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

APPELLANTS' PRINCIPAL BRIEF

ORAL ARGUMENT *EN BANC* REQUESTED

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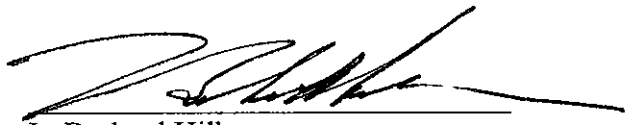
CERTIFICATE OF INTERESTED PARTIES

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 of Wise, Carter, Child & Caraway, P.A., attorney for appellee Mississippi Baptist Medical Center;

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

Respectfully submitted, this the 6th day of November, 2007.



L. Breland Hilburn
Attorney for the Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Miss. R. App. P. 34(a) the Appellant requests that this Court allow oral argument in this case and respectfully suggests that argument should be heard by the Court *en banc*. The Appellant believes the legal issues before the Court are of paramount importance as they raise for the first time the constitutionality of two recent enactments of the Mississippi Legislature. It is the contention of the Appellant that Miss. Code Ann. § 11-1-58 and § 15-1-36(15) violate numerous provisions of the Mississippi Constitution of 1890, as well as, certain fundamental provisions of the United States Constitution.

Specifically the Appellant contends that § 11-1-58 and § 15-1-36(15) violate the constitutional provisions pertaining to: separation of powers; open and accessible courts; and equal protection. In light of the grave constitutional issues raised the Appellant respectfully asks this Court to grant oral argument *en banc* so the full constitutional implications of upholding the validity of § 11-1-58 and § 15-1-36(15) may be argued before the Court.

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STATEMENT OF THE ISSUES

The Appellants raise numerous issues on appeal which concern the constitutionality of Miss. Code Ann. § 11-1-58 and § 15-1-36(15).

I. Whether the trial court erred in its determination that Miss. Code Ann. § 11-1-58 and Miss. Code Ann. § 15-1-36(15) are facially valid as the statutes did not violate the Separation of Powers Clause of the Mississippi Constitution of 1890 by unconstitutionally usurping judicial rulemaking power?

II. Whether the trial court erred in its determination that strict compliance is the appropriate standard of compliance, pursuant to Miss. Code Ann. § 11-1-58?

III. Whether the trial court erred in its determination that Miss. Code Ann. § 15-1-36(15) is facially valid and that is does not violate the Plaintiff's constitutional rights to Open Courts pursuant to the Mississippi Constitution of 1890?

IV. Whether the trial court erred in its determination that strict compliance is the appropriate standard of compliance, pursuant to Miss. Code Ann. § 15-1-36(15)?

V. Whether the trial court erred in its determination that Miss. Code Ann. § 11-1-58 and § 15-1-36(15) did not impinge on the Plaintiff's fundamental rights to open and accessible courts in violation of the equal protection clauses of the Mississippi and United States Constitutions?

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal following the trial court's granting of Defendant Warden's motion to dismiss and Defendant Mississippi Baptist Medical Center's motion to dismiss, or in the alternative, motion for summary judgment. The Defendants moved the trial court to dismiss the Plaintiff's complaint on the ground that he failed to strictly comply with Miss. Code Ann. §§ 11-1-58 & 15-1-36(15). It is the contention of the Plaintiff that said statutes are facially invalid as they run afoul of numerous provisions of the Mississippi and United States Constitutions. Grieved by the trial court's ruling the Plaintiff timely appeals to this Court.

B. Course of Proceedings in the Court Below and Statement of Relevant Facts

The disposition of this case is such that a separate statement of the facts would be unnecessary as the case was disposed of on a procedural basis, so only a brief statement of relevant facts will follow. On or about October 1, 2002 Melinda Thomas underwent a duodenal switch bariatric surgery which was performed by Defendant Warden at Ocean Springs Hospital in Ocean Springs, Mississippi. Following the surgery, Mrs. Thomas consistently had trouble swallowing and getting food into her stomach. [R. at 6].

After many months of attempting to get an appointment with Dr. Warden, only to be told every time she called that there was nothing to worry about that it would go away, she was finally able to get an appointment to evaluate the problem on May 20, 2003. [R. at 7]. A follow up procedure was conducted by Dr. Warden and it was determined Mrs. Thomas had anastomotic stricture, after the procedure Mrs. Thomas was able to ingest food, however, this procedure only helped her for about a week, then she was unable to intake sufficient amounts of food to maintain her health. [R. at 7]. Following, the May 20, procedure Mrs. Thomas did not receive any follow-up assistance despite her numerous attempts to contact Dr. Warden. [R. at 7].

After failing to receive any follow-up care from Dr. Warden, Mrs. Thomas was admitted to Mississippi Baptist Medical Center on September 2, 2003 to be given a TPN protein IV drip to get her protein and other levels up to the proper level as they had fallen as a result of not being able to ingest enough food to get the proper nutrition. [R. at 7A]. MBMC personnel did not begin the TPN protein IV drip until approximately Wednesday, September 3, 2003, after she had been moved to the Intensive Care area of the hospital, and after the point in time when she had been diagnosed with E-coli bateria sepsis. Mrs. Thomas was not infected with this bacteria when she was admitted to the hospital. The infection came after admission and initial blood testing and other tests administered by hospital personnel. From, this point Mrs. Thomas' condition continued to deteriorate so that on September 7, 2003, at approximately 5:20PM she died of E-coli bacteria sepsis, the inability of her body to absorb protein and other nutrients weakened her immune system and her ability to fight the infection. [R. at 7A].

On September 6, 2005 counsel for Plaintiff sent via certified mail a pre-suit notice letter pursuant to Miss. Code Ann. § 15-1-36(15), which commands that sixty (60) days pre-suit notice be given before filing a lawsuit against a physician or medical service provider. [R. at 37]. After fifty-nine (59) days had elapsed Plaintiff filed his complaint against Defendant Warden and Mississippi Baptist Medical Center on Friday, November 4, 2005. [R. at 5]. Plaintiff's early filing was due to the fact that the statute of limitations would have barred the suit on Sunday November 6, 2005, and at the time of filing of the suit it was unclear whether the sixty additional days given to plaintiffs in § 15-1-36(15) was absolute or if the statute of limitations would have been tolled an additional day. In any event, process was not served on either Defendant until after sixty days had elapsed from the date the notice letter was sent.

In response to the Plaintiff's complaint, Defendant Mississippi Baptist Medical Center [MBMC] filed its separate answer on December 20, 2005. [R. at 11]. Fourteen days after

Defendant MBMC filed its answer the Plaintiff filed his certificate of compliance with Miss. Code Ann. § 11-1-58 on January 3, 2006. [R. at 21]. Twenty-eight days after the Plaintiff had filed its certificate of compliance Defendant Warden filed a motion to dismiss on January 31, 2006, and moved the court to dismiss the Plaintiff's complaint for failure to strictly comply with §§ 11-1-58 and 15-1-36(15). [R. at 23]. The Plaintiff filed his reply to Defendant Warden's motion to dismiss on May 24, 2006, to which Defendant Warden replied on June 13, 2006 and noticed a hearing for September 25, 2006. [R. at 24, 39]. In response to Mississippi Supreme Court opinions, which were handed down subsequent to the last filing of the Plaintiff that directly dealt with the issues involved, the Plaintiff filed a response to the Defendant Warden's reply on July 5, 2006. [R. at 48]. On August 28, 2006 the trial court signed an order prepared by Defendant Warden, granting his motion to dismiss in advance of the hearing which was scheduled for September 25, 2006. [R. at 64-65].

On August 28, 2006, a month before the scheduled hearing, Plaintiff's counsel sent notice to the Attorney General, pursuant to Miss. R. Civ. P 24(d), and advised the Attorney General of Plaintiff's contention that Miss. Code Ann. § 11-1-58 and § 15-1-36(15) were unconstitutional. [R. at 66]. The notice to the Attorney General, along with a supplemental response of the Plaintiff which raised the constitutional issues was filed on August 30, 2006. [R. at 66-79]. Due to an error or omission in the Hinds County Circuit Clerk's office, counsel for Plaintiff did not become aware of the signed order until September 18, 2006 when Plaintiff's counsel was informed by the trial judge's court administrator that a scheduled hearing on the motion to dismiss had been canceled, because the case had been dismissed. Upon learning of the dismissal Plaintiff's counsel filed a motion for relief from the trial court's order granting Defendant Warden's motion to dismiss on September 27, 2006, due to the underlying constitutional issues which were not addressed by the order signed by the trial judge which was prepared by

Defendant Warden. [R. at 80]. Also on September 27, 2006 Plaintiff's counsel filed a notice of appeal of the Order signed on August 28, 2006. [R. at 94].

While the dismissal of Defendant Warden was on appeal, Defendant MBMC filed a motion to dismiss on October 17, 2006. [R. at 205]. In response to Defendant MBMC's motion, the Plaintiff filed his response on October 17, 2006, along with a second notice sent to the Attorney General, pursuant to MRCP 24(d), alerting the Attorney General of the Plaintiff's intention to raise constitutional issues. [R. at 188, 224A-B]. The following day, and before Defendant Warden had filed a response to the Plaintiff's motion for relief from judgment, the Plaintiff filed an amended motion for relief from the trial court's order on October 18, 2006. [R. at 225].

Thereupon on October 30, 2006, Defendant MBMC amended its motion to dismiss to include the Plaintiff's failure to strictly comply with Miss. Code Ann. § 15-1-36(15). [R. at 246]. Also on October 30, 2006, Defendant Warden filed his response to the Plaintiff's motion for relief from the trial court's order. [R. at 253]. The following day Defendant MBMC filed its reply to the Plaintiff's response to the defendant's motion to dismiss or in the alternative for summary judgment. [R. at 277]. On November 7, 2006, the Plaintiff filed his reply to Defendant Warden's response to the Plaintiff's motion for relief from judgment. [R. at 294]. After consulting with Defendant's counsel, the two pending motions for Defendant Warden and Defendant MBMC were noticed for hearing on January 29, 2007. [R. at 310].

After a hearing at which the trial judge fully heard the constitutional issues which are the subject of this appeal the trial judge granted Defendant MBMC's motion to dismiss and entered a final judgment on March 9, 2007. [R. at 320-322]. The Plaintiff filed his notice of appeal on March 26, 2007. [R. at 314]. Also on March 9, 2007 the trial judge, after permitting the Plaintiff's Rule 60(b)(6) motion due to the constitutional issues raised, granted Defendant

Warden's motion to dismiss. [R. at 323-324]. Thereupon, on April 9, 2007 the Plaintiff filed an amendment to his previous notice of appeal of Defendant Warden filed on September 27, 2006, which had been stayed by the Mississippi Supreme Court. [R. at 317]. At that time two separate appeals were pending before this Court, Defendant Warden's appeal Docket No. 2006-TS-01703, and Defendant MBMC's appeal, Docket No. 2007-TS-00821. On May 8, 2007, in the interest of judicial efficiency, Plaintiff filed a motion to consolidate the appeals in the Mississippi Supreme Court. Motion No. 2007-1321. On June 4, 2007, a Clerk's notice was sent out by the Mississippi Supreme Court Clerk granting the Plaintiff's motion and consolidated all appeals into one.

SUMMARY OF THE ARGUMENT

The trial court erred in dismissing the Plaintiff's case for failing to strictly comply with two legislative enactments which violate the demands of the Mississippi Constitution regarding separation of powers, open courts, and equal protection. Although it is conceded that legislative enactments enjoy a presumption of validity once it has been established that a statute, or statutes, violate the Constitution it is this Court's obligation to strike down those statutes and send a message to the legislature that this Court takes its oath to defend the Mississippi Constitution seriously and it will not stand idly by and let its power be usurped.

James Madison in The Federalist, No. 48 warned that "power is of an encroaching nature." Madison went on to write "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist, No. 51 (J. Madison) (J. Cooke ed. 1961). Before this Court are two instances in which the State Legislature has exceeded its constitutional power, and has sought to intrude upon the inherent power of this Court to enact procedural rules which the Mississippi Constitution of 1890 has bestowed upon this Judiciary, and it is now the responsibility of this Court to control the legislature.

Sections 1 and 2 of the Mississippi Constitution of 1890 provide for a division of power between the three great branches of government, as well as, forbid any one branch from encroaching upon the power bestowed upon another branch by the Constitution. Miss. Const. Art. 1 §§ 1& 2. The inherent power of this Court to promulgate procedural rules emanates from the doctrine of separation of powers along with Section 144 of the Mississippi Constitution which vests the judicial power of the State with this Court. *Hall v. State*, 539 So. 2d 1338, 1345 (Miss. 1989). As such, whenever a procedural statute enacted by the legislature is found by this

should strike down § 15-1-36(15) as violating the peoples' constitutional right to open and accessible courts in this State.

Furthermore, this Court should find that the right to open and accessible courts is fundamental, and unless the defendants can point to a compelling state interest in support dismissing viable, legitimate claims over procedural mistakes, these two statutes should be found unconstitutional as violating the Equal Protection Clauses of the United States and Mississippi Constitutions.

Should this Court determine that §§ 11-1-58 & 15-1-36(15) do not run afoul of the United States and Mississippi Constitutions this Court should recognize the serious constitutional ramifications that arise from requiring a strict compliance standard with the statutes and hold the statutes merely require substantial compliance. In the present case the Plaintiff's case was dismissed for only giving fifty-nine, not sixty, days pre-suit notice, and for filing the certificate of compliance with § 11-1-58 a mere fourteen days after Defendant Mississippi Baptist Medical Center filed its answer and twenty-eight days before Defendant Warden filed anything. This Court should not support legislation which dismisses viable causes of actions over pre-suit procedural technicalities and frivolities. In fact in the Rules which this Court promulgates this view is supported, in the comments to Miss. R. Civ. P. 1 this Court advises "[p]roperly utilized, the rules will tend to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies."

In the present case it is undeniable the Plaintiff has been denied his day in court "because of technical deficiencies." It is the profound contention of the Plaintiff that §§ 11-1-58 & 15-1-36(15) blatantly violate numerous provisions of the Mississippi Constitution and as such are facially invalid. However, if and only if, this Court chooses to uphold these two statutes it is

imperative that this Court interpret these statutes in a manner which favors access to the courts, and adopt a substantial compliance standard with §§ 11-1-58 & 15-1-36(15). As neither Defendant can point to any way in which they have been prejudiced by the pre-suit mistakes this Court should find at very least that the Plaintiff substantially complied with §§ 11-1-58 & 15-1-36(15).

The Constitutional rights which are implicated by these two statutes are not trivial. Rather, they are bedrock principles upon which the foundation of our whole representative democracy is based upon. In light of the grave constitutional concerns which these statutes impede upon this Court should find §§ 11-1-59 & 15-1-36(15) are unconstitutional, or in the alternative, that substantial compliance is the appropriate standard of compliance, and reverse the order of the lower court granting the Defendants' motions to dismiss and remand the case to the Circuit Court of the First Judicial District of Hinds County, Mississippi for further proceedings.

ARGUMENT

I. STANDARDS OF REVIEW

A. Motion to Dismiss and Summary Judgment Standard of Review

On appeal a motion to dismiss is reviewed by this Court under a de novo standard. *Monsanto v. Hall,* 912 So. 2d 134, 136 (Miss. 2005). Likewise, this Court reviews a trial court's ruling on a summary judgment motion under a de novo standard. *Saucier ex rel. Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So. 2d 1351,1354 (Miss. 1998). Under Miss. R. Civ. P. 56(c) summary judgment is granted to a party only if "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

B. Motion for Relief From Judgment Standard of Review

A trial court's ruling on a motion for relief from judgment is reviewable on appeal under an abuse of discretion standard. *Montgomery v. Montgomery*, 759 So. 2d 1238, 1240 (Miss. 2000). Further, "a party is not entitled to relief from judgment merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules, or ignorance of the law is not enough. *Perkins v. Perkins*, 787 So. 2d 1256, 1261 (Miss. 2001).

The trial court correctly permitted the Plaintiff's motion for relief from judgment and then improperly granted Defendants' motions to dismiss or in the alternative for summary judgment. As the Plaintiff/Appellant has stated in his statement of the facts, the trial court signed an Order granting Defendant Warden's motion to dismiss on August 28, 2006. However, due to an oversight or omission at the Hinds County Circuit Clerk's Office, Plaintiff's counsel was not aware of the signed Order until September 18, 2006 when Plaintiff's counsel was informed by the Trial Judge's Court Administrator that a scheduled hearing on the motion to dismiss which had been set for September 25, 2006 was canceled. Because the Plaintiff did not become aware

of the signed Order until September 18, 2006, the Plaintiff was unable to file a motion to reconsider pursuant to Miss. R. Civ. P. 59, as the time for doing so had expired. Furthermore, the Plaintiff first attempted to raise the constitutional issues which underlie this case on August 30, 2007, over a month before the motion to dismiss was set for hearing. The trial judge properly considered the surrounding circumstances and events, and in his discretion, permitted the Plaintiff's motion for relief from judgment, before improperly dismissing the case upon finding the constitutional issues were without merit. [R. at 323-324].

C. Constitutional Review of Enactments of the Mississippi Legislature

Enactments of the Mississippi Legislature enjoy a strong presumption of validity. *Richmond v. City of Corinth,* 816 So. 2d 373, 375 (Miss. 2002). In determining constitutionality of a statute, the Court "presumes a statute is constitutional unless the challenging party is able to prove unconstitutionality beyond a reasonable doubt." *Wallace v. Town of Raleigh,* 815 So. 2d 1203, 1206 (Miss. 2002). However, in the present case the Plaintiff/Appellant has carried his heavy burden and has proven that Section 11-1-58 and 15-1-36(15) of the Mississippi Code are facially unconstitutional.

II. MISS. CODE ANN. §§ 11-1-58 AND 15-1-36(15) UNCONSTITUTIONALLY VIOLATE THE SEPERATION OF POWERS PROVISION OF THE MISSISSIPPI CONSTITUTION OF 1890 AND ARE A LEGISLATIVE USURPTION OF THE INHERENT RULEMAKING POWER OF THE JUDICIARY

> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. The Federalist, No. 48 (J. Madison) (J. Cooke ed. 1961).

James Madison's writings articulated the evils the Framers sought to avoid when they sat down in the State House in Philadelphia to work on a new Constitution in 1787. Madison,

however, was not alone in his warning against allowing the separate branches of government from encroaching upon another branch's power. Our Country's Patriarch George Washington also warned in his farewell address "[t]he spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism." *Book v. State Office Building Commission,* 149 N.E.2d 273, 294 (Ind. 1958). This Court has also recognized, "as government endures and enlarges, there will be areas in which the functions of the separate bodies will clash with the idealistic concept of separation of powers." *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1336 (Miss. 1983).

When the framers of the Mississippi Constitution of 1890 penned the Constitution they had three prior state constitutions, as well as, the United States Constitution to serve as a foundation. Furthermore, by 1890 the idea of separation of powers was no longer a mere political theory, rather, separation of powers had become a bedrock principle on which the representative democracy of the United States was founded upon. *Alexander*, 441 So. 2d at 1335. Thus, with a firm foundation in history the drafters of the Mississippi Constitution of 1890 provided for a division between the three branches of government, as well as, forbade the encroachment by any branch upon the power of another. MISS. CONST. ART. 1 § 1and § 2.

This Court has held that, "the inherent power of this Court 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)). The Court explains that its, "rulemaking power is a function of our constitution's command that the three great governmental powers be separate." *Hall v. State*, 539 So. 2d 1338, 1345 (Miss. 1989). (citing MISS. CONST. ART. 1 §§1 and 2; *see also Glenn v. Herring*, 415 So. 2d 695, 696 (Miss. 1982); *Newell*, 308 So. 2d at 76; *Matthews v. State,* 288 So. 2d 714, 715 (Miss. 1974)). The doctrine of separation of

powers at its crux commands that no officer of one department of government may exercise a power at the core of the power constitutionally given to one of the other departments of government. *Jones by Jones v. Harris*, 640 So. 2d 120, 124 (Miss. 1984) (Robertson, J., concurring).

The Court's power to proscribe general procedural rules emanates from Section 144 of the Mississippi Constitution which vests the judicial power of the State in the Supreme Court.[1] Furthermore, the legislature has recognized the inherent power of the Supreme Court to proscribe general procedural rules. This recognition was reiterated and codified by the legislature in Miss. Code Ann. § 9-3-61 wherein the legislature affirms that, "[a]s 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 . . . by general rules the forms of process, writs, pleadings, motions." The Supreme Court of Mississippi has interpreted its inherent constitutional power and § 9-3-61 to mean any attempts by the legislature to abridge the Court's rulemaking powers are of no force and effect. *Hall v. State,* 539 So. 2d 1338, 1346 n. 16 (Miss. 1989) (*see also* Order of the Supreme Court, No. 1, 395-397 So.2d 1 (Miss. Cases, May 26, 1981) "in the event of a conflict between these rules and any statute or court rule previously adopted these rules shall control").[2]

A threshold determination in separation of powers analysis is whether the statute purports to establish a procedural or substantive rule. It is the inherent power of the Court to adopt *procedural* rules while the legislature retains the right to adopt *substantive* rules. While this Court has yet to expressly define what procedural rules versus what substantive rules are, one

[1] Former Chief Justice Ethridge speaking for the Court wrote, "[t]he phrase 'judicial power' in Section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the constitution, for the efficient disposition of judicial business." *Southern Pacific Lumber Co. v. Reynolds*, 206 So. 2d 334, 335 (Miss. 1968).

[2] This Court should bear in mind in the years following the adoption of the Mississippi Rules of Civil Procedure the legislature made numerous attempts to retake the power it previously possessed over the Court. An example of which was Miss. Code Ann. § 9-3-71 (Supp. 1988) which allowed the legislature to disapprove of any rule proposed by the Court. Needless to say this enactment was constitutionally invalid and was later repealed by the legislature.

would be amiss in an attempt to argue a statute which demands a certificate of merit to be attached upon filing, or a statute which demands waiting sixty days prior to filing suit, to be anything but procedural.[3] Turning to BLACK'S LAW DICTIONARY, the substantive versus procedural distinction is defined as, "laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are 'substantive laws' in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are 'procedural laws.'" BLACK'S LAW DICTIONARY 1203 (6th ed. 1990). Neither § 11-1-58 nor § 15-1-36(15) establish rights or responsibilities, or, in any other manner fit, into the category of substantive law which is left for the legislature to enact. Rather both § 11-1-58 and § 15-1-36(15) establish manners and mechanisms which plaintiffs must follow in order to institute a lawsuit against a physician or medical service provider in Mississippi. There is probably no clearer example of what a procedural rule is then § 11-1-58 and § 15-1-36(15).

Keeping in mind the procedural versus substantive distinction, and turning to the relevant statute, § 11-1-58 states in pertinent part, "the complaint shall be accompanied by a certificate." Miss. Code Ann. § 11-1-58(1). This seemingly simple statement is a blatant usurption of judicial power by the legislature and it cannot be allowed to stand. These statutes are a legislative attempt to change, modify, and bypass certain rules of the Mississippi Rules of Civil Procedure which is a power inherently given to this Court by the Constitution and acknowledged by the legislature. Allowing these enactments of the legislature to stand will be but the first step onto a slippery slope, the end of which is unknown. The Judiciary simply cannot stand idly by and

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[3] However, this Court has shed some light on what is **not** a substantive rule. In *Hall v. State,* 539 So. 2d 1338 (Miss. 1989) this Court rejected an argument, similar to that of Defendant Warden, that would place issues relating to public policy within the legislative control. A number of commentators have explored this rejection of a public policy exception. *See* Ronald C. Morton, Rules, Rule-making, and the Ruled: The Mississippi Supreme Court as Self-Proclaimed Ruler, 12 Miss. C. L. Rev. 293, 310-15 (1991); Kala R. Holt, The Balance of Power *Weidrick v. Arnold* and the Conflict Over Legislative and Judicial Rulemaking Authority in Arkansas, 46 Ark. L. Rev. 627, 644-646 (1993).

watch the legislature trounce over the Constitution in order to take power bestowed solely upon the Judiciary, power which the Judiciary should jealously guard. The doctrine of separation of powers is fundamental to our system of government and the Judiciary must vehemently guard the powers bestowed upon it by the Constitution and should rebut any attempt by the legislature to overstep its constitutional bounds.

In fact this Court has advised, "from the time Mississippi was admitted into the Union, until today, the Supreme Court has been constitutionally obligated to exercise the judicial power of this State. This includes responsibility for the procedural rules to be followed in filing, prosecuting, and appealing litigation – civil and criminal – within the courts of this state." *Long v. McKinney*, 897 So. 2d 160, 184 (Miss. 2004). Our Country's Founding Fathers warned of the tendency of power to be of an encroaching nature. It is in this context that the legislature is now encroaching upon inherent judicial power, and it must be rebuked.

A. Miss. Code Ann. §§ 11-1-58 & 15-1-36(15) Conflict with Miss. R. Civ. P. 3.

Rule 3 of the MRCP entitled, "Commencement of Action," subsection (a) instructs practitioners and courts alike that, "[a] civil action is commenced by filing a complaint with the court." This rule clearly states when and how to commence an action and nothing in the rule requires any sort of accompanying affidavit or certificate. Likewise, MRCP 3 is completely devoid of any requirement that a plaintiff give a defendant **any** pre-suit notice as required by Miss. Code Ann. § 15-1-36(15) prior to the commencement of an action. Thus, the requirements imposed by the legislature in Miss. Code Ann. §§ 11-1-58 & 15-1-36(15) clearly are contrary to MCRP 3 and therefore, according to *Hall v. State,* are of no force and effect. *Hall*, 539 So. 2d at 1346.

B. Miss. Code Ann. § 11-1-58 Conflicts with Miss. R. Civ. P. 8.

An even more blatant usurption of power may be found by comparing § 11-1-58 to Miss. R. Civ. P. 8. Rule 8 is titled "General Rules of Pleading." Rule 8 instructs that a pleading which sets forth a claim for relief shall contain two things: (1) a short and plain statement of the claim and (2) a demand for judgment for relief. Note that Rule 8 does not state that an affidavit, certificate, or any other paper must accompany a pleading. In fact, subsection (e) entitled "Pleading to be Concise and Direct: Consistency" clearly conflicts which § 11-1-58, wherein the Rule mandates, "**No technical forms of pleading or motions are required.**" Miss. R. Civ. P 8(e) (emphasis added). The purpose behind Rule 8 was to do away with technical and detailed pleadings and now only requires that a party be put on notice. *Estate of Stevens v. Wetzel*, 762 So. 2d 293, 295 (Miss. 2000). The legislature in enacting § 11-1-58 has clearly usurped the Court's rulemaking power and has blatantly crossed the line abolishing technical pleadings established in Rule 8(e)(2). Rule 8 clearly states no technical forms are required and the legislature has attempted to circumvent the rule through its promulgation of § 11-1-58, which clearly adopts technical forms of pleadings. Since § 11-1-58 violates Rule 8 the statute accordingly is of no force or effect. *Hall*, 539 So. 2d at 1346.

C. Miss. Code Ann. § 11-1-58 Conflicts with Miss. R. Civ. P. 10.

A third conflict is found between § 11-1-58 and Rule 10 of the MRCP. Rule 10 is titled "Form of Pleadings" and it provides requirements for any pleading which is submitted to a court. A careful study of Rule 10 will demonstrate that the Supreme Court in promulgating the Rules did not envision, or require attaching certificates, or affidavits to complaints in order for such complaints to be sufficient. In fact Rule 10(d) instructs that **only**, "[w]hen any claim or defense is founded on an account or other written instrument, a copy thereof should be attached." A

medical malpractice claim is merely a negligence action which has its foundations in the common law, and it is in no way reliant upon a written instrument.

However, assuming *arguendo* that medical malpractice actions are founded upon a written instrument, and that a paper or certificate needs to be attached, this Court has stated Rule 10(d) does not require rigid application. In fact this Court has allowed parties asserting breach of contract claims who failed to attach the contract to the complaint, an opportunity to correct their failure through discovery or amendment. *See Donald v. Amoco Production Co.*, 735 So. 2d 161, 178 (Miss. 1999). The *Donald* Court went on to instruct, "[*i*]*n view of the liberal provision for discovery found in Rules 26-37, M.R.C.P. the attachments of exhibits to pleading*[*s*] *is hardly as important as in former days*."[4] *Id.* (quoting *Gilchrist Mach. Co. v. Ross*, 493 So. 2d 1288, 1292 (Miss. 1986)(emphasis in original)) *see also* Jeffrey Jackson, Civil Procedure, ENCYCLOPEDIA OF MISSISSIPPI LAW, § 13:1 (West 2001) "However, pleadings based on a written instrument should have a copy of the written instrument attached under Rule 10(d). The requirement of attaching instruments is not strictly enforced."

Therefore, not only does § 11-1-58 conflict with Rule 10(d) itself, by requiring the attachment of a paper despite the fact medical malpractice actions are not founded upon a "written instrument," but the statute goes further and violates this Court's interpretation of Rule 10(d) which states the Rule should not be rigidly applied.[5] Thus, the dismissal of this case pursuant to § 11-1-58 for failure to attach a physician's certificate violates both Rule 10(d), as

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[4] Most troubling Miss. Code Ann. § 11-1-58, being a pre-suit requirement, requires medical malpractice victims to obtain expert certification without being able to fully utilize the discovery provisions provided for in the MRCP which are available for all other plaintiffs. Therefore, § 11-1-58 denies medical malpractice victims the right to conduct discovery which is afforded to all other plaintiffs.

[5] The comments to Rule 10 go on to state, "subdivision 10(d) was amended to its present form, which states that foundational documents should be attached, unless a reason for the failure to do so is stated. Thus, it remains good practice normally to attach such documents as part of a clear statement of a claim or defense. If, however, a foundational document is not attached to an otherwise sufficient pleading, the document may be obtained by discovery."

well as, this Court's interpretation of Rule 10(d) and accordingly § 11-1-58 should be given no force or effect. *Hall*, 539 So. 2d at 1346.

D. Miss. Code Ann. § 11-1-58 Conflicts with Miss. R. Civ. P. 11.

A fourth conflict is found between § 11-1-58 and Rule 11 entitled "Signing of Pleadings and Motions." Rule 11 clearly sets forth that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." The Defendants will likely point to the language in Rule 11 "or statute" as support for the validity of § 11-1-58. However, it is better to examine the Rules themselves in order to determine if a deviation from Rule 11 needs to be authorized by rule or by statute. Miss. R. Civ. P. 1 outlines the applicability of the rules to govern procedure in circuit, chancery and county courts, but Rule 1 notes that the rules have limited applicability subject to the limitations of Miss. R. Civ. P. 81.[6] Turning to Rule 81 twelve areas are outlined in which the rules have limited applicability, areas which are "generally governed by statutory procedures."

After examination of the twelve areas generally governed by statute it is clear medical malpractice does not fall within any of the categories of cases which can be affected by a statute. Thus, since § 11-1-58 effectively requires complaints to be verified in violation of the commands of Rule 11, unless the Defendants can point to a **Rule**[7] which negates the mandate of Miss. R. Civ. P. 11, Miss. Code Ann. § 11-1-58 must necessarily be found to be unconstitutional as a violation of separation of powers. *Hall*, 539 So. 2d at 1346.

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[6] The areas expressly limited by Rule 81 are proceedings pertaining to: habeas corpus; disciplining an attorney; pursuant to Youth Court Law or Family Court Law; election contests; bond validations; adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment; eminent domain; Title 91 of the Mississippi Code of 1972; Title 93 of the Mississippi Code of 1972; creation and maintenance of drainage and water management districts; creation of and change in boundaries of municipalities; and proceedings brought under the following sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

[7] The Defendants will be unable to point to any procedural rule which requires a certificate of compliance similar to § 11-1-58. Currently there are only **two** rules which require a pleading to be verified or accompanied by an affidavit. These rules, of course, are Rules 27(a) and 65.

E. Miss. Code Ann. § 11-1-58 Conflicts with Miss. R. Civ. P. 15.

Finally, Miss. R. Civ. P. 15 titled "Amended and Supplemental Pleadings" sets forth certain enumerated grounds in which plaintiffs may as a right amend their pleadings, and certain times in which plaintiffs by leave of court may amend their pleadings. While the statute makes no reference to amendments, in § 11-1-58 (1)(b) it states the remedy for a complaint missing the certificate is dismissal.[8]

This Court has stated that Rule 15 should be **liberally construed** to allow amendments and such amendments, "should be denied only if the amendment would cause actual prejudice to the opposite party." Miss. R. Civ. P. 15 cmts; *Beverly v. Powers*, 666 So. 2d 806, 809 (Miss. 1995); *Coleman v. Smith*, 841 So. 2d 192, 194 (Miss. Ct. App. 2003). Griffith in his MISSISSIPPI CHANCERY PRACTICE treatise went so far as to say, "there would sometimes be a failure of full justice on the actual merits unless amendment and correction in the pleadings, and in other procedural steps, were seasonably and judiciously allowed." V. Griffith, MISSISSIPPI CHANCERY PRACTICE § 388 (2d ed. 1950). These later points ring particularly true in this case. The Plaintiff consulted with a physician before filing his complaint, and before Defendant Warden filed his motion to dismiss, the Plaintiff filed the necessary affidavit with the clerk. [R. at 21.]

Moreover, upholding the constitutionally suspect statute, Miss. Code Ann. § 11-1-58, is perilous. Defendant Warden stated in his brief to the trial court, "Rule 15 should not be used to circumvent constitutionally enacted legislation regulating access to the courts." [R. at 264.] Defendant Warden's statement is manifestly wrong and it ignores the fundamental command of separation of powers which is crucial to our representative democracy. In other words,

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[8] The trial court found a strict compliance standard to be the appropriate standard of compliance based on this Court's decision in *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583, 589 (Miss. 2006). It is quite disturbing that this Court adopted a strict compliance standard with § 11-1-58, because requiring medical malpractice plaintiffs to strictly comply with the statute violates both the letter and the spirit of Rule 15 by denying medical malpractice plaintiffs the right to **ever** amend their complaint to remedy trivial errors.

Defendant Warden would like this Court to succumb to the desire of the legislature, special interest groups and lobbyists, and follow the procedural rules which the legislature deems appropriate. Simply put, it is impossible to reconcile § 11-1-58 with Miss. R. Civ. P. 15. This Court in requiring plaintiffs strictly comply with § 11-1-58 has in effect stated medical malpractice plaintiffs are not afforded the liberal amendment rules which are afforded to all other plaintiffs and defendants in circuit, county, and chancery courts in Mississippi.

To require plaintiffs to strictly comply with the mandates of § 11-1-58 necessarily requires that this Court declare that Rules 3, 8, 10, 11 and 15 are inapplicable to plaintiffs in medical malpractice actions. This Court recognized in *Long* that, "[f]or generations, this Court was not aggressive in taking a leadership in all things judicial, including procedural matters related to judicial processing of substantive law enacted by the legislature." *Long*, 897 So. 2d at 184. The *Long* Court went on to caution that the Court should be ever-vigilant in guarding its constitutional right to enact procedural rules. *Id.* at 185. Here the legislature has taken its first step towards instructing this Court how to handle its affairs.[9] Just as this Court has no place enacting rules of quorum for the legislature to follow, the legislature has no place to tell this Court how to conduct its own affairs. The legislature has encroached upon the Judiciary and accordingly should be rebuked by this Court. *See Murray v. State*, 870 So. 2d 1182, 1184 (Miss. 2004) ("where there is a conflict between a statute and a procedural rule created by the Supreme Court, the rule controls and the statute is void and of no effect").

[9] This is not the only step the legislature has taken to encroach upon this Court's power. The legislature's 2004 amendments to the State's venue statute, Miss. Code Ann. § 11-11-3, now require each joined plaintiff to properly establish venue, which is blatantly contrary to Miss. R. Civ. P. 82(c) which instructs that where multiple parties are joined in an action the suit may be properly brought "in any county in which one of the claims could properly have been brought."

F. Other States Have Found Similar Acts Unconstitutional.

The constitutionality of the certificate of merit requirement currently before the Court is a novel issue in Mississippi; however, many other states have heard these same arguments and have come to the conclusion that such a requirement is unconstitutional. Most recently the Supreme Court of Arkansas held its certification requirement to be unconstitutional as it mandated dismissal for a party's failure to comply with the statute. The court interpreted the mandatory dismissal to be proof that the statute was procedural and the statute conflicted with Rule 3 of Arkansas' Rules of Procedure in violation of the separation of powers provision of the Arkansas Constitution. *Summerville v. Thrower*, No. 06-501, __S.W. ____, 2007 WL 766319 (March 15, 2007).

The *Summerville* decision came in the wake of the Supreme Court of Oklahoma's decision in *Zeier v. Zimmer, Inc.* in which the Oklahoma court held its affidavit of merit requirement to consist of special legislation prohibited by the Oklahoma constitution, as well as, creating a monetary barrier to court access which likewise violated the State constitution. *Zeier v. Zimmer, Inc.,* 2006 OK 98 (2006). In addition to these recent decisions many other states have found similar certification requirements to be constitutionally infirm. *See Hiatt v. Southern Health Facilities, Inc.,* 626 N.E.2d 71,73 (Ohio 1994) (certification requirement conflicted with procedural rule specifying that pleadings need not be verified or accompanied by affidavit); *Ohio ex rel. Ohio Acad. Of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1076 (Ohio 1999) (rejected a second attempt by the legislature to impose a certification requirement this time labeled as jurisdictional); *Barnes v. Eighth Judicial Dist. Court of Nevada*, 748 P.2d 483, 487 (Nev. 1987); *see also Hinchman v. Gillette,* 618 S.E.2d 387, 396-405 (W.Va. 2005) (Davis, J., concurring).

A particularly interesting case is that of a 1997 Pennsylvania law requiring a certificate of merit. 40 P.S. § 1301.821-A. The Supreme Court of Pennsylvania immediately suspended the

operation of the statute on the ground that it was inconsistent with the court's constitutional rulemaking authority.[10] Subsequent to the suspension of the statute the court promulgated a new rule imposing a similar certification requirement "in any action based upon an allegation that a licensed professional deviated from a professional standard." Pa. R. Civ. P. 1042.3. Pennsylvania provides a perfect case study on how separation of powers should work. The legislature overstepped their bounds by enacting a procedural rule which the Pennsylvania Supreme Court promptly suspended. Six years later the Pennsylvania Supreme Court found, for whatever reason, that such a procedural rule was necessary and accordingly enacted the suspended law through amending its court rules. This Court may follow the lead of the Pennsylvania court and enact its own procedural rule calling for a certification of merit.[11] However, unless and until this Court enacts its own procedural rule § 11-1-58 remains an unconstitutional usurpation of judicial power which should be promptly suspended by this Court. In fact this Court has wisely observed the procedural needs of a particular era are better served "if promulgated by those conversant with the law through years of legal study, observation and actual trials in accord with their oaths rather than by well-intentioned, but over-burdened, legislators of other pursuits and professions." *Long,* 897 So. 2d at 185.

III. SHOULD THIS COURT UPHOLD MISS. CODE ANN. § 11-1-58 A SUBSTANTIAL COMPLIANCE STANDARD SHOULD BE ADOPTED BECAUSE OF THE CONSTITUTIONAL RAMIFICATIONS OF A STRICT COMPLIANCE STANDARD

The legislative encroachment upon judicial rulemaking power through the enactment of § 11-1-58 renders the statute facially invalid, and as such this Court should strike the statute down as unconstitutional and send a clear message to the legislature that this Court continues to adhere

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[10] Order of January 17, 2997, Civil Procedural Rules Docket No. 5, No. 269 suspending the following sections of the Health Care Services Malpractice Act, added by Act No. 1996-135; Section 813-A, 40 P. S. § 1301.813-A.

[11] This approach has also been followed by the North Carolina Supreme Court. *See* Rules Civ. Proc., G.S. § 1A-1, Rule 9(j).

to the constitutional demand that the great powers remain separate. However, should this Court choose to allow the legislature to encroach upon its authority, this Court should adopt a substantial compliance standard with the mandates of § 11-1-58. Otherwise, adopting a strict compliance standard would undoubtedly allow the legislature to negate the Mississippi Rules of Civil Procedure. Subsequent to the hearing on the Defendant's motion to dismiss this Court expressly held strict compliance is the appropriate standard of compliance with § 11-1-58. *Caldwell v. North Mississippi Medical Center,* 956 So. 2d 888, 891 (Miss. 2007). However, in *Caldwell* this Court was not confronted with the dire constitutional issues which are raised by a strict standard of compliance. Therefore, if but only if, this Court finds the statute on its face is valid and does not violate the Mississippi Constitution of 1890 this Court should refine its stance and hold substantial compliance the appropriate standard of compliance. It is beyond refute that § 11-1-58 encroaches upon judicial rulemaking power, however, if this Court chooses to uphold the statute, this Court, at the bare minimum, should retain the right to determine compliance or non-compliance and not allow the legislature to completely usurp judicial authority in this State.

This Court has addressed the dismissal of a case for the failure of an attorney to attach a certificate to the complaint in *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006). In *Walker* the plaintiff filed his complaint on April 7, 2004, absent the certificate, and the plaintiff did not correct his error until the plaintiff responded to a motion for summary judgment filed on September 8, 2005, over a year after the filing of the complaint. Unlike this case where the Plaintiff filed the certificate and rectified his error a mere fourteen days after Defendant Mississippi Baptist answered and twenty-eight (28) days **before** Defendant Warden filed *anything*. Neither Defendant can demonstrate any way in which the Plaintiff's actions have prejudiced either of their rights.

For example, if this Court continues to adhere to a strict compliance standard with § 11-1-58, this Court will effectively state Miss. R. Civ. P. 15 does not apply to medical negligence plaintiffs. To adopt a strict compliance standard with § 11-1-58 effectively states that under no circumstances could a plaintiff, who did not attach a certificate upon filing of his or her complaint, correct their omission through amending the complaint, which is manifestly contrary to the liberal amendment command of Rule 15. Allowing the legislature to enact procedural rulemaking statutes, and then requiring medical malpractice plaintiffs to strictly comply with those statutes and forsake their right to amend their complaint to fix trivial errors or omissions is a dangerous path to tread upon. In fact the comments to Rule 15 explain that the role of courts is to decide cases on the merits not on technicalities. Furthermore the comments go on to clearly state, "there would sometimes be a failure of full justice on the actual merits unless amendment and correction in the pleadings, and in other procedural steps, were seasonably and judiciously allowed." Miss. R. Civ. P. 15 cmts (quoting V. Griffith, MISSISSIPPI CHANCERY PRACTICE § 388 (2d ed. 1950)). In fact this Court has instructed that Rule 15 should be liberally construed to allow amendments and such amendments "should be denied only if the amendment would cause actual prejudice to the opposite party." Miss. R. Civ. P. 15 cmts; *Beverly v. Powers*, 666 So. 2d 806, 809 (Miss. 1995). The danger in adopting a strict compliance standard with § 11-1-58 is doing so wipes away the procedural rules which this Court has promulgated. **The legislature must not be permitted to do this**. If the true goal of § 11-1-58 is to screen out merit-less cases neither Defendant has offered a suitable explanation for dismissing a **valid** complaint with a **valid** certificate testifying to the merit of the cause of action merely due to a late filing of the certificate which has not prejudiced either Defendant. Unless, the goal of this statute is to both weed out claims without merit, along with, meritorious claims on mere technicalities in an effort to shield negligent and dangerous physicians from valid lawsuits.

A. This Court Has Interpreted the Only Other Analogous Statutes in Mississippi in a Manner Favoring Access to the Courts

Moreover, there are currently two statutes in Mississippi which permissibly require the attachment of a certificate when filing a complaint. *See* Miss. Code Ann. § 23-15-927 (governing election contests) and Miss. Code Ann. § 93-17-3 (governing adoption proceedings). However, and of utmost importance, these two certification requirements are only permissible because the Mississippi Rules of Civil Procedure specifically limit their applicability in certain enumerated cases. Specifically, Miss. R. Civ. P. 81 reads, "[t]hese rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures . . . (3) proceedings pursuant to the Youth Court Law and the Family Court Law; (4) proceedings pertaining to election contests." Thus, the authority of the legislature to require the attachment of certificates to the complaints only came about because Rule 81 specifically exempts election contests and family court proceedings from the domain of the Rules.

Humoring for a moment the possibility that the legislature can somehow attach additional pleadings requirements to medical negligence plaintiffs it is useful to examine how this Court has interpreted the law in regards to § 23-15-927 and § 93-17-3, where the legislature was constitutionally permitted to do so. This Court has in two prior cases addressed the issue of amending a complaint to comply with § 23-15-927. In *Pearson v. Parsons*, 541 So. 2d 447 (Miss. 1989), this Court addressed whether the statutory provisions were met when an attorney after filing a complaint amended his complaint to attach a certificate. This Court found, "[a]s there is nothing in the statutes conflicting with the rules respecting amendments, in the present procedural context the Mississippi Rules of Civil Procedure apply." *Id.* at 450. This is because where Rule 81 limits the applicability of the Rules in specific instances the Rules continue to apply to the extent that they do not conflict with a statutory provision. *Id.* Likewise, this Court

IV. MISS. CODE ANN. § 15-1-36(15) UNCONSTITUTIONALLY VIOLATES THE PLAINTIFF'S RIGHTS TO OPEN COURTS IN VIOLATION OF THE MISSISSIPPI CONSTITUTION OF 1890.

The Mississippi Constitution of 1890 guarantees that the courts in Mississippi shall be open to all of her citizens. Specifically section 24 of the Constitution reads:

> All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law; and right and justice shall be administered without sale, denial, or **delay**.

MISS. CONST. ART. 3 § 24 (1890) (emphasis added). The Remedy Clause of § 24 is purely procedural and is limited in applicability to the positive law of the State which determines what the law will allow redress for. However, it is undisputed in the present case that the positive law of the State recognizes a cause of action for medical negligence against physicians and health care providers. Therefore, it is evident that § 24 applies to actions against physicians. In a recent treatise on Mississippi Law, former Mississippi Supreme Court Justice James L. Robertson elaborated on the procedural protections § 24 grants plaintiffs. Former Justice Robertson wrote "[t]he 'due course of law' refers to the procedural course charted most prominently by the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence. A substantial departure from the customary rules of civil practice would offend rights of litigant secured by Section 24." James L. Robertson, Constitutional Law, ENCYCLOPEDIA OF MISSISSIPPI LAW § 19:87 (West 2001) [hereinafter "Robertson"].

The sixty day notification provision of § 15-1-36(15) is without a doubt a substantial departure from the customary rules. In practice and effect § 15-1-36(15) suspends the application of the Rules of Civil Procedure in regards to medical malpractice plaintiffs. Because of the arbitrary nature with which the legislature has sought to amend the Mississippi Rules of Civil Procedure with respect solely to medical malpractice plaintiffs, the Plaintiff has demonstrated to this Court a substantial departure from the customary rules which warrants this

Court holding § 15-1-36(15) to be unconstitutional as it offends Section 24 of the Mississippi Constitution.

A. Miss. Code Ann. § 15-1-36(15) Imposes an Unconstitutional Delay Upon Plaintiffs Bringing Medical Negligence Actions.

It is an undisputable fact that Miss. Code Ann. § 15-1-35(15) imposes a delay upon plaintiff's in medical malpractice actions, and as such, § 15-1-35(15) is violative of the Mississippi Constitution. Section 15-1-36(15) states in pertinent part that, "[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." Miss. Code Ann. § 15-1-36(15). One would be amiss to attempt to argue that § 15-1-36(15) does not restrict an individual's access to the courts. Former Justice of the Mississippi Supreme Court George Ethridge in his treatise on Mississippi Constitutions explained the purpose of § 24 of the Constitution and wrote that, "[t]he courts are not required to open for the trial of cases at all times, but must be open for the receiving of complaints and suits and the issuance and service of process." George H. Ethridge, MISSISSIPPI CONSTITUTIONS, at 124 (The Tucker Printing House 1928)[hereinafter "Ethridge"]. More pointedly Justice Ethridge wrote, "**[t]he legislature cannot deny access to the courts either directly or indirectly.**" [Id.](emphasis added).

The learned Justice went on to explain, "[t]here is no person in all this country who is above the law. There is no citizen so poor and humble who is not entitled to the protection of the law." [Id.] *see also Meeks v. Meeks,* 126 So. 189, 190 (Miss. 1930). However, contrary to the Constitution and contrary to the learned writings of Justice Ethridge the legislature through § 15-1-36(15) has sought to deny the rights of one group of Mississippians in a manner in which it is constitutionally forbidden from doing. By requiring medical malpractice victims to wait sixty days before filing their complaint the legislature has by very definition, delayed the Plaintiff's access to the courts. Nothing prohibits a person injured in a car accident through the negligence

of another, from going to the courthouse that very day and filing a complaint against the negligent driver. However, if a person is injured by a physician that person is required to wait sixty (60) days before being able to file his or her complaint against the negligent physician. **This is a blatant violation of the Mississippi Constitution and it cannot stand.** Stated by a man far more wise and eloquent than myself, "[t]he legislature cannot deny access to the courts either **directly or indirectly**." Ethridge, at 124 (emphasis added).

Section 15-1-36(15), in effect and in practice, tells medical malpractice plaintiffs that although they have a cause of action, and although they have a right to sue, they must wait. This is in stark contrast to the writing of the former Justice who stated, "[j]ustice cannot be delayed by postponement (as by moratorium acts) to later periods of time. The person wronged is entitled to speedy justice." *Id.* The Plaintiff does not argue that he is entitled to a trial on the merits on the date he is injured. Such a system would be unduly burdensome, and frankly impossible to administer. Rather, the Plaintiff merely submits that he has a constitutionally protected right to file his complaint and preserve his rights and his claim against a physician on the date his cause of action accrued just as any other tort victim is entitled, and not have to wait sixty days.

In more recent years, Former Justice Robertson has also addressed the final clause of Section 24, specifically the mandate the justice be administered without delay. While Justice Robertson explained that delay *per se* is not unconstitutional, such as the case of necessary delay or delay due to the inaction of a plaintiff. Robertson, at § 19:87. The Former Justice instructs "[t]o present an issue of constitutional dimensions, [the] litigant must show a state-caused delay." *Id.* A state-caused delay is precisely what is at issue in the present case. Likewise, in addition to § 24 of the Mississippi Constitution, the First Amendment of the United States Constitution provides citizens a reciprocal right of access to the courts. In construing the First Amendment right the Fifth Circuit has recently instructed that it has "characterized the right of

access . . . to be implicated where the ability to file suit was delayed, or blocked altogether." *Foster v. McClain*, 28 F.3d 425, 430 (5th Cir. 1994).

The legislature through the enactment of § 15-1-36(15) has unconstitutionally delayed the commencement of all actions brought by medical malpractice victims for a period of sixty days.[13] Accordingly, the legislature's unconstitutional attempt to delay the Plaintiffs constitutional right to commence his action should be recognized for what it is and this Court should find Miss. Code Ann. § 15-1-36(15) unconstitutional and in violation of Section 24 of the Mississippi Constitution.

B. Other States Have Found Similar Acts Unconstitutional.

Just as other states have determined statutes requiring attachment of certificates of merit to be unconstitutional, many states have held pre-suit notice requirements to be constitutionally infirm as well. The Supreme Court of Arkansas in response to a constitutional challenge of its pre-suit notice requirement stated, "[w]e can think of few rules more basic to the civil process than a rule defining the means by which complaints are filed and actions commenced for a common law tort such as medical malpractice." *Weidrick v. Arnold*, 835 S.W.2d 843, 848 (Ark. 1992). The court proceeded to strike down its pre-suit notice requirement as conflicting with Rule 3 of the Arkansas Rules of Civil Procedure. Miss. Code Ann. § 15-1-36(15) in addition to denying plaintiffs access to courts is also constitutionally infirm due to the same conflict between the statute and Rule 3 of the MRCP which was explored by the Arkansas court in *Weidrick*.

The Supreme Court of New Hampshire struck down its version of Miss. Code Ann. § 15-1-36(15) years ago on equal protection grounds. The New Hampshire court found the sixty day notice requirement to be a procedural hurdle which did not relate to any legitimate legislative

[13] The only area when the constitutionality of a notice period has been tested is that of the Mississippi Tort Claims Act. However, as discussed *supra* in section V.A. any attempted analogy between the Mississippi Tort Claims Act and the Mississippi Medical Tort Claims Act is fundamentally flawed.

objective. *Carson v. Maurer*, 424 A.2d 825, 834 (N.H. 1980). The Court went on to state, "by placing numerous pitfalls in the path of unsuspecting plaintiffs, the effect of this notice requirement is to unjustly hinder the prosecution of many claims." *Id.*

The rules of court promulgated by this Supreme Court have proven over the years to be more than adequate in addressing the procedural manner a party must follow in order to commence a suit. Miss. Code Ann. § 15-1-36(15) is the legislature's attempt to add its two cents to an area of the law in which it has no business and accordingly no say. This Court should follow the lead of its sister courts and find § 15-1-36(15) unconstitutional and allow all plaintiffs to rest assured that if they follow the procedural instructions of the Mississippi Rules of Civil Procedure their case will be heard.

V. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT STRICT COMPLIANCE IS THE APPROPRIATE STANDARD OF COMPLIANCE WITH § 15-1-36(15).

The trial court further trounced on the constitutional rights of the Plaintiff by applying a strict compliance standard to § 15-1-36(15). In so doing the trial court in essence stated that the legislature has taken away the right of medical malpractice plaintiff's to commence a lawsuit immediately – delaying their ability to seek a remedy for their wrong – and unless the plaintiff follows the legislature's procedures "to a T" the plaintiff will not get his constitutional right to bring a suit back. Such logic is dangerous to the very core of our democratic form of government which relies on the important and fundamental role which the courts play in our tripartite form of government.

The strict compliance standard which the trial court adopted once again raises irreconcilable conflicts between § 15-1-36(15) and Miss. R. Civ. P. 61 which instructs that, "[t]he court at every stage of the proceedings **must** disregard any error or defect in the

proceeding which does not affect the substantial rights of the parties."[14] Miss. R. Civ. P. 61 (emphasis added). In fact the comments to Rule 1 cite Rule 61 as probably the most important statement which will further the overall and underlying goal of the Rules, specifically to, "facilitate[] decisions on the merits, rather than determinations on technicalities." Miss. R. Civ. P. 1 cmts.[15] Once again it is evident the reason why the founders of this State specifically provided for three separate branches of government. This Court in promulgating its Rules realized there will be times in which there would be a miscarriage of justice if trivial errors are not disregarded. On the other hand, the legislature through § 15-1-36(15) has unconstitutionally delayed a class of Mississippians access to the courts, and has proceeded to further deny access entirely if *any* trivial mistake has occurred **prior to commencing a suit**. Adopting a substantial compliance standard will allow the Judicial branch to determine compliance or non-compliance instead of permitting the legislature to usurp that power.

On September 6, 2005 the Plaintiff sent the required notice to the Defendants via certified mail. [R. at 37.] Subsequent to the Plaintiff's notice being sent this Court has held in regards to § 15-1-36(15) "notice is served on the date that notice is *mailed*." *Proli v. Hathorn,* 928 So. 2d 169, 175 (Miss. 2006)(emphasis in original). Based on this Court's holding in *Proli* and § 15-1-36(15) the Plaintiff had to wait sixty days from September 6, 2005 before he could file suit which was Saturday, November 5, 2005. This suit was filed **one** day early on Friday, November 4, 2005 solely because it appeared the statute of limitations was going to run on Sunday. Section 15-1-36(15) requires a plaintiff to give sixty days pre-suit notice, in this case the Defendants

[14] Neither of the Defendants have nor can they articulate a way in which their rights were substantially affected by the Plaintiff filing his complaint one day early. The Defendants, being medical service providers, are already afforded protections unavailable to all other Mississippians. Furthermore, although the suit was filed one day early on November 4, 2005 neither Defendant was served with the complaint and summons until after the sixty day period had elapsed.

[15] The comments to Rule 1 also state, "[p]roperly utilized, the rules will tend to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies."

were provided with fifty-nine days pre-suit notice. Furthermore, the only reason why the Defendants were not provided the full sixty days notice was due to the fact the statute of limitations would run on a Sunday. The Defendants cannot point to any way in which any of their rights were impaired by giving fifty-nine and not sixty days pre-suit notice. On the other hand, if this Court chooses to uphold the decision of the lower Court the Plaintiff will be denied his day in Court over a twenty-four hour frivolity.

Commentators and courts have argued that the intent of these pre-suit notice statutes is to encourage pre-suit settlement discussions. In the present case, fifty-nine days elapsed and no word was heard from either Defendant to communicate their interest, or lack thereof, in pre-suit resolution. After filing the complaint, and before process was served upon the Defendants, over sixty days had elapsed before either Defendant was aware of an action being filed against them. However, did either Defendant in the interim contact the Plaintiff in an attempt to resolve this dispute, of course not. The Defendants are attempting to take advantage of an unconstitutional law which hinders one's access to the court system under the guise of encouraging pre-suit resolution. The fact remains that the Plaintiff was denied his constitutional right of access to the courts of this State, and the Plaintiff sat by without complaint for fifty-nine days. Now the trial court has denied the Plaintiff his right to **ever** have his day in court due to a strict reading of § 15-1-36(15). The New Hampshire Court addressed this argument and explained, "[t]he malpractice defendant gets all the notice he needs when he is served with process, because he still has ample time to review the claim and initiate settlement negotiations before the trial begins." *Carson*, 424 A.2d at 834. If this Court chooses to uphold § 15-1-36(15) clearly a substantial compliance standard is the more desirable standard due to the dire constitutional concerns a strict compliance standard raises.

A. The Purposes of the Mississippi Tort Claims Act and the Mississippi Medical Tort Claims Act are Opposite of Each Other

The trial court and the Defendants relied upon this Court's adoption of strict compliance as the appropriate standard of compliance with Miss. Code Ann. § 11-46-11, the Mississippi Tort Claims Act [hereinafter MTCA] notice provision. *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 819 (Miss. 2006). However, it is imperative to explore the different goals and functions of the Mississippi Medical Tort Claims Act [hereinafter MMTCA] and the MTCA before adopting the compliance standard of the MTCA for the MMTCA.

To begin with any attempt to analogize the MTCA with the MMTCA is fundamentally flawed. This Court has explicitly and unequivocally stated, "control of sovereign immunity is properly the domain of the legislature." *Wells by Wells v. Panoly Co. Bd. of Educ.*, 645 So. 2d 883, 889 (Miss. 1994). At common law a victim had no cause of action against the State. This immunity was derived from the English common law rule of "the King can do no wrong." In stark contrast to sovereign immunity, actions for medical negligence are nothing more than a common law tort for negligence, only with a professional standard of care as contrasted with a reasonable person standard.

The Defendants and the trial court look to the constitutionality of the MTCA as support for the constitutionality of the MMTCA. This however, they cannot do. The MTCA does not infringe upon constitutional rights because the MTCA did not limit any rights of victims, rather the MTCA expanded victim's rights. Before the enactment of the MTCA a person harmed by the State had no legal recourse. *See Wells by Wells,* 645 So. 2d at 889-900. With the passage of the MTCA the legislature relaxed the State's immunity and granted injured victims a right where none previously existed. Therefore, since no right existed prior to the MTCA the notice restrictions of the MTCA could not be unconstitutional, because the legislature did not limit access to the courts, rather the legislature created access where none previously existed.

On the other hand, at common law any injured victim could bring a negligence claim against a physician, or any other person, who wronged him. Furthermore, such victim did not have to wait one, two, or sixty days before filing his or her complaint. Moreover, this right to file a complaint upon accrual of an action persists to this day for all victims of negligence, except victims of medical negligence. As such, the MMTCA has unconstitutionally taken away and limited certain rights which injured victims had at common law.

Therefore, any attempted analogy between the MTCA and the MMTCA must fail because the two enactments are stark opposites of one another. The MTCA **granted** rights to injured victims which were not available at common law. Furthermore, sovereign immunity is the exclusive domain of the legislature. *Wells by Wells,* 645 So. 2d at 889. As such the legislature can impose whatever restrictions it deems appropriate on actions against the State. On the other hand, the MMTCA has **taken** rights from injured victims which were available at common law. Thus, an attempted analogy between the MMTCA and MTCA does not even rise to the level of comparing apples to oranges; it is more like comparing apples to rocks.

B. The Language of the Statute Does Not Mandate Strict Compliance.

However, if a comparison is drawn between the notice provisions of the MTCA and the MMTCA it is evident that substantial compliance is the more appropriate standard for the MTCA. Section § 11-46-11 contains the notice provision for the MMTCA. The statute provides that individuals wishing to bring a claim against a governmental entity must provide a notice of a claim ninety (90) days prior to commencing suit. Nowhere in § 11-46-11 is a situation provided for in which the ninety day waiting period would be inapplicable. This makes sense. If an injured person wishes to bring a suit against a city, police department, state office, or any other governmental agency the injured party will have little difficulty finding and delivering the notice to the governmental agency. In general governmental agencies do not move and the

transparency of government makes it easy for an individual to locate and deliver notice upon the appropriate agency.

On the other hand, § 15-1-36(15) contemplated within the statute instances in which no compliance at all is required. Thus, the difference between the two notice provisions is § 11-46-11 is written in mandatory language with no provision for deviation, whereas, § 15-1-36(15) expressly provides for instances where no notice need be given. The final sentence of § 15-1-36(15) reads, "[t]his subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name." The final sentence is relevant because the legislature realized there would be times when a plaintiff did not know a defendant's name before filing the suit and commencing discovery, and for that defendant no pre-suit notice would be required. Since the legislature anticipated times in which parties' names would not be known and accordingly there would be times in which no pre-suit notice is required, it would be anomalous to hold such language to mandate strict compliance. In fact the exact opposite is true; the legislature realized there would be instances in which no compliance is necessary.

As such it is evident, that if, and only if, this Court determines to uphold this unconstitutional piece of legislation, substantial compliance is a more appropriate standard of compliance. When the legislature enacts laws which impede the citizenry's access to the courts, this Court should swiftly and sternly strike down those laws and chastise the legislature for its unconstitutional acts. However, if this Court chooses to allow the legislature to indirectly deny access to the courts, this Court should interpret those laws and individuals rights under them in such a manner that favors access to the courts, and not with one hand on the door awaiting to slam the door to the courthouse closed in the face of any plaintiff who errs ever so slightly during pre-suit proceedings. Such is the approach taken by courts in Florida which have held similar

pre-suit notice and screening requirements should be "construed in a manner that favors access to courts." *Patry v. Capps*, 633 So. 2d 9, 13 (Fla. 1994).[16]

VI. MISS. CODE ANN. §§ 11-1-58 & 15-1-36(15) IMPINGE ON THE PLAINTIFF'S FUNDAMENTAL RIGHTS TO OPEN AND ACCESSIBLE COURTS AND THE STATUTES ARE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE MISSISSIPPI AND FEDERAL CONSTITUTION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV *see also* MISS. CONST. ART. 3 § 14 (1890). The Supreme Court has held "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Tulsa Professional Collection Serv. Inc. v. Pope,* 485 U.S 478, 485 (1988). A court when confronted with a statute that may violate the due process clause must first determine the appropriate standard of review. The court is to apply strict scrutiny of the statute in question only when the statute implicates a suspect class or a fundamental right. *Wells by Wells,* 645 So. 2d at 893.

The right to open and accessible courts is a fundamental right and accordingly any legislation which interferes with a person's access to the courts must survive strict scrutiny. *Cleveland v. Mann*, 942 So. 2d 108, 121-22 (Miss. 2006)(Diaz, J., dissenting). This Court in *Wells by Wells* applied the rational relation test to determine whether the Accident Relation Fund violated the constitutional guarantee to trial by jury. The Court explained it's rational for applying the rational relation test as "[t]he right to trial by jury is guaranteed only for those actions which, at common law, a jury was required. The right to proceed against the State, provided in the Accident Contingent Fund, was not available at common law." *Wells by Wells,* 645 So. 2d at 889-900. On the other hand, actions against physicians were available at common

[16] The Florida courts also instruct that pre-suit notice and screening requirements "are not intended to deny access to the courts on the basis of technicalities." *Id.*

law and the right to trial by jury in medical negligence cases was available at common law. Accordingly this Court should find and hold the right open and accessible courts is a fundamental right and any attempt by the legislature to impede that access must survive a strict scrutiny test. *See Cleveland v. Mann*, 942 So. 2d 108, 121-22 (Miss. 2006)(Diaz, J., dissenting) ("[t]he right to a jury of one's peers and the right of access to the court system of the state of Mississippi is a fundamental right"). The right to a trial by jury is such an engrained and fundamental right in our society that it was expressly laid out as a grievance the colonists had against the King of England when they definitely penned the Declaration of Independence in 1776 and chastised the crown "[f]or depriving us in many cases, of the benefit of Trial by Jury."

Since access to the court system is a fundamental right the statutes must survive strict scrutiny analysis and the State must demonstrate 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). Applying strict scrutiny analysis it is obvious that neither § 11-1-58 nor § 15-1-36(15) can withstand such scrutiny and as such both violate the equal protection clause of the Mississippi and United States Constitution.

A. Miss. Code Ann. § 11-1-58 Does Not Withstand Strict Scrutiny

Section § 11-1-58 purports to limit the filing of merit-less lawsuits by mandating dismissal of *all* complaints which are not accompanied by a certificate of merit. Furthermore, the trial court found the appropriate standard of compliance with § 11-1-58 is strict compliance and no errors are so trivial as to warrant overlooking them. In so holding the trial court effectively found the interest in requiring medical malpractice plaintiffs to file a certificate of merit to be superior to the interest in affording those plaintiffs access to the courts. Moreover, the Defendants cannot point to a "compelling state interest" which would warrant a pre-suit requirement such as § 11-1-58. Other courts have pointed out that § 11-1-58 serves to weed out

merit-less suits. However, Miss. R. Civ. P. 11 already allows for sanctions in cases in which a party files any motion or pleading which is frivolous or filed for the purpose of harassment or delay. *See also* Miss. R. App. P. 38 (which allows for damages if the Supreme Court or Court of Appeals determines the appeal to be frivolous). Finally, Rule 3.1 of the Rules of Professional Conduct imports an ethical responsibility of all members of the bar to neither bring nor defend a proceeding or claim which is frivolous. Miss. R. Prof. Conduct 3.1.

Prior to the passage of § 11-1-58 this Court had in place methods and mechanisms for ensuring that frivolous pleadings were not filed. Section 11-1-58 places an unnecessary and unconstitutional hurdle in front of plaintiffs who were the victims of medical malpractice, and none others, because this Court already implemented procedures to protect against the filing of frivolous lawsuits, and because the state cannot show a compelling interest in such legislation § 11-1-58 cannot survive strict scrutiny and should be held to be unconstitutional.

B. Miss. Code Ann. § 15-1-36(15) Does Not Withstand Strict Scrutiny

Section 15-1-36(15) requires medical malpractice victims give sixty (60) days pre-suit notice before filing suit against a physician or medical service provider. The trial court extended this harsh rule to require the Plaintiff to strictly comply with § 15-1-36(15) and in doing so dismissed a viable cause of action for a one day pre-suit mistake on the Plaintiff's part. Once again, since § 15-1-36(15) impedes a person's fundamental right of access to the judicial system this Court should require the statute to withstand strict scrutiny.

Applying a strict scrutiny standard to § 15-1-36(15) it is evident the statute cannot withstand equal protection review. There is no compelling state interest in the present case which outweighs the great detriment caused to the plaintiff who has to idly stand by and wait for his turn to file suit. The Supreme Court of New Hampshire addressing the very issue found this argument unsound and the court explained that after being served with a complaint a defendant

has ample time to review the suit and enter into settlement negotiations before trial should they so desire. *Carson,* 424 A.2d at 835. The New Hampshire court found the special treatment given to medical care providers bore no reasonable relationship to the stated purpose of the statute. *Id.* at 835. On the other hand, the New Hampshire statute imposed a procedural hurdle which prolonged the time and increased the cost of medical malpractice litigation. This had the effect of unfairly postponing the time which malpractice victims could expect to recover for injuries. The New Hampshire Court concluded that, "[a]ny conceivable public benefit conferred by [the statute] is outweighed by the restrictions it imposes on private rights." *Id.*

The Mississippi statute imposes similar restrictions upon its citizenry's access to the judicial system. There is no compelling state interest furthered by requiring medical malpractice plaintiffs to wait sixty (60) days before filing their complaint. On the other hand, medical malpractice victims have a fundamental right of access to the courts which is impeded by § 15-1-36(15). Both statutes § 11-1-58 and § 15-1-36(15) prolong and hinder medical malpractice plaintiffs access to the judicial system. Because there is no compelling state interest in favor of either of these statutes this Court should strike down the statutes for violating the equal protection clauses of the Mississippi and United States Constitutions.

CONCLUSION

This Court has recently noted that for years "our judiciary has struggled to adapt well-intentioned, but archaic, ill-suited procedural statutes to the needs of litigants." *Long,* 897 So. 2d at 184. These observations ring true in the present case. Although it appeared as though the legislature finally acknowledged and accepted the boundaries to which they are confined by the Mississippi Constitution the enactment of § 11-1-58 and § 15-1-36(15) are underhanded attempts to once again control the procedural matters of this Court. The task is now left to this Court to rebuke the legislature and to restore the balance of powers which the framers of our Constitution envisioned. The basic fact that the mandates of § 11-1-58 and § 15-1-36(15) cannot comport with many of the Mississippi Rules of Civil Procedure demonstrates that these are the precise "ill-suited procedural statutes" this Court warned of just a few years ago. In order to restore the balance this Court should recognize the conflicts between the two statutes and the procedural rules and accordingly strike the statutes down as they clearly violate the separation of powers clause of the Mississippi Constitution.

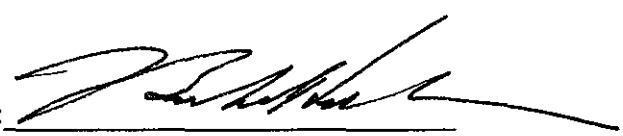
Furthermore, the Plaintiff/Appellant has clearly demonstrated that Miss. Code Ann. § 15-1-36(15) conflicts with Section 24 of the Mississippi Constitution. The open courts provision of the Constitution guarantees to all access to the courts without delay, yet the legislature has carved out a special niche for a limited class of tort victims and has told them they must wait sixty days before they can file suit. Simply put it is impossible to reconcile § 15-1-36(15) with Section 24 of the Mississippi Constitution. Thus, in addition to violating separation of powers Miss. Code Ann. § 15-1-36(15) must be declared unconstitutional because it imposes a delay upon medical malpractice victims in direct violation of Section 24 of the Mississippi Constitution.

Finally, the Plaintiff/Appellant has also demonstrated that both statutes impede one's fundamental right to open and accessible courts in violation of the Equal Protection Clauses of the Mississippi and United States Constitutions and that there are no compelling State interests justifying the unconstitutional statutes. Although enactments of the legislature enjoy a strong presumption of constitutionality once this presumption is overcome it is this Court's responsibility to strike down those unconstitutional statutes. Thus, in the present case this Court should recognize the statutes for what they are, unconstitutional statutes which violate the separation of powers, open courts, and equal protection clauses of the Mississippi Constitution, and strike down these statutes for their blatant violations.

The constitutional ramifications of upholding either of these statutes in the face of the challenges brought by the Plaintiff/Appellant are daunting. Therefore, this Court should reverse the decision of the lower court, find the disputed statutes to be unconstitutional – or at the very least declare substantial compliance to be the appropriate standard of compliance and interpret the statutes in a manner favoring access to the courts – and deny the Defendants' motions to dismiss and for summary judgment and remand the case to the Circuit Court of the First Judicial District of Hinds County, Mississippi for further proceedings.

Respectfully Submitted, this the 6th day of November, 2007.

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

BY: 

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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:

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SO CERTIFIED this the 6th day of November, 2007.

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ADDENDUM

A. Miss. Code Ann. § 11-1-58 Medical malpractice; certificate of expert consultation; exemptions; confidentiality

(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

B. Miss. Code Ann. § 15-1-36 Actions for medical malpractice

(1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.

(4) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be a minor without a parent or legal guardian, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have a parent or legal guardian or shall have died, whichever shall have first occurred; provided, however, that in no event shall the period of limitation begin to run prior to such minor's sixth birthday unless such minor shall have died.

(5) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be under the disability of unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, commence action on such claim at any time within two (2) years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred.

(6) When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.

(7) For the purposes of subsection (3) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday.

(8) For the purposes of subsection (4) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday or from and after such person shall have a parent or legal guardian, whichever occurs later, unless such disability is otherwise removed by law.

(9) The limitation established by this section as to a licensed physician, osteopath, dentist, hospital or nurse shall apply only to actions the cause of which accrued on or after July 1, 1976.

(10) The limitation established by this section as to pharmacists shall apply only to actions the cause of which accrued on or after July 1, 1978.

(11) The limitation established by this section as to podiatrists shall apply only to actions the cause of which accrued on or after July 1, 1979.

(12) The limitation established by this section as to optometrists and chiropractors shall apply only to actions the cause of which accrued on or after July 1, 1983.

(13) The limitation established by this section as to actions commenced on behalf of minors shall apply only to actions the cause of which accrued on or after July 1, 1989.

(14) The limitation established by this section as to institutions for the aged or infirm shall apply only to actions the cause of which occurred on or after January 1, 2003.

(15) No 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. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

C. Miss. R. Civ. P. 3 Commencement of action

(a) Filing of Complaint. A civil action is commenced by filing a complaint with the court. A costs deposit shall be made with the filing of the complaint, such deposit to be in the amount required by the applicable Uniform Rule governing the court in which the complaint is filed.
The amount of the required costs deposit shall become effective immediately upon promulgation of the applicable Uniform Court Rule, and its approval by the Mississippi Supreme Court.

(b) Motion for Security for Costs. The plaintiff may be required on motion of the clerk or any party to the action to give security within sixty days after an order of the court for all costs accrued or to accrue in the action. The person making such motion shall state by affidavit that the plaintiff is a nonresident of the state and has not, as affiant believes, sufficient property in this state out of which costs can be made if adjudged against him; or if the plaintiff be a resident of the state, that he has good reason to believe and does believe, that such plaintiff cannot be made to pay the costs of the action if adjudged against him. When the affidavit is made by a defendant it shall state that affiant has, as he believes, a meritorious defense and that the affidavit is not made for delay; when the affidavit is made by one not a party defendant it shall state that it is not made at the instance of a party defendant. If the security be not given, the suit shall be dismissed and execution issued for the costs that have accrued; however, the court may, for good cause shown, extend the time for giving such security.

(c) Proceeding In Forma Pauperis. If a pauper's affidavit is filed in the action the costs deposit and security for costs may be waived. The court may, however, on the motion of any party, on the motion of the clerk of the court, or on its own initiative, examine the affiant as to the facts and circumstances of his pauperism.

(d) Accounting for Costs. Within sixty days of the conclusion of an action, whether by dismissal or by final judgment, the clerk shall prepare an itemized statement of costs incurred in the action and shall submit the statement to the parties or, if represented, to their attorneys. If a refund of costs deposit is due, the clerk shall include payment with the statement; if additional costs are due, a bill for same shall accompany the statement.

D. Miss. R. Civ. P. 8 General rules of pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and, (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses: Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials or designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all of its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to Be Concise and Direct: Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

(g) Pleadings Shall Not Be Read or Submitted. Pleadings shall not be carried by the jury into the jury room when they retire to consider their verdict, except insofar as a pleading or portion thereof has been admitted in evidence.

(h) Disclosure of Minority or Legal Disability. Every pleading or motion made by or on behalf of a person under legal disability shall set forth such fact unless the fact of legal disability has been disclosed in a prior pleading or motion in the same action or proceeding.

E. Miss. R. Civ. P. 10 Form of pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statement. The first paragraph of a claim for relief shall contain the names and, if known, the addresses of all the parties. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and the paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate

transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) Copy Must Be Attached. When any claim or defense is founded on an account or other written instrument, a copy thereof should be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading.

F. Miss. R. Civ. P. 11 Signing of pleadings and motions

(a) Signature Required. Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in that attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign that party's pleading or motion and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. The signature of an attorney who is not regularly admitted to practice in Mississippi, except on a verified application for admission pro hac vice, shall further constitute a certificate by the attorney that the foreign attorney has been admitted in the case in accordance with the requirements and limitations of Rule 46(b) of the Mississippi Rules of Appellate Procedure.

(b) Sanctions. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

G. Miss. R. Civ. P. 15 Amended and Supplemental Pleadings

(a) Amendments. A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Attached Authorities

MISSISSIPPI CONSTITUTIONS

BY

GEORGE H. ETHRIDGE

Associate Justice of the Supreme Court of Mississippi

1928

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ground that it was objected to as having been secured by the illegal search and seizure of an automobile, or the question of the sufficiency of evidence to constitute probable cause, is for the trial judge and not for the officer to decide. Holmes v. State, 111 So. 860.

On the trial of the defendant, if he desires the question of the admissibility of the evidence heard out of the hearing of the jury, he must make application for it to be heard in the absence of a jury, otherwise he will be held to have waived such right. Holmes v. State, 111 So. 860.

In Atwood v. State, 11 So. 865, it was held that whenever the attention of affiant is called to the fact that his statement is not a mere assertion, but must be sworn to, and he is then called upon to do some corporal act, and does it, such facts constitute an oath within the meaning of this section, but it was not necessary for an oath to be administered in the regular and solemn way. See the authorities cited in both the major and dissenting opinions.

Where a county is divided in two judicial districts, and there are no restrictions in the act dividing the county into two judicial districts, or prohibiting a justice of the peace from issuing a warrant to be served and returned before another justice of the peace of another judicial district, the justice of the peace may issue a search warrant to be served in that judicial district and returned before an officer in that district. Golfredo v. State, 111 So. 131.

While a search warrant issued upon an affidavit that affiant has reason to believe and does believe that intoxicating liquors are possessed, etc., by a named person does not describe affiant as being a credible person, yet the officer issuing the warrant on such affidavit must have assumed that the affiant was a credible person, and where there is no motion to quash the affidavit and warrant on the ground that he was not a credible person, and there is no proof in reference thereto, the warrant will be held valid. Golfredo v. State, 111 So. 131.

Where a sheriff acting upon information amounting to probable cause searches automobiles without a warrant, and objection is made to the admission of any evidence obtained thereby, and where the court inquires into the sufficiency of the evidence to constitute probable cause, and where the facts are sufficient to constitute same, the evidence is admissible under this section. Brown v. State, 115 So. 436.

Where an officer, after a search, inserts in the affidavit and warrant the name of the person searched, which name was not in the affidavit and warrant at the time the search was made, the warrant is void, and the evidence obtained is inadmissible. Grizzard v. State, 115 So. 555.

CONSTITUTION OF 1890 SECTION 24

Section 24 of the Constitution of 1890 reads as follows:

"All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law; and right and justice shall be administered without sale, denial, or delay."

This is the great guarantee of Law and Justice. For every wrong known to the common law, or every right having a legal basis and subject to be enforced in the courts at common law is preserved by this section and a remedy must be provided by law, or else the courts will proceed in the proper court to apply the remedy as it existed when the American Nation gained its Independence or such other remedy as may have existed under the law at the time the constitution was ordained. It is not within the power of the legislature to deny a remedy

in the courts for the vindication of a legal right or the redress of a legal wrong as these rights and wrongs were known to the common law. The great personal rights guaranteed by the bill of rights can be enforced in the courts of the land. Every public officer is subject to the law of the land and is responsible in a civil action for any legal wrong that he does a citizen acting as an officer if he acts beyond the authority of the law. He is only protected when he acts in conformity to the law. There is no person in all this country who is above the law. There is no citizen so poor and humble who is not entitled to the protection of the law. There must not only be a remedy provided for every wrong, but the courts must be open at all times for the entertainment of suits to vindicate these rights and protect the citizen in the enjoyment of his person, his goods, lands and his reputation. The courts are not required to open for the trial of cases at all times, but must be open for the receiving of complaints and suits and the issuance and service of process. The legislature cannot deny access to the courts either directly or indirectly. Justice must be granted every person whether such person is able to pay the cost or not. If he is too poor to pay or secure the cost he may under the law make oath to that fact and his suit will then be entertained. All rights will be accorded to him just as though he was paying the expense. If a person is able to deposit the cost or give security therefor it may be required; but if he is unable to do so he cannot be denied justice. Whatever persons are used by the law for securing his rights must in such case act subject only to the liability of the person suing to pay should he ever get possession of enough property to satisfy a judgment. The judge and the jury (if one is had in such court) are under oath to administer justice without respect to persons or their conditions.

This section has not been much considered in the suits that have arisen in Mississippi, but justice has been administered under it throughout the history of the state. It is as broad almost if not quite as the fourteenth amendment and it not only prohibits the denial of justice but it is construed (in other states) as being mandatory and as embracing the right to justice without embarrassing restraint. Justice cannot be delayed by postponement (as by moratorium acts) to later periods of time. The person wronged is entitled to speedy justice. It can only be delayed after the right of action accrues for such length of time as may be reasonably necessary to secure the attendance of witnesses and the investigation of the facts of the case and the nature of the remedy sought to be enforced. This right to free justice however does not extend to all the courts of the country. It extends only to the use and officers in a court of competent jurisdiction and does not embrace the right of free appeal to the higher courts. A person has the right of appeal where it is given others on the same terms and conditions that others enjoy appeals but it need not be free from conditions open alike to all. The law may require bond conditioned to pay cost and other reasonable incidents of appeals. The legislature

may regulate the exercise of the right in reasonable ways that do not tend to a denial of justice if it applies to all alike. It may accordingly limit the time within which a suit may be brought after the right to sue accrues if the time is sufficient length to permit of proper preparation. Consequently statutes of limitation may be enacted limiting the time within which suit may be brought after the cause of action accrues; and it may provide, as has been done in this state, that if suit shall not be brought within such period the right as well as the remedy will be forever barred. The power exists in the legislature to change the procedure to enforce the right so long as equally efficacious, or reasonably efficacious remedies are provided. It may change the rules of evidence and the burden of proof so long as it does not seriously impair the right to redress.

The section has an interesting history. At the common law every person was regarded as being entitled to a legal remedy for every wrong done him in his person, lands, goods or reputation.

But the King claimed the right to suspend all laws in his discretion. Around this claim ranged much discussion and much conflict in practice. During the reign of the House of Tudor parliament was induced to pass an act declaring that a proclamation of the King when sanctioned by his cabinet would have the force of law. Mr. Hallam in his constitutional history of England says that when parliament granted this it granted all it had away and that the King, who had the power of assembling and of dissolving parliament, could do what he pleased and that there was no necessity of his assembling the parliament except to satisfy public opinion. If parliament was about to pass a law that displeased he could dissolve that body and call for the election of another when it suited his convenience. The result was that there arose a struggle in England for law. The commons claimed the right to enact laws and especially those relating to revenues for the government of the country. It ran through many centuries with varying fortunes. At some periods the King was triumphant. At other times parliament was uppermost in influence and power. The King found many expedients for making his power effective. He had control of the judiciary. He claimed the right to appoint and remove them at pleasure—a very dangerous thing indeed for the liberty and rights of the people. At times he claimed the right to dictate to the Judges their decisions in certain particulars. The judges, being removable by the King frequently yielded to this dictation. They were at least prone to agree with the Kings wishes. The people had the jury in common law trials, but the king established courts which dispensed with jury trials in all cases coming before it. The Star Chamber was the most conspicuous of these courts and has become in later days the most odious. "The act of 31 Henry VIII which gave the Kings proclamation the force of law, enacted that offenders against them might be punished by the usual officers of the council together with some of the judges in the Star Chamber or elsewhere. These powers also came, after a time, like those granted in 1488 to be exercised by the council at large instead of by certain members of it. It is clear

however—and this was one of the chief complaints against the court—that the jurisdiction which belonged by law or by custom to the whole body of the Kings council was usurped by the inner body of advisers called the privy council, which had engrossed all the other functions of the larger body.

Sir T. Smith tells us that juries misbehaving were many times commanded to appear in the Star Chamber or before the privy council for the matter. The uncertain composition of the court is well displayed by Coke who says the Star Chamber is or may be compounded of three several councils, (1) the lords and others of the privy council, (2) the judges of either bench and the barons of the exchequer, (3) the lords of parliament, who are not over standing Judges of the court. Hudson on the other hand (tempt Chas. I) considers that all peers had of sitting in the court. The latter class however had certainly given up sitting in the 17th century. The jurisdiction was equally vague, and, as Hudson says, it was impossible to define it without offending the supporters of the prerogative by a limitation of its powers or the common lawyers by attributing it an excessive latitude. In practice its jurisdiction was almost unlimited. It took notice of maintenance and liberties, bribery or partiality of jurors, falsification of panels or of verdicts, routs and riots, murder, felony, forgery, perjury, fraud, libel and slander, and offenses against proclamations, duels, acts tending to treason as well as of a few civil matters—disputes as to land between great men or corporations, disputes between English and foreign merchants, testamentary cases, etc.—in fact all offenses may here be examined and punished if the King will (Hudson) its procedure was not according to the common law; it dispensed with the incumbrance (?) of a jury; it could proceed on mere rumor or examine witnesses; it could apply torture; it could inflict any penalty short of death. It was thus admirably (?) calculated to support order against anarchy, or of despotism against individual or national liberty. How liberty ever triumphed over such formidable instruments of despotism is the wonder of the ages; and it will take a protracted study of constitutional history and an understanding of the principles that cause men to face martyrdom to fully understand what it cost us to secure liberty. When we remember that education was confined to a limited circle and that the court had the public opinion, machinery or nearly so, it is wonderful to realize that the chosen few who influenced by a love of liberty and the doctrines of Christianity bravely subjected all that they had in the struggle to rescue the liberties of the people from the grinding tyranny of despots who really believed that they were appointed of God to rule their fellow-men; and that the influences of religion generally was brought up to a belief in the divinity of Kings and their God given right to rule; and that resistance to the King was not only legal treason but damnable sin.

Ought we not in view of these things learn the principles of liberty and the lessons of history, and never again permit tyranny to get a foothold.

COURT DECISIONS UNDER SECTION 24:

In Commercial Bank v. Chambers, 8 Sm. & M. 9, the court held that the legislature could not take away the right to an appeal after it had been exercised under a statute.

The words "due course of law", used in this section, require actual notice to defendants known to reside in the jurisdiction of the court. Brown v. Levee Commissioners, 50 Miss. 468.

All persons sui juris have equal rights to the protection of this section of the Constitution, and the legislature cannot discriminate against a class of persons as to incidents of an appeal from the judgment of an inferior court. Chicago R. Co. v. Moss, 60 Miss. 641.

The legislature may enact rules creating presumptions from certain facts where there is a logical connection between facts and the result sought to be obtained; consequently, Chapter 115, Laws of 1908, provides that the possession of certain appliances shall be presumptive evidence of violation of law prohibiting sale of intoxicating liquors is constitutional. Gillespie v. State, 96 Miss. 856, 51 So. 811, 926.

The authority given to a municipality to close or vacate a street or alley, being of a judicial character, does not violate the Constitution. Polk v. Hattiesburg, 109 Miss. 872, 69 So. 675.

As under this section of the Constitution, every person and corporation is entitled to resort to the courts for redress of any grievance affecting the person's reputation and property, and as under section 25 of the Constitution every person is entitled to prosecute and defend in any civil cause, and under Section 14 and the 14th amendment to the Federal Constitution no person can be deprived of life, liberty and property without due process of law, it must be assumed, therefore, in the absence of specific allegations and proof to the contrary that the Grand Lodge of a fraternal organization in forfeiting the charter of a subordinate lodge acted in accordance with its rules and proceeded from adequate cause. Vicksburg Lodge &c. 116 Miss. 214, 76 So. 572.

Where, under Chapter 145 Laws of 1912, the board of supervisors of a county let contract for road work in a district created under such act, approved plans and specifications and accepted work after its performance as being in accordance with contract, county is liable for damages to plaintiff's land due to the improper placing of culvert in construction of said road, thereby causing the waters to impound upon the property of such person. Covington County v. Watts, 120 Miss. 428, 82 So. 309.

As this section of the Constitution is one of the most important of all of the provisions of the bill of rights, and as similar sections of the constitutions of other states have been more fully construed, I will refer to some of them for further illustration of the meaning of this section. It has been construed in other states in providing a remedy for every injury recoverable by suit at common law, where there is a common law remedy for the injuries named in the section of the Constitution the legislature must enact and enforce an effective remedy for the enforcement of the rights guaranteed by this section. The legislature may change the remedy and the proceedings so long as such change does not seriously breach the rights guaranteed by the section. The section has to be construed in the light of the common law. Ex parte Grossman, 45 Sp. Ct. (U. S.), 332, 69 L. ed. 378 (advance sheets); Byrd v. State, 1 Howard (Miss.), 163

In Mattson v. Astoria, 39 Oregon 577, 65 Pac. 1066, 87 Am. St. Rep. 687, the Supreme Court of Oregon, in construing a similar provision of the Constitution of that state, held that although a statute may change the remedy or form of procedure, attach conditions precedent to its exercise, abolish old and substitute new remedies, it cannot deny a remedy entirely. At page 689, 87 Am. St. Rep., the court said:

"The legislature may change the formalities of legal procedure, but it cannot make changes so as to impair the enforcement of rights; Brown v. Buck, 75 Mich. 274, 13 Am. St. Rep. 438, 42 N. W. 827; Kirkman v. Bird, 22 Utah 100, 83 Am. St. Rep. 774, 61 Pac. 338; Merchants Bank v. Ballou, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481; Wilson v. Simon, 91 Md. 1, 80 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022."

To like effect see the following cases:

Pullen v. City, 77 Oregon, 320, 146 Pac. 822, 77 Oregon 328, Ann. Cas. 1917D, 936, 147 Pac. 1191; Platt v. City, 104 Oregon 148, 206 Pac. 296; Landis v. Campbell, 79 Mo. 433, 49 Am. St. Rep. 239; Flanders v. Merrimack, 48 Wis. 567, 4 N. W. 741; McLain v. Williams, 10 S. D. 352, 73 N. W. 72; Park v. Detroit Free Press Co., 72 Mich. 560, 16 Am. St. Rep. 544; State v. Cadigan, 50 Atl. 1079, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714; Salt Creek Va. Turnpike Co. v. Parks, 80 Ohio St. 568, 435 N. E. 304, 28 L. R. A. 769; Anderton v. City of Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830. See also Decennial Digest Title, Constitutional Law, Sec's. 321-329; 10 Century Digest, Constitutional Law, Sec's. 950-963.