

IN THE MISSISSIPPI SUPREME COURT

No. 2007-CA-00593-SCT

CHARLIE DOYLE WIMLEY,  
INDIVIDUALLY AND ON BEHALF OF  
ALL WRONGFUL DEATH  
BENEFICIARIES OF JEANETTE DOYLE,  
DECEASED

APPELLANT

vs.

BILL REID

APPELLEE

---

**THE MAGNOLIA BAR ASSOCIATION'S MOTION FOR PERMISSION TO  
FILE ATTACHED AMICUS BRIEF**

---

Comes now, the Magnolia Bar Association, pursuant to Mississippi Rule of Appellate Procedure 29, and submits this Motion for Permission to File the Attached Amicus Brief supporting the position of the Appellant that M.C.A. § 11-1-58's requirement of a certificate of merit is an unconstitutional violation of the Separation of Powers Doctrine. In support thereof, the Magnolia Bar Association states as follows:

1. Rule 29(a) allows the filing of an amicus brief where the amicus can establish that it "has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case." M.R.A.P. 29(a).

2. The stated objective of the Magnolia Bar Association is to advance the science of jurisprudence; to facilitate the administration of justice; to promote

reform in the law; to uphold the honor and integrity of the legal profession; to provide an agency to articulate the various problems confronting blacks and minorities in the State of Mississippi and the world; to promote a forum for the intellectual growth of its members; and to assure that justice prevails in the State of Mississippi.

3. Since its inception, the members of the Magnolia Bar have been zealously committed to the principle that the court system should provide open access to the Courts for all citizens. To the extent that that M.C.A. § 11-1-58 places procedural impediments to filing suit on behalf of medical malpractice plaintiffs – impediments not authorized by the Mississippi Supreme Court - the legislation violates the Separation of Powers Doctrine, Mississippi Constitution Article One, Section One.

4. A recent ruling from the United States Supreme Court highlights the value of amicus briefs. In June of this year, the United States Supreme Court ruled that the death penalty for the crime of rape of a child was unconstitutional. *Kennedy v. Louisiana*, 2008 WL 2511282 \*2 (S.Ct.) (“Thirty-seven jurisdictions- 36 States plus the Federal Government-currently impose capital punishment, but only six States authorize it for child rape.”). In reaching its decision, the majority noted that only six states had statutes that allowed for capital punishment in cases of child rape. No other state or the federal government punished child rape this severely.

5. A week later, a blogger noted that the opinion failed to mention that the Uniform Military Code of Justice, in 2006, added child rape to those crimes eligible for the death penalty. *In Court Ruling on Executions, a Factual Flaw*, NEW YORK TIMES, July 2, 2008. Not one of the ten briefs filed in the case noted that there was a federal statute permitting the death penalty in cases of child rape. *Id.*

6. The Magnolia Bar has seen the brief filed by on behalf of the Appellant on this issue and the Magnolia Bar's brief contains additional citations that may be helpful to this Court to meaningfully review the constitutionality of M.C.A. § 11-1-58. Therefore, the Magnolia Bar Association respectfully requests that the Court accept the attached amicus brief as additional support for the argument that M.C.A. § 11-1-58 is unconstitutional.

Wherefore, the Magnolia Bar Association respectfully requests that the Court accept the attached amicus brief as additional support for the proposition that M.C.A. § 11-1-58 is unconstitutional.

Respectfully submitted,

The MAGNOLIA BAR ASSOCIATION

By: \_\_\_\_\_  
S. Malcolm Harrison, President  
2115 West Capitol Street  
P.O. Box 648

Jackson, Mississippi 39205  
(601) 353-2540

Of Counsel:

Precious T. Martin, Sr. [REDACTED]  
Crystal Wise Martin [REDACTED]  
PRECIOUS MARTIN AND ASSOCIATES  
P.O. Box 373  
Jackson, Mississippi 39205-0370  
Telephone: (601) 944-1447  
Facsimile: (601) 944-1448

Pieter Teeuwissen  
840 E River Place Suite 607  
Jackson MS 39236  
P O Box 16787  
Jackson, MS 39236  
Telephone: (601) 420-1188  
Facsimile: (601) 366-2292

Carlton W Reeves  
Pigott Reeves & Johnson  
775 N Congress St  
Jackson MS 39201  
P O Box 22725  
Jackson, MS 39225-2725  
(601) 354-2121  
(601) 354-7854

## CERTIFICATE OF SERVICE

I, S. Malcolm Harrison, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Motion for Permission to File Attached Amicus Brief to the following:

Hon. Ashley Hines  
Circuit Court Judge  
P.O. Box 1362  
Greenville, MS 38702-1362

Dennis C. Sweet, III  
Sweet & Associates  
P.O. Box 1178  
Jackson, MS 39215

Heber S. Simmons, III  
Simmons Law Group  
240 Trace Colony Park Dr., Suite 200  
Ridgeland, MS 39157

R. Mark Hodges  
Wise Carter Child & Caraway  
P.O. Box 651  
Jackson, MS 39205-0651

This, the \_\_\_\_ day of July, 2008.

S. Malcolm Harrison

---

## CERTIFICATE OF SERVICE

I, S. Malcolm Harrison, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Motion for Permission to File Attached Amicus Brief to the following:

Hon. Ashley Hines  
Circuit Court Judge  
P.O. Box 1362  
Greenville, MS 38702-1362

Dennis C. Sweet, III  
Sweet & Associates  
P.O. Box 1178  
Jackson, MS 39215

Heber S. Simmons, III  
Simmons Law Group  
240 Trace Colony Park Dr., Suite 200  
Ridgeland, MS 39157

R. Mark Hodges  
Wise Carter Child & Caraway  
P.O. Box 651  
Jackson, MS 39205-0651

This, the 4<sup>th</sup> day of July, 2008.

S. Malcolm Harrison / PM  
S. Malcolm Harrison

IN THE MISSISSIPPI SUPREME COURT

No. 2007-CA-00593-SCT

CHARLIE DOYLE WIMLEY,  
INDIVIDUALLY AND ON BEHALF OF  
ALL WRONGFUL DEATH  
BENEFICIARIES OF JEANETTE DOYLE,  
DECEASED

APPELLANT

vs.

BILL REID

APPELLEE

---

**PROPOSED AMICUS BRIEF FILED ON BEHALF  
OF THE APPELLANT SUBMITTED BY THE MAGNOLIA BAR  
ASSOCIATION**

---

**Magnolia Bar Association  
S. Malcolm Harrison, President  
2115 West Capitol Street  
P.O. Box 648  
Jackson, Mississippi 39205  
(601) 353-2540**

## **TABLE OF CONTENTS**

Table of Authorities. . . . .	ii
Statement of The Issue. . . . .	iv
Summary of Argument. . . . .	iv
Law and Argument. . . . .	1
Conclusion. . . . .	10
Certificate of Service. . . . .	12



## TABLE OF AUTHORITIES

### Cases:

<i>Albritton v. City of Winona</i> , 181 Miss. 75, 178 So. 799 (1938) . . . . .	3
<i>Anderson v. Assimos</i> , 553 S.E.2d 63 (N.C.App. 2001) . . . . .	8
<i>Gray v. University of Mississippi School of Medicine</i> , 2008 WL 570430 (Miss.App.) . . . . .	2
<i>Hall v. State</i> , 539 So.2d 1345 (Miss. 1989) . . . . .	3, 4
<i>Hiatt v. S. Health Facilities, Inc.</i> , 626 N.E.2d 71 (Ohio 1994) . . . . .	9
<i>Long v. McKinney</i> , 897 So.2d 160 (Miss. 2004) . . . . .	4
<i>Mississippi Ethics Comm'n v. Committee on Prof'l Responsibility of Mississippi Bar</i> , 672 So.2d 1222 (Miss.1996) . . . . .	3
<i>Newell v. State</i> , 308 So.2d 71 (Miss.1975) . . . . .	3
<i>Ohio ex rel. Ohio Acad. Of Trial Lawyers v. Sheward</i> , 715 N.E.2d 1062, 1076 (Ohio 1999) . . . . .	9
<i>Sommerville v. Thrower</i> , 2007 WL 766319 (Ark. 2007) . . . . .	5
<i>Zeier v. Zimmer, Inc.</i> , 152 P.3d 861 (Okla. 2006) . . . . .	7

### Constitutional Provisions and statutes:

Mississippi Const. Art. 1, Sect. 1 . . . . .	2
M.C.A. § 11-1-58(1)(a) . . . . .	<i>passim</i>
M.C.A. § 13-1-401 (Supp.1988) . . . . .	4

### Rules:

M.R.C.P. 3 . . . . .	5
----------------------	---

M.R.C.P. 9 .....	5
M.R.C.P. 11 .....	5
M.R.C.P. 16 .....	6
M.R.C.P. 26 .....	6
M.R.C.P. 56 .....	6

#### **Law Journal Articles:**

David Zukher, <i>The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?</i> 49 Syracuse L. Rev. 391 (2005) .....	7
Matthew Parrott, <i>Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How The Debate Reflects A Trend Towards Compulsion In Alternative Dispute Resolution</i> ; 75 Fordham L. Rev. 2685 (2007) .....	1
Michael Cristoforo, <i>Medical-Malpractice Contingency-Fee Caps: A Big Victory For Florida's Voters And Tort Reformers? Maybe Not</i> , 62 U. Miami L. Rev. 913 (April, 2008). ....	6
Mimi Marchev, <i>The Medical Malpractice Insurance Crisis; Opportunity for State Action</i> (July 2002, The Robert Wood Johnson Foundation) .....	1
Richard M. Markus, <i>Conspiracy of Silence</i> , 14 Clev.-Marshall L. Rev. 520 (1965) .....	7

## LAW AND ARGUMENT

1. **Miss. Code Ann. § 11-1-58 requiring that plaintiffs in medical malpractice lawsuits file a certificate of merit is unconstitutional in that it violates the Separation of Powers Doctrine**

- a. ***Introduction:***

The Court has asked the parties to brief the issue of whether M.C.A. § 11-1-58 violates the Separation of Powers Doctrine. M.C.A. § 11-1-58 was enacted by the Mississippi Legislature in 2002 in reaction to a perceived need for tort reform with regard to medical malpractice lawsuits.<sup>1</sup> The statute requires any attorney filing a medical malpractice lawsuit to file with the complaint a certificate stating that the attorney has consulted with an expert qualified to opine as to the standard of care in the particular case and that the attorney has concluded, based on that consultation, “that there is a reasonable basis for the commencement of such action.” M.C.A. § 11-1-58(1)(a).

---

<sup>1</sup> See, e.g., <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14932>. The rising costs of medical malpractice premiums was blamed on out-of-control jury verdicts. However, the real reason for the rising costs of malpractice premiums was much more complicated. Mimi Marchev, *The Medical Malpractice Insurance Crisis; Opportunity for State Action* (July 2002, The Robert Wood Johnson Foundation) at [http://www.nashp.org/Files/gnl48\\_medical\\_malpractice.PDF](http://www.nashp.org/Files/gnl48_medical_malpractice.PDF). “What is not disputed is that the percentage of patients injured by medical negligence who actually bring suit is very small. The estimates range from one-in-eight to one-in-ten. Of those who do, only one in three receive any compensation.” *Id.* at pp. 5-6. See also, Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How The Debate Reflects A Trend Towards Compulsion In Alternative Dispute Resolution*; 75 Fordham L. Rev. 2685, 2709 (2007) (“Despite uncertainty regarding what caused the med-mal insurance crises, medical lobbyists have demanded legislative protection from the constant threat of litigation and rising insurance premiums”).

Alternatively, the attorney must file a certificate alleging that he was unable to obtain a consultation due to the imminent expiration of the applicable statute of limitations. M.C.A. § 11-1-58(1)(b). Also, he may file a certificate stating that he was unable to obtain a certificate after making attempts to consult with at least three experts and that none would agree to a consultation. M.C.A. § 11-1-58 (1)(c).

As the Mississippi Court of Appeals has recognized, “Section 11-1-58 makes mandatory that the medical malpractice complaint be filed with an accompanying certificate of consultation with an expert or a certificate of counsel stating that a consultation has not been obtained due to the running of the statute of limitations or an inability to secure consultation with an expert.” *Gray v. University of Mississippi School of Medicine*, 2008 WL 570430, \*4 (Miss.App.).

***b. M.C.A. § 11-1-58 imposes unique procedural requirements on medical malpractice lawsuits. As such, it violates the Separation of Powers Doctrine which dictates that procedural requirements for filing suit are the province of the judiciary and not the legislature.***

The Mississippi Constitution contains a provision requiring that the powers of the three branches of government be separate. Mississippi Const. Art. 1, Sect.

1. Specifically, it states:

The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Act, M.C. A. § 13-1-401 (Supp.1988), which expanded the definition of “unavailability” for purposes of hearsay to include unavailability of a child at trial due to a substantial likelihood of traumatic emotional or mental distress. Because that definition was considerably broader than that which was provided under the Mississippi Rules of Evidence, this Court held that the Evidence of Child Sexual Abuse Act was void as an unconstitutional impingement on the Separation of Powers Doctrine. *Hall*, 539 So.2d at 1348.

A similar conclusion regarding the limited authority of the legislature was reached in *Long v. McKinney*, 897 So.2d 160 (Miss. 2004). In *Long*, this Court addressed the procedures to be used in filing wrongful death lawsuits. In so doing, it held that any provisions of the wrongful death statutes that were in conflict with the Court’s dictates in *Long* were unconstitutional. The Court stated as follows:

we hold that where provisions of this opinion conflict with the Statute, the provisions herein shall control. In doing so, it is our purpose to not only fulfill our constitutional responsibility, but also, to improve our judicial and legal systems, so that cases may more efficiently and fairly move through the courts, providing proper resolution to the litigants.

*Long*, 897 So.2d at 164.

Both *Hall* and *Long* demonstrate the principle that procedural statutes are “legislative suggestions” to be followed “unless determined to be an impediment to justice or an impingement on the constitution.” *Newell v. State*, 308 So.2d 71, 76 (Miss. 1975). It is the Judicial Branch of our State Government, however, that possesses exclusive authority to approve and establish procedural rules that affect

the patient's failure to attach an affidavit of medical negligence. On appeal, the Oklahoma Supreme Court held that the statute requiring a certificate of merit was not only an unconstitutional special law but that it was also invalid in that it created an unconstitutional monetary barrier to court access. *Zeier*, 152 P.3d at 868, 872.

North Carolina addressed the constitutionality of a legislatively-prescribed certificate of merit in *Anderson v. Assimios*, 553 S.E.2d 63, 67 - 68 (N.C.App. 2001). In *Anderson*, the state legislature placed a restriction on a party's right to file a malpractice claim against a "health care provider" which required the party's pleading to certify, in the complaint, that the medical care has been "reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." The North Carolina Court of Appeals struck the statute as an unconstitutional foray by the legislature into an area reserved for the courts.

This certification requirement impairs, unduly burdens, and in some instances, where the injured party is unable to timely find an expert or is without funds to employ such an expert or find an attorney who is willing to advance the funds to employ an expert, prohibits the filing of any medical malpractice claim. Even if an expert is obtained, Rule 9(j) places in the hands of that expert the right to decide if the injured party may proceed into court with her claim. It is for the courts of this state to adjudicate in a meaningful time and manner the merits of an injured party's claim after granting a hearing appropriate to the nature of the case. Because Rule 9(j) denies a plaintiff this right, it violates Article I, Section 18 of the North Carolina

Constitution and is therefore void. *See Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, 119 (1971) (holding due process prohibits a state from denying, solely because of inability to pay filing fee, access to the courts to individuals who seek judicial dissolution of their marriage).

*Id.*

Ohio addressed the constitutionality of a legislatively-prescribed certificate of merit in *Hiatt v. S. Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994). The Ohio Supreme Court held that the state procedural rule providing that, unless otherwise specifically provided for in the rules, pleadings need not be verified or accompanied by an affidavit prevailed over a conflicting statute requiring that claims against medical services providers were to be accompanied by affidavits of the claimant's attorney establishing that he had submitted written request for medical records. *Hiatt*, 626 N.E.2d at 73. When the Ohio legislature attempted to circumvent the court's ruling in *Hiatt* by passing the same statute but declaring therein that the certificate of merit was jurisdictional and not procedural, the Ohio Supreme Court again found the statute unconstitutional. *Ohio ex rel. Ohio Acad. Of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1076 (Ohio 1999).

*d. Conclusion*

There can be no doubt that M.C.A. § 11-1-58 places an onerous and unnecessary impediment on the filing of medical malpractice lawsuits – an impediment not contemplated by – and in conflict with – at least six of the Mississippi Rules of Civil Procedure. The statute impinges on this Court's

authority to promulgate the procedural rules governing the filing and litigating of lawsuits and, in so doing, violates the Separation of Powers Doctrine. This Court should strike the certificate of merit requirement as unconstitutional.

Respectfully submitted,

The MAGNOLIA BAR ASSOCIATION

By: S. Malcolm Harrison /pm  
S. Malcolm Harrison, President  
2115 West Capitol Street  
P.O. Box 648  
Jackson, Mississippi 39205  
(601) 353-2540

Of Counsel:

Precious T. Martin, Sr. [REDACTED]  
Crystal Wise Martin [REDACTED]  
PRECIOUS MARTIN AND ASSOCIATES  
P.O. Box 373  
Jackson, Mississippi 39205-0370  
Telephone: (601) 944-1447  
Facsimile: (601) 944-1448

Pieter Teeuwissen  
840 E River Place Suite 607  
Jackson MS 39236  
P O Box 16787  
Jackson, MS 39236  
Telephone: (601) 420-1188  
facsimile: (601) 366-2292  
Carlton W Reeves



Pigott Reeves & Johnson  
775 N Congress St  
Jackson MS 39201  
P O Box 22725  
Jackson, MS 39225-2725  
(601) 354-2121  
(601) 354-7854

## CERTIFICATE OF SERVICE

I, S. Malcolm Harrison, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Proposed

Amicus Brief to the following:

Hon. Ashley Hines  
Circuit Court Judge  
P.O. Box 1362  
Greenville, MS 38702-1362

Dennis C. Sweet, III  
Sweet & Associates  
P.O. Box 1178  
Jackson, MS 39215

Heber S. Simmons, III  
Simmons Law Group  
240 Trace Colony Park Dr., Suite 200  
Ridgeland, MS 39157

R. Mark Hodges  
Wise Carter Child & Caraway  
P.O. Box 651  
Jackson, MS 39205-0651

This, the 11<sup>th</sup> day of July, 2008.

S. Malcolm Harrison / PM  
S. Malcolm Harrison