

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2004-CA-02532**

**CANDICE YOUNG,  
PERSONAL REPRESENTATIVE OF THE  
WRONGFUL DEATH BENEFICIARIES OF  
CHERIE S. HANCOCK, DECEASED**

**APPELLANT/ CROSS APPELLEE**

**V.**

**DONALD C. GUILD, M.D.**

**APPELLEE/ CROSS APPELLANT**

**ON APPEAL FROM  
THE CIRCUIT COURT OF YAZOO COUNTY, MISSISSIPPI**

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**REPLY BRIEF OF THE CROSS APPELLANT**

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**SUBMITTED BY:**

**WHITMAN B. JOHNSON, III, ESQ. (REDACTED)  
DENISE C. WESLEY, ESQ. (REDACTED)  
CURRIE, JOHNSON, GRIFFIN,  
GAINES & MYERS, P.A.**

**P.O. BOX 750  
JACKSON, MS 39205-0750  
TELEPHONE: (601) 969-1010  
FACSIMILE: (601) 969-5120**

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## DEFENDANT'S REPLY AND FURTHER SUPPORT OF CROSS-APPEAL

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### I. Irresistible Impulse Doctrine

#### A. Statement of Current Mississippi Law

Under current Mississippi law, a Plaintiff filing suit for a wrongful death action under a theory of negligence must prove the four elements of duty, breach, causation, and damages. Scafide v. Bazzone, 962 So.2d 585, 597 (¶ 40) (Miss. App. 2006). Failure of proof on any one element warrants dismissal of the Plaintiff's claim. Within the aforementioned framework, the Irresistible Impulse Doctrine is applied to the element of causation. The doctrine operates by distinguishing suicide by one with a mental illness which prevents one from understanding the consequences of his actions (as where the patient is delusional or psychotic) from those suicides in which the decedent consciously and deliberately chooses to end his own life. Collums v. Union Planters Bank, 832 So.2d 572, 578 (¶ 14-16) (Miss. App. 2002).

In order for wrongful death by suicide to be actionable, a two-part test must be met: (1) the decedent must have been under an "irresistible impulse" which makes him unable to discern the nature or consequences of taking his own life, and (2) this "irresistible impulse" must have been caused by defendant's intentional wrongful conduct. Collums, 832 So.2d 572, 578 (¶ 14). On the other hand, conscious and deliberate suicide committed by a person who has voluntarily chosen to end his own life severs the causal chain between the defendant's actions and the decedent's death. Thus, the Irresistible Impulse Doctrine is not a free-standing maxim; it is a doctrine that is to be applied within the context of a larger negligence cause of action.

A number of Mississippi cases have applied the Irresistible Impulse Doctrine to civil suicide cases. All of the Mississippi cases begin with the basic premise that suicide is an intervening cause that breaks chain of causation from the Defendant's actions to the decedent's decision to commit

suicide. The cases further conclude that the Irresistible Impulse Doctrine offers a mechanism to allow recovery only if both prongs of its two part test are met.

In Richardson v. Edgeworth, the plaintiff sued two justices of the peace, as well as their deputy sheriffs and surety Company for the suicide of her husband. Richardson, 214 So.2d 579 (Miss. 1968). The Mississippi Supreme Court accepted the plaintiff's position that the defendants' intentional abuse of the legal process to collect civil debts had produced Mr. Richardson's suicide under an irresistible impulse. Richardson, 214 So.2d 579. The Richardson court held that "where the suicide is committed in response to an uncontrollable impulse, recovery may be had if the mental state of deceased was substantially caused by the defendants' intentional wrongful acts..." Richardson, 214 So.2d 579.

In the later federal case of Shamburger v. Grand Casino of Mississippi, Inc./Biloxi, 84 F. Supp.2d 794 (S.D. Miss. 1998), the United States District Court for the Southern District of Mississippi applied the two part test of the Irresistible Impulse Doctrine on a case in which another wife sued for the suicide death of her husband, allegedly fueled by the Grand Casino's attempt to collect debts owed to it by Mr. Shamburger. Shamburger, 84 F. Supp.2d 794, 795-796. After observing that Mississippi had adopted the Irresistible Impulse Doctrine in Richardson, the court disregarded potential factual issues concerning the wrongfulness of the defendant's actions. Instead, the very fact that the decedent had committed suicide precluded recovery as a matter of law unless Shamburger could establish both parts of the Irresistible Impulse Doctrine. Shamburger, 84 F. Supp.2d 794, 798.

Regarding the first prong of the test which concerns the severity of the decedent's mental illness, an irresistible impulse is described as "an uncontrollable impulse without conscious volition to cause death." Shamburger, 84 F. Supp.2d 794, 799 (quoting Richardson v. Edgeworth, 214 So.2d 579, 587). The Shamburger court went on to carefully distinguish between a "mental condition"

such as depression, which breaks the causal chain, and a “mental illness” which does not sever the causal chain because the decedent does not act from his or her own volition:

If the person commits suicide in response to a mental condition, as distinguished from a mental illness, a prior tortfeasor, perhaps in part responsible for that condition, will not be liable because the act of the deceased is viewed as an independent intervening cause. But if the act of the tortfeasor spawns a mental illness which in turn causes the suicide, then the causal chain is not broken and liability will attach. Plainly, the distinction is a fine one that may rest largely on the terminology preferred by a given psychologist or psychiatrist. But its importance cannot be minimized, for it is the only shield between a past tortfeasor and liability for suicide by the victim, and further, it is the best means the law can devise to account for the important social values intertwined with this difficult issue...

Accordingly, the legally dispositive distinction to be made by the Court is that between a mental “condition”, such as depression and a mental “illness”. Actions caused by a mere mental condition are deemed volitional and therefore sever the causal chain linking suicide to wrongful conduct.

Shamburger, 84 F. Supp.2d 794, 799 (quoting Jamison v. Storer Broadcasting Company, 511 F. Supp. 1286, 1291 (E.D. Mich. 1981)). As it turned out, in Shamburger, the Plaintiff’s expert actually provided testimony to the effect that Mr. Shamburger’s suicide was volitional:

Clearly, for the Court’s purposes here, Dr. Barnes stated that if you had asked Shamburger what he was going to do before he committed suicide, he would have said he going to kill himself and such acts were voluntary and with knowledge of the consequences of his acts.

Shamburger, 84 F. Supp.2d 794, 800. Therefore, the Court found that Mr. Shamburger’s suicide was not actionable as a matter of law. Shamburger, 84 F. Supp.2d 794, 799.

A few years later, the Mississippi Court of Appeals favorably cited to both Richardson and Shamburger in the case of Collums v. Union Planter Bank, 832 So.2d 572. Without restating the facts of the Collums case, which are set forth in the Cross-Appellant Brief, it should be reiterated that in Collums, the Mississippi Court of Appeals expressly stated that in Mississippi an irresistible impulse is defined as “a failure to control the body and not be able to understand the consequences of certain actions.” Collums, 832 So.2d 572, 578 (¶ 16). Furthermore, Collums specifically

declined to make suicide from depression actionable because volitional suicide resulting from depression does not an irresistible impulse, regardless of the severity of the depression. Collums, 832 So.2d 572, 578 (¶ 15-16).

Mississippi law is clear that suicide is not actionable unless the two part test of the Irresistible Impulse Doctrine is satisfied. Mississippi law is also clear that when a decedent's suicide is attributed to depression, even severe depression, the suicidal act does not rise to the level of suicide resulting from an irresistible impulse. Therefore, suicides caused by the decedent's depression are not recoverable as a matter of law. For this reason, if no other, the verdict in favor of Dr. Guild should stand.

Nevertheless, the Plaintiffs essentially argue that a medical negligence action has elements of proof that differ from other negligence actions, such that the Irresistible Impulse Doctrine does not or should not apply. The only difference between a medical negligence and a non-professional negligence action, however, is in the element of duty. In a non-professional negligence suit, the plaintiff's duty is defined as the duty to act as a reasonably prudent person would have acted. Burr v. Mississippi Baptist Medical Center, 909 So.2d 721, 728 (¶ 21) (Miss. 2005). In a medical negligence case, the defendant physician has a duty to act as a minimally competent, reasonably prudent physician in that specialty would have acted under the same circumstances. Whittington v. Mason, 905 So.2d 1261, 1264, note 1 (¶ 18) (Miss. 2005). Aside from these slightly different definitions of duty, the remaining elements of breach, causation and damages are identical and must be proven in both types of negligence cases. Since the Irresistible Impulse Doctrine applies to the element of causation, the doctrine is just as applicable to a medical negligence action as any other action of negligence under Mississippi law. Consequently, any attempt to distinguish medical negligence cases from general negligence cases is without merit.



**B. Correct Application of the Irresistible Impulse Doctrine Should Have Resulted in Summary Judgment in Favor of Dr. Guild.**

Application of the Irresistible Impulse Doctrine as it has been articulated in Mississippi should have resulted in summary judgment or directed verdict in favor of the Defendant. In Shamburger v. Grand Casino of Mississippi, Inc./Biloxi, 84 F. Supp. 2d 794, 798 (S.D. Miss. 1998), the Irresistible Impulse Doctrine was stated as allowing compensation for a decedent's suicide only if (1) the defendant's intentional tortious act causes, (2) an irresistible impulse in the decedent to commit suicide. In the Hancocks' suit against Dr. Guild, application of the Irresistible Impulse Doctrine required dismissal of the Plaintiff's claim because the Plaintiffs neither alleged nor provided proof of any intentional tortious act committed by Dr. Guild. Further, even if an intentional tort had been alleged and proven, the notes found during the investigation proved that the suicide was not the result of an irresistible impulse. Ms. Hancock's suicide notes clearly evidenced her understanding of the consequences, even going so far as to reference both her upcoming funeral and her desire to be an organ donor. (RE 235; Record at 51).

The application of the Irresistible Impulse Doctrine as defined in Mississippi should therefore have resulted in a finding that Cherie Hancock did not suffer from an irresistible impulse to kill herself, but that her suicide was a deliberate, conscious act severing any causal connection of liability on the part of Dr. Guild. For this reason, the verdict in favor of Dr. Guild should be affirmed regardless of any error alleged by the Plaintiffs.

In an attempt to differentiate the Plaintiffs' wrongful death action from other negligence actions applying the Irresistible Impulse Doctrine, the Plaintiffs cited the case of Mississippi State Hospital v. Wood, 823 So.2d 598 (Miss. App. 2002). In Wood, the plaintiff filed suit against the Mississippi State Hospital for the suicide of her daughter, which occurred during hospitalization for in-patient psychiatric treatment. Wood, 823 So.2d 598, 599 (¶ 1). However, it does not appear from

the opinion that the Irresistible Impulse Doctrine was even raised in this case.<sup>1</sup> Certainly this Defendant's legal position should not be affected by an appellate decision in which the parties failed to raise and the court never reached the issue now presented for review.

The Plaintiffs in the case at hand have pointed to the Wood opinion as representative of the Mississippi Court of Appeal's acceptance of the fact that a medical negligence claim against a physician for a patient's suicide may be maintained without consideration of the Irresistible Impulse Doctrine. However, the Defendant would argue to this Court that because this specific issue was not raised before the Court of Appeals, the Wood decision should not be read to implicitly support the Plaintiff's argument. In fact, because the Wood decision involved circumstances of custodial care,<sup>2</sup> it is factually dissimilar from Cherie Hancock's out-patient status at the time of her suicide, a difference that has been recognized by other states as a determinative factor in whether a patient's suicide severs the causal chain under the Irresistible Impulse Doctrine.

**C. Even a modified application of the Irresistible Impulse Doctrine, as practiced by several states, should have resulted in a finding of summary judgment in favor Dr. Guild.**

The Plaintiffs urge this Court to consider Edwards v. Tardif, 692 A.2d 1266, 240 Conn. 610 (Conn.1997), as a case indicative of the case law that Mississippi "is postured to agree with." (Cross-Appellee Brief at p. 14). However, the truth of the matter regarding the position of other states is

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<sup>1</sup>  
The record in Wood shows that neither this defense nor the illegality defense were raised by the defendant.

<sup>2</sup>  
Not only did the suicide in Wood occur during the time that the hospital had physical custody of the patient, it occurred during a period of forced isolation during a voluntary hospitalization. This could conceivably be considered false imprisonment, an intentional tort, so as to satisfy at least one part of the requirement for suicide recovery. See Lee v. Alexander, 607 So.2d 30 (Miss. 1992) (refusal to discharge patient from voluntary psychiatric hospitalization can constitute false imprisonment).

that there is split on the issue of whether physicians should be singled out as a segment of the population for whom the common law Irresistible Impulse Doctrine does not apply. A survey of these national positions was included in a recent opinion from the Supreme Court of New Hampshire. See Maloney v. Badman, –A.2d– 2007 WL 4440314 (N.H. 2007).

In Maloney, the court acknowledged that as a general rule, “negligence actions seeking damages for the suicide of another will not lie because the act of suicide is considered a deliberate, intentional and intervening act which precludes a finding that a given defendant, in fact, is responsible for the harm.” Maloney, 2007 WL 4440314, p. \*2 (quoting McLaughlin v. Sullivan, 123 N.H. 335, 337, 461 A.2d 123 (1983)). The court in Maloney went on to recognize that there are two exceptions to this general rule, which can be concisely stated as follows: “under one exception, liability exists because the Defendant actually caused the suicide; under the other, liability exists because the Defendant had a duty to prevent it.” Maloney, 2007 WL 4440314, p. \*2 (citing McLaughlin, 123 N.H. at 337, 461 A.2d 123)). With regard to the second exception, the deciding factor of the Defendant’s liability is whether the Defendant had the control necessary to prevent the decedent from committing suicide. Maloney, 2007 WL 440314, p. \*6. The Court observed that the requisite control is found primarily in situations where the medical care provider had custody of the decedent at the time of the suicide:

Even in the case of individual psychiatrists, commentators have suggested that imposing liability ... is only appropriate if [the] patient is hospitalized at the time of the suicide, because a psychiatrist does not have *sufficient control* over the non-hospitalized patient to prevent his suicide. McLaughlin, 123 N.H. at 340, 461 A.2d 123 (quotation and brackets omitted). Courts in other jurisdictions have so held. See King v. Smith, 539 So2d 262, 264 (Ala.1989) (given minimum personal contacts between psychiatrist and patient and, particularly, fact that psychiatrist treated patient on out-patient basis, psychiatrist and patient lacked special relationship necessary make psychiatrist liable for patient’s subsequent suicide); Nally v. Grace Com. Church of the Valley, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948, 956 (Cal. 1988) (recognizing that California Supreme Court has imposed a special relationship

giving rise to a duty to exercise due care in order to prevent suicide only “in the limited context of hospital-patient relationships where the suicidal person died while under the care and custody of hospital physicians who were aware of patient’s unstable mental condition”), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989); Winger v. Franciscan Medical Center, 299 Ill.App.3d 364, 233 Ill.Dec. 748, 701 N.E.2d 813, 820 (Ill.App.Ct. 1998) (mental healthcare professional may be liable for patient’s suicide where professional “has assumed the custody or control of an individual, be it for a voluntary or involuntary admission, so that it is treating the individual and has knowledge of his suicidal tendencies”), *appeal denied*, 183, Ill.2d 598, 238 Ill.Dec. 721 N.E.2d 825 (Ill. 1999); Runyon 510 P.2d at 947, 950 (physicians treating decedent in out-patient clinic lack degree of control required to impose duty to prevent suicide).

Maloney, 2007 WL 440314, p. \*6.

In the case at hand, Cherie Hancock committed suicide after being discharged from the hospital.<sup>3</sup> Therefore, if Mississippi is to follow the lead of other states, the touchstone issue of whether Ms. Hancock’s severed the causal chain between her death and Dr. Guild’s actions is whether Dr. Guild had sufficient control over Cherie Hancock at the time of her suicide, such that Cherie Hancock’s own conscious decision to take her own life does not sever the causal chain in this case. Using the criteria set forth in Maloney, the fact that Dr. Guild did not have custody over Cherie Hancock at the time of her suicide supports the conclusion that Ms. Hancock’s suicide did in fact sever the causal chain in this case, thereby further supporting dismissal of the claims against Dr. Guild. Accordingly, the lower court’s denial of Dr. Guild’s motion for summary judgment should be reversed by this Court on appeal.

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Dr. Guild testified at trial that Cherie Hancock had been voluntarily admitted into the hospital and that at the time of her discharge, he had no legal basis for having her committed to remain in the hospital against her will. (TR 596-597). She appeared ready to move on with the next phase of her life and even showed some optimism. (RE 323, TR 271-272) Failure to discharge in these circumstances can subject a physician to suit for false imprisonment. See Lee v. Alexander, 607 So.2d 30.

#### **D. Policy Argument**

Under Mississippi law suicide is an illegal act. Nicholson on behalf of Gollott v. State, 672 So.2d 744 (Miss. 1996). Because suicide is an illegal act, the Plaintiffs should not be permitted to recover damages arising from the act of suicide. See Price v. Purdue Pharma Co., 920 So.2d 479 (Miss. 2006) (plaintiff's illegal act bars recovery regardless of defendant's negligence). Consequently, as a matter of public policy this Court should uphold the previous line of cases, beginning with Richardson v. Edgeworth, which specifically held that suicide (an illegal act) is not recoverable unless a plaintiff can show that it resulted from an irresistible impulse beyond the decedent's control that was caused by an intentional act of the defendants. In the Mississippi cases in which the Irresistible Impulse Doctrine was raised, there was never any discussion which would make the doctrine inapplicable to a medical negligence case. Although the Plaintiffs cite Mississippi State Hospital v. Wood, the defendant in that case apparently never even raised the issue now before the court.

In their Cross-Appellee Brief, the Plaintiffs mischaracterize the Irresistible Impulse Doctrine as "a special immunity for psychiatrists of a kind not enjoyed by other medical professionals." (Cross-Appellee Brief at p. 14). Apparently, the Plaintiffs would rather single out psychiatrists as a special group of defendants who can be sued for suicide despite established case law precluding recovery for suicide without satisfaction of the Irresistible Impulse Doctrine.

The Plaintiffs have therefore erroneously labeled the Irresistible Impulse Doctrine as an immunity or unfair bar to a plaintiff's recovery for rightful claims against negligent care providers. However, review of Mississippi case law establishes that the prohibition the Plaintiffs are actually challenging is this state's presumptive bar against recovery for suicide. In relation to this general bar, the Irresistible Impulse Doctrine is actually an exception to the rule allowing a plaintiff to

recover for wrongful death by suicide, but only upon proof of both prongs of the doctrine. The Plaintiffs are actually asking this court to do is not carve an exception to the Irresistible Impulse Doctrine, but instead disregard the state's general prohibition against recovery for suicide. Considering this state's public policy against suicide, the Plaintiff's approach should not be accepted by this Court.

**II. Trial Court's Denial of Motion to Compel Deposition of Jim Herring and Denial of Defendant's Subsequent Request for Negative Inference Instruction**

**A. The deposition of Jim Herring would have provided relevant evidence of Dr. Guild's discharge plan**

In their Reply Brief, the Plaintiffs erroneously state that "the only modicum of specificity in the Defendant's argument" is Dr. Guild's argument that he should have been allowed to question Jim Herring regarding observations of Ms. Hancock's behavior and the behavior of her family towards her. (Cross-Appellee Brief at p. 22). The Plaintiffs then go on to twist this argument of relevance into an argument of comparative fault. However, the Defendant would first respond that the behavioral interactions between Cherie Hancock and her family provide evidence of the existence or non-existence of love, society, and companionship. Furthermore, the Defendant would also point out that it is undisputed that Attorney Herring was the individual responsible for referring Cherie Hancock to Dr. Guild. (RE 16; Record at 306). This fact is important because it is relevant to Dr. Guild's position that although Cherie Hancock was hospitalized at St. Dominic, her suicide assessment was always minimal. Questioning of Jim Herring would have help to establish this reason for referring Cherie to Dr. Guild.

Most importantly, as stated in the Defendant's Cross-Appeal Brief, Jim Herring was also involved in implementing the discharge plan for Ms. Hancock. (RE 324-326; TR 273-274, 296). Therefore, since the Plaintiffs strongly argue that Dr. Guild did not complete the discharge plan, the

deposition of Jim Herring would have provided relevant information on the implementation of the discharge plan.

Lastly, the Plaintiffs argue that the Defendant could have subpoenaed documents from Jim Herring, while accusing the Defendant of lack of specificity in describing the documents that could have been requested from or as a result of the deposition of Jim Herring. However, this argument ignores the fact that had the Defendant been permitted to depose Jim Herring, Jim Herring would have been able to provide and/or describe documents which the Defendant would have then been able to obtain through subpoena at a later date, after having obtained the necessary descriptive specificity through Mr. Herring's deposition.

Therefore, in the event that this cause of action should be reversed and remanded, the trial court's order denying the Defendant's Motion to Compel the deposition of Jim Herring should be reversed.

**B. At trial, Dr. Guild should have been permitted to offer a negative inference instruction to the jury.**

In the Cross-Appellee Reply Brief, the Plaintiffs argue that Dr. Guild has provided no explanation of the subject matter of the testimony that was deprived him. (Cross-Appellee Brief at p. 23). The Plaintiffs even go so far as to state that the Defendant "gives no authority" for the proposition that invocation of the attorney-client privilege justifies a negative inference instruction. (Cross-Appellee Brief at . 23).

Clearly, the Plaintiffs ignored the case of Jackson v. Brumfield, 458 So.2d 736 (Miss. 1984), that was cited and quoted in the Defendant's Cross-Appeal. While the case of Jackson v. Brumfield specifically involved physician-patient privilege, the Plaintiffs have provided no authority as to why this same reasoning does not apply to an attorney-client relationship.

Once again, with the Plaintiffs' having accused Dr. Guild of failure to implement his discharge plan, the testimony of Jim Herring regarding his role in the discharge plan was extremely relevant to Dr. Guild's defense. Therefore, Dr. Guild should have been permitted to provide the jury with a negative inference instruction at the trial of this case.

### **Conclusion**

The Court presently has before it Plaintiffs' appeal of the jury verdict in favor of Dr. Guild. As shown by his original brief, Dr. Guild believes that Plaintiffs' appellate argument is without merit and the jury's verdict, rendered after several days of trial and presentation of multiple witnesses and exhibits, must stand.

Nonetheless, he has cross-appealed for fear of being accused of waiving legal positions which were taken but rejected by the trial court. Certainly, these issues need not be reached should the Court believe the jury verdict should be affirmed. However, Dr. Guild's cross-appeal establishes his right to a judgment even if the Plaintiffs' claims of error are correct.

The Plaintiffs have responded to the Defendant's Cross-Appeal with arguments supporting the mistaken assumption that application of the Irresistible Impulse Doctrine to medical negligence claims somehow automatically defeats the viability of a wrongful death action in a medical negligence case in which the patient commits suicide. This assumption is invalid on its face since the Irresistible Impulse Doctrine accepted in Mississippi is actually a two-part test, the very nature of which exposes the error of the Plaintiffs' assumption because tests have to be proven. Furthermore, even if this Court were to follow suit with other jurisdictions and find that suicide does not sever the causal chain in cases where the medical care provider has control or custody of the decedent, this rule would not result in automatic non-viability of a wrongful death claim for suicide; but rather, would require a claimant to show that the defendant medical care provider had custody



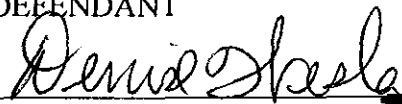
of the decedent. Since Ms. Hancock obviously was outside of Dr. Guild's custody at the time she voluntarily ended her life, even Plaintiffs' suggestion of a modified suicide rule does not prevent judgment in favor of Dr. Guild.

For all of these reasons, in the event that the jury verdict is not permitted to stand, this Court should reverse the trial court's denial of the Defendant's motion for summary judgment. Should this action be reversed and remanded, the Defendant respectfully requests that this court reverse the trial court's rulings on either the Defendant's Motion to Compel the Deposition of Jim Herring or the Defendants request for a negative inference instruction should the Plaintiffs once again decide not to call attorney Jim Herring as a witness at trial .

Respectfully submitted,

DONALD C. GUILD, M.D., DEFENDANT

BY:

  
WHITMAN B. JOHNSON III, [REDACTED]  
DENISE C. WESLEY, MSB #100771

OF COUNSEL:

CURRIE JOHNSON GRIFFIN  
GAINES & MYERS, P.A.  
1044 River Oaks Drive  
Jackson, Mississippi 39232  
Post Office Box 750  
Jackson, Mississippi 39205  
Telephone: (601) 969-1010  
Facsimile: (601) 969-5120

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this day served a true and correct copy of the above and foregoing motion by causing a copy of same to be hand-delivered, transmitted via electronic facsimile, and/or mailed by United States mail, postage prepaid, to the following persons at the address(es) shown:

Mississippi Supreme Court Clerk's Office  
450 High Street  
P.O. Box 249  
Jackson, MS 39201

Honorable Jannie M. Lewis  
Yazoo County Circuit Court Judge  
Post Office Box 149  
Lexington, MS 39095

B. Humphreys McGee, III  
Scruggs Law Firm  
Post Office Box 1136  
Oxford, MS 38655

Ronald M. Kirk, Esq.  
Post Office Drawer N  
Flora, MS 39071

SO CERTIFIED, this the 6<sup>th</sup> day of February, 2008.

  
DENISE C. WESLEY