arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000) (emphasis in original).

This Court "will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute." *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006) (internal citations and quotations omitted). A single provision of a broader statute is not analyzed in isolation when there is a constitutional challenge; this Court rather construes "the whole statute . . . in light of a strong presumption of a statute's validity." *Id.*

As an initial matter, § 538.225 imposes no new restraint. This Court has acknowledged that the statute simply reiterates existing requirements on plaintiffs: it does nothing more than "parallel" the requirement of Rule 55.03 that an attorney exercise a reasonable inquiry to ensure the suit is well grounded in fact and law. *Mahoney*, 807

S.W.2d at 508. Since failure to comply with Rule 55.03 can also result in mandatory dismissal, the requirement of § 538.225 "is hardly more onerous on the right to trial by jury" than the rule. *Id*. In that sense, the affidavit of merit does nothing more than provide more specific guidance as to how medical malpractice plaintiffs must comply with existing pre-suit requirements rather than imposing any new requirement or other restrictions on his or her right to seek redress.

Even if the affidavit of merit does impose a new restriction, its purpose, importance, and reasonableness have been recognized by this Court—as well as the Missouri Court of Appeals—time and time again. *See*, *e.g.*, *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 272 (Mo. banc 2014) ("the purpose of section 538.225 is to stop medical malpractice suits 'that lack even color of merit' at an early stage"); *Morrison v. St. Luke's Health Corp.*, 929 S.W.2d 898, 905 (Mo. App. E.D. 1996) ("the purpose of § 538.225.1 is to eliminate at the early stages of litigation medical malpractice actions against health care providers which lack the color of merit and to protect the public against the costs of ungrounded medical malpractice claims"). Indeed, this Court has even recognized that "the affidavit condition of § 538.225 is a reasonable means to hinder a plaintiff whose medical malpractice petition is groundless from misuse of the judicial process in order to wrest a settlement from the adversary by the threat of the

exaggerated cost of defense this species of litigation entails." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 508 (Mo. banc 1991).[1]

Section 538.225 therefore became a critical component to the goal of a broader tort reform package, which was meant 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." *Id.* at 507. By "cull[ing] at an early stage" any frivolous claims and allowing for their prompt dismissal without the need for unnecessary litigation expenses, it essentially works as the front line of defense. *Id.*

*Mahoney's* analysis of § 538.225 is no less relevant now than it was in 1991. Having been previously recognized as a reasonable means of accomplishing the legislature's goal of protecting the healthcare system, any restraint the statute imposes on Appellant to bring her cause of action therefore cannot be unreasonable.

However, carving out an exception to it whenever a plaintiff claims impossibility would be antithetical to § 538.225's recognized purpose. A trial court could either accept the plaintiff's assertion at face value—and entirely gut the statute of any consequence or effect whatsoever—or conduct some inquiry into the veracity of the assertion. This would also subvert § 538.225's purpose.

[1] *Mahoney* went on to recite with approval an Illinois appellate decision holding that the affidavit of merit's goal of eliminating frivolous cases is a "legitimate governmental purpose" that § 538.225 "is rationally related to achieving." 807 S.W.2d at 511 (quoting *Alford v. Phipps*, 169 Ill.App.3d 845, 851, 523 N.E.2d 563, 567 (4th Dist. 1988)).

Appellant essentially asks this Court to judicially engraft an exception to § 538.225. Aside from the obvious fact that no such exception was provided by the legislature and to create one would effectively re-write the statute, Appellant's proposed exception also leads to serious policy implications for future cases. A medical malpractice plaintiff would be able to skirt requirements this Court has previously declared to be reasonable, simply by making an unsubstantiated claim that compliance was impossible. The early stages of litigation presumably would either then devolve into a time-consuming and expensive foray into the merits of a plaintiff's impossibility claim, or would proceed wholly without regard to § 538.225's reasonable requirements.

Furthermore, it is important to note that an assertion of impossibility cannot be sustained absent proof that compliance was *actually* impossible; substantial evidence tending to prove impossibility is typically required. *Edwards v. Mellen*, 366 S.W.2d 317, 320 (Mo. 1963) (noting a party must offer proof that something outside the party's control "made compliance with the statute impossible at the moment complained of"). No such evidence is present here.

**2. Section 538.225 does not violate the separation of powers.**

*Mahoney* squarely addressed, analyzed, and rejected the argument that the legislature impermissibly interfered with the courts by enacting § 538.225. The doctrine of separation of powers is violated only when one branch of government "interfere[s] impermissibly with the other's performance of its constitutionally assigned power," or if "one branch assumes a power that more properly is entrusted to another." *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). As

*Mahoney* recognized, § 538.225 does not involve either of those situations. The statute instead "works to unburden rather than burden the administration of justice . . . and so does not unconstitutionally encroach upon that inherent function of the judiciary." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 510 (Mo. 1991). Since *Mahoney*'s holding on this issue is still applicable, the separation of powers argument should once again be rejected.

**3. Section 538.225 does not violate the right to trial by jury.**

Once again, *Mahoney* is again instructive on this issue. There, this Court firmly dispensed with the same argument Ms. Hink is advancing here, and squarely held that "section 538.225 does not violate Article 1, § 22(a) of the Missouri Constitution." *Mahoney*, 807 S.W.2d at 508. This Court's analysis is just as applicable now as it was in 1991. Section 538.225 continues to "parallel[] the practice already prescribed for civil actions, and is hardly more onerous to the right to trial by jury." *Id.* Ms. Hink's argument on this issue is relegated to a lone footnote, in which she points out she could present testimony at trial from any expert she desired, rather than someone in substantially the same specialty as Dr. Helfrich. *Appellant's Brief*, p. 10 n.1. But what the statute at issue requires in subsections (1) and (2) does not constitute a sufficient change in the substantive law already applicable to civil actions to change *Mahoney*'s holding. Accordingly, there is no unreasonable infringement on a medical malpractice plaintiff's right to a jury trial.

## CONCLUSION

This Court has found § 538.225 constitutional before and should do so again in this case. The affidavit of merit serves the important purpose of protecting health care providers from the expense of groundless lawsuits, a purpose that would be significantly undermined if plaintiffs could circumvent the statute's requirements by simply claiming—without proof—that compliance is impossible. Therefore, as *amicus curiae*, the Missouri Organization of Defense Lawyers respectfully suggests that this Court should affirm the trial court's judgment in favor of Respondents.

## CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief contains 1,809 words and fully complies with the provisions of Rule 55.03, 81.18, and 84.06.

I further certify that on October 30, 2017, a copy of this brief was served via the Court's electronic filing system upon the following counsel:

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