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

Reply Brief of Appellant

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I. ARGUMENT

A. 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 Violates the Constitution.

Respondent devotes a significant portion of its Brief to arguing why the Legislature has the authority to enact a statute requiring an affidavit of merit in medical malpractice actions. This argument, however, is irrelevant. As noted in Appellant's original Brief, Appellant is not claiming any version of a statute requiring an affidavit of merit would necessarily be a violation of the open courts clause. Instead, Appellant is claiming the current version of RSMo. § 538.225 is a violation of the open courts clause because it places an arbitrary or unreasonable restriction on medical malpractice causes of action. Specifically, Appellant is challenging the fact that RSMo. § 538.225 requires, without exception, all medical malpractice plaintiffs to obtain a causation opinion from a health care provider in the same profession and specialty as the defendant at the outset of the case, even though such an opinion is not required to make a submissible case at trial.

B. Under Numerous Scenarios, Compliance With RSMo. § 538.225 is Either Impossible or it Places the Plaintiff at an Unfair Disadvantage at the Outset of the Case.

Respondent argues that compliance with RSMo. § 538.225 is always possible because the statute only requires an opinion from a health care provider that has

performed the procedure at issue, regardless of the health care provider's degree, license or specialty. This argument fails for two reasons.

The first reason this argument fails is because it ignores the clear language of the statute. 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. Thus, while a physician with one specialty might be able to offer an opinion against a physician with a different specialty (but only if said physician routinely performs the procedure in question), health care providers in one profession (physicians, nurses, physical therapists, chiropractors, etc….) cannot testify against a health care provider in another profession.

The second reason Respondent's argument fails is because it fails to recognize that health care providers may perform a procedure or participate in a procedure but nonetheless be unqualified to offer an opinion regarding the cause of damages resulting from the procedure. Thus, Respondent's argument that "[i[f 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," is entirely inaccurate. Respondent's Brief at p. 15. As noted in Appellant's original Brief, there are countless scenarios where a health care provider performing a procedure or participating in a procedure will not have the requisite expertise to offer a causation opinion.

Moreover, even in cases where a plaintiff can potentially obtain a causation opinion from a health care provider in the same profession and specialty as the defendant,

the circumstances of the case may dictate that a health care provider outside the defendant's profession or specialty is more qualified to testify at trial regarding causation. Hence, the plaintiff is placed at a disadvantage from the outset because the defendant necessarily will not be required to obtain a causation expert in the same profession and specialty as the defendant. For example, in a case against a family practice doctor for failing to diagnose cancer, the plaintiff is required to obtain a causation opinion from a family practice specialist at the outset of the case, but will ultimately be required to obtain a causation opinion from an oncologist to have a legitimate chance of succeeding at trial. However, the defendant can simply obtain a causation opinion from an oncologist from the outset of the case that will also testify at trial.

C. Appellant Has Standing To Challenge RSMo. § 538.225.

Respondent argues that Appellant does not have standing to challenge the constitutionality of RSMo. § 538.225 because she did not attempt to file an affidavit referencing a causation opinion from a physician outside of Dr. Helfrich's specialty. In other words, Respondent is arguing that Appellant does not have standing because she did not file a non-compliant affidavit and have it rejected by the trial court. In doing so, Respondent cites several criminal cases that involve either the overbreadth doctrine or vagueness doctrine. Respondent cites no case that supports the proposition that Appellant lacks standing to challenge RSMo. § 538.225 because she did not file a non-compliant affidavit that was rejected by the trial court.

Moreover, Respondent's argument ignores the potential repercussions of filing an affidavit that is deemed non-compliant. In that regard, RSMo. § 538.225.7 states the following:

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

Thus, a plaintiff that files an affidavit that is deemed non-compliant can be held responsible for the defendant's attorney's fees and costs.

In addition, there is no time deadline for a defendant to bring a motion challenging the plaintiff's affidavit, such that a defendant could sit on such a challenge right up to trial. For example, in a case against a nurse, if the plaintiff filed an affidavit referencing a standard of care opinion from a nurse and a causation opinion from a physician, a defendant could raise a challenge to said affidavit even after depositions of said experts were taken and even though the plaintiff could make a submissible case at trial. And, because the causation opinion is from a health care provider in a different

profession than the defendant nurse, the trial court would nonetheless be required to dismiss pursuant to RSMo. § 538.225.

D. Appellant Is Not Required to Demonstrate That No Set of Circumstances Exists Under Which RSMo. § 538.225 Would be Valid.

Respondent appears to argue that the proper standard to be applied in determining whether RSMo. § 538.225 violates the open courts clause is whether Appellant can show that no set of circumstances exists under which the statute would be valid. Respondent's Brief at p. 15. Appellant cites Artman v. State Bd. of Registration for Healing Arts, 918 S.W.2d 247, 251 (Mo. banc. 1996) as support for this argument. However, Artman involves an overbreadth challenge, not an open courts challenge, and Respondent cites no case that supports the proposition a heightened standard applies in the context of an open courts challenge. Simply put, it is well settled that 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 v. St. Anthony's Med. Ctr., 498 S.W.3d 419, 433 (Mo. *banc* 2016).

II. CONCLUSION

For all of the foregoing reasons, Appellant respectfully asks the Court to reverse the decision of the trial court and remand this matter for further proceedings.

Respectfully submitted,

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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 1634 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 14th day of November, 2017, by and through the court's electronic filing system, to:

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