

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NUMBER 2007-CA-00593**

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

APPELLANTS

v.

NO.: 2007-CA-00593

BILL REID, CRNA, AND JOHN DOES 1-10

APPELLEES

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

APPELLEES' BRIEF

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Bill Reid, CRNA, Appellee
2. Charlie Doyle Wimley, Appellant
3. R. Mark Hodges, Counsel for Appellee
4. Loren H. Pratt, Counsel for Appellee
5. Dennis C. Sweet, III, Counsel for Appellant
6. Omar L. Nelson, Counsel for Appellant
7. Peiter Teeuwissen, Counsel for Appellant
8. W. Ashley Hines, Circuit Court Judge for the Circuit Court of
Leflore County, Mississippi

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STATEMENT OF THE ISSUE

- I. The circuit court properly dismissed with prejudice Ms. Wimley's wrongful death action against Defendant Bill Reid and properly denied her Motion to Amend, since she failed to strictly comply with Miss. Code Ann. § 11-1-58 and attach the requisite certificate of expert consultation at the time the complaint was filed.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal presents a medical malpractice wrongful death action arising from the treatment of Ms. Jeanette Doyle at the Coleman Eye Center in Greenwood, Mississippi on May 13, 2003 and her death on May 15, 2003. Charlie Doyle Wimley ("Ms. Wimley"), individually and on behalf of all wrongful death beneficiaries of Ms. Doyle, filed her complaint on February 22, 2005, in the Circuit Court of Leflore County, Mississippi. Ms. Wimley's complaint alleged that Coleman Cataract and Eye Laser Surgery Center, Inc. ("the Center"), Michael Coleman, M.D., Denise Young, R.N., Bill Reid, CRNA, B. Robbins, R.N., C. Larry, R.N., and John Does 1-10, were negligent and grossly negligent in causing Ms. Doyle's death. This appeal addresses the order of dismissal with prejudice in favor of Defendant Bill Reid, CRNA; the order was filed on April 6, 2007. Ms. Wimley failed to appeal from the order dismissing the other Defendants on the same grounds as Mr. Reid.

B. Course of Proceedings

Ms. Wimley filed her medical malpractice wrongful death action on February 22, 2005, without attaching a certificate of expert consultation as required by Miss. Code Ann. § 11-1-58(1)(a). R. 1, 10, 22, 37. On April 14, 2005, Co-defendants, the Center, Mr. Coleman, and Ms. Lary answered and asserted a motion to dismiss based on Ms. Wimley's failure to comply with § 11-1-58(a). R. 10. Likewise, Mr. Reid timely responded to Ms. Wimley's averments on May 6, 2005, and affirmatively plead his motion to dismiss based on Ms. Wimley's failure to comply with the medical malpractice reform laws of 2002 and 2003, the statutes that mandate the expert consultation certificate and other suit prerequisites applicable to this case. R. 22. Ms. Wimley, without leave of the court, filed a Certificate of Consultation on May 11, 2005, more than two

months after filing the complaint. R. 33. On May 25, 2005, Ms. Wimley moved the trial court to allow her leave to amend the complaint and attach a certificate of expert consultation. R. 37-53. The Center, Mr. Coleman, and Ms. Lary responded to Ms. Wimley's motion for leave to amend on May 26, 2005, reiterating their prior affirmative defense, § 11-1-58. R. 56-57. Mr. Reid also responded to Ms. Wimley's motion for leave to amend on June 9, 2005, once again raising the medical malpractice tort reform laws, specifically § 11-1-58, as a bar to the amendment and a ground for dismissal. R. 81-83. On October 24, 2005, the trial judge, W. Ashley Hines, held a hearing on the Defendants' motions to dismiss, which he ultimately took under advisement. R. 154, 157, 164; T. 1-12. Thereafter, on February 22, 2007, the Center, Mr. Coleman, and Ms. Lary filed a Renewed Motion to Dismiss, and Mr. Reid filed a Renewed Motion to Dismiss on March 19, 2007. R. 168-173, 176-181. On March 9, 2007, the court dismissed the Center, Mr. Coleman, and Ms. Lary with prejudice. R. 174. Judge Hines dismissed with prejudice Bill Reid from suit on April 6, 2007, and he also rejected Ms. Wimley's motion for leave to amend at that time. R. 183-184.

C. Statement of the Facts

Ms. Doyle went to the Coleman Cataract and Eye Laser Surgery Center ("Center") for cataract surgery on May 13, 2003. R. 81.¹ During the course of surgery, Ms. Doyle suffered what appeared to be an asthma attack. R. 3, 14, 24. Personnel from the Center properly responded to Ms. Doyle's condition by providing emergency treatment and by contacting an ambulance, which arrived immediately and took her to Greenwood Leflore Hospital. R. 14, 24. Ms. Doyle died on May 15, 2003. R. 3.

¹"R." denotes a citation to the Record while "T." denotes a citation to the Hearing Transcript.

Ms. Wimley filed her complaint on February 22, 2005, failing to attach a certificate of expert consultation or any other information required by Miss. Code Ann. § 11-1-58. R. 1, 10, 22, 37. In response, the Center, Mr. Coleman, and Ms. Lary affirmatively plead “SECOND DEFENSE-MOTION TO DISMISS” followed by the statement that “Plaintiff’s counsel further failed to submit with the Complaint a certificate of consultation with an expert as expressly and unequivocally required by § 11-1-58(a).” R. 10. On May 6, 2005, Mr. Reid answered and affirmatively raised his “FIRST DEFENSE/MOTION TO DISMISS” which stated, “Plaintiffs have failed to comply with the requirements of the medical malpractice reform laws passed in 2002 and 2003.” R. 22.

After receiving the Defendants’ answers and defenses, Ms. Wimley untimely filed a Certificate of Consultation on May 11, 2005, seventy-eight days after filing the complaint. R. 33. Ms. Wimley then moved for leave to amend the complaint, so that she could “strictly adhere” to § 11-1-58 and attach the certificate of consultation to the complaint. R. 37-53. The Center, Mr. Coleman, and Ms. Lary responded to Ms. Wimley by raising their Motion to Dismiss based on § 11-1-58. R. 56-57. In Mr. Reid’s response opposing Ms. Wimley’s leave to amend, he once again raised his Motion to Dismiss based on Ms. Wimley’s failure to attach a certificate of consultation to the complaint. R. 81-83.

Both Ms. Wimley and the Defendants argued their respective positions regarding dismissal and leave to amend before Judge Hines on October 24, 2005. R. 154, 157, 164; T. 1-12. Judge Hines took the motions under advisement. T. 10. Thereafter, in light of the court’s failure to rule, the Defendants each filed a Renewed Motion to Dismiss based on Ms. Wimley’s failure to strictly comply with §11-1-58 and the Mississippi Supreme Court’s decision directly on point in *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006), which was

decided shortly before the filing of the renewed motions. R. 168-173, 176-181. Judge Hines properly granted the Defendants' Motions to Dismiss *With Prejudice* and denied Ms. Wimley's Motion to Amend. R. 174, 183-184.

SUMMARY OF THE ARGUMENT

Ms. Wimley unequivocally and without explanation or excuse failed to comply with Miss. Code Ann. § 11-1-58 and attach a certificate of expert consultation or an expert report to the complaint. Without the required certificate, Ms. Wimley's complaint failed as a matter of law. The Mississippi Supreme Court has held in several cases that a plaintiff must strictly comply with § 11-1-58, or the trial court must dismiss the complaint. The trial court correctly followed the binding authority of these cases and dismissed the action with prejudice.

Ms. Wimley argues that this Court's prior holdings are incorrect. According to Ms. Wimley, she must only substantially comply with § 11-1-58. Because Ms. Wimley tried to correct her error and later file a certificate, she argues that her efforts complied with § 11-1-58. However, § 11-1-58 presents a clear legislative mandate passed in response to the medical liability crisis and its language is clear in requiring dismissal. The Court properly applied the clear dictates of the statute and the prior holdings of this Court requiring strict compliance with § 11-1-58.

Ms. Wimley also incorrectly argues on appeal the constitutionality of § 11-1-58 and the sufficiency of Mr. Reid's motion to dismiss. Because Ms. Wimley failed to raise or argue in the trial court the statute's constitutionality or the sufficiency of Mr. Reid's answer, these issues are procedurally barred from consideration on appeal.

ARGUMENT

A. Standard of Review

The Mississippi Supreme Court applies a *de novo* standard of review for a motion to dismiss, since it is a matter of law. *Howard v. Estate of Harper ex rel. Harper*, 947 So. 2d 854, 856 (Miss. 2006). When ruling on a motion to dismiss, a trial judge must accept the allegations contained in the plaintiff's complaint as true. *Id.* A judge should grant a motion to dismiss if the "plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." *Rosen v. Gulf Shores, Inc.*, 610 So. 2d 366, 368 (Miss. 1992). If evidence is submitted that is outside the pleadings, then "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Miss. R. Civ. P. 12(c).

B. Law and Analysis

The circuit court properly dismissed with prejudice Ms. Wimley's wrongful death action against Defendant Bill Reid and properly denied her Motion to Amend, since she failed to strictly comply with Miss. Code Ann. § 11-1-58 and attach the requisite certificate of expert consultation at the time the complaint was filed.

(i) Recent holdings require dismissal since Ms. Wimley failed to attach a certificate of expert consultation at the time she filed the complaint.

Under the plain language of Miss. Code Ann. § 11-1-58(1)(a), a "complaint [alleging medical malpractice] *shall* be accompanied by a certificate executed by the attorney for the plaintiff" stating that the attorney "has consulted with at least one (1) expert." Miss. Code Ann. § 11-1-58(1)(a) (emphasis added). Furthermore, under § 11-1-58(1)(c), if an attorney cannot attach a certificate due to time constraints imposed by the statute of limitations, then the attorney can so certify in the complaint and can supplement the complaint with the required certificate "within

sixty (60) days after service of the complaint or the suit shall be dismissed.” Miss. Code Ann. § 11-1-58(1)(c) (emphasis added). Instead of attaching a certificate as required by § 11-1-58(1)(a) or § 11-1-58(1)(c), an attorney may attach “expert information in the form required by the Mississippi Rules of Civil Procedure.” Miss. Code Ann. § 11-1-58(7).

Ms. Wimley did nothing to comply with any aspect of § 11-1-58 when she filed her complaint. Her complaint presented no certificate of expert consultation, no expert information required by the Mississippi Rules of Civil Procedure, and no attorney’s certificate pursuant to § 11-1-58(1)(c) explaining the failure in order to obtain the extension of up to sixty days to supplement the complaint with the proper certificate of expert consultation. Having done nothing to trigger the sixty day extension, Ms. Wimley then waited seventy-eight days to present anything regarding the requirements of § 11-1-58. At that point, dismissal was required, even if she had followed the extension procedure of § 11-1-58(1)(c), because that provision requires that “the suit shall be dismissed” if the certificate is not provided by way of supplementation within sixty days of the date on which the complaint was filed.

Ms. Wimley effectively argues that she should receive more favorable treatment than a plaintiff who properly invokes § 11-1-58(1)(c), because she seeks to avoid dismissal through a certificate filed seventy-eight days after the complaint. A plaintiff who invokes § 11-1-58(1)(c) and conforms a complaint to it must provide the certificate within sixty days. Ms. Wimley neither invoked § 11-1-58(1)(c), nor presented her certificate within sixty days after filing her complaint. To allow Ms. Wimley’s argument to prevail would be to effectively repeal § 11-1-58(1) and render a nullity § 11-1-58(1)(c).

In *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006), the Mississippi Supreme Court decided as a matter of first impression the “application and operation of Miss.

Code Ann. § 11-1-58 (Supp. 2005).” *Walker*, 931 So. 2d at 588. The plaintiff in *Walker* failed to comply with § 11-1-58 by attaching a certificate of expert consultation to the complaint. *Id.* at 586, 589. The plaintiff filed the complaint on April 7, 2004 and then filed the certificate on September 8, 2005. *Id.* at 589. When the plaintiff filed the certificate, discovery was underway. *Id.* at 585. Because the plaintiff failed to attach the certificate, the defendant raised the “defense failure to state a claim on which relief can be granted” and subsequently moved for summary judgment. *Id.* at 585-86. The trial judge granted the motion for summary judgment and dismissed the plaintiff’s action with prejudice. *Id.* at 587.

On appeal, the plaintiff “concede[d] her failure to *strictly* comply with Miss. Code Ann. § 11-1-58(1)(a)” but argued she “*substantially* complied with Miss. Code Ann. § 11-1-58(1)(a)” since her attorney eventually filed a certificate. *Id.* at 588-90. The Court held that a plaintiff must strictly comply with § 11-1-58 and file a certificate of expert consultation or an expert report at the time the complaint is filed. *Id.* at 589. The Court affirmed the trial court’s grant of summary judgment and dismissal with prejudice. *Id.* at 592.

After the Mississippi Supreme Court decided the *Walker* case, it held once again that strict compliance is required for § 11-1-58 in *Caldwell v. North Mississippi Medical Center, Inc.*, 956 So. 2d 888, 894-95 (Miss. 2007). In fact, the plaintiffs in *Caldwell* raised the same issue as the plaintiff in *Walker*, namely, “whether strict compliance with the statutory requirements of Miss. Code Ann. § 11-1-58 is required.” *Caldwell*, 956 So. 2d at 894. As in *Walker*, the plaintiffs in *Caldwell* argued they substantially complied with § 11-1-58 when they filed an expert disclosure after the complaint had been filed. *Id.* at 891. The Court held that the plaintiffs failed to strictly comply with § 11-1-58; thus, the Court upheld the trial court’s order of dismissal.

The *Walker* and *Caldwell* cases are completely dispositive of the present lawsuit, and as such, this Court should uphold the trial court's order granting dismissal with prejudice. Like the scenario in *Walker* and *Caldwell*, Ms. Wimley failed to attach a certificate of expert consultation or an expert report to the complaint. R. 1, 10, 22, 37. As in *Walker*, Ms. Wimley untimely filed a certificate. R. 33. Ms. Wimley failed to file a certificate until seventy-eight days after she filed the complaint. R. 33.

Ms. Wimley also concedes her failure to *strictly* comply with § 11-1-58 like the plaintiffs in *Walker* and *Caldwell*, and Ms. Wimley premises her argument for reversal on the already rejected standard of *substantial compliance* with the statute. R. 37-53. Ms. Wimley argues that the late filing of the certificate should not be fatal since it was filed "shortly after the complaint was filed" and Ms. Wimley tried "to cure the defect by filing a motion for leave to amend her complaint." See *Appellant Brief* p. 17. The argument put forth by Ms. Wimley is purely one for substantial compliance, contravening the strict compliance requirements of *Walker*, *Caldwell*, and the statute itself. Ms. Wimley's "after the fact" efforts are ineffectual in the face of a standard of strict compliance, just like the efforts of the plaintiffs in *Walker* and *Caldwell*. Ms. Wimley simply failed to meet the requirements of § 11-1-58, and the trial court's judgment of dismissal must be upheld as it was in *Walker* and *Caldwell*.

The Mississippi Court of Appeals has also considered the requirements of Miss. Code Ann. § 11-1-58 in *Nelson v. Baptist Mem'l Hosp.-N. Miss. Inc.*, 2005-CA-02058-COA (Miss. Ct. App. May 8, 2007). In *Nelson*, the plaintiffs failed to provide a certificate of consultation with their original complaint or provide pre-suit notice pursuant to § 15-1-36(15). *Id.* at ¶ 3. The plaintiffs filed their original complaint in 2003, later filed an amended complaint with the required certificate, and then served process for the first time. *Id.* at ¶ 3. The trial judge

dismissed the plaintiff's medical malpractice action with prejudice based on their failure to strictly comply with § 11-1-58 and § 15-1-36(15), as well as ineffective service of process. *Id.* at ¶ 5.

The Court of Appeals reversed the order of dismissal with prejudice, and rendered a judgment of dismissal without prejudice. *Id.* at ¶ 23. In reversing the trial court, the appellate court distinguished the facts of *Nelson* from *Walker*. *Id.* at ¶ 19. The *Nelson* court stated that the plaintiffs "clearly" consulted an expert before filing a complaint, and the plaintiffs had not waited until discovery "to remedy their failure to file the certificate." *Id.* Furthermore, the court noted that the plaintiffs served an amended complaint with the certificate attached, which the defendants received before they filed an answer. *Id.* Indeed, since the original, defective complaint was never served, no answer was due. *Cf. id.* (stating the defendants "were not forced to respond to a complaint lacking an attorney's certificate.") The *Nelson* plaintiffs could have voluntarily dismissed their complaint and refiled a separate suit instead of an amended complaint.

Besides distinguishing the facts from *Walker*, the *Nelson* court also based its decision on the fact that "[t]he statute at issue . . . had only been in effect a few months when [the] case was filed." The court's holding also took into account prior cases construing the pre-suit notice letter requirements of § 15-1-36(15). *Id.* at ¶¶ 22-23. The court specifically stated, "We find . . . that the original complaint filed by the Nelsons should be dismissed without prejudice for failing to attach an attorney's certificate *and* for failing to give sixty days prior notice. *Id.* (emphasis added). The court noted dismissal was the proper remedy, but recent holdings by the Mississippi Supreme Court required dismissal without prejudice *for failing to serve pre-suit notice*. *Id.* at ¶¶ 20, 22 (emphasis added). According to the court, the plaintiffs' errors were not "egregious"

enough to warrant dismissal with prejudice, “especially in light of the fact that they attempted to correct those errors *before* they ever served process.” *Id.* at ¶ 23 (emphasis added).

The order of dismissal with prejudice, entered by Judge Hines, is in accord with the *Nelson* holding. R. 183-184. The facts of the present case are virtually identical to *Walker supra* and do not resemble the facts in *Nelson*. Unlike *Nelson*, Ms. Wimley failed to ever serve a complaint that had the required certificate attached. R. 1, 10, 22, 37. Mr. Reid responded to Ms. Wimley’s complaint without the benefit of a certificate or expert report. R. 1, 10, 22, 37. Nothing in the record supports the notion that Ms. Wimley “clearly” consulted an expert *before* filing the complaint, and discovery was already underway when Ms. Wimley attempted to correct her error. R. 18, 28, 29, 33, 37-53. Nor can Ms. Wimley point to the statute being “in effect a few months” when she filed suit: it was more than two years old in February of 2005. Because Ms. Wimley failed to timely comply with § 11-1-58 before service of process, the error warranted dismissal with prejudice.²

The holding in *Nelson* was also due to the plaintiff’s failure to comply with the notice provision of § 15-1-36(15) and that appears to be what the Court of Appeals felt mandated dismissal *without* prejudice. *Nelson*, 2005-CA-02058-COA, at ¶¶ 20, 22 (emphasis added). Judge Hines’ decision was based solely upon Ms. Wimley’s failure to include the certificate of expert consultation. R. 174, 183-184; T. 1-12. In the end, the *Nelson* decision also supports Judge Hines’ order, though that decision is not binding on this Court. The controlling authority is *Walker supra*, and *Walker* holds that the dismissal with prejudice in favor of Bill Reid, CRNA, must be affirmed.

²While *Nelson* is clearly distinguishable, it also seems considerably at odds with this Court’s controlling decisions in *Walker* and *Caldwell*.

(ii) Ms. Wimley fails to support her argument with authoritative case law.

Ms. Wimley incorrectly relies on cases interpreting Miss. R. Civ. P. 41(b) governing involuntary dismissal, and fails to cite any binding authority regarding § 11-1-58 or Miss. R. Civ. P. 12(b)(6) in the context of a medical malpractice suit. *See Appellant Brief p. 16*. Furthermore, none of the Rule 41(b) cases cited by Ms. Wimley are factually analogous to the present case. *Id.* In fact, both *Wallace v. Jones*, 572 So. 2d 371 (Miss. 1990), and *Rogers v. Kroger Co.*, 669 F. 2d 317 (5th Cir. 1982), were about a dismissal for failure to prosecute. *Id. Dinot v. Gavagnie*, 948 So. 2d 1281 (Miss. 2007), involved a dismissal pursuant to Rule 41(b) for failure to obtain admission *pro hac vice*. These cases have no application here where this Court has already rendered two decisions (*Walker* and *Caldwell*) directly on point.

The only citations Ms. Wimley provides this Court in support of her position are dissenting opinions. *See Appellant Brief p. 16, 18*. First, Ms. Wimley cites *Community Hospital of Jackson, Mississippi v. Goodlett ex rel. Goodlett*, 2006-CA-01629-SCT (Miss. Sept. 20, 2007). The *Goodlett* case involved a plaintiff who tried to assert she strictly complied with § 11-1-58(4), which permits a plaintiff to file a certificate of expert consultation ninety days after a request for medical records. *Id.* at ¶ 11. At the time the plaintiff requested the medical records, she was not a real party in interest and had no standing to bring suit.³ *Id.* at ¶¶ 11-12. The Mississippi Supreme Court held that the plaintiff failed to strictly comply with § 11-1-58, since only a real party in interest could request the medical records and dismissal was warranted. *Id.* at ¶ 13. The court remanded, “since the trial court [was] in a better position to know whether the order of dismissal should be with or without prejudice.” *Id.* at ¶ 14.

³The plaintiff prematurely brought suit on behalf of her mother before her mother assigned the power of attorney to the plaintiff. *Id.* at ¶ 12.

The *Goodlett* case is supportive of Mr. Reid's position that this Court should affirm the trial court's judgment of dismissal with prejudice. The Mississippi Supreme Court again affirmed that a plaintiff must strictly comply with § 11-1-58 or dismissal is required. The *Goodlett* court also stated that dismissal can be *with prejudice* if the trial court, in this case the Circuit Court of Leflore County, decides that dismissal with prejudice is the proper remedy. *See id.* at ¶ 14. Judge Hines carefully considered the multiple motions to dismiss filed by Mr. Reid and his Co-defendants, held a hearing, took the motions under advisement, and ultimately ruled that all the Defendants should be dismissed with prejudice. R. 174, 183-184; T. 1-12. Thus, the *Goodlett* majority opinion supports affirming the judgment of the Circuit Court of Leflore County.

(iii) Ms. Wimley's constitutional arguments are procedurally barred.

The Record is devoid of any claim, argument, or reference by Ms. Wimley challenging the constitutionality of § 11-1-58, and as such, the constitutional arguments put forth by the Ms. Wimley are procedurally barred. *See Appellant Brief p. 18-19.* In order for the Mississippi Supreme Court to consider the constitutional arguments raised in Ms. Wimley's brief, she must "specifically [have] plead" the constitutionality of § 11-1-58. *Pickens v. Donaldson*, 748 So. 2d 684, 691 (Miss. 1999) (holding plaintiff was procedurally barred from challenging the constitutionality of the Mississippi Tort Claims Act because she failed to raise the issue in the court below). Ms. Wimley failed to raise the argument in the trial court proceedings, in any pleading, motion, response, or oral argument, and the issue is not preserved for appeal. *Id.* Furthermore, Ms. Wimley did not give any notice to the Attorney General of her intent to challenge the constitutionality of § 11-1-58, as required by to Miss. R. Civ. P. 24(d) and Miss. R. App. P. 44(a). *Id.*; Miss. R. Civ. P. 24(d) (requiring notification to Attorney General in order for

the Attorney General to intervene and argue the constitutionality of a statute); Miss. R. App. P. 44(a) (requiring party to serve a brief about the constitutionality of a statute to the Attorney General). Because Ms. Wimley challenges the constitutionality of § 11-1-58 for the first time on appeal, this Court's established precedent requires that it decline to address that challenge. *See Cockrell Pearl River Valley Water Supply Dist.*, 865 So. 2d 357, 360 (Miss. 2004) (holding the "law is well established" that a plaintiff's failure to raise an issue of constitutionality in the trial court proceedings bars argument in Mississippi Supreme Court).

(iv) Ms. Wimley's argument that Mr. Reid failed to raise a Rule 12(b)(6) motion is procedurally barred and unsupported by the Record.

Ms. Wimley also raises for the first time on appeal the sufficiency of Mr. Reid's affirmative defense in his answer. *See Appellant Brief p. 19-22*. Since Ms. Wimley failed to argue at the trial level the alleged vagueness of the Mr. Reid's affirmative defense, she is procedurally barred from arguing that alleged deficiency on appeal. *See Crowe v. Smith*, 603 So. 2d 301, 305 (Miss. 1992) ("Under Mississippi law, an appellant is not entitled to raise a new issue on appeal, since to do so prevents the trial court from having an opportunity to address the alleged error."). Ms. Wimley failed to give the trial court the opportunity to address the alleged error; therefore, she did not preserve the issue for appeal.

Though Ms. Wimley failed to preserve for appeal the sufficiency of Mr. Reid's answer and affirmative defenses, Mr. Reid did in fact properly assert a motion to dismiss based on § 11-1-58. R. 22. The *Walker* case supports Mr. Reid's contention that his affirmative defense was legally sufficient. *See Walker v. Whitfield Nursing Ctr., Inc.*, 931 So. 2d 583, 585-86, 591 (Miss. 2006). As previously noted *supra*, the plaintiff in *Walker* failed to attach a certificate of expert consultation as required by §11-1-58. *Id.* at 586. The defendant answered and asserted the

defense “failure to state a claim upon which relief can be granted.” *Id.* at 585. The defendant then moved for summary judgment, specifically asserting the plaintiff’s failure to comply with § 11-1-58. *Id.* at 586. On appeal, the plaintiff contended the defendant “waived its right to assert Miss. Code Ann. § 11-1-58 as a defense because it did not assert this statutory defense in its answer.” *Id.* at 591. The Mississippi Supreme Court held that the plaintiff “did fail to state a claim upon which relief can be granted due to the [plaintiff’s] blatant failure to comply with the notice prerequisites of Miss. Code Ann. § 11-1-58.” *Id.* Since the defendant asserted a motion to dismiss in his answer, the complaint was properly dismissed with prejudice. *Id.*

Going further than the defendant in *Walker*, Mr. Reid included a defense and a motion to dismiss in his answer. R. 22. Mr. Reid specifically included in his answer: “FIRST DEFENSE/MOTION TO DISMISS” pleading that, “Plaintiffs have failed to comply with the requirements of the medical malpractice reform laws passed in 2002 and 2003.” R. 22. Section 11-1-58 was one of the central pieces of the medical malpractice reform legislation passed in the 2002 extraordinary legislative session, which was convened to address the medical liability crisis. *See* Copy of the 2002 Session Law, Addendum A. Mr. Reid thus clearly included within his defense and motion to dismiss Ms. Wimley’s failure to comply with the medical malpractice tort reform laws, which was considerably more detail than that provided by the “form” Rule 12(b)(6) defense plead by the defendant in *Walker*.

Furthermore, following Mr. Reid’s answer and defenses, Ms. Wimley untimely attempted to comply with § 11-1-58. R. 33, 37-53. Ms. Wimley cannot reasonably argue that Mr. Reid’s answer failed to put her on notice of the failure to comply with § 11-1-58. Mr. Reid clearly complied with Miss. R. Civ. P. 8(c) and 12(b)(6) when he alerted Ms. Wimley to her failure to abide by the medical malpractice tort reform laws. Because Mr. Reid affirmatively plead a

motion to dismiss in his answer, Ms. Wimley's argument (which was waived below in any event) is without merit.

CONCLUSION

Defendant Bill Reid requests that the Court uphold the trial court's judgment, dismissal with prejudice. Ms. Wimley failed to follow the requirement of Miss. Code Ann. § 11-1-58 and to attach a certificate of expert consultation or an expert report to the complaint. Based on Mr. Reid's answer and motions for dismissal, the trial court properly dismissed the complaint with prejudice. For the foregoing reasons, the Court should affirm the dismissal, *with prejudice*.

Respectfully submitted, this the 13th day of November, 2007

BILL REID, CRNA, AND JOHN DOES 1-10

By: 

R. MARK HODGES, MSB #2493
LOREN H. PRATT, MSB #102647

Attorneys for Appellees

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CERTIFICATE OF SERVICE

I, Loren H. Pratt, undersigned counsel for the Appellees certify that I have this day mailed
a true and correct copy of the foregoing to the following:

Honorable Ashley Hines
Circuit Court Judge
Post Office Box 1315
Greenville, Mississippi 38702-1315

Dennis C. Sweet, III, Esq.
Sweet & Associates
City Centre Building
158 East Pascagoula Street
Jackson, Mississippi 39201

Counsel for Appellants

This the 13th day of November, 2007.



LOREN H. PRATT

By: Representatives Watson,
Blackmon, Eads, Flags, Jennings,
Masterson, Moak, Pierce, Robinson
(63rd), Simpson, Smith (39th),
Stevens, Warren

To: Select Committee on
Civil Justice Reform

HOUSE BILL NO. 2
(As Sent to Governor)

1 AN ACT TO AMEND SECTION 11-11-3, MISSISSIPPI CODE OF 1972, TO
2 REVISE VENUE IN MEDICAL MALPRACTICE ACTIONS; TO AMEND SECTION
3 11-46-1, MISSISSIPPI CODE OF 1972, TO CLARIFY THAT CERTAIN HEALTH
4 CARE PRACTITIONERS ARE EMPLOYEES UNDER THE TORT CLAIMS ACT; TO
5 CREATE SECTION 11-1-62, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT
6 PHYSICIANS, OPTOMETRISTS, NURSE PRACTITIONERS AND PHYSICIAN
7 ASSISTANTS SHALL BE PROTECTED FOR PRESCRIBING FDA APPROVED DRUGS;
8 TO AMEND SECTION 15-1-36, MISSISSIPPI CODE OF 1972, TO REDUCE THE
9 PERIOD FOR COMMENCING A MALPRACTICE ACTION AGAINST AN INSTITUTION
10 FOR THE AGED OR INFIRM; TO PROVIDE A SIXTY-DAY NOTICE FOR MEDICAL
11 MALPRACTICE ACTIONS; TO AMEND SECTION 85-5-7, MISSISSIPPI CODE OF
12 1972, TO REVISE THE LIMITATION OF JOINT AND SEVERAL LIABILITY FOR
13 DAMAGES CAUSED BY TWO OR MORE MEDICAL DEFENDANTS; TO REQUIRE
14 AFFIDAVITS IN MEDICAL MALPRACTICE ACTIONS; TO PROVIDE A LIMITATION
15 ON THE AWARD OF NONECONOMIC DAMAGES; TO REQUIRE THE COMMISSIONER
16 OF INSURANCE TO DETERMINE AND REPORT CERTAIN INFORMATION REGARDING
17 PHYSICIANS AND THE AVAILABILITY OF MEDICAL MALPRACTICE INSURANCE;
18 TO AMEND SECTION 43-11-1, MISSISSIPPI CODE OF 1972, TO DEFINE THE
19 TERM MEDICAL RECORDS; TO CREATE SECTION 43-11-16, MISSISSIPPI CODE
20 OF 1972, TO PROVIDE THAT MEDICAL RECORDS SHALL REMAIN THE PROPERTY
21 OF THE INSTITUTIONS FOR THE AGED AND INFIRM, SUBJECT TO REASONABLE
22 ACCESS TO THE INFORMATION CONTAINED THEREIN UPON REQUEST BY THE
23 RESIDENT, HIS PERSONAL REPRESENTATIVES OR HEIRS; TO PROVIDE
24 IMMUNITY FOR MEDICAL PERSONNEL PROVIDING VOLUNTEER SERVICE TO
25 SCHOOL PROGRAMS; AND FOR RELATED PURPOSES.

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

27 SECTION 1. Section 11-11-3, Mississippi Code of 1972, is
28 amended as follows:

29 11-11-3. (1) Civil actions of which the circuit court has
30 original jurisdiction shall be commenced in the county in which
31 the defendant or any of them may be found or in the county where
32 the cause of action may occur or accrue and, if the defendant is a
33 domestic corporation, in the county in which said corporation is
34 domiciled or in the county where the cause of action may occur or
35 accrue, except where otherwise provided, and except actions of
36 trespass on land, ejectment and actions for the statutory penalty
37 for cutting and boxing trees and firing woods and actions for the

38 actual value of trees cut which shall be brought in the county
39 where the land or some part thereof is situated.

40 (2) Any action against a licensed physician, osteopath,
41 dentist, nurse, nurse practitioner, physician assistant,
42 psychologist, pharmacist, podiatrist, optometrist, chiropractor,
43 institution for the aged or infirm, hospital or licensed pharmacy,
44 including any legal entity which may be liable for their acts or
45 omissions, for malpractice, negligence, error, omission, mistake,
46 breach of standard of care or the unauthorized rendering of
47 professional services shall be brought in the county in which the
48 alleged act or omission occurred.

49 (3) If a civil action is brought in an improper county, such
50 action may be transferred to the proper county pursuant to Section
51 11-11-17.

52 **SECTION 2.** Section 11-46-1, Mississippi Code of 1972, is
53 amended as follows:

54 11-46-1. As used in this chapter the following terms shall
55 have the meanings herein ascribed unless the context otherwise
56 requires:

57 (a) "Claim" means any demand to recover damages from a
58 governmental entity as compensation for injuries.

59 (b) "Claimant" means any person seeking compensation
60 under the provisions of this chapter, whether by administrative
61 remedy or through the courts.

62 (c) "Board" means the Mississippi Tort Claims Board.

63 (d) "Department" means the Department of Finance and
64 Administration.

65 (e) "Director" means the executive director of the
66 department who is also the executive director of the board.

67 (f) "Employee" means any officer, employee or servant
68 of the State of Mississippi or a political subdivision of the
69 state, including elected or appointed officials and persons acting
70 on behalf of the state or a political subdivision in any official



71 capacity, temporarily or permanently, in the service of the state
72 or a political subdivision whether with or without compensation.
73 The term "employee" shall not mean a person or other legal entity
74 while acting in the capacity of an independent contractor under
75 contract to the state or a political subdivision; provided,
76 however, that for purposes of the limits of liability provided for
77 in Section 11-46-15, the term "employee" shall include physicians
78 under contract to provide health services with the State Board of
79 Health, the State Board of Mental Health or any county or
80 municipal jail facility while rendering services under such
81 contract. The term "employee" shall also include any physician,
82 dentist or other health care practitioner employed by the
83 University of Mississippi Medical Center (UMMC) and its
84 departmental practice plans who is a faculty member and provides
85 health care services only for patients at UMMC or its affiliated
86 practice sites. The term "employee" shall also include any
87 physician, dentist or other health care practitioner employed by
88 any university under the control of the Board of Trustees of State
89 Institutions of Higher Learning who practices only on the campus
90 of any university under the control of the Board of Trustees of
91 State Institutions of Higher Learning. The term "employee" shall
92 also include any physician, dentist or other health care
93 practitioner employed by the State Veterans Affairs Board and who
94 provides health care services for patients for the State Veterans
95 Affairs Board. The term "employee" shall also include Mississippi
96 Department of Human Services licensed foster parents for the
97 limited purposes of coverage under the Tort Claims Act as provided
98 in Section 11-46-8.

99 (g) "Governmental entity" means and includes the state
100 and political subdivisions as herein defined.

101 (h) "Injury" means death, injury to a person, damage to
102 or loss of property or any other injury that a person may suffer
103 that is actionable at law or in equity.

104 (i) "Political subdivision" means any body politic or
105 body corporate other than the state responsible for governmental
106 activities only in geographic areas smaller than that of the
107 state, including, but not limited to, any county, municipality,
108 school district, community hospital as defined in Section
109 41-13-10, Mississippi Code of 1972, airport authority or other
110 instrumentality thereof, whether or not such body or
111 instrumentality thereof has the authority to levy taxes or to sue
112 or be sued in its own name.

113 (j) "State" means the State of Mississippi and any
114 office, department, agency, division, bureau, commission, board,
115 institution, hospital, college, university, airport authority or
116 other instrumentality thereof, whether or not such body or
117 instrumentality thereof has the authority to levy taxes or to sue
118 or be sued in its own name.

119 (k) "Law" means all species of law including, but not
120 limited to, any and all constitutions, statutes, case law, common
121 law, customary law, court order, court rule, court decision, court
122 opinion, court judgment or mandate, administrative rule or
123 regulation, executive order, or principle or rule of equity.

124 **SECTION 3.** The following shall be codified as Section
125 11-1-62, Mississippi Code of 1972:

126 11-1-62. In any civil action alleging damages caused by a
127 prescription drug that has been approved by the federal Food and
128 Drug Administration, a physician, optometrist, nurse practitioner
129 or physician assistant may not be sued unless the plaintiff pleads
130 specific facts which, if proven, amount to negligence on the part
131 of the medical provider. It is the intent of this section to
132 immunize innocent medical providers listed in this section who are
133 not actively negligent from forum-driven lawsuits.

134 **SECTION 4.** Section 85-5-7, Mississippi Code of 1972, is
135 amended as follows:

136 85-5-7. (1) As used in this section "fault" means an act or
137 omission of a person which is a proximate cause of injury or death
138 to another person or persons, damages to property, tangible or
139 intangible, or economic injury, including, but not limited to,
140 negligence, malpractice, strict liability, absolute liability or
141 failure to warn. "Fault" shall not include any tort which results
142 from an act or omission committed with a specific wrongful intent.

143 (2) Except as may be otherwise provided in subsections (6)
144 and (8) of this section, in any civil action based on fault, the
145 liability for damages caused by two (2) or more persons shall be
146 joint and several only to the extent necessary for the person
147 suffering injury, death or loss to recover fifty percent (50%) of
148 his recoverable damages.

149 (3) Except as otherwise provided in subsections (2) and (6)
150 of this section, in any civil action based on fault, the liability
151 for damages caused by two (2) or more persons shall be several
152 only, and not joint and several and a joint tort-feasor shall be
153 liable only for the amount of damages allocated to him in direct
154 proportion to his percentage of fault. In assessing percentages
155 of fault an employer and the employer's employee or a principal
156 and the principal's agent shall be considered as one (1) defendant
157 when the liability of such employer or principal has been caused
158 by the wrongful or negligent act or omission of the employee or
159 agent.

160 (4) Any defendant held jointly liable under this section
161 shall have a right of contribution against fellow joint
162 tort-feasors. A defendant shall be held responsible for
163 contribution to other joint tort-feasors only for the percentage
164 of fault assessed to such defendant.

165 (5) Nothing in this section shall eliminate or diminish any
166 defenses or immunities which currently exist, except as expressly
167 noted herein.

168 (6) Joint and several liability shall be imposed on all who
169 consciously and deliberately pursue a common plan or design to
170 commit a tortious act, or actively take part in it. Any person
171 held jointly and severally liable under this section shall have a
172 right of contribution from his fellow defendants acting in
173 concert.

174 (7) In actions involving joint tort-feasors, the trier of
175 fact shall determine the percentage of fault for each party
176 alleged to be at fault.

177 (8) Except as provided in subsection (6) of this section, in
178 any action against a licensed physician, psychologist, osteopath,
179 dentist, nurse, nurse practitioner, physician assistant,
180 pharmacist, podiatrist, optometrist, chiropractor, hospital,
181 institution for the aged or infirm, or licensed pharmacy,
182 including any legal entity which may be liable for their acts or
183 omissions, for malpractice, negligence, error, omission, mistake
184 or the unauthorized rendering of professional services which
185 involve joint tort-feasors, the trier of fact shall determine the
186 percentage of fault for each joint tort-feasor, including named
187 parties and absent tort-feasors, without regard to whether the
188 joint tort-feasor is immune from damages. For noneconomic
189 damages, a defendant's liability shall be several only. For
190 economic damages, for any defendant whose fault is determined to
191 be less than thirty percent (30%), liability shall be several only
192 and for any defendant whose fault is determined to be thirty
193 percent (30%) or more, liability shall be joint and several only
194 to the extent necessary for the person suffering injury, death or
195 loss to recover fifty percent (50%) of his recoverable damages.
196 Fault allocated under this subsection to an immune tort-feasor or
197 a tort-feasor whose liability is limited by law shall not be
198 reallocated to any other tort-feasor.

199 (9) Nothing in this section shall be construed to create a
200 cause of action. Nothing in this section shall be construed, in
201 any way, to alter the immunity of any person.

202 SECTION 5. Section 15-1-36, Mississippi Code of 1972, is
203 amended as follows:

204 15-1-36. (1) For any claim accruing on or before June 30,
205 1998, and except as otherwise provided in this section, no claim
206 in tort may be brought against a licensed physician, osteopath,
207 dentist, hospital, institution for the aged or infirm, nurse,
208 pharmacist, podiatrist, optometrist or chiropractor for injuries
209 or wrongful death arising out of the course of medical, surgical
210 or other professional services unless it is filed within two (2)
211 years from the date the alleged act, omission or neglect shall or
212 with reasonable diligence might have been first known or
213 discovered.

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

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

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

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

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

260 (5) If at the time at which the cause of action shall or
261 with reasonable diligence might have been first known or
262 discovered, the person to whom such claim has accrued shall be
263 under the disability of unsoundness of mind, then such person or
264 the person claiming through him may, notwithstanding that the

265 period of time hereinbefore limited shall have expired, commence
266 action on such claim at any time within two (2) years next after
267 the time at which the person to whom the right shall have first
268 accrued shall have ceased to be under the disability, or shall
269 have died, whichever shall have first occurred.

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

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

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

287 (9) The limitation established by this section as to a
288 licensed physician, osteopath, dentist, hospital or nurse shall
289 apply only to actions the cause of which accrued on or after July
290 1, 1976.

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

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



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

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

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

306 (15) No action based upon the health care provider's
307 professional negligence may be begun unless the defendant has been
308 given at least sixty (60) days' prior written notice of the
309 intention to begin the action. No particular form of notice is
310 required, but it shall notify the defendant of the legal basis of
311 the claim and the type of loss sustained, including with
312 specificity the nature of the injuries suffered. If the notice is
313 served within sixty (60) days prior to the expiration of the
314 applicable statute of limitations, the time for the commencement
315 of the action shall be extended sixty (60) days from the service
316 of the notice for said health care providers and others. This
317 subsection shall not be applicable with respect to any defendant
318 whose name is unknown to the plaintiff at the time of filing the
319 complaint and who is identified therein by a fictitious name.

320 **SECTION 6.** (1) In any action against a licensed physician,
321 health care provider or health care practitioner for injuries or
322 wrongful death arising out of the course of medical, surgical or
323 other professional services where expert testimony is otherwise
324 required by law, the complaint shall be accompanied by a
325 certificate executed by the attorney for the plaintiff declaring
326 that:

327 (a) The attorney has reviewed the facts of the case and
328 has consulted with at least one (1) expert qualified pursuant to
329 the Mississippi Rules of Civil Procedure and the Mississippi Rules

330 of Evidence who is qualified to give expert testimony as to
331 standard of care or negligence and who the attorney reasonably
332 believes is knowledgeable in the relevant issues involved in the
333 particular action, and that the attorney has concluded on the
334 basis of such review and consultation that there is a reasonable
335 basis for the commencement of such action; or
336 (b) The attorney was unable to obtain the consultation
337 required by paragraph (a) of this subsection because a limitation
338 of time established by Section 15-1-36 would bar the action and
339 that the consultation could not reasonably be obtained before such
340 time expired. A certificate executed pursuant to this paragraph
341 (b) shall be supplemented by a certificate of consultation
342 pursuant to paragraph (a) or (c) within sixty (60) days after
343 service of the complaint or the suit shall be dismissed; or
344 (c) The attorney was unable to obtain the consultation
345 required by paragraph (a) of this subsection because the attorney
346 had made at least three (3) separate good faith attempts with
347 three (3) different experts to obtain a consultation and that none
348 of those contacted would agree to a consultation.
349 (2) Where a certificate is required pursuant to this section
350 only, a single certificate is required for an action, even if more
351 than one (1) defendant has been named in the complaint or is
352 subsequently named.
353 (3) A certificate under subsection (1) of this section is
354 not required where the attorney intends to rely solely on either
355 the doctrine of "res ipsa loquitur" or "informed consent." In
356 such cases, the complaint shall be accompanied by a certificate
357 executed by the attorney declaring that the attorney is solely
358 relying on such doctrine and, for that reason, is not filing a
359 certificate under subsection (1) of this section.
360 (4) If a request by the plaintiff for the records of the
361 plaintiff's medical treatment by the defendants has been made and
362 the records have not been produced, the plaintiff shall not be



363 required to file the certificate required by this section until
364 ninety (90) days after the records have been produced.

365 (5) For purposes of this section, an attorney who submits a
366 certificate of consultation shall not be required to disclose the
367 identity of the consulted or the contents of the consultation;
368 provided, however, that when the attorney makes a claim under
369 paragraph (c) of subsection (1) of this section that he was unable
370 to obtain the required consultation with an expert, the court,
371 upon the request of a defendant made prior to compliance by the
372 plaintiff with the provisions of this section, may require the
373 attorney to divulge to the court, in camera and without any
374 disclosure by the court to any other party, the names of
375 physicians refusing such consultation.

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

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

384 **SECTION 7.** (1) For the purposes of this section, the
385 following words and phrases shall have the meanings ascribed
386 herein unless the context clearly requires otherwise:

387 (a) "Noneconomic damages" means subjective,
388 nonpecuniary damages arising from death, pain, suffering,
389 inconvenience, mental anguish, worry, emotional distress, loss of
390 society and companionship, loss of consortium, bystander injury,
391 physical impairment, injury to reputation, humiliation,
392 embarrassment, loss of the enjoyment of life, hedonic damages,
393 other nonpecuniary damages, and any other theory of damages such
394 as fear of loss, illness or injury. The term "noneconomic

395 damages" shall not include damages for disfigurement, nor does it
396 include punitive or exemplary damages.

397 (b) "Actual economic damages" means objectively
398 verifiable pecuniary damages arising from medical expenses and
399 medical care, rehabilitation services, custodial care,
400 disabilities, loss of earnings and earning capacity, loss of
401 income, burial costs, loss of use of property, costs of repair or
402 replacement of property, costs of obtaining substitute domestic
403 services, loss of employment, loss of business or employment
404 opportunities, and other objectively verifiable monetary losses.

405 (c) "Provider of health care" means a licensed
406 physician, psychologist, osteopath, dentist, nurse, nurse
407 practitioner, physician assistant, pharmacist, podiatrist,
408 optometrist, chiropractor, institution for the aged or infirm,
409 hospital, licensed pharmacy or any legal entity which may be
410 liable for their acts or omissions.

411 (2) (a) In any action for injury based on malpractice or
412 breach of standard of care against a provider of health care,
413 including institutions for the aged or infirm, in the event the
414 trier of fact finds the defendant liable, they shall not award the
415 plaintiff more than the following for noneconomic damages:

416 (i) For claims for causes of action filed on or
417 after passage of House Bill No. 2, 3rd Extraordinary Session 2002,
418 but before July 1, 2011, the sum of Five Hundred Thousand Dollars
419 (\$500,000.00);

420 (ii) For claims for causes of action filed on or
421 after July 1, 2011, but before July 1, 2017, the sum of Seven
422 Hundred Fifty Thousand Dollars (\$750,000.00);

423 (iii) For claims for causes of action filed on or
424 after July 1, 2017, the sum of One Million Dollars
425 (\$1,000,000.00).

426 It is the intent of this section to limit all noneconomic
427 damages to the above.

428 (b) The trier of fact shall not be advised of the
429 limitations imposed by this subsection (2) and the judge shall
430 appropriately reduce any award of noneconomic damages that exceeds
431 the applicable limitation.

432 (3) The limitation on noneconomic damages set forth in
433 subsection (2) shall not apply in cases where the judge determines
434 that a jury may impose punitive damages.

435 (4) Nothing in this section shall be construed to impose a
436 limitation on damages for disfigurement or actual economic
437 damages.

438 SECTION 8. The Commissioner of Insurance shall determine the
439 number of physicians licensed by and practicing in the State of
440 Mississippi who are unable to obtain medical malpractice
441 insurance, and the commissioner shall report such information and
442 other information that the commissioner determines which impacts
443 the medical profession to the Legislature on or before January 5,
444 2003. The commissioner shall make recommendations to the
445 Legislature on or before January 5, 2003, concerning the
446 establishment of an actuarially sound joint underwriting medical
447 malpractice association for the purpose of making necessary
448 medical malpractice insurance available for physicians, registered
449 nurses and all other personnel who are duly licensed to practice
450 in a hospital, hospitals, nursing facilities or assisted living
451 facilities. The need and funding for such association shall be
452 determined by the Legislature.

453 SECTION 9. Section 43-11-1, Mississippi Code of 1972, is
454 amended as follows:

455 43-11-1. When used in this chapter, the following words
456 shall have the following meaning:

457 (a) "Institutions for the aged or infirm" means a place
458 either governmental or private which provides group living
459 arrangements for four (4) or more persons who are unrelated to the
460 operator and who are being provided food, shelter and personal

461 care whether any such place be organized or operated for profit or
462 not. The term "institution for aged or infirm" includes nursing
463 homes, pediatric skilled nursing facilities, psychiatric
464 residential treatment facilities, convalescent homes and homes for
465 the aged, provided that these institutions fall within the scope
466 of the definitions set forth above. The term "institution for the
467 aged or infirm" does not include hospitals, clinics or mental
468 institutions devoted primarily to providing medical service.

469 (b) "Person" means any individual, firm, partnership,
470 corporation, company, association or joint stock association, or
471 any licensee herein or the legal successor thereof.

472 (c) "Personal care" means assistance rendered by
473 personnel of the home to aged or infirm residents in performing
474 one or more of the activities of daily living, which includes, but
475 is not limited to, the bathing, walking, excretory functions,
476 feeding, personal grooming and dressing of such residents.

477 (d) "Psychiatric residential treatment facility" means
478 any nonhospital establishment with permanent facilities which
479 provides a twenty-four-hour program of care by qualified
480 therapists, including, but not limited to, duly licensed mental
481 health professionals, psychiatrists, psychologists,
482 psychotherapists and licensed certified social workers, for
483 emotionally disturbed children and adolescents referred to such
484 facility by a court, local school district or by the Department of
485 Human Services, who are not in an acute phase of illness requiring
486 the services of a psychiatric hospital, and are in need of such
487 restorative treatment services. For purposes of this paragraph,
488 the term "emotionally disturbed" means a condition exhibiting one
489 or more of the following characteristics over a long period of
490 time and to a marked degree, which adversely affects educational
491 performance:

492 1. An inability to learn which cannot be explained
493 by intellectual, sensory or health factors;



494 2. An inability to build or maintain satisfactory
495 relationships with peers and teachers;
496 3. Inappropriate types of behavior or feelings
497 under normal circumstances;
498 4. A general pervasive mood of unhappiness or
499 depression; or
500 5. A tendency to develop physical symptoms or
501 fears associated with personal or school problems. An
502 establishment furnishing primarily domiciliary care is not within
503 this definition.

504 (e) "Pediatric skilled nursing facility" means an
505 institution or a distinct part of an institution that is primarily
506 engaged in providing to inpatients skilled nursing care and
507 related services for persons under twenty-one (21) years of age
508 who require medical or nursing care or rehabilitation services for
509 the rehabilitation of injured, disabled or sick persons.

510 (f) "Licensing agency" means the State Department of
511 Health.

512 (g) "Medical records" mean, without restriction, those
513 medical histories, records, reports, summaries, diagnoses and
514 prognoses, records of treatment and medication ordered and given,
515 notes, entries, x-rays and other written or graphic data prepared,
516 kept, made or maintained in institutions for the aged or infirm
517 that pertain to residency in, or services rendered to residents
518 of, an institution for the aged or infirm.

519 **SECTION 10.** The following shall be codified as Section
520 43-11-16, Mississippi Code of 1972:

521 43-11-16. Medical records are and shall remain the property
522 of the various institutions for the aged or infirm, subject,
523 however, to reasonable access to the information contained therein
524 upon written request by the resident, his legally appointed
525 representatives, his attending medical personnel and his duly
526 authorized nominees, and upon payment of any reasonable charges



527 for such service. Nothing in this section shall be construed to
528 deny access to medical records by the Attorney General, the
529 licensing agency, or his or its agents and investigators in the
530 discharge of their official duties under this chapter. Except as
531 otherwise provided by law, medical records shall not constitute
532 public records and nothing in this section shall be deemed to
533 impair any privilege of confidence conferred by law or the
534 Mississippi Rules of Evidence on residents, their personal
535 representatives or heirs by Section 13-1-21.

536 SECTION 11. (1) Any licensed physician, certified nurse
537 practitioner, psychologist or physician assistant who voluntarily
538 provides needed medical or health services to any program at an
539 accredited school in the state without the expectation of payment
540 shall be immune from liability for any civil action arising out of
541 the provision of such medical or health services provided in good
542 faith on a charitable basis. This section shall not extend
543 immunity to willful acts or gross negligence. Except in cases of
544 rendering emergency care wherein the provisions of Section
545 73-25-37, Mississippi Code of 1972, apply, immunity under this
546 section shall be extended only if the physician, certified nurse
547 practitioner, psychologist or physician assistant and patient
548 execute a written waiver in advance of the rendering of such
549 medical services specifying that such services are provided
550 without the expectation of payment and that the licensed physician
551 or certified nurse practitioner, psychologist or physician
552 assistant shall be immune as provided herein.

553 (2) Any physician who voluntarily renders any medical
554 service under a special volunteer medical license authorized under
555 Section 73-25-18 without any payment or compensation or the
556 expectation or promise of any payment or compensation shall be
557 immune from liability for any civil action arising out of any act
558 or omission resulting from the rendering of the medical service
559 unless the act or omission was the result of the physician's gross

560 negligence or willful misconduct. In order for the immunity under
561 this subsection to apply, there must be a written or oral
562 agreement for the physician to provide a voluntary noncompensated
563 medical service before the rendering of the service by the
564 physician.

565 **SECTION 12.** If any provision of this act is held by a court
566 to be invalid, such invalidity shall not affect the remaining
567 provisions of this act, and to this end the provisions of this act
568 are declared severable.

569 **SECTION 13.** This act shall take effect and be in force from
570 and after January 1, 2003, and shall apply to all causes of action
571 filed on or after that date.

MISSISSIPPI CODE OF 1972

As Amended

SEC. 11-1-58. Certificate of consultation required in medical malpractice actions; definitions.

(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.

SOURCES: Laws, 2002, 3rd Ex. Sess., ch. 2, § 6, HB 2, effective from and after January 1, 2003.

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