IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2006-CA-01703
Consolidated with
CASE NO. 2007-CA-00821

NORMAN Q. THOMAS JR., INDIVIDUALLY
AND ON BEHALF OF WILLIAM THOMAS
AND ANNA THOMAS, TWO MINORS — APPELLANT

VERSUS

CLARK G. WARDEN, M.D.;
MISSISSIPPI BAPTIST MEDICAL CENTER
AND JOHN DOES 1-10 — APPELLEES

Appeal From the Circuit Court of
the First Judicial District of Hinds County, Mississippi

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT *EN BANC* REQUESTED

OF COUNSEL:

L. Breland Hilburn [redacted]
C. Louis Clifford IV
Patrick J. Schepens [redacted]
EAVES LAW FIRM
101 North State Street
Jackson, Mississippi 39201
Telephone: (601) 355-7961
Facsimile: (601) 355-0530

Roger L. McGehee, Jr. Esq. [redacted]
ATTORNEY AT LAW
115 North State Street
Jackson, Mississippi 39201
Telephone: (601) 982-1000
Facsimile: (601) 982-1005

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CERTIFICATE OF INTERESTED PARTIES

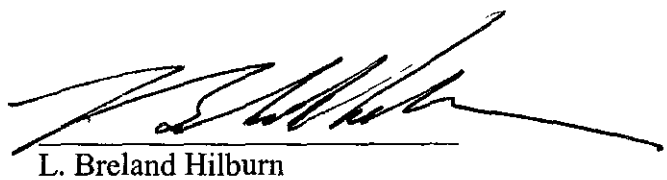
The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 28(a)(1) have an interest in the outcome of this case. These representations are made in order that the Justices for the Supreme Court of Mississippi may evaluate possible disqualification or recusal.

1. Appellant Norman Q. Thomas Jr., and William Thomas, and Anna Thomas, two minors;
2. L. Breland Hilburn, C. Louis Clifford IV, and Patrick J. Schepens of Eaves Law Firm, attorneys for the appellant;
3. Roger L. McGehee Jr. attorney for appellant;
4. Appellees Clark G. Warden, M.D., and Mississippi Baptist Medical Center;
5. Stuart B. Harmon and Kristopher A. Graham of Page, Kruger & Holland, P.A. attorneys for appellee Clark G. Warden;
6. Eugene R. Naylor and Elizabeth A. Ganzerla of Wise, Carter, Child & Caraway, P.A., attorneys for appellee Mississippi Baptist Medical Center;

7. Judge W. Swan Yerger, Hinds County Senior Circuit Court Judge.

8. Walter T. Johnson and J. Collins Wohner Jr. of Watkins & Eager, PLLC attorneys for *Amici Curiae* Mississippi State Medical Association, Mississippi Hospital Association, Mississippi Health Care Association, Mississippi Nurses Association, and Mississippi Dental Association.

Respectfully submitted, this the 2nd day of April, 2008.



L. Breland Hilburn
Attorney for the Appellant

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I. THE CONSTITUTIONALITY OF MISS. CODE ANN. § 11-1-58 & § 15-1-36(15) IS PROPERLY BEFORE THIS COURT.

Defendant Warden and Defendant MBMC would like this Court to abstain from considering the constitutionality of Miss. Code Ann. § 11-1-58 & § 15-1-36(15) which is understandable. The Defendants realize that should this Court undertake a constitutional examination of the statutes in question, these statutes will be declared unconstitutional as they violate the separation of powers clause, the open and accessible courts provision, and the equal protection clause of the Mississippi Constitution of 1890.

In an attempt to persuade this Court from addressing the constitutionality of Miss Code Ann.§11-1-58 & 15-1-36(15) for the first time, the Defendants engage in circular reasoning which is neither persuasive nor reasonable.

A. THE PLAINTIFF IS NOT REQUIRED TO FOLLOW UNCONSTITUTIONAL LAWS.

Both Defendant Warden and Defendant MBMC seek shelter in the long held legal principle that if the Court may decide an issue concerning a statute without ruling on the constitutionality of that statute the Court should refrain from deciding the constitutionality of the statute. *Grant v. State,* 686 So. 2d 1078 (Miss. 1996). This principle is understandable as it comports with another fundamental legal cannon, that enactments of the legislature are presumed valid until it is proven beyond a reasonable doubt that the enactment is unconstitutional. *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 1206 (Miss. 2002).

The Defendants thereupon rely on the circular reasoning that because the Plaintiff did not strictly comply with Miss. Code Ann. § 11-1-58 and § 15-1-36(15) the trial court properly dismissed their case. The Defendants further argue that had the Plaintiff complied with the statutes the complaint would not have been dismissed. Therefore, the Defendants reason this Court need not venture into the realm of the constitutionality of the statutes because this case can

be decided on the basis of the Plaintiff's failure to strictly comply with the statutes. The Defendants' position evidences their misunderstanding of constitutional law and the basic premise that unconstitutional legislation is void. This Court has affirmatively held any attempts by the legislature to abridge the Court's rulemaking powers are of no force and effect. *Hall v. State*, 539 So. 2d 1334, 1346 n. 16 (Miss. 1989) (*see also* Order of the Supreme Court, No. 1, 395-397 (Miss. Cases, May 26, 1981). Therefore, since the Plaintiff has demonstrated to this Court that Miss. Code Ann. § 11-1-58 and § 15-1-36(15) encroach upon this Court's rulemaking authority the statutes "are of no force and effect," and the trial court's dismissal of this action based upon unconstitutional and void legislative enactments was error.

The Defendants take the judicial cannon advising restraint when determining questions concerning the Constitution to the extreme.[1] Simply put, the Defendants' argument is akin to asserting that if the civil rights leaders of yesterday had just "followed the laws" there would not have been a problem. However, there was a problem; unconstitutional statutes, when proven unconstitutional, are void. The procedural statutes enacted by the Mississippi legislature violate the separation of powers provision of the Mississippi Constitution, as well as, the open courts guarantee, and the equal protection clause. Furthermore, the Defendants have not cited one case, treatise, law journal, restatement, encyclopedia, or any other authority for the proposition that unconstitutional laws must be followed, yet that is precisely the argument they make in their briefs. Rather, the law is the opposite; as this Court has previously cited the preeminent case of *Marbury v. Madison*, 5 U.S. 137 (1803), for the proposition that congressional enactments contrary to the constitution are void. *Myers v. City of McComb*, 943 So. 2d 1 (Miss. 2006).

[1] An example of proper judicial restraint would be in the event this Court finds substantial compliance to be the appropriate standard of compliance. In which case this Court could find the Plaintiff substantially complied and reverse the lower courts decision without ruling on the constitutional claims raised in the Plaintiff's briefs.

The constitutional issues now before the Court have been raised by the Plaintiff in the trial court, where both of the Defendants thoroughly briefed all issues. The trial court, after a hearing, ruled on the merits of the Plaintiff's claims; throughout the course of the lower court proceedings, the Attorney General of Mississippi was notified of the constitutional issues pursuant to the procedural rules. Therefore, all issues have been preserved for appeal and the question of the constitutionality of Miss. Code Ann. § 11-1-58 and § 15-1-36(15) is now ripe for judicial review.

B. THE DEFENDANTS' ARGUMENT THAT THE APPLICABLE STATUTE OF LIMITATIONS HAS RUN IS COMPLETELY WITHOUT MERIT AND SHOULD BE DISREGARDED.

In a further attempt to dissuade this Court from venturing into the arena of the constitutionality of Miss. Code Ann. § 11-1-58 and § 15-1-36(15) the Defendants argue the Plaintiff's claim is precluded by the statute of limitations, although neither Defendant offers any authority to support their premise. The Defendants contend that since the Plaintiff did not attach the certificate required by Miss. Code Ann. § 11-1-58 when the suit was filed on November 4, 2005 the suit was void and therefore the statute of limitations was not tolled. However, the Defendants' argument runs head on into Rule 3 of the Mississippi Rules of Civil Procedure which commands that "[a] civil action is commenced by filing a complaint with the court."[2] Glaringly absent from Rule 3 is a command that any certificate or affidavit need be attached to a complaint in order to initiate a lawsuit. Moreover, this Court has explicitly held Miss. R. Civ. P. 3 "provides that a suit is commenced by the filing of a complaint with the court." *Estate of Schneider,* 585 So. 2d 1275, 1277 (Miss. 1991).[3] The Mississippi Rules of Civil Procedure

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[2] The Comments to Rule 3 explain the purpose of this rule is to "establish a precise date for fixing the commencement of a civil action." Miss. R. Civ. P. 3 cmts. The fixing of a certain date for the commencement of an action is important because it is decisive of whether a claim is "barred by a statute of limitations." *Id.*

[3] *See Erby v. Cox,* 654 So. 2d 503 (Miss. 1995)(holding filing of a civil action is sufficient to toll the statute of limitations pursuant to Rule 3 even if process is not issued); *see also* Jeffery Jackson, Civil Procedure, ENCYCLOPEDIA OF MISSISSIPPI LAW, § 13.1 (West 2001) "For the purposes of tolling state statutes of limitations,

govern the procedure in circuit courts in Mississippi, not procedural statutes enacted by the legislature. Thus, even assuming *arguendo* the Plaintiff's complaint was defective by not attaching a certificate, procedural statutes which conflict with the procedural rules of this Court are of no force and effect.

The Defendants put forward another alternative statute of limitations argument which has not been raised until now. Their argument is that if this Court finds Miss. Code Ann. § 15-1-36(15) unconstitutional the Plaintiff's claim is time barred because the Plaintiff waited 59 days until after the original statute of limitations ran. Defendant Warden attempts to phrase the issue as the Plaintiff is "trying to have it both ways," this however is not true, the Plaintiff simply wishes to pursue his fundamental constitutional right to bring a meritorious suit against a tortfeasor. The first sentence of Miss. Code Ann.§15-1-36(15) states "[n]o action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action." Thus, it is the first sentence of § 15-1-36(15) that raises constitutional problems, specifically separation of powers, equal protection, and open courts. Therefore, congruent with the severability clause which was added in 2002 only the invalid provisions of the statute are to be excised from the statute.[4]

The United States Supreme Court can be looked to for instructions on the application of the severability clause found in the statute. The Court has instructed "a court should refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)(quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). The Court went on to state "unless it is evident that the Legislature would not have enacted those provisions which are

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and for other purposes under the Mississippi Rules of Civil Procedure, a civil action is commenced by filing a complaint with the court."

[4] "If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provision of this act are declared severable." Section 12 of Laws 2002, 3rd Ex. Sess., Ch. 2

within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Therefore, using the Supreme Court for guidance it is clear the appropriate remedy for this Court, in regards to § 15-1-36(15), is to strike the first sentence of the statute as unconstitutional. It is the third sentence of§ 15-1-36(15) which extends the statute of limitations for sixty (60) days when notice is served within sixty days prior to the expiration of the applicable statute of limitations. In the case at bar notice – which is effective when mailed – was served on both Defendants one day prior to the expiration of the statute of limitations and therefore under the valid portions of Miss. Code Ann.§ 15-1-36(15) the statute of limitations was extended for sixty days until November 5, 2005. Furthermore, by only excising the first sentence of§ 15-1-36(15) from the statute, which bars the bringing of suits without giving sixty days notice, the overall intent of the statute, to give notice to health care providers and to facilitate settlement of disputes may be furthered without violating separation of powers and denying plaintiffs' rights to open courts and equal protection. Therefore, both of the Defendants tenuous arguments that the Plaintiff's complaint is barred by the statute of limitations are without merit.

II. SECTIONS 11-1-58 AND 15-1-36(15) OF THE MISSISSIPPI CODE ARE PROCEDURAL RULES WHICH CONFLICT WITH CERTAIN RULES OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE IN VIOLATION OF THE MISSISSIPPI CONSTITUTION OF 1890

For forty years this Court has instructed that its power to proscribe general procedural rules stems from § 144 of the Mississippi Constitution which vests the judicial power of the State in the Supreme Court. *Southern Pacific Lumber Co. v. Reynolds,* 206 So. 2d 334, 335 (Miss. 1968). This Court has gone on to hold that its "inherent power to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of the judicial powers in the courts." *Claypool v. Mladineo*, 724 So. 2d 373, 380 (Miss. 1998)(quoting *Newell v. State,* 308 So. 2d 71, 76 (Miss. 1975)). Because the constitutional

concept of separation of powers is impacted whenever a procedural statute enacted by the legislature conflicts with a procedural rule promulgated by this Court, in those cases the procedural statute is of no force and effect. *Hall*, 539 So. 2d at 1346. This concept has been so engrained by the three branches of government in Mississippi that the legislature has conceded and acknowledged that the Supreme Court "has the power to prescribe . . . by general rules the forms of process, writs, pleadings, motions . . . and the practice and procedure for trials." Miss. Code Ann. §9-3-61.

As the Plaintiff pointed out in his principle brief when a statute is attacked for conflicting with the rulemaking power of this Court, and obstinately violating the separation of powers provision of the Mississippi Constitution, a threshold determination must be made as to whether the statute is substantive or procedural. This Court has consistently instructed that it retains the inherent power to adopt procedural rules while the legislature retains the power to adopt substantive rules. *Claypool,* 724 So. 2d at 380. This does not mean that the legislature is barred completely from enacting procedural rules. Rather, after a rule has been characterized as procedural the party challenging the constitutionality of the rule must still demonstrate that the procedural statute *conflicts* with a procedural rule. For if the procedural statute did not conflict with any rule of court then it could be characterized as a "legislative suggestion concerning procedural rules" which this Court has stated it would follow "unless determined to be an impediment to justice or an impingement upon the constitution." *Newell*, 308 So. 2d at 76. However, when a procedural statute conflicts with a procedural rule the procedural statute impinges upon the Court's inherent rulemaking authority and thereby violates the separation of powers provision of the Mississippi Constitution. It is in this context, wherein a procedural statute conflicts with a procedural rule, that the constitution is offended and the statute is of no force and effect. *Hall*, 539 So. 2d at 1346.

A. MISS. CODE ANN. § 11-1-58 IS A PROCEDURAL STATUTE.

As the Plaintiff pointed out in his principle brief a threshold determination must be made by this Court as to whether Miss. Code Ann. § 11-1-58 is a substantive rule or a procedural rule. While there is no binding case law in Mississippi defining what is a substantive rule and what is a procedural rule there are useful markers which may be used to aid the current examination.

As both Plaintiff and Defendant MBMC have pointed out a cursory definition of substantive law and procedural law may be found by turning to *Black's Law Dictionary*. While substantive law is defined as "the part of the law that creates, defines, and regulates the rights, duties, and powers of parties," procedural law is defined as "the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *Black's Law Dictionary* 1241, 1470 (8th ed. 2004). After stating the definitions of substantive law and procedural law Defendant MBMC leaps to the conclusion that both statutes in question are substantive because they "regulate, or fix, a plaintiff's right to a remedy at law."[5] However, beyond taking their word for it, Defendant MBMC offers little to support its contention Miss. Code Ann. § 11-1-58 is substantive, and the little authority they do cite supports the Plaintiff's contention that these statutes are purely procedural.

Defendant MBMC relies heavily upon Judge Southwick's concurring opinion in *Wolfe v. City of D'Iberville*, 799 So. 2d 142, 150 (Miss. App. 2001)(Southwick, J. concurring), wherein he advised "[t]here is a sense that if the regulation is of conduct occurring within a court, from the time the matter was properly commenced in that court until it is disposed of by the court, it is likely to be a matter of practice and procedure." What is important to examine in Judge Southwick's opinion is his instruction that if the statute regulates conduct within a court it is likely procedural. This thought is echoed by both Defendants MBMC and Warden wherein

[5] Appellee MBMC's Brief at 17.

Defendant Warden argues if a suit which is not in compliance with Miss. Code Ann. § 11-1-58 is filed "[w]hat should happen to the suit, and how the suit should be treated, procedurally, is up to the courts,"[6] while Defendant MBMC similarly states "[h]ow the courts deal procedurally with a plaintiff who fails to meet the conditions precedent remains the province of the court."[7] Therefore, under both Defendant Warden's and Defendant MBMC's analysis if Miss. Code Ann. §11-1-58 dictates what a court must do with a complaint which fails to attach a certificate then the statute is procedural. Therein lies the fatal flaw of the Defendants argument and the fatal flaw of the statute.

Pursuant to § 11-1-58(1)(b) a complaint which fails to attach a certificate of expert consultation "shall be dismissed." Therefore, the statute does not allow this or any court in the state of Mississippi to determine how to "deal procedurally with a plaintiff who fails to meet the conditions precedent." Rather, the statute not only establishes new heightened pleading requirements in violation of Rules 8, 9, and 11 of the Mississippi Rules of Civil Procedure, but the statute also instructs courts how to procedurally deal with plaintiffs who, through mistake or omission, fail to attach a certificate at the time of filing. Under both Defendants' criteria this statute is procedural. It should also be noted that the mandatory dismissal found in Miss. Code Ann. § 11-1-58 is precisely what was relied upon by the Supreme Court of Arkansas when it struck down a similar Arkansas statute for conflicting with Rule 3 of the Arkansas Rules of Civil Procedure and the separation of powers provision of the Arkansas Constitution. *Summerville v. Thrower*, No. 06-501, __S.W.___, 2007 WL 766319 (Ark. March 15, 2007).

Further support for the conclusion that Miss. Code Ann. § 11-1-58 is procedural can be found through an examination of this Court's jurisprudence surrounding the Miss. Code Ann. § 93-17-3 which contains language identical to that of Miss. Code Ann. § 11-1-58. As pointed out in

[6] Appellee Warden's Brief at 31.
[7] Appellee MBMC's Brief at 20.

the Plaintiff's principle brief this Court has instructed the requirement that a petition for adoption shall be accompanied by a doctor's certificate "is not a jurisdictional requirement." *L.W. v. C.W.B.*, 762 So. 2d 323, 328 (Miss. 2000). This Court's conclusion that a requirement that a certificate be attached to a petition is not jurisdictional is understandable as such a pleading requirement is purely procedural, albeit a proper exercise of legislative procedural rulemaking in the context of Miss. Code Ann. § 93-17-3 as Miss. R. Civ. P. 81 limits the Rules applicability in proceedings pertaining to Family Court Law. There is simply no way to come to the conclusion that Miss. Code Ann. § 11-1-58 is a jurisdictional statute[8] when this Court has previously held an almost identical statute, §93-17-3, to not be jurisdictional and capable of being waived.

Although Defendant MBMC takes issue with this Court looking to its sister jurisdictions for assistance in this matter, the Defendant's reluctance to look at other courts instructions is likely due to the fact that little support may be found for its position that Miss. Code Ann. § 11-1-58 is substantive and not procedural. In fact many states have defined statutes requiring a certificate or affidavit of merit to accompany a complaint to be nothing more that a procedural pleading requirement.[9] The logical conclusion reached by other courts that statutes mandating certificates of merits to be attached is a procedural pleading requirement is understandable and fits succinctly with *Black's* definition of procedural law as a rule which prescribes the steps for having a right enforced.

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[8] Furthermore, any attempt by the legislature to limit the jurisdiction of Circuit Courts of the State by any means other than a constitutional amendment would violate Art. 6 § 156 of the Mississippi Constitution of 1890 which provides for the jurisdiction of circuit courts in this State.

[9] See *Summerville v. Thrower*, No. 06-501, __S.W.___, 2007 WL 766319 (Ark. March 15, 2007); *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006); *In re Vaccine Cases*, 36 Cal. Rptr. 3d 80, 92 (Cal. App. 2005)(describing amendment to pre-suit notice statute to require a certificate of merit to be procedural as it "affects the conduct of litigation rather than changing the 'legal consequences of past conduct'"); *Shirley v. Hosp. Auth. of Valdosta/Lowndes County*, 587 S.E.2d 873, 875 (Ga. App. 2003)(describing Georgia certificate of merit statute as "procedural and should be liberally construed"); *Ferreira v. Rancocas Orthopedic Associates*, 836 A.2d 779, 782 (N.J. 2003)(describing New Jersey statutes requiring certificate of merit and pre-suit notice as "procedural requirements in order for a plaintiff to maintain a professional malpractice action"); *Dorris v. Detroit Osteopathic Hosp. Corp.*, 594 N.W. 2d 455, 464 (Mich. 1999)(describing Michigan statute requiring certificate of merit and pre-suit notice as 'procedural requirements of a malpractice action'); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062.

1. MISS. CODE ANN. § 11-1-58 DOES NOT REGULATE A RIGHT UNLIKE THE MISSISSIPPI TORT CLAIMS ACT AND THE MISSISSIPPI WORKER'S COMPENSATION ACT.

As support for their contention that Miss. Code Ann. § 11-1-58 is a substantive law the Defendants rely upon the Mississippi Tort Claims Act, and the Mississippi Workers Compensation Act. However, the Defendants' reliance is fundamentally misplaced as the foregoing acts modify a plaintiff's substantive rights whereas § 11-1-58 mandates the procedural method a plaintiff must follow to have his right enforced.

The Plaintiff in Section V.A.[10] of his principle Brief describes the fundamental differences between the Mississippi Tort Claims Act [MTCA] and the Mississippi Medical Tort Claims Act [MMTCA]. Despite this distinction the Defendants maintain in their efforts to bootstrap their argument by stating since the MTCA is constitutional the MMTCA is constitutional, this argument however is fundamentally mistaken. While the MTCA has modified and created a *substantive* cause of action against the State where none existed before, Miss. Code Ann. § 11-1-58 has in no way created, abolished, or modified the common law cause of action for medical negligence.

Likewise, worker's compensation laws have been upheld because, as pointed out by Defendant MBMC "the legislature chose to substitute one remedy for another: a statutory cause of action in place of the remedy available at common law." *Walters v. Blackledge*, 71 So. 2d 443 (Miss. 1954). However, in regards to § 11-1-58 the *cause of action* which the Plaintiff has based his complaint upon, medical negligence, is left unaffected. Thus, the two acts which the Defendants look to for aid, the MTCA and the worker's compensation acts are of no avail because where they modified the substantive rights of an injured person, Miss. Code Ann. § 11-1-

[10] Plaintiff's Principle Brief at 37-38.

58 is a procedural statute which provides the procedure for a citizen exercising the right to bring an action against a physician.

The substantive/procedural distinction and its relation to the MTCA and the worker's compensation act may be more readily seen by examining a substantive provision of the MMTCA. Section 11-1-60 of the Mississippi Code places a cap on non-economic damages sought in medical malpractice actions. Like the MTCA and the worker's compensation statute Miss. Code Ann. § 11-1-60 "defines and regulates the rights of parties," specifically § 11-1-60 limits a plaintiff's recovery. When § 11-1-60 is contrasted with § 11-1-58 the differences are readily apparent, where § 11-1-60 regulates the rights of plaintiffs, § 11-1-58 does not regulate a right, rather it merely proscribes the procedural steps a plaintiff must take in order to have his or her right enforced. As such it is clear § 11-1-58 is a procedural statute, as it clearly prescribes the steps a plaintiff must follow to have his right judicially enforced.

2. CURRENT LEGISLATION IN THE MISSISSIPPI LEGISLATURE UNDERSCORES THE FACT THAT MISS. CODE ANN. § 11-1-58 & § 15-1-36(15) ARE PROCEDURAL STATUTES

Further support for the position that Miss. Code Ann. § 11-1-58 is a procedural statute may be found by examining the current actions of the Mississippi Legislature. On January 24, 2008, Representative Percy Watson proposed House Bill 215 in the Mississippi House of Representative. House Bill 215, which has been attached to the Plaintiff's Reply Brief, is an act to amend Miss. Code Ann. § 11-1-58, specifically the act seeks to add a Subsection 8 to the statute which provides as follows:

> Where the complaint was not accompanied by a certificate executed by the attorney in accordance with this section, upon motion made the attorney may comply by showing that he actually consulted with a qualified expert prior to filing the complaint or by showing that such failure to provide the certificate was the result of excusable neglect.

The Mississippi House of Representatives passed House Bill 215 on February 28, 2008 by a vote of sixty-seven (67) in favor of the bill to fifty-four (54) against the bill. Thereupon on March 4, 2008 House Bill 215 was referred to Senate Judiciary A where it died on March 18, 2008. However, what is remarkable about House Bill 215 is it further proves the underlying procedural basis of§ 11-1-58, and the slippery slope which the enactment of§ 11-1-58 began.

With the enactment of§ 11-1-58 the legislature began to prod into the matters of this Court by enacting heightened pleading standards which conflict with Rules 3, 8, 9, 10, 11, & 15. Now, after realizing some of the procedural problems which have arisen due to the new procedural requirements of§ 11-1-58 the legislature sought to dictate further how this Court should handle its procedural affairs by providing for motion practice. The very existence of House Bill 215, should serve as a warning to this Court that the legislature is actively trying to usurp this Court's inherent procedural power, and it is in the hands of this Court to prevent this from occurring.

While both Defendants and the *Amici Curiae* belittle the Plaintiff's warning of the legislative encroachment upon this Court's inherent procedural rule-making power, this Court should be aware there is an active element in the Mississippi Legislature attempting to do just that. In addition to House Bill 215, Representative Mark Baker on January 29, 2008 proposed House Bill 382, which is attached to the Plaintiff's Reply Brief, which should serve to this Court as a direct shot across the bow. Alarmingly House Bill 382 provides that "[t]he rules of practice and procedure in the courts of this state shall be governed by statute; however, the courts may adopt such rules of practice and procedure not inconsistent with statutory law." If there is any doubt that there is an element of the Mississippi legislature actively seeking to usurp the rule-making authority of this Court, House Bill 382 should serve to clarify that doubt.

Fortunately, House Bill 382 died in committee on February 19, 2008; however, in light of both House Bill 215 and House Bill 382 this Court should be even more vigilant in guarding its

inherent constitutional authority to promulgate procedural rules. Defendant Warden in his Brief argues that the Plaintiff is attempting to incite a "legislative versus judicial 'turf war' where there simply is none."[11] Disturbingly however such a war does exist and it was begun when the legislature enacted § 11-1-58 and § 15-1-36(15). Furthermore, the active encroachment by the legislature persists as is evident by House Bill 215 and House Bill 382, if this Court shows weakness and succumbs to the legislative encroachment, the legislature will be emboldened and House Bill 382 will rise again next session with more support. Whether or not Defendant Warden chooses to acknowledge the encroachment by the legislature the fact remains that members of the legislature are actively seeking to take the inherent procedural rule-making authority from this Court, and it must be stopped.

B. MISS. CODE ANN. § 15-1-36(15) IS A PROCEDURAL STATUTE.

The same outlying markers which were used in the foregoing analysis of Miss. Code Ann.§ 11-1-58 when applied to Miss. Code Ann.§15-1-36(15) also demonstrate that§ 15-1-36(15) is a procedural statute. In accord with the definition of procedural law provided in *Black's Law Dictionary*, § 15-1-36(15) "prescribes the steps for having a right or duty judicially enforced" specifically in Mississippi a plaintiff may not file a suit for medical malpractice until sixty days pre-suit notice has been given. Nowhere in the language of § 15-1-36(15) does the statute "regulate the right" to bring a lawsuit against a medical service provider, rather and quite clearly the statute prescribes the steps for having that right enforced.

Defendant Warden posits the argument that since Miss. Code Ann.§ 15-1-36(15) is a *pre-*suit requirement the Mississippi Rules of Civil Procedure do not apply. However, what Defendant Warden does not comprehend is that requiring sixty days pre-suit notice be given prior to filing a civil action in Mississippi runs completely contrary to the commands of Miss. R.

[11] Appellee Warden's Brief at 8.

Civ. P. 3 that "[a] civil action is commenced by filing a complaint with the court." Nowhere in the rule is there found any requirement that pre-suit notice must be given prior to filing a complaint.

Prior to the adoption of the Mississippi Rules of Civil Procedure many commentators wrote at length in regards to the power of this Court to provide for its own procedural rules.[12] Professor Frank, writing prior to this Court's decision in *Newell* and the adoption of the procedural rules, was among the commentators which proposed a division between substantive law which would be created by the legislature, and procedural law which would be governed by the judiciary. In describing the two types of law Professor Frank explained the creation of new courts, their organization, judges salaries, statutes of limitation, and subjects of jurisdiction would all be quite clearly substantive law in the control of the legislature. Frank, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L. J. 287, 303 (1972) [hereinafter Frank]. On the other hand the "***method of commencing an action***, the form, content and amendment of pleadings . . . are all matters directly related to the orderly dispatch of litigation and are therefore within the judiciary's power to control." *Id.* at 304 (emphasis added). Professor Frank went on to describe some other procedural matters such as what constitutes effective notice,[13] and the method by which cases are continued or dismissed.[14] Thus, in accord with all of the outlying markers which may be looked to in order to determine whether Miss. Code Ann. § 15-1-36(15) is procedural or substantive the only conclusion is the statute is procedural as it mandates the proper method of commencing an action, a matter which is unequivocally procedural.

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[12] *See generally* Frank, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L. J. 287 (1972); Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C. L. REV. 1 (1982); Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, 3 MISS. C. L. REV. 45 (1982).

[13] Frank at 304.

[14] Frank at 305.

The real gist of Defendant Warden's argument that the pre-suit notice does not conflict with the rules because the rules do not come in to effect until a suit is commenced, is Defendant Warden's subsequent argument that the statute is jurisdictional.[15] In fact Defendant Warden points out this Court recently stated, in dicta, that Miss. Code Ann. § 15-1-36(15) is "mandatory and jurisdictional." *Saul v. Jenkins*, 963 So. 2d 552, 554 (Miss. 2007). With all due respect to the Court, the statement that the notice requirement of § 15-1-36(15) is jurisdictional is not entirely correct. Article VI Section 156 of the Mississippi Constitution of 1890 states "[t]he circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law." As the circuit courts of Mississippi are constitutional courts with constitutionally mandated jurisdiction the legislature cannot enact procedural hurdles which take away and/or limit the circuit courts jurisdiction by anything less than a constitutional amendment. Such a result may be reached by comparing the first clause of Section 156 which vests jurisdiction of all civil and criminal matters not vested in another court with the circuit courts, and the second clause which explicitly allows the legislature to control the appellate jurisdiction of the circuit courts. Thus, § 15-1-36(15) cannot be a jurisdictional statute as a statute cannot override the constitution. *See Newell,* 508 So. 2d at 77 ("no citation is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield").

Furthermore, this Court has previously dealt with an almost identical issue in *Haralson v. Mississippi*, 308 So. 2d 222 (Miss. 1975). This Court in *Haralson* confronted the former statute Miss. Code Ann. § 9-13-33,[16] which mandated that in all cases in which the trial is noted by an official court reporter "any person desiring to appeal the case shall notify the court reporter in

[15] Appellee's Brief at 26.
[16] Repealed by Laws 1991, Ch. 573, § 141, eff. July 1, 1991.

writing within ten (10) days after adjournment of the court of the fact that a copy of the notes is desired." For years this Court struggled with the application of§ 9-13-33 in determining when the notice was to be filed, what was valid and sufficient notice, and lack of notice. As early as 1933 this Court even held that the notice requirement of§ 9-13-33 jurisdictional in *Mayflower Mills v. Breeland*, 168 Miss. 207, 149 So. 787 (1933). However, by the time this Court heard the *Haralson* case it affirmatively stated "[n]ot only have we followed this statute but we have misconstrued its effect by holding that it is jurisdictional." *Haralson*, 308 So. 2d at 224. This Court went on to hold, "[t]his Court's jurisdiction of an appeal is in no wise dependent upon the giving of the notice to the court reporter to transcribe the trial notes." *Id.*

The *Haralson* Court made another observation that is pivotal to the present analysis. The *Haralson* Court unequivocally found the statute mandating ten days notice be given to the court reporter prior to filing an appeal to be "**purely procedural and in reality an invasion by the legislature of the rule-making power of this Court**." *Id.* at 223 (emphasis added). Similarly§ 15-1-36(15) is purely procedural and the jurisdiction of circuit courts to hear a simple medical negligence case is in no way reliant upon the giving of pre-suit notice. The legislature cannot change the jurisdiction of a constitutional court by anything short of a constitutional amendment. Finally, neither Defendant nor their *Amici* supporters put forward an argument that Miss. Code Ann.§ 15-1-36(15) does not conflict with Miss. R. Civ. P. 3. Therefore, since§ 15-1-36(15) is a procedural statute and it conflicts with Rule 3 in accord with the pronouncement set forth in *Hall v. State*, the statute is of no force and effect and pursuant to the severability clause found within the statute the first sentence of Miss. Code Ann.§ 15-1-36(15) barring the filing of suits for sixty days should be severed from the statute.

C. BOTH MISS CODE ANN. § 11-1-58 & § 15-1-36(15) VIOLATE NUMEROUS RULES OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE

From the foregoing analysis it is clear that both Miss. Code Ann. §11-1-58 & 15-1-36(15) are procedural statutes as they "prescribe the steps for having a right or duty judicially enforced." *Black's Law Dictionary* 1241 (8th ed. 2004). Furthermore, neither statute "creates, defines [or] regulates the rights, duties, and powers of parties." *Black's* at 1470. These two statutes are instances in which the legislature has disregarded and trounced over the Mississippi Constitution of 1890 in an effort to tell this Court how it should conduct its business. Pursuant to the precedent clearly established in *Hall v. State* where a procedural statute is found to conflict with a procedural rule the statute is of no force and effect. As the two statutes in question are clearly procedural the question then turns to whether either of the statutes conflict with a procedural rule.

Remarkably and understandably, neither Defendant nor their *Amici* respondents, presented any argument to this Court to support the proposition that Miss. Code Ann. § 11-1-58 and § 15-1-36(15) do not conflict with any procedural rules of this Court. This is understandable because no sound argument may be made that these statutes do not conflict with some of this Court's procedural rules. In his Principle Brief the Plaintiff lays outs the basis for conflicts found between § 11-1-58 and § 15-1-36(15) and Rules 3, 8, 10, 11 and 15 of the Mississippi Rules of Civil Procedure. Neither of the Defendants attempted to refute the Plaintiff's argument because none can be made, quite simply these procedural statutes conflict with the procedural rules of this Court and accordingly the statutes are of no force and effect. *Hall*, 539 So. 2d at 1346.

III. MISS. CODE ANN. § 15-1-36(15) VIOLATES SECTION 24 OF THE MISSISSIPPI CONSTITUTION OF 1890 WHICH COMMANDS THAT ALL COURTS SHALL BE OPEN.

The Defendants contend that Miss. Code Ann. § 15-1-36(15) sixty day prohibition of all access to the courts does not violate the great command secured in § 24 of the Mississippi

Constitution's Bill of Rights that all courts shall be open. The Defendants further contend that § 24 does not grant an unlimited right of access to the courts, rather, they contend all that guaranteed by § 24 is a *reasonable* right of access to the courts.[17]

A preliminary examination of Section 24 of the Mississippi Constitution reveals that the word "reasonable" is nowhere to be found, contrary to other states' constitutions. The constitutions of Arizona, Delaware, Louisiana, Utah, and Washington all have open courts guarantees in their respective bill of rights, however, the foregoing states' guarantees either provide justice shall be administered without "unnecessary delay"[18] or "unreasonable delay."[19] Contrary to the Defendants assertions that the Mississippi Constitution only guarantees reasonable access, if the framers of the Mississippi Constitution only wanted to provide *reasonable* access to the courts or guarantee that justice would be administered without *unreasonable* delay the framers would have done as other states have. Neither the legislature nor this Court has the authority to add a reasonableness requirement to the constitution where none is found, if the framers had intended to guarantee reasonable access, or justice without reasonable delay they would have done so.

Section 24 contains three separate and distinct commands: "[a]ll courts **shall** be open; and every person . . . **shall** have remedy by due course of law; and right and justice **shall** be administered without . . . delay." Miss. Const. § 24. The word shall has a distinct and precise meaning, a meaning which both Defendants seek to take advantage of when interpreting Miss. Code Ann. § 11-1-58, but in reference to § 24 of the constitution the Defendants seek to state shall means reasonable. Quite to the contrary this Court has recently reiterated that "shall is mandatory." *Arceo v. Tolliver*, 949 So. 2d 691, 695 (Miss. 2007). The Defendants interpretation

[17] Appellee MBMC's Brief at 22; Appellee Warden's Brief at 28.
[18] ARIZ. CONST. ART. 2 § 11 (1910); UTAH CONST. ART 1 § 11 (1895); WASH. CONST. ART. 1 § 30 (1899).
[19] DEL. CONST. ART. 1 § 9 (1897); LA. CONST. ART. 1 § 22 (1974).

of § 24 of the constitution demonstrates that they seek to have it both ways. The Defendants argue that the word "shall" when used in § 11-1-58 is mandatory and requires strict compliance, but the same word "shall" when used three times in § 24 of the constitution really means reasonable. The Defendants argument that "shall" when used in a statute means strict compliance but when used in the constitution allows for a liberal interpretation is simply incongruous.

A. MISS. CODE ANN. § 15-1-36(15) IS A PRIMA FACIE CASE OF A VIOLATION OF THE CONSTITUTIONAL DEMAND THAT ALL COURTS SHALL BE OPEN AND JUSTICE ADMINISTERED WITHOUT DELAY.

The early predecessors of this Court recognized that what former Justice George Ethridge called "the great guarantee of Law and Justice," the command in the courts of this state be open and justice administered without delay, is a paramount right of our citizens. The predecessor of this Court, the High Court of Errors and Appeals of Mississippi, in 1866 described Section 14[20] of the Bill of Rights of the Mississippi Constitution of 1832 and declared "[t]he prompt and speedy administration of justice, under the law, is a cardinal object of all government." Opinion of the Court, 41 Miss. 54, 1866 WL 2946, *3 (1866). The Court went on to admonish that in regards to the command that the courts be open "this right cannot be denied or delayed without a violation of the solemn guarantees of the constitution. *Id.* It is clear the predecessors of this Court have long held the guarantees of the open courts provision of the Mississippi Constitution to be of fundamental to the citizens of Mississippi.[21] However, the legislature through the enactment of Miss. Code Ann. § 15-1-35(15) has closed the courthouse doors for all victims of medical negligence for sixty days and in doing so the legislature has violated the clear commands of § 24 of the Mississippi Constitution.

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[20] Section 14 of the Mississippi Constitution of 1832 is reflected today in Section 24 of the current constitution.

[21] The guarantee that the courts be open and justice be administered without delay is such a fundamental and basic right that the majority of states expressly include in their constitutions that justice shall be administered without delay these states include: Alabama, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming.

B. NO ACCESS IS NOT REASONABLE ACCESS.

The Defendants contend that the mandatory guarantees of § 24 of the Mississippi Constitution in reality should only be held to a reasonableness standard. The Defendants rely upon this Court's reference to the Fifth Circuit case *Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 403 (5th Cir. 1984)(cited with approval in *Townsend v. Estate of Gilbert*, 616 So.2d 333, 337 (Miss. 1993). However, the *Townsend* Court was mistaken in its reliance upon a federal case which interpreted the United States Constitution. Of paramount importance is the United States Constitution has no comparable provision to § 24 of the Mississippi Constitution.[22] Munford & Wiggs, *Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond*, 43 MISS. L. J. 287 (1986). Since the United States Constitution does not have a provision comparable to § 24 of the Mississippi Constitution little assistance can be drawn from a federal appellate court which construed a document without an open courts provision. Mr. Munford went on to write "the provision that 'every person for an injury done him shall have remedy by due course of law' was intended to prevent arbitrary suspensions of the law." However, § 15-1-36(15) does exactly that; it arbitrarily suspends the law and denies plaintiffs access to the courts for sixty days. If one follows the plain language of § 24 of the Mississippi Constitution the only conclusion that may be reached is that § 15-1-36(15) violates the great command that "all courts **shall** be open . . . and justice **shall** be administered without . . . delay." (emphasis added).

Although the Defendants maintain that § 24 of the Mississippi Constitution only guarantees a *reasonable* right of access to the courts, even holding § 15-1-36(15) to a reasonableness standard the statute fails to pass constitutional muster. Assuming *arguendo* the Defendants' position is correct and all the constitution's command that "all courts shall be open"

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[22] Like the Federal Constitution sixteen (16) state constitutions do not contain an open courts provision these states are: Alaska, Arizona, Arkansas, California, Georgia, Hawaii, Idaho, Iowa, Michigan, Nevada, New Mexico, New Jersey, New York, South Carolina, Texas, and Virginia.

means is that the courts should be "reasonably" open the question then becomes one of reasonableness. Under the plain language of Miss. Code Ann. § 15-1-36(15) a victim of medical negligence may not file suit until the defendant has been given at least sixty days prior written notice. Therefore, even after a medical malpractice victim's cause of action has accrued he or she is barred from recourse in the courts of this state for "at least sixty days." Miss. Code Ann. § 15-1-36(15). The Defendants are arguing to this Court that the complete denial of access to the courts for a period of time is reasonable. It is unfathomable that in this country and in this state where a fundamental pillar of our constitutional democracy is the rule of law and the access to the justice system that a party would argue the denial of all access for a period of time is reasonable. If this Court is to hold the denial of access to the courts of this state for sixty days is reasonable; where does this end, is 100 days reasonable, is one-year reasonable? The path the Defendants want this Court to follow is a dangerous path whose onset begins with the closing of the courts of this state for sixty days and whose end may be a complete denial of any access to the courts in this State.

Moreover, even if this Court reaffirms *Townsend* and the federal interpretation of the United States Constitution which has no open courts guarantee, it cannot be said that no access is reasonable access. Only under a strained and liberal reading of the Mississippi Constitution can one come to the conclusion that § 15-1-36(15) does not conflict with § 24 of the Mississippi Constitution. As such, and congruent with the severability clause found in § 15-1-36 this Court should sever the first sentence of § 15-1-36(15) which forbids the citizens of Mississippi from commencing a suit for sixty days. By severing only the first sentence the legislature's intent of providing pre-suit notice to physicians and hospitals will be furthered in that plaintiff's who provide pre-suit notice will be provided with an additional sixty days in which to bring their suit, however, they will not be barred from bringing their suit at an earlier time.

IV. THE RIGHT TO OPEN AND ACCESSIBLE COURTS GUARANTEED IN THE MISSISSIPPI CONSTITUTION OF 1890 IS FUNDAMENTAL.

As alluded to by both Defendants as well as the Plaintiff in this case, to date this Court has not explicitly held whether or not the right to open and accessible courts guaranteed by the Mississippi Constitution of 1890 is a fundamental right, although this Court has referred to§24 as a "cardinal object of all government" and a "solemn guarantee[] of the constitution." Opinion of the Court, 41 Miss. 54, 1866 WL 2946, *3 (1866). It should also be observed that the open courts guarantee is found in the Mississippi Bill of Rights, the most logical place to memorialize the most sacred and fundamental rights of a people. Furthermore, while members of this Court have alluded to whether the right to open and accessible courts is a fundamental right, the issue has yet to be properly before this Court and formally decided upon. *See Cleveland v. Mann*, 942 So. 2d 108, 121-22 (Miss. 2006))(Diaz, J., dissenting).

There is however, a reciprocal right which is directly affected based upon this Court's determination as to whether or not the right to open and accessible courts in Mississippi is fundamental. The United States Supreme Court has held "[t]he right of jury trial in civil cases at common law is so basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Parklane Hosiery Co, Inc. v. Shore,* 439 U.S. 322, 352 (1979)(quoting *Jacob v. New York,* 315 U.S. 752, 752-53 (1942). The Supreme Court went on to implore that a "right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Id.* Therefore, it is the duty this Court jealously guard and protect the fundamental right to trial by jury.

With this in mind, if the right to trial by jury is a fundamental right, therefore and necessarily the right to open and accessible courts **must** be fundamental as well. For if the Defendants' position is adopted and only *reasonable* access is guaranteed to the courts of this state the acknowledged fundamental right to trial by jury is meaningless. Our sister jurisdictions

have examined their state constitutional guarantee of open courts have found the guarantee to be fundamental. The Pennsylvania Supreme Court has held "[t]he right to have justice administered without delay is a fundamental right which should not be infringed unless no other course is reasonably possible." *Exton Drive-In, Inc. v. Home Indem. Co.*, 261 A.2d 319, 323 (Pa. 1969). Similarly, the South Dakota Supreme Court construed its open courts provision to "allow unhindered access to the courthouse by a person who had a valid cause of action based on existing statute or the common law, timely and properly brought, who then would be allowed to present their case to a human fact finder. In other words under those conditions, a litigant was guaranteed its day in court." *Wegleitner v. Sattler,* 582 N.W.2d 688, 698 (S.D. 1998). Likewise, Section 24 of the Mississippi Constitutional guarantees to the citizens their fundamental right to have access to the courts of this state when they have a valid cause of action, such as the Plaintiff's claim against the Defendants.

Pursuant to the constitution of Mississippi a statute which implicates a suspect class or a fundamental right must withstand strict scrutiny. *Wells by Wells,* 645 So. 2d at 893. When a fundamental right is implicated the statute must be stricken unless the State demonstrates that the statute is narrowly tailored to serve a compelling state interest. *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1011 (Miss. 2004). When strict scrutiny analysis is applied to Miss. Code Ann. § 11-1-58 & § 15-1-36(15) both are constitutionally infirm as neither statute is narrowly tailored to serve a compelling state interest.

A. MISS. CODE ANN. § 11-1-58 CANNOT WITHSTAND STRICT SCRUTINY ANALYSIS.

Defendant Warden's analysis of the equal protection problems posed by Miss. Code Ann. §11-1-58 is replete with citations to courts throughout this country instructing that there is no constitutional right to file merit-less, frivolous, malicious, abusive, or harassing suits against another. While Defendant Warden is correct that there is no right to file frivolous lawsuits, the

people of this State do have a fundamental constitutional right to file meritorious suits. More importantly the statute in question makes no distinction between meritorious lawsuits and frivolous lawsuits. In fact under the current interpretation of Miss. Code Ann. § 11-1-58 **all** lawsuits which are filed without the certificate of merit are dismissed regardless of the merit of the plaintiff's claim. This is the essence of placing form over substance. Adopting the Defendants' point of view is to place a greater emphasis upon the form of pleading a cause of action than the citizenry's right to bring that action.

More importantly Defendant Warden has not and **cannot** put forward any evidence to support his gross accusations that the Plaintiff has filed a frivolous, harassing or otherwise merit-less lawsuit. In fact, in regards to Defendant Warden the exact opposite is true. On January 3, 2006, twenty-eight days **before** Defendant Warden filed his motion to dismiss or any responsive pleading, Plaintiff filed the certificate of merit pursuant to Miss. R. Civ. P. 15 and effectively amended his complaint to comport with Miss. Code Ann. § 11-1-58.[23] This exact scenario displays the glaring problems confronted with this statute. The fact remains that fourteen days after Defendant MBMC filed its answer and twenty-eight days **before** Defendant Warden filed **anything** the certificate was filed with the trial court attesting that an expert had been consulted and this is a **meritorious claim**. However, despite the fact that there is merit to the Plaintiff's claim his cause of action has been dismissed over a procedural pre-suit frivolity which places the temporal attachment of a piece of paper above the Plaintiff's fundamental constitutional right to open courts and trial by jury.

Section 11-1-58 is neither narrowly tailored nor does it serve a compelling state interest. This Court has already placed procedural and ethical responsibilities upon members of the bar

[23] While this Court has not addressed what precisely is a "responsive pleading" the federal courts interpretation of Fed. R. Civ. P. 15, which the Mississippi rule is modeled after, are replete with their instructions that a motion to dismiss is **not** a responsive pleading. *Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007); *Sunset Financial Resources, Inc. v. Redevelopment Group V, LLC*, 417 F.Supp.2d 632 (D.N.J. 2006); *Sculimbrene v. Reno*, 158 F.Supp.2d 8 (D.D.C. 2001).

prohibiting the filing of frivolous lawsuits. Miss. R. Prof. Conduct 3.1 & Miss. R. Civ. P. 11. However, neither rule supports the Defendants objectives in this case, specifically, neither rule mandates the dismissal of a legitimate cause of action and a properly plead complaint for the failure to attach an attorney's attested certificate. The United States Supreme Court has clearly stated a fundamental right to trial by jury exists in this country, consequently the right in Mississippi to open and accessible courts must be fundamental otherwise the legislature may follow its present model and adopt numerous procedural hurdles in an attempt to shield negligent actors from liability for their actions. As Miss. Code Ann. § 11-1-58 cannot withstand strict scrutiny analysis this Court should strike it down for violating the Plaintiff's fundamental right to open and accessible courts.

B. MISS. CODE ANN. § 15-1-36(15) CANNOT WITHSTAND STRICT SCRUTINY ANALYSIS

An even more fundamental assault on the people of Mississippi's constitutional rights may be found in the first sentence of Miss. Code Ann. § 15-1-36(15) which slams shut the courthouse doors on the people of Mississippi. Moreover, the rigid application of § 15-1-36(15) in the present case will result in the dismissal of the Plaintiff's cause of action over a twenty four hour frivolity.

The Defendants argue extensively about the purposes and intent of § 15-1-36(15) to encourage pre-suit resolution. However, neither Defendant has put forward any evidence that upon receipt of the notice letter that either they or their attorney attempted to contact the Plaintiff or his attorneys by telephone, facsimile, electronic mail, or any other medium. The truth is due to the rigid application of § 15-1-36(15) defendants no longer have any incentive to try to resolve a lawsuit prior to trial. Rather, negligent defendants after receipt of the notice letter can sit back and wait to see if the plaintiff makes a trivial procedural error which will relieve the negligent defendant of all liability. This is not a system of justice.

The Defendants rely heavily on the idea that all that is required pursuant to § 24 of the Mississippi Constitution is reasonable access, although the Defendants cannot point out where in § 24 of the constitution the word reasonable may be found. Nonetheless even assuming the Defendants are correct and all that is required is reasonable access and the fundamental right to a jury trial really is not that fundamental the question then turns to, **whether no access is reasonable**? Pursuant to the first sentence of § 15-1-36(15) a victim of medical negligence has **no access** to the courts of this State for sixty days. Surely it cannot legitimately be maintained that no access to the courts of this State is reasonable.

The fundamental right to a jury trial is beyond dispute, in fact our founding fathers felt so strongly about the right to a jury trial that the denial of a jury trial was listed as a grievance against the crown in the Declaration of Independence. However, what is at stake in this case is just how protected is the citizenry's right to a jury trial when the legislature can enact a procedural statute which bars the citizenry's access to the courts entirely. Now the Defendants have pointed out the courthouse bar is for a limited time period, but it is amazing that such an argument is even put forth in this Country which holds its democratic values and the rule of law as ideals for the rest of the world to follow.

Applying strict scrutiny to Miss. Code Ann. § 15-1-36(15) it is clear the statute cannot pass constitutional muster. There is no compelling state interest in the present case which outweighs the fact that § 15-1-35(15) shuts off the courthouse and the legal system to victims of medical negligence. There is no compelling state interest in telling people who have been harmed once already that they have **no legal recourse for sixty days**. Accordingly, this Court should strike the first sentence of Miss. Code Ann. § 15-1-36(15) as it violates the equal protection clause of the Mississippi Constitution and impinges upon citizens' fundamental right to open and accessible courts.

V. *AMICI CURIAE* BRIEF IS WITHOUT ANY SUPPORT IN THE LAW AND SHOULD BE DISREGARDED.

The arguments propounded by the *Amici Curiae* which have filed a brief in support of the Defendants can be boiled down into two categories: the first argument, relies upon the lone dissent of Justice Hawkins in *Hall v. State* whose position was rejected by the other members of the Court 8 to 1; and the second argument, which relies upon the history of the Federal Rules of Civil Procedure, disregards fundamental differences between the United States Constitution and the Mississippi Constitution of 1890.

A. THE POSITION ESPOUSED BY JUSTICE HAWKINS HAS BEEN REJECTED BY THE PREDECESSORS OF THIS COURT AND THE MISSISSIPPI LEGISLATURE.

The *Amici Curiae* would have this Court not only relinquish its inherent procedural rule-making authority, but furthermore, the *Amici Curiae* would have this Court adopt a position it simply cannot in light of enactments of the legislature in the years post *Hall v. State*. The *Amici Curiae* argue that when it comes to procedural statutes which potentially involve "public policy" it then becomes permissible for the legislature to enact rules of practice and procedure for the judiciary to follow. The *Amici Curiae* pay little heed to the notion that the exact argument they posit was rejected by this Court in *Hall*. Moreover, even prior to this Court's decision in *Hall* and the promulgation of the Mississippi Rules of Civil Procedure this Court expressly stated Section 144 of the Constitution which vests judicial power in the Supreme Court "leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose." *Newell,* 308 So. 2d at 77. The *Newell* Court could not have been clearer that the exact proposition the *Amici* respondents suggest has been considered and rejected.

The fallacy of allowing the legislature to enact procedural rules where they touch on "public policy" is that the term public policy is an amorphous term which could be interpreted to

encompass any procedural rule. For example, Miss. R. App. P. 27 provides that in appeals the appellant's principal brief cannot exceed fifty pages. No one would legitimately argue that Miss. R. App. P. 27 is anything but procedural as it clearly mandates how the appellate courts control their business. However, the legislature in response to the ongoing public environmental awareness campaign could enact a statute which states "it is the public policy of Mississippi to conserve our natural resources and in keeping with this policy no legal briefs or memorandum turned into any of the courts of this state may exceed ten pages in length." Following the *Amici Curiae's* position the statute would have to control as it touches on "public policy" and an issue which clearly governs how the courts regulate their practice would be usurped by the legislature. While the line between substantive law and procedural law may be a fine line at times, adopting a position which allows legislative control over all matters affecting "public policy" is granting the legislature carte blanche authority over the practice and procedure in Mississippi courts once again.

However, even if the *Amici Curiae's* position is correct and the predecessors of this Court got it wrong in *Hall* and in fact there is a shared authority between the legislature and the judiciary to enact procedural rules in civil cases, this Court cannot simply overrule *Hall* and turn back the clock. The Mississippi legislature pursuant to Miss. Code Ann.§9-3-61 has recognized:

> As a part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals.

Therefore, even if this Court wanted to adopt the dissent of Justice Hawkins this Court is without power to do so. Pursuant to § 9-3-61 any power the legislature had to enact procedural rules,

assuming it had any, has been delegated to this Court, and accordingly the *Amici Curiae's* first argument proposed is entirely without merit.

B. THE *AMICI CURIAE'S* RELIANCE UPON FEDERAL LAW IS MISPLACED.

The second argument the *Amici Curiae* make displays a fundamental misunderstanding of the differences between the United States and Mississippi constitutions. Essentially the *Amici Curiae* argue that in the federal system "the power of Congress to legislate procedural matters has never been questioned."[24] However, the *Amici Curiae* provide no persuasive argument as to why this Court should follow the federal example especially in light of the fundamental differences between the Federal and Mississippi constitutions.

Article III Section 1 of the United States Constitution vests the judicial power in one Supreme Court and "in such other inferior Courts as the Congress may from time to time ordain and establish." U. S. Const. Art. 3 § 1. Therefore, under the federal system it was not the Constitution which created with courts of appeals, and the district courts throughout the country, rather, Congress created the appellate and district courts system. Thus, the reason why Congress is able to maintain control over the district and appellate courts in the federal system is because Congress created them. *See generally* Frank, *supra,* at 299 n. 82.

Contrast the federal constitution with the Mississippi Constitution and the differences become quite clear. The Mississippi Constitution vests the judicial power of the State in the Supreme Court,[25] as well as, circuit courts,[26] chancery courts,[27] and justice courts.[28] Therefore, in addition to the Supreme Court, the circuit, chancery, and justice courts of Mississippi are constitutionally created and accordingly the legislature cannot exercise control over the procedural matters of these courts. At most the *Amici Curiae's* strained argument could be said

[24] *Amici Curiae* Brief at 10.
[25] Miss. Const. Art. 6 § 144 (1890).
[26] Miss. Const. Art. 6 § 156 (1890).
[27] Miss. Const. Art. 6 § 159 (1890).
[28] Miss. Const. Art. 6 § 171 (1890).

to apply to the court of appeals and the county courts in this State, but for the fact that Miss. Code Ann.§9-3-61 once again presents an impasse to their argument.

The *Amici Curiae's* radical argument requires this Court to reject not only the well reasoned opinion of *Hall v. State*, but furthermore the *Amici Curiae* would have this Court disregard the fact that the legislature has **subsequently** to *Hall v. State* acknowledged and relinquished any power it arguably had. Thus, the *Amici Curiae's* brief finds itself without any support and their radical position is without merit.

CONCLUSION

This Court recently observed that "[f]or generations, this Court was not aggressive in takings a leadership role in all things judicial, including procedural matters related to judicial processing of substantive law enacted by the legislature." *Long v. McKinney*, 897 So. 2d 160, 184 (Miss. 2004). As a result of this judicial apathy this Court had to struggle for years to "adapt well-intentioned, but archaic, ill-suited prodcuedrual statutes to the needs of litigants." *Id.* Then over thirty years ago this apathy ended and this Court began to exercise its inherent judicial rulemaking authority in *Newell* and through the ultimate promulgation of the Mississippi Rules of Civil Procedure. However, it is once again imperative that this Court take an aggressive ledership role and protect its inherent judicial rulemkaing authority.

Based upon an analysis of a variety of materials including *Black's Law Dictionary*, the jurisprudence of other states, numerous law journal articles, and the Defendants own briefs, the only conclusion that can be reached in regard to Miss. Code Ann.§ 11-1-58 &§ 15-1-36(15) is that they are procedural statutes. Furthermore, neither of the Defendants nor their *Amici* supporters offered any argument that the statutes do not conflict with certain of the Mississippi Rules of Civil Procedure. Rather, they solely rely on their strained contention that the statutes are substantive; however, the authority they rely upon most heavily, Judge Southwick's concurring opinion, actually supports the Plaintiff's contention that these statutes regulate conduct occurring within a court. For these reasons alone this Court should strike § 11-1-58 *in toto* and strike the first sentence of§ 15-1-36(15) for violating the separation of powers provision of the Mississippi Constitution.

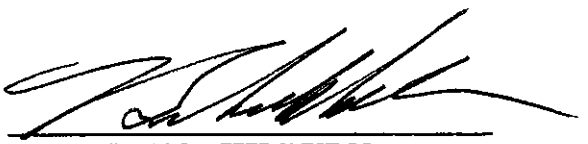
In addition to violating the separation of powers provision of the Mississippi Constitution § 15-1-36(15) also offends the great command secured in § 24 that all courts shall be open and justice shall be administered without delay. In response to the Plaintiff's argument the

Defendants contend the framers did not really mean the courts shall be open, rather they meant the courts shall reasonably be open. However, what the Defendants cannot explain is if the framers of the constitution meant the courts shall be reasonably open why did they not do as other states and write that in the constitution. The constitution of this state is not just a piece of paper as the Defendants would have it be and the presence of certain words and the absence of other words means something. There is no way this Court can reconcile§ 15-1-36(15) with§ 24 of the consitution without reading a reasonableness requirement into the constitution which is not found in the plain language of the constitution. Finally, the Plaintiff has shown to this Court that §24 of the constitution implicates a fundamental right and because neither Miss. Code Ann.§ 11-1-58 nor 15-36(15) can survive strict scrutiny analsysis this Court must strike down the statutes for violating the equal protection clause of the Mississippi Constitution.

The constitutional ramifications of upholding § 11-1-58 and § 15-1-36(15) are daunting. However, should this Court wish to abstain from ruling on the constitutionality of the statutes this Court should rule that due to the underlying constitution issues surrounding these statutes only substantial compliance is required and the Plaintiff's actions amount to substantial compliance. Such a holding would be in accord with a number of sister states which have held the right to access the courts in a state outweighs the right of defendants to have procedural statutes strictly complied with. In doing so this Court should reverse the lower court's grant of the Defendants' motion to dismiss and remand the case to the Circuit Court of the First Judicial District of Hinds County, Mississippi for further proceedings

Respectfully Submitted, this the 2nd day of April, 2008.

NORMAN Q. THOMAS JR., INDIVIDUALLY
AND ON BEHALF OF WILLIAM THOMAS
AND ANNA THOMAS, TWO MINORS

BY: 

L. BRELAND HILBURN
ROGER L. MCGEHEE, JR
C. LOUIS CLIFFORD IV
PATRICK J. SCHEPENS
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned counsel of record for, Appellants, hereby certifies that true and correct copies, electronic and paper, of the Appellants' Principal Brief were delivered via hand delivery to the following addresses:

Stuart B. Harmon, Esq.
Kristopher Graham, Esq.
PAGE, KRUGER & HOLLAND, P.A.
Post Office Box 1163
Jackson, MS 39215-1163

Eugene R. Naylor, Esq.
Elizabeth A. Ganzerla, Esq.
WISE CARTER CHILD & CARAWAY, P.A.
Post Office Box 651
Jackson, MS 39205-0651

Honorable Jim Hood
Attorney General of Mississippi
Post Office Box 220
Jackson, MS 39201

Honorable Swan W. Yerger
Hinds County Senior Circuit Judge
Post Office Box 327
Jackson, MS 39205-0327

Walter T. Johnson, Esq.
J. Collins Wohner Jr., Esq.
WATKINS & EAGER PLLC
400 East Capitol Street, Suite 300
Post Office Box 650
Jackson, MS 39205

SO CERTIFIED this the 2nd day of April, 2008.

L. BRELAND HILBURN

L. Breland Hilburn ([redacted]
C. Louis Clifford IV [redacted]
Patrick J. Schepens [redacted]
EAVES LAW FIRM
101 North State Street
Jackson, Mississippi 39201
Telephone: (601) 355-7961
Facsimile: (601) 355-0530

Roger L. McGehee, Jr. Esq. [redacted]
ATTORNEY AT LAW
Suite 215, Highland Village
4500 Interstate 55 North
Jackson, MS 39211-5932
Telephone: (601) 982-1000
Facsimile: (601) 982-1005

MISSISSIPPI LEGISLATURE REGULAR SESSION 2008

By: Representative Watson To: Judiciary A

Attachments

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 215

AN ACT TO AMEND SECTION 11-1-58, MISSISSIPPI CODE OF 1972, TO REVISE CERTIFICATE OF CONSULTATION REQUIREMENTS IN MEDICAL MALPRACTICE ACTIONS; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 11-1-58, Mississippi Code of 1972, is amended as follows:

11-1-58. (1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:

(a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or

(b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph

(b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or

(c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

(2) Where a certificate is required pursuant to this section only, a single certificate is required for an action, even if more than one (1) defendant has been named in the complaint or is subsequently named.

(3) A certificate under subsection (1) of this section is not required where the attorney intends to rely solely on either the doctrine of "res ipsa loquitur" or "informed consent." In such cases, the complaint shall be accompanied by a certificate executed by the attorney declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate under subsection (1) of this section.

(4) If a request by the plaintiff for the records of the plaintiff's medical treatment by the defendants has been made and the records have not been produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced.

(5) For purposes of this section, an attorney who submits a certificate of consultation shall not be required to disclose the identity of the consulted or the contents of the consultation; provided, however, that when the attorney makes a claim under paragraph (c) of subsection (1) of this section that he was unable to obtain the required consultation with an expert, the court, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of this section, may require the attorney to divulge to the court, in camera and without any

disclosure by the court to any other party, the names of physicians refusing such consultation.

(6) The provisions of this section shall not apply to a plaintiff who is not represented by an attorney.

(7) The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure. Nothing in this section requires the disclosure of any "consulting" or nontrial expert, except as expressly stated herein.

(8) Where the complaint was not accompanied by a certificate executed by the attorney in accordance with this section, upon motion made the attorney may comply by showing that he actually consulted with a qualified expert prior to filing the complaint or by showing that such failure to provide the certificate was the result of excusable neglect.

SECTION 2. This act shall take effect and be in force from and after its passage and shall apply to all cases pending or filed as of that date and thereafter.

MISSISSIPPI LEGISLATURE REGULAR SESSION 2008

By: Representative Baker (74th)

To: Judiciary A

HOUSE BILL NO. 382

AN ACT TO PROVIDE THAT COURT RULES SHALL BE GOVERNED BY STATUTE; TO PROVIDE THAT THE COURTS MAY ADOPT RULES NOT INCONSISTENT WITH STATUTORY LAW; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. The rules of practice and procedure in the courts of this state shall be governed by statute; however, the courts may adopt such rules of practice and procedure not inconsistent with statutory law.

SECTION 2. This act shall take effect and be in force from and after July 1, 2008.