IN THE
MISSOURI SUPREME COURT

NO. SC90835

Sohrab Devitre,

Appellant,

v.

Mitchell B. Rotman, M.D.

Respondent.

APPEAL FROM THE TWENTY-FIRST JUDICIAL CIRCUIT COURT
STATE OF MISSOURI

THE HONORABLE STEVEN H. GOLDMAN, CIRCUIT JUDGE DIVISION TWELVE

SUBSTITUTE BRIEF OF RESPONDENT MITCHELL B. ROTMAN, M.D.

DAVID I. HARES, ESQ. & ASSOCIATES

David I. Hares, Esq.
Missouri Bar Number 28600

Robert J. Amsler, Jr., Esq.
Missouri Bar Number 37545

7700 Bonhomme Avenue,
Suite 530
Saint Louis, Missouri 63105-1924
(314) 721-4033 Telephone
(314) 721-7990 Facsimile
ATTORNEYS FOR RESPONDENT
MITCHELL B. ROTMAN, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

STATUTES

SUPREME COURT RULES

JURISDICTIONAL STATEMENT

Appellant Sohrab Devitre is appealing the judgment entered by the Honorable Steven H. Goldman in Division Twelve of the Twenty-First Judicial Circuit of the Circuit Courts of Missouri that dismissed the case against Respondent Mitchell B. Rotman, M.D. Appellant Devitre alleged Respondent Rotman had assaulted and battered him during a medical examination. Judge Goldman issued a final judgment and dismissed the case against Respondent Rotman because Appellant Devitre failed to file a health care affidavit as required by §538.225, R.S.Mo.

Appellant appealed the decision to the Eastern District of the Missouri Court of Appeals. The case was briefed and argued. On 23 February 2010 the Eastern District of the Missouri Court of Appeals issued its opinion affirming the decision of Judge Goldman.

Appellant then appealed the case to this Court, which agreed to review the matter. The Missouri Supreme Court therefore has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Appellant Sohrab Devitre refiled a petition against Respondent Mitchell B. Rotman, M.D., and Defendant The Orthopedic Center of Saint Louis (hereinafter Orthopedic Center) on 13 April 2009 and Appellant Devitre alleged that he was injured during a medical examination performed by Respondent Rotman pursuant to Supreme Court Rule 60.01(b)(3). (Legal File P. 5-8 [hereinafter L.F.]) The suit against then Defendant Orthopedic Center was based on the principle of *respondeat superior* as Appellant did not file any allegations against Defendant Orthopedic Center separate and apart from the allegations against Respondent Dr. Rotman. (L.F. 5-8) The Honorable Steven H. Goldman dismissed the case because Appellant failed to file a health care affidavit and that ruling is the basis of this appeal. (L.F. 103)

The case *sub judice* has its genesis in a lawsuit filed by Respondent Devitre in the Circuit Court of Jefferson County, Missouri against a driver who collided with the rear of Appellant Devitre's vehicle. (L.F. 31) The driver of the other automobile requested Appellant Devitre to consent to a medical examination, commonly referred to as an IME, pursuant to Supreme Court Rule 60.01(b)(3) and Appellant Devitre agreed to the examination. (L.F. 41) The IME occurred on 21 August 2006 at the offices of Respondent Rotman. (L.F. 6, 41) Appellant surreptitiously recorded the medical examination performed by Respondent Rotman. (L.F. 6, 9-29, 31) During the IME Respondent Rotman touched Appellant Devitre, moving parts of Appellant Devitre's body for passive range of motion testing, and he requested Appellant Devitre to move

parts of his own body without Respondent Rotman's assistance for active range of motion testing. (L.F. 9-29) Appellant Devitre never requested to terminate the IME or ask Respondent Rotman to stop the medical examination. (L.F. 9-239) Respondent Rotman subsequently testified by deposition about his examination and his medical opinions formed on the basis of the history from Appellant Devitre, the medical records, and his own examination. Eventually the parties tried the automobile collision case in the Circuit Court of Jefferson County, Missouri, and the jury entered a verdict in favor of Appellant Devitre for eighteen thousand dollars ($18,000.00). (S.L.F. 1-3)

After the minimal jury verdict the Appellant filed a lawsuit against Respondent Rotman and Defendant Orthopedic Center in which he made allegations that Respondent Rotman injured him in the course of performing the medical examination in the automobile accident case noted *supra*. (S.L.F. 4-29) The surreptitious recording of the medical examination was the basis of the suit and Appellant Devitre attached it to his petition as an exhibit. (L.F. 9-29) The Honorable Barbara J. Wallace, who presided over the case in Division 13 of the Saint Louis County Circuit Court, dismissed the case without prejudice on 30 January 2009 because the Appellant did not file a health care affidavit as required by §538.225, R.S.Mo. (S.L.F. 30-31)

Appellant Devitre then refiled the case within the one year afforded to a plaintiff when there is a non-suit as set forth in §516.230, R.S.Mo., commonly referred to as the one year savings statute, after Judge Wallace dismissed the first suit. (L.F. 5-30) This appeal is taken from that second lawsuit. Appellant Devitre made the same exact allegations against Respondent Rotman and Defendant Orthopedic Center in the second

case as he did in the first lawsuit against them. (S.L.F. 4-29; L.F. 5-30) Again Appellant Devitre alleged that Respondent Rotman injured him in the course of performing a medical examination pursuant to Supreme Court Rule 60.01(b)(3). (L.F. 5-30)

During the pendency of the second lawsuit Respondent Rotman and Defendant Orthopedic Center each filed a number of motions in the case at bar. Defendant Orthopedic Center filed a motion to dismiss for improper service pursuant to Supreme Court Rule 55.27(a)(5) because the sheriff served the receptionist at Defendant Orthopedic Center. (S.L.F. 32-36) The receptionist was neither authorized by Defendant Orthopedic Center to accept service nor was she a proper person upon who service was permitted by Supreme Court Rule 54.13(b)(3). (S.L.F. 35-36) Both Respondent Rotman and then Defendant Orthopedic Center filed a joint motion to dismiss the case because Appellant Devitre did not file a health care affidavit within ninety (90) days as required by §538.225, R.S.Mo. (L.F. 97-99)

Defendant Orthopedic Center served a notice upon Appellant stating that it would argue its motion to dismiss for insufficient service of process on 20 July 2009 and Respondent Rotman and Defendant Orthopedic Center also served notice upon Appellant that they would argue their joint motion to dismiss based upon Appellant's failure to file a healthcare affidavit on 20 July 2009 as well. Judge Goldman listened to the arguments of the parties pertaining to both motions, granted the motion of Defendant Orthopedic Center with regard to the insufficiency of the service of process, and dismissed the case as to Defendant Orthopedic Center on that ground alone. (S.L.F. 37) Judge Goldman further stated he would take the motion to dismiss of Respondent Rotman with regard to

the healthcare affidavit under advisement. (S.L.F. 37) The Court entered an order reflecting these rulings at the conclusion of the hearing on 20 July 2009. (S.L.F. 37) Later that same day Judge Goldman issued a judgment which dismissed with prejudice the case against Respondent Rotman, the only remaining party, on the basis that Appellant Devitre did not file a health care affidavit as required by §538.225, R.SMo. (L.F. 103) The judgment of Judge Goldman dismissing the lawsuit against Respondent Rotman is the subject of the appeal.

It must be noted that Appellant Devitre in the instant case appealed the judgment against Respondent Rotman only. Appellant's notice to appeal in this case only cites the judgment of Judge Goldman with regard to the failure to file the healthcare affidavit. (L.F. 104) Appellant Devitre neither referenced nor attached the prior order dismissing the case as to then Defendant Orthopedic Center based on the insufficiency of service of process. Instead, Appellant Devitre attached the order of Judge Goldman dismissing the case due to Appellant's failure to file a healthcare affidavit and referenced that the judgment applied to both Respondent Rotman and Defendant Orthopedic Center. (L.F. 103-104) Likewise, Appellant's brief only discusses the propriety of Judge Goldman's judgment dismissing the case against Respondent Rotman and does not reference the prior order of Judge Goldman dismissing Defendant Orthopedic Center on the basis of insufficient service of process. (L.F. 103-104)

Appellant Devitre only appealed the judgment of Judge Goldman concerning the motion of Respondent Rotman and he has not preserved any error with regard to the order of Judge Goldman dismissing the case as to Defendant Orthopedic Center on the

basis of insufficient service of process. Appellant's reference in his brief that Judge Goldman dismissed the case as to both Respondent Rotman and then Defendant Orthopedic Center on the basis of the healthcare affidavit is erroneous. Defendant Orthopedic Center was previously dismissed by Judge Goldman and the judge only dismissed Respondent Rotman on the basis of the motion to dismiss for failure to file a healthcare affidavit.

POINTS RELIED ON

I. The Court did not err in dismissing the case against Respondent Mitchell B. Rotman, M.D., because Appellant failed to file a health care affidavit as required by §538.225, R.S.Mo. in that Appellant never filed a health care affidavit with regard to having obtained a written opinion of a legally qualified health care provider that Mitchell B. Rotman, M.D. failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.

CASES

Vitale v. Sandow, 912 S.W.2d 121 (Mo.App. W.D. 1995)

Budding v. S.S.M. Healthcare System, 19 S.W.3d 678, 680 (Mo. 2000)

Mello v. Giliberto, 73 S.W.3d 669, 679 (Mo.App. E.D. 2002)

Gaynor v. Washington University, 261 S.W.3d 650, 653 (Mo.App. E.D. 2008)

STATUTE

Section 538.225, R.S.Mo

SUPREME COURT RULE

Supreme Court Rule 60.01(b)(3)

ARGUMENT

I. The Court did not err in dismissing the case against Respondent Mitchell B. Rotman, M.D., because Appellant failed to file a health care affidavit as required by §538.225, R.S.Mo. in that Appellant never filed a health care affidavit with regard to having obtained a written opinion of a legally qualified health care provider that Mitchell B. Rotman, M.D. failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.

A. Standard of Review

An appellate court reviews a motion to dismiss granted by a circuit court *de novo*. *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. banc 2007); *Fenlon v. Union Electric Company*, 266 S.W.3d 852, 854 (Mo.App. ED 2008). Matters of statutory interpretation and the application of the statute to specific facts are reviewed *de novo*. *Lindquist v. Mid America Orthopaedic*, 224 S.W.3d 593, 594-595 (Mo., 2007) (citations omitted); *White v. Tariq*, 299 S.W.3d 1, 3 (Mo. App., 2009) (citations omitted); *Boggs ex rel. Boggs v. Lay*, 164 S.W.3d 4, 23 (Mo.App. E.D. 2005).

B. Argument

The Missouri legislature enacted §538.225, R.S.Mo. which imposes a requirement on Plaintiff to file an affidavit with the Court stating that the Plaintiff has a written opinion by a legally qualified health care provider and the opinion states that the

defendant was negligent in the provision of medical services to the plaintiff. §538.225.1, R.S.Mo. 2005. This is commonly referred to as a health care affidavit. The affidavit is required whenever a party brings an action against a health care provider for damages for personal injury on account of the rendering of or failure to render health care services. §538.225.1 R.S.Mo. In the case *sub judice*, the Appellant argues that §538.225.1, R.S.Mo. 2005 is inapplicable because Appellant was not in a physician-patient relationship with Respondent. Appellant's supposition is faulty when analyzed in reference to the health care affidavit statute and Chapter 538. Appellant had to file a health care affidavit but refused to do so and in response the judge correctly dismissed the case.

1. Definitions

The Missouri Legislature enacted Chapter 538 out of concern for the medical care system and its continued integrity and survival. In so doing, the legislature included some definitions in the chapter to guide in its interpretation and application. The actions of Respondent Rotman as alleged in the petition are within the parameters of Chapter 538 and therefore Respondent is entitled to the procedures and protections contained in the chapter.

This Court has written about the purpose and intent of the Legislature when it enacted Chapter 538. The Court stated in *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. 1991):

"It is readily understood from the history and text of Chapter 538 that the enactment is a legislative response to the public concern over the increased cost of health

care and the continued integrity of that system of essential services. The effect intended for §538.225 within that scheme is 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. The preservation of the public health is a paramount end of the exercise of the police power of the state." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. 1991) (citations omitted)

"The primary rule of statutory construction is to ascertain the intent of the lawmakers by construing words used in the statute in their plain and ordinary meaning." *Hyde Park Housing Partnership et al. v. Director of Revenue,* 850 S.W.2d 82, 84 (Mo. 1993) *citing Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo. banc 1992) "If terms within a … statute are defined by the legislature, this Court must give effect to the legislature's definition." *Jones v. Director of Revenue,* 832 S.W.2d 516, 516 (Mo., 1992) *citing St. Louis Country Club v. Administrative Hearing Commission*, 657 S.W.2d 614, 617 (Mo. banc 1983) Absent statutory definition, words used in statutes are given their plain and ordinary meaning as set forth in a dictionary. *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 809 (Mo. banc 1998) *citing Moon Shadow, Inc. v. Director of Revenue,* 945 S.W.2d 436, 437 (Mo. banc 1997) and *Spudich v. Director of Revenue*, 745 S.W.2d 677, 680 (Mo. banc 1988)

Definitions with regard to Chapter 538 are set forth in §538.205, R.S.Mo. In particular, §538.205(4), R.S.Mo. defines a "health care provider" as "any physician …" §538.205, (4), R.S.Mo. Respondent Rotman, a physician licensed by the State Board of

Registration for the Healing Arts, is a health care provider by definition. (L.F. 30) The statute also defines "health care services" as "any services that a health care provider renders to a patient in the ordinary course of the health care provider's profession." §538.205(5), R.S.Mo. An IME is a service; it cannot be a good. A service is the performance of labor for another. Black's Law Dictionary, 5th Edition Service is "the work performed by one that serves." *Merriam-Webster Online Dictionary* Appellant Devitre is a patient. The word "patient" is defined as the "recipient of any of various personal services." *Merriam-Webster Online Dictionary; Webster's New Collegiate Dictionary* 840 (1973). Appellant was a patient as defined in Webster's Dictionary because he was the recipient of Respondent Rotman's personal service—the medical examination (IME), which Respondent Rotman performed in the ordinary course of his profession as a physician. Applying these definitions within §538.205, R.S.Mo., the actions that are alleged against Respondent are the very type of actions that are subject to Chapter 538 as contemplated by the legislature in that a health care provider, Respondent Rotman, performed a health care service, the IME, and Appellant Devitre is a patient, as defined in the law.

Appellant misreads the statutes at issue and specifically §538.225(5), R.S.Mo. with regard to the word "patient." In his brief, Appellant Devitre argues that there is no physician-patient relationship between himself and Respondent Rotman and therefore the requirement of a health care affidavit is inapplicable to the case. (Brief of Appellant, P. 9) However, Appellant is reading more into the statute than the legislature wrote. The words "physician-patient relationship" do not appear anywhere within the statute.

Instead, the legislature used the word patient, which Webster's defines as the recipient of any of various personal services. While there was no physician-patient relationship between Appellant Devitre and Respondent Rotman, Appellant Devitre was nonetheless a patient as defined by *Merriam-Webster Online Dictionary* and *Webster's New Collegiate Dictionary* 840 (1973).

Respondent Rotman is entitled to the benefits afforded him by Chapter 538 because he is a health care provider providing a health care service to a patient. Therefore the Appellant was required to provide a health care affidavit and Appellant's obstinate refusal to file a health care affidavit was fatal to his case.

2. Ordinary Course of Business

This Court questioned whether Respondent Rotman was acting in the ordinary course of business as a physician when he performed a medical evaluation, which Appellant falsely characterized as an assault and battery. Respondent Rotman was performing recognized and accepted medical tests during which Appellant alleges Respondent injured him. The performance of range of motion testing during a medical examination, to which Appellant consented, is what Respondent Rotman routinely does as a physician.

a) Respondent Rotman's Actions Do Not Constitute Assault and Battery

The courts have routinely held that an assault and battery occurs when a physician performs treatment without the patient's consent or where the treatment provided is not the treatment to which the patient gave his consent. *Wilkerson, et al. v. Mid-America Cardiology*, 908 S.W.2d 691, 699 (Mo. App. W.D. 1995) *citing Hershley v. Brown*, 655

S.W.2d 671, 678 (Mo.App.1983) "A battery is an intentional tort which, by definition, is not a cause of action for negligence. A claim in battery or trespass may lie by reason of treatment furnished by a physician where an operation is performed without the patient's consent or where the operation is not the surgical procedure to which the patient gave his consent." *Baltzell v. Van Buskirk*, 752 S.W. 2d 902, 906 (Mo.App. W.D. 1988) (citations omitted)

However, the facts stated in the petition by the Appellant are determinative of the issue and Appellant's conclusion that Respondent Rotman committed an assault and battery is not. The Appellant framed the issues by using the terms "assault and battery" in his petition. Petitions set forth the facts and will also plead elements of a cause of action as if the elements themselves are facts. *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 682 (Mo. 1981) These "facts" are not facts at all but legal conclusions. *Id.* Legal conclusions cannot be used to determine the nature of a lawsuit. Legal conclusions in a petition are not binding on the pleader. *Lewis v. Wahl*, 842 S.W.2d 82, 87 (Mo. 1992) If the legal conclusions asserted by a plaintiff cannot bind the plaintiff, the legal conclusions of the plaintiff cannot be held to bind the defendant either.

In this case the Appellant consented to a medical examination by Respondent when a third party sought a medical examination and evaluation as part of an automobile accident in which Appellant sued the third party. (L.F. 41) Any reasonable reading of the allegations in the petition filed by the Appellant lead to the conclusion that Appellant's true claim is that during a medical examination Respondent Rotman injured the Appellant when he performed range of motion testing.

Respondent attached a surreptitious recording of the examination by Respondent of Appellant to his petition. In the petition, Appellant alleges that Respondent moved Appellant's arms, shoulder joints, and shoulder past their then range of motion. (L.F. 6-7) Respondent Rotman asked Appellant to remove his shirt so he could examine the right shoulder and Appellant Devitre consented. (L.F. 18) Within the recording Respondent Rotman asks to move various parts of Appellant's body and Appellant consents. (L.F. 21-25) The facts, not legal conclusions, allege that the Appellant went to see Respondent Rotman for a medical evaluation by a licensed physician pursuant to the legal procedure promulgated by this Court in Rule 60.01(b)(3) and that during the medical examination Respondent Rotman injured the Appellant.

Respondent Rotman's actions do not constitute an assault and battery because Appellant consented to the examination and followed the directions of Respondent Rotman during the course of the medical examination. Appellant's categorization of the case as assault and battery is not controlling or dispositive of the issue. Respondent Rotman's performed a simple examination as any physician would on a patient with the same complaints as Appellant Devitre.

b) Respondent Rotman's Actions Are in the Ordinary Course of Business for a Physician

The question then arises as to whether a medical examination performed pursuant to Rule 60.01(b)(3) is a health care service in the ordinary course of the physician's profession. Respondent Rotman performed a medical examination utilizing his professional education, training, and experience as a licensed and board certified

orthopedic surgeon. Respondent performed recognized medical tests and interpreted those tests to provide expert testimony about Appellant Devitre's health to aid a jury in arriving at a verdict. Respondent Rotman was providing a health care service, albeit in a legal case, when he performed a medical examination of Appellant.

Respondent Rotman was unable to find any Missouri cases or any cases in any other jurisdiction which discussed whether an independent medical examination was an act within the ordinary course of a physician's practice. However, numerous cases, cited *infra*, hold that when a physician injures a person during the course of a medical examination, the lawsuit is subject to the same laws and procedures as if the person injured was a patient seeing the doctor for medical treatment and not a legal proceeding.

A number of jurisdictions have concluded that when a physician is not establishing a traditional physician-patient relationship but rather performing an examination for a limited reason or for a third party, the physician still owes a duty of reasonable care to the patient. For instance, the New Jersey Supreme Court held that an individual could file a lawsuit against a physician performing a pre-employment physical when the physician was negligent in administering the physical. *Beading v. Sirotta*, 197 A.2d 857, 561 (N.J. 1964). The Court made this ruling while also acknowledging the physician main purpose was to benefit the employer and not the employee. *Id.*

The New York Court of Appeals held that a plaintiff is required to file a medical malpractice lawsuit against a doctor who performed a physical examination for disability insurance purposes. *Twitchell v. MacKay*, 78 A.D.2d 125 (N.Y.App. 4th Div. 1980) The Court wrote that the plaintiff was aware he was seeing a physician for an examination

and after that examination the physician would generate a report containing his medical opinions for the insurance company. *Id.* at 128 The Court held that if the physician performed the examination in a negligent fashion, then the case was a medical malpractice case. *Id.* at 129 The Court further held that the plaintiff could not proceed against the defendant physician on the theory the case was one of battery for the manner in which the physician manipulated the knee of the plaintiff. *Id.* The New York Court of Appeal struck the portions of the petition not in conformance with medical malpractice statutes. *Id*. at 129-130

The Colorado Supreme Court decided a case remarkably similar to this one, in which a physician examined a plaintiff who was injured in a vehicular accident in the course of the lawsuit. *Greenberg v. Perkins*, 845 P2d 530, 531 (Colo. 1993) The doctor ordered a functional capacity evaluation. *Id.* at 532 During the course of the evaluation the plaintiff believed she was injured by some of the testing. *Id*. The Supreme Court of Colorado determined that a relationship is created between a non-patient examinee and a physician such that the physician should not cause harm the person. *Id.* at 536 The Court wrote that the physician was required to exercise his professional skill in examining the patient and ordering tests. *Id.* The words "professional skill" clearly indicate that the physician was exercising his duty during the examination as a physician and was subject to medical negligence.

The Michigan Supreme Court held that a physician performing a medical evaluation as part of a legal proceeding did have an obligation to perform the examination with professional skill and to avoid injuring the examinee. *Dyer v. Trachtman*, 679 N.W.2d

311 (Mi. 2004) Moreover, the Michigan Supreme Court noted that in the adversarial nature of a lawsuit, a doctor might not only be subject to vigorous cross-examination but plaintiffs could sue the IME physician. *Id.* at 315 The resulting litigation would be ill-advised and would make it impossible for a party to obtain a physician who would perform the independent medical examination because it would lead to "an endless stream of litigation wherein defeated litigants would seek to redeem loss of the main action by suing to recover damages from those witnesses whose adverse testimony might have brought about the adverse result." *Id.* at 316 The Court noted that whether medical malpractice was alleged must be analyzed in light of whether the facts raised questions involving medical judgment. *Id*. at 317 The Michigan Supreme Court held that because the IME physician's alleged negligence was based in medical malpractice, the physician would be able to avail himself of the protections afforded physicians in medical malpractice cases as promulgated by the Michigan Legislature. *Id*. at 317

It is in the ordinary course of a physician's profession to utilize his skill and training to obtain a relevant history, medically examine an individual, and perform recognized medical tests, which the physicians deems appropriate, to arrive at a medical diagnosis or conclusion. Once a physician completes these tasks the physician will formulate a course of treatment. There is no difference between how a physician examines a patient for treatment and how a physician examines a person for a medical examination pursuant to Rule 60.01(b)(3). If Appellant had alleged Respondent Rotman injured him during the course of a medical examination for an injury then Respondent would be afforded the benefits of Chapter 538. If Appellant Devitre approached

Respondent Rotman to discuss a painful shoulder Respondent Rotman would have put the arm and shoulder through range of motion tests. If in performing the range of motion tests Respondent Rotman moved the arm or shoulder and damaged a tendon or ligament, the Appellant could have sued Respondent Rotman for the injury and Appellant Devitre would have to provide an affidavit to the court stating the Plaintiff had a written opinion from an expert that Respondent Rotman's performance of the test fell below the standard of care and as a result Respondent Rotman injured the patient.

It is absurd and non-sensical to require a health care affidavit in a lawsuit against a physician when the allegations are that the physician negligently injured a patient while performing an examination and yet not require that same health care affidavit in a lawsuit when the only distinguishing factor is that the recipient of the medical examination was present not for treatment but because of an agreement by the parties to a lawsuit for a medical examination pursuant to Supreme Court Rule 60.01(b)(3).

The responsibilities of a physician that are within the ordinary course of the health care provider's profession have expanded vastly over time. Often the doctor must provide information to an employer about whether the employee can perform his duties because he is ill or will receive long term care and treatment or miss time due to an operation. A physician is called upon to provide his medical diagnoses or information or conclusions to an insurance company to justify further medical treatment, testing, and for referrals to specialists. Physicians appear in court and legal proceedings both as retained and non-retained expert witnesses. While taking part in the legal system is not a daily activity it is in the ordinary course of the health care provider's profession. In fact there

are now board certifications available for physicians who make independent medical examinations a regular and ordinary part of their practice of medicine.

As society becomes more litigious and health care more complex, parties have an increasing need to use medical doctors both as retained and non-retained medical experts. Limiting a physician's profession to only the narrow examination and treatment of a patient fails to acknowledge all of the responsibilities of a physician. Physicians routinely testify on behalf of their patients as non-retained experts and otherwise participate in legal cases involving workers' compensation, automobile accident cases, disability hearings, cases involving bodily injury arising out of a premises liability action, cases regarding the competency of an individual who might be involuntarily committed or who drafted a will, and in criminal cases as well as a multitude of other legal or administrative cases. We as a society rely on doctors with increasing frequency to provide medical services in legal cases by explaining the complex issues of medical science.

In fact, the very existence of Rule 60.01 is evidence of the judiciary formally recognizing that it is in the normal course of business for physicians to provide a medical examination and then appear in court to provide a second medical service by explaining the medical issues. This Court held in *State ex rel. American Mfg. Co. v. Anderson*, 194 S.W. 268, 272 (Mo. 1917) that the courts have the inherent authority to order a plaintiff to submit to an examination by a physician. The inherent authority of the court to order an examination of a plaintiff existed prior to the rules of civil procedure promulgated by the Missouri Supreme Court. *State ex rel. McCloud v. Seier*, 567 S.W.2d 127, 128 (Mo.

1978) In 1943 the first statute was enacted which governed medical examinations. *Id.* at 128-129 This Court superseded the statute when it enacted Supreme Court Rule 60.01 in 1960. *Id.* at 129 Supreme Court Rule 60.01 is a formal procedure to administer how physicians providing a medical examination of a plaintiff can participate in the legal system by providing expert testimony, which was handled by the courts on a case by case basis under their inherent power prior to the first codification and first version of Rule 60.01. As the participation of medical experts increased the Court established a method for their participation. The increase in the use of medical evidence and testimony is proof that physicians in the ordinary course of their profession are providing medical services and participating in the legal system.

Physicians are increasingly a part of the legal system by providing testimony and evidence in a number of different types of cases. Physicians testify as retained and non-retained experts. Because of the need for physicians to explain to the Court and jury what the medical issues are in a case, it is in the ordinary course of business for a physician to perform a number of medical tasks including independent medical evaluations.

3. Application of §538.225, R.S.Mo.

Section 538.225, R.S.Mo. requires the plaintiff to file a health care affidavit whenever the plaintiff sues a health care provider based upon the provider's rendering or failure to render health care to a patient. The Appellant sued Respondent for the alleged injury Respondent caused when he performed a medical examination of Appellant. The law compelled Appellant to file a health care affidavit because the alleged injury arose

out of a medical examination performed by Respondent, a licensed physician, upon Appellant Devitre, a patient by definition.

This Supreme Court held that §538.225, R.S.Mo. applies to more than just medical negligence causes of action. This Court stated that the legislature clearly demonstrated its intent that §538.225, R.S.Mo., applies to more than negligence cases by use of the phrase "any action" in the statute. *Budding v. S.S.M. Healthcare System*, 19 S.W.3d 678, 680 (Mo. 2000). The question to resolve when determining if a health care affidavit is required is whether the allegations arise from the defendants actions as a health care provider. *Jacobs v. Wolff*, 829 S.W.2d 470, 472 (Mo.App. E.D. 1992). The Plaintiff in the *Jacobs* case filed her petition against Dr. Wolff and Nurse Unser for tortious interference with a contract, negligent infliction of emotional distress, negligence, and prima facie tort. *Id.* at 471. The Eastern District of the Court of Appeals held that the plaintiff's claim was based on the rehabilitative care rendered to the plaintiff and an affidavit was required. *Id*. at 473.

A health care affidavit is required regardless of how the plaintiff characterizes the claim. *Id.* In *St. John's Regional Health Center, Inc. v. Windler*, 847 S.W.2d 168 (Mo.App. S.D. 1993), the plaintiff's claim was one of false imprisonment. But the Southern District Court of Appeals stated the elements of the cause of action do not dictate whether a health care affidavit is required. *St. John's Regional Health Center, Inc. v. Windler*, 847 S.W.2d 168, 171 (Mo.App. S.D. 1993). The Court held that if the claim involves a health care provider and recipient and the provision of health care services, then an affidavit is mandatory. *Id*. The Western District concurred in *Vitale v.*

Sandow, 912 S.W.2d 121 (Mo.App. W.D. 1995), when it held the plaintiff's characterization of his claim as one for libel was really a claim that the doctor misdiagnosed Mr. Vitale's condition as malingering in the doctor's report based upon the doctor's independent medical examinations. *Vitale v. Sandow*, 912 S.W.2d 121, 122 (Mo.App. W.D. 1995). The Eastern District Court of Appeals approvingly said that if the relationship is that of health care provider and recipient, and the true claim relates to the provision of health care services, then a health care affidavit is necessary. *Mello v. Giliberto*, 73 S.W.3d 669, 679 (Mo.App. E.D. 2002); *Gaynor v. Washington University*, 261 S.W.3d 650, 653 (Mo.App. E.D. 2008).

In *Gaynor* the Eastern District of the Court of Appeals held the health care affidavit is required even if the claim is based on *res ipsa loquitur* and no expert opinion is required. *Gaynor v. Washington University*, 261 S.W.3d 650, 654 (Mo.App. E.D. 2008). If the plaintiff fails to file a health care affidavit in a case against a health care professional for the professional's actions during the course of the provision of health care services as required by §538.225, R.S.Mo., then the Court must dismiss the case as the amended language in §538.225.6, R.S.Mo. 2005 allows no discretion and mandates dismissal. §538.225.6, R.S.Mo. 2005; *SSM Health Care St. Louis v. Schneider*, 229 S.W.3d 279, 281 (Mo.App. E.D. 2007); *Gaynor* at 653.

In this case, the Plaintiff alleged he was injured by Respondent Rotman in the course of a medical examination to which he consented as permitted by Supreme Court Rule 60.01(b)(3). (L.F. 6). During the course of the medical examination Respondent Rotman moved the Plaintiff's body through a number of range of motion tests and during

certain tests the Plaintiff experienced pain. (L.F. 6-7; 18, L. 11; 21, L. 6 – 26, L. 2) All of these tests and the medical examination were to provide evidence of the causation or nature and extent of the injuries from the automobile accident.

Respondent Rotman, retained by the Defendant in the automobile accident case, provided his opinions to the Court and jury based upon the history, medical examination, and the medical records. Respondent Rotman, who is licensed by the Missouri Board of Healing Arts as a physician and surgeon, is an orthopedic specialist and he performed the medical examination. Respondent utilized his skill as an orthopedic surgeon, his medical training and knowledge, and performed recognized medical tests during the examination in order to form his opinions regarding Appellant Devitre and the injuries caused in the automobile collision. Respondent Rotman is uniquely qualified by his education, training and experience as a physician to provide an opinion after an examination of an individual. No person other than a physician is qualified to medically examine a person. These qualities, the education, training, and experience, are exactly what a physician must utilize when providing his medical services. Likewise, Appellant Devitre was the recipient of the health care services. It was his body that Respondent Rotman was examining. Finally, the examination provided to the Appellant was the provision of a health care service as only a physician could examine a patient and provide an opinion to assist the Court and jury. The Appellant's allegations in the suit against Respondent Rotman arise from Respondent's actions as a health care provider, Appellant's position as recipient, and Respondent's provision of a health care service to Appellant. Thus a health care affidavit is mandatory.

Especially analogous is the *Vitale* case cited *supra*. Mr. Vitale was involved in an automobile accident while in the course and scope of his employment. *Vitale*, at 121. Mr. Vitale's employer then directed the medical care as permitted by the Workers Compensation Act. *Id.* The first physician to examine Mr. Vitale was Theodore Sandow, Jr., M.D. *Id*. Dr. Sandow then referred Mr. Vitale to two other physicians, James S. Appelbaum, M.D. at Neurology Center, Inc. and Dr. Whittaker at Neurology Neurosurgery, for examination and treatment. *Id*. Dr. Appelbaum and Dr. Whittaker examined Mr. Vitale and they were unable to find any physical abnormalities. "In their ***independent evaluations*** the doctors were unable to find any physical abnormalities that would cause his symptoms." *Id*. at 122 (emphasis added). Dr. Appelbaum and Dr. Whittaker both wrote letters, which were sent to Dr. Sandow, and the two doctors stated that Mr. Vitale was malingering. *Id*. Obviously, neither Dr. Appelbaum nor Dr. Whittaker provided any treatment to Mr. Vitale because they did not find any abnormalities after the examination. Each doctor performed an independent medical evaluation and provided their medical opinions about Mr. Vital to Dr. Sandow and these opinions were admitted into evidence during the workers' compensation case. Mr. Vitale went to the doctors, who were health care providers, and Mr. Vitale was the recipient of the health care services of the doctors with regard to their examination and diagnoses that he was malingering. The Western District of the Court of Appeals held that Mr. Vitale had to submit a health care affidavit and his failure to do so was fatal to his case.

Appellant Devitre uses a single case to support his argument that an affidavit is not required. In the case, a person submitted a specimen for drug testing in a laboratory at

Saint John's Regional Health Center, Inc., in Springfield, Missouri. *Meekins v. St. John's Regional Health Center, Inc.*, 149 S.W.3d 525 (Mo.App. S.D.) The Court held that a drug test performed by a hospital was not the provision of a health care service. The *Meekins* case is not applicable to this case. In *Meekins* the person submitted to a drug screen test to a laboratory at the hospital and a doctor did not provide a medical service to him. There was no medical provider utilizing his knowledge, training, and experience in examining the person, performing the test or in interpreting the test.

In the case at bar, Respondent Rotman utilized his medical knowledge, training, and experience, a review of the pertinent medical records, and the movement, both active and passive, of parts of the Appellant's body to arrive at a medical opinion. Only a physician, licensed by the state, can provide a medical opinion. The provision of the medical opinion is a medical service. The case *sub judice* is not analogous to the *Meekins* case; but, it is analogous to the *Vitale* case. In *Vitale* the two doctors performed independent medical evaluations and each reported that the claimant was malingering. The Western District of the Court determined that the plaintiff had to file a health care affidavit because the true allegation was that the doctors misdiagnosed the claimant. In this case, Respondent Rotman was performing an independent medical evaluation and, assuming *arguendo* that Appellant Devitre's assertions are true, the actual nature of the case is not that Respondent Rotman committed an assault and battery during the examination but rather Respondent Rotman performed a medical test improperly and injured Appellant Devitre. A health care affidavit is required.

A decision that would strip a physician of the protections of the Medical Malpractice Act because he performed a medical examination during a legal case will chill the willingness of physicians to provide their medical expertise to aid the Court and jury in explaining the medical issues and deciding a case for fear of litigation not covered by the malpractice act. A plaintiff, who believes a physician testifying for the defense was particularly persuasive in his testimony and thus greatly influenced a jury, could then sue the physician for allegedly injuring him during the examination to make up for the low or non-existent award. A plaintiff could even plan prior to the medical examination to bait the doctor and record the results by a tape recorder or even hidden video. The explanation of the medical facts and issues is an important service provided by the medical community to the courts and bar. The willingness of physicians to continue this valuable service will evaporate. A physician would not want to expose himself to litigation solely because he provided persuasive medical evidence, which a jury gave great credence to in arriving at its decision.

CONCLUSION

In the course of the case by Appellant Devitre against a motorist, the parties consented to an independent medical examination pursuant to Supreme Court Rule 60.01(b)(3). Respondent Rotman performed the medical examination and provided his testimony at the automobile accident case.

After obtaining a minimal jury verdict in the automobile accident case, Appellant filed a case alleging assault and battery against Respondent Rotman and Defendant Orthopedic Center and used the surreptitious recording as the basis of his lawsuit. The

Honorable Barbara Wallace dismissed the case when Appellant failed to file a health care affidavit. The Appellant refiled the case against Respondent Rotman and Appellant Devitre again claimed that Respondent Rotman injured him during the medical examination. Judge Goldman dismissed the second case against Respondent Rotman because Appellant again failed to file a heath care affidavit.

The allegations against Respondent Rotman are the intentional torts of assault and battery. However, the characterization of the lawsuit by the Appellant is not controlling. In this case, Appellant went to Respondent Rotman for a medical examination for legal purposes. As such, Appellant was a patient and Respondent Rotman, a licensed physician, utilized his special education, training, and experience to perform a medical service in ordinary course of his profession. A litigant is required to obtain a written opinion from a health care provider and then file an affidavit with the Court whenever the allegations arise out of the relationship of health care provider, recipient, and the provision of a health care service—in this case the examination and testimony before the Court and jury. Appellant never filed the affidavit as required by law and the Court properly dismissed the case.

DAVID I. HARES, ESQ.
& ASSOCIATES

BY_____
David I. Hares, Esq.
Missouri Bar Number 28600

_____
Robert J. Amsler, Jr.
Missouri Bar Number 37545

7700 Bonhomme Avenue
Suite 530
St. Louis, Missouri 63105
Phone (314) 721-4033
Facsimile (314) 721-7990
Attorneys for Respondent Mitchell B. Rotman, M.D.

CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) and (c)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court 84.06(b) and, according to the word count function on Microsoft Word 2007, by which it was prepared, contains seven thousand, six hundred ninety (7,690) words, exclusive of the cover, Certificate of Service, this Certificate of Compliance, the signature block, and the appendix.

DAVID I. HARES, ESQ.
& ASSOCIATES

BY_____

David I. Hares, Esq.
Missouri Bar Number 28600

Robert J. Amsler, Jr.
Missouri Bar Number 37545

7700 Bonhomme Avenue
Suite 530
St. Louis, Missouri 63105
Phone (314) 721-4033
Facsimile (314) 721-7990
Attorneys for Respondent Mitchell B. Rotman, M.D.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed by First Class U.S. Mail along with a CD version in Word this 1st day of July 2010 to: James S. Collins, II, Esq., 6654 Chippewa, Saint Louis, Missouri 63109.

_____

APPENDIX

Table of Contents

Section 516.230 Further savings in cases of nonsuits

If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370, and the plaintiff therein 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 if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff, or, if no executor or administrator be qualified, then within one year after letters testamentary or of administration shall have been granted to him.

Section 538.205 Definitions

As used in sections 538.205 to 538.230, the following terms shall mean:

(1) "Economic damages", damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity;

(2) "Equitable share", the share of a person or entity in an obligation that is the same percentage of the total obligation as the person's or entity's allocated share of the total fault, as found by the trier of fact;

(3) "Future damages", damages that the trier of fact finds will accrue after the damages findings are made;

(4) "Health care provider", any physician, hospital, health maintenance organization, ambulatory surgical center, long-term care facility including those licensed under chapter 198, RSMo, 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;

(5) "Health care services", any services that a health care provider renders to a patient in the ordinary course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized. Professional services shall include, but are not limited to, transfer to a patient of goods or services incidental or pursuant to the practice of the health care provider's profession or in furtherance of the purposes for which an institutional health care provider is organized;

(6) "Medical damages", damages arising from reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitative services;

(7) "Noneconomic damages", damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages;

(8) "Past damages", damages that have accrued when the damages findings are made;

(9) "Physician employee", any person or entity who works for hospitals for a salary or under contract and who is covered by a policy of insurance or self-insurance by a hospital for acts performed at the direction or under control of the hospital;

(10) "Punitive damages", damages intended to punish or deter willful, wanton or malicious misconduct, including exemplary damages and damages for aggravating circumstances;

(11) "Self-insurance", a formal or informal plan of self-insurance or no insurance of any kind.

538.225. Affidavit by a health care provider certifying merit of case--legally qualified health care provider, defined--content filed, when--failure to file, effect--in camera review, when

1. In any 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, the plaintiff or the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.

2. As used in this section, the term "legally qualified health care provider" shall mean 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.

3. The affidavit shall state the name, address, and qualifications of such health care providers to offer such opinion.

4. A separate affidavit shall be filed for each defendant named in the petition.

5. Such affidavit shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended for a period of time not to exceed an additional ninety days.

6. If the plaintiff or his attorney fails to file such affidavit the court shall, upon motion of any party, dismiss the action against such moving party without prejudice.

7. 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.

54.13. Personal Service Within the State

(a) By Whom Made. Service of process within the state, except as otherwise provided by law, shall be made by the sheriff or a person over the age of 18 years who is not a party to the action.

(b) How and on Whom Made. Personal service within the state shall be made as follows:

…

(3) On Corporation, Partnership or Other Unincorporated Association. Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, when it may be sued as such, by delivering a copy of the summons and petition to an officer, partner, or managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof or by delivering copies to its registered agent or to any other agent authorized by appointment or required by law to receive service of process.

55.27. Defenses and Objections--How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) How Presented. Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) That plaintiff does not have legal capacity to sue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

60.01. Examination and Report

(a) Order for Examination.

(1) In an action in which the mental condition, physical condition, or blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party (i) to submit to physical, mental, or blood examinations by physicians or other appropriate licensed health care providers or (ii) to produce for such examinations such party's agent or the person in such party's custody or legal control.

(2) In any action in which the vocational ability of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party (i) to submit to evaluation by vocational rehabilitation professionals or (ii) to produce for such evaluation such party's agent or the person in such party's custody or legal control.

(3) Any order under this Rule 60.01(a) may be made only on motion for good cause shown, upon notice to the person against whom the order is sought and to all other parties. Such order shall specify the time, place, manner, conditions, scope of, and identity of each person conducting the examination or evaluation. The court may, as a condition of its order, require the party requesting the order to reimburse the person who is the subject of the order for that person's reasonable round trip expenses in traveling more than sixty miles from the place of residence to the place of examination or evaluation.

(b) Report of Findings.

(1) If requested by the party against whom an order is made under Rule 60.01(a) or the person who is the subject of the order, the party obtaining the order shall deliver to the requesting person or party a copy of a detailed written report of the examiner or evaluator setting out the findings, including results of all tests made, diagnosis, and conclusions, together with like reports of all earlier examinations or evaluations of the same condition. After delivery, the party obtaining the order shall be entitled upon request to receive from the party against whom the order is made a like report of any examination or evaluation, previously or thereafter made, of the same condition, unless, in the case of a report of examination or evaluation of a person not a party, the party shows an inability to obtain it. The court on motion shall make an order against a party requiring delivery of a report on such terms as are just; if an examiner or evaluator fails or refuses to make a report, the court may exclude the examiner's or evaluator's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination or evaluation so ordered or by taking the deposition of the examiner or evaluator, the person examined or evaluated waives any privilege the person may have in that action, or any other involving the same controversy, regarding the testimony of every other person who has examined or evaluated or may thereafter examine or evaluate the person in respect of the same mental condition, physical condition, vocational ability, or blood relationship.

(3) This Rule 60.01(b) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise, and does not preclude discovery of a report of or the taking of a deposition of the examiner or evaluator in accordance with the provisions of any other rule.