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

CERTIFICATE OF INTERESTED PERSONS

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

1. Bill Reid, CRNA, Appellee
2. Charlie Doyle Wimley, Appellant
3. R. Mark Hodges, Counsel for Appellee
4. Gretchen W. Kimble, Counsel for Appellee
5. Dennis C. Sweet, III, Counsel for Appellant
6. Omar L. Nelson, Counsel for Appellant
7. Pieter Teeuwissen, Counsel for Appellant
8. W. Ashley Hines, Circuit Court Judge for the Circuit Court of Leflore County, Mississippi
9. Jim Hood, State of Mississippi Attorney General

This the 11th day of July, 2008.

BY: 

R. MARK HODGES [redacted]
GRETCHEN W. KIMBLE [redacted]
Attorneys for Appellee Bill Reid, CRNA

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I. Introduction

This Court has requested supplemental briefs addressing whether the expert consultation certification requirement of Miss. Code Ann. § 11-1-58[1] violates the separation of powers doctrine. Under the established Mississippi law outlined below, it does not.

In its 2002 extraordinary session, the Mississippi Legislature met to address widespread concerns about Mississippi's litigation crisis, particularly in the area of healthcare, providers of which were finding insurance difficult or impossible to obtain and who were leaving the state in ever-increasing numbers. The Legislature, acting within its constitutional authority to enact public policy through substantive law, passed a series of measures designed in part to stabilize the healthcare system by preventing the filing of meritless medical negligence claims. Among these measures, Miss. Code Ann. § 11-1-58 requires a plaintiff's attorney, in any action against a health care provider, to certify in the complaint that he or she has consulted with an expert and, on the basis of that consultation, believes the plaintiff has a reasonable basis for the commencement of such an action.

As a preliminary matter, it is noteworthy that the constitutionality of this statute under the separation of powers doctrine was not raised by the parties in the trial court. This Court has recently reiterated its long-held rule that the Court will not consider constitutional arguments not raised by either party in the proceedings below.[2] In *In re V.R.*, the Court specifically refused to address a separation of powers argument at the appellate level, holding, "The mere fact that a separation of

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[1]The full text of this statute may be found in Addendum B to the principal brief of Appellee. The statute provides options for compliance with the certification requirement under various circumstances.

[2]*Adams v. Baptist-Mem'l Hosp.-Desoto, Inc.*, 965 So. 2d 652, 657 (Miss. 2007).

powers issue is constitutional in nature does not absolve it from the general rule that objections must be raised at the trial level." 725 So. 2d 241, 245 (Miss. 1998). As the Plaintiff did not raise the constitutionality of Miss. Code Ann. § 11-1-58 in the lower court, this Court may decline to consider the issue now.

II. Standard of Review

The Mississippi Supreme Court must be convinced "beyond all reasonable doubt" that a law violates a constitutional provision in order to overturn a statute as unconstitutional. *Oxford Asset Partners, LLC v. City of Oxford,* 970 So. 2d 116, 120 (Miss. 2007) (quoting *Richmond v. City of Corinth,* 816 So. 2d 373, 375 (Miss. 2002). "In determining whether an action of the Legislature violates the Constitution, the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution." *State v. Bd. of Levee Comm'rs,* 932 So. 2d 12, 19 (Miss. 2006). "'[O]ne who assails a legislative enactment must overcome the strong presumption of validity and such assailant must prove his conclusions affirmatively, and clearly establish it beyond a reasonable doubt. All doubts must be resolved in favor of validity of a statute." *Id.* at 19-20 (quoting *Cities of Oxford, Carthage, Starkville and Tupelo v. Northeast Elec. Power Ass'n,* 704 So. 2d 59, 65 (Miss. 1997)).

III. Legal Authority and Analysis

A. Miss. Code Ann. § 11-1-58 is a proper exercise of the Legislature's authority to enact substantive laws to effect public policy[3] objectives.

In the passage of § 11-1-58, the Legislature acted within its constitutional power to change

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[3]"Our statutes are enactments of the public policy of this state." *Lanier v. State,* 635 So. 2d 813, 816 (Miss. 1994) (overruled on unrelated grounds.)

the substantive law of medical malpractice. This Court has long held that "the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object. . . . [T]here is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies. . . ." *Walters v. Blackledge*, 220 Miss. 485, 508, 71 So. 2d 433, 441 (1954) (*quoting Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 624 (Mo.1936)). Obviously, the power to abolish a cause of action includes the power to limit it.

In a concurring opinion in a case dealing with the timeliness of an appeal, former Mississippi Court of Appeals Judge Leslie Southwick defined procedural regulations as those regulating "conduct occurring within a court, from the time the matter was properly commenced in that court until it is disposed of by the court . . . ." *Wolfe v. City of D'Iberville*, 799 So. 2d 142, 150 (Miss. Ct. App. 2001) (Southwick, J., concurring) (emphasis supplied). Judge Southwick also outlined in his concurrence the parameters of the Legislature's domain over substantive law: "Whether the matter was timely commenced in that court is not internal practice and procedure, but instead it is something that can be, and indeed always has been, controlled by the legislature . . . ." *Id.*

At least as early as 1935, the Legislature has exercised its authority to limit a litigant's right to bring suit by prohibiting foreign corporations transacting business in the state without registering with the Secretary of State from maintaining any suit in the state. Miss. Code Ann. § 79-4-15.05 (2008). The Legislature has repeatedly revised and amended this statutory requirement, and the Mississippi Supreme Court has applied the various versions of the statute without questioning the Legislature's authority to place limitations on a foreign corporation's right to file suit.[4]

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[4]*See Capital Assoc., Inc. v. Sally Southland, Inc.*, 529 So. 2d 640, 641-42 (Miss 1988); *Honey Fluff Donut Co. v. Daniel, Inc.*, 374 So. 2d 800, 801-02 (Miss. 1979); *Parker v. Lin-Co. Producing Co.*, 197 So.

This Court has tacitly acknowledged legislative authority to require expert consultation prior to filing in a medical malpractice suit. *Bean v. Broussard*, 587 So. 2d 908, 913 (Miss. 1991). In reversing a sanctions award for filing a medical malpractice suit without having retained the services of a qualified expert to testify regarding the standard of care, the Court in *Bean* held, "none of the cases cited states that a medical expert need be retained before filing. Indeed, no cases, rules or statutes impose such a requirement .... While it may be the better practice to retain an expert early on, one is not required to do so." *Id.* at 912-13. By noting that no statute required retention of an expert prior to filing suit, the Court implied that the Legislature had authority to impose the requirement but had chosen not to do so. The Legislature chose to do so in 2002 when it enacted § 11-1-58.

The Legislature has not overstepped its authority over substantive law into the area of procedural matters in the enactment of the expert consultation requirement statute. The expert certification statute establishes substantive requirements — jurisdictional pre-requisites — that, if a case is one requiring expert testimony under existing law,[5] the medical negligence plaintiff's attorney must consult with an expert, must conclude on the basis of that consultation that there is a reasonable basis for commencement of suit and must certify this in the complaint. Just as the Legislature has constitutionally limited a foreign corporation's right to file suit until it obtains a certificate of authority from the Secretary of State, the Legislature has placed expert certification requirements on a litigant's ability to use Mississippi courts to file a medical negligence action.

2d 228, 230 (Miss. 1967); *See also Cuba Timber Co. v. Boswell*, 339 F. Supp. 2d 773, 775-76 (Miss. 2004) (construing Mississippi law); *Bryant Const. Co. v. Cook Const. Co.*, 518 So. 2d 625, 632 (Miss. 1987) (discussing Miss. Code Ann. § 79-4-15.02 in dicta).

[5]It is well settled Mississippi law that expert testimony is required to establish the prima facie elements of a medical negligence claim. *See Coleman v. Rice*, 706 So. 2d 696, 698 (Miss. 1997).

Without meeting these requirements, a represented plaintiff has no substantive claim for medical malpractice and has no right to file suit on that claim.

The Legislature has by enactment of the expert certification statute accomplished what this Court implied it could do in *Bean v Broussard, supra.* The requirement of expert certification does not regulate "conduct occurring within a court, from the time the matter was properly commenced in that court until it is disposed of by the court." Instead, this requirement accomplishes the Legislature's legitimate goal of limiting access to the courts to those represented medical negligence plaintiffs who can make a prima facie case, and thus suit is not "properly commenced" absent an expert certification filed with the complaint.

B. Existing law requires upholding § 11-1-58 even if it has incidental procedural ramifications.

The separation of powers doctrine by no means establishes that the Legislature is precluded from all matters involving Mississippi's court system. Given that the Legislature is constitutionally charged with enacting the laws of this state[6] and that the court system is charged with administering those laws, the two branches' territories will inevitably overlap. In *Alexander v. State ex rel. Allain*, the Mississippi Supreme Court acknowledged that complete separation of legislative and judicial authority would not always be possible, stating "there will be areas in which the functions of the separate bodies will clash with the idealistic concept of separation of powers." 441 So. 2d 1329, 1336 (Miss. 1983) (overruled on other grounds).

Even when a legislative enactment encroaches on the judiciary's procedural rule-making

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[6]As the law-making body of the State of Mississippi, the Legislature has authority to create substantive law, and the Court has long recognized that the Legislature has "all political powers not withheld in [Mississippi's] Constitution, or in conflict with the Constitution of the United States." *Hinton v. Perry Co.*, 84 Miss. 536, 547, 36 So. 565, 567 (1904).

authority,[7] this Court has recognized a need to uphold the laws of the state whenever possible, holding in *Newell v. State* that "[w]e are keenly aware of, and measure with great respect, legislative suggestions concerning procedural rules and they will be followed unless determined to be an impediment to justice or an impingement upon the constitution." 308 So. 2d 71, 76 (Miss. 1975). The *Newell* Court further held, "as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest . . . ." *Id.* at 78 (emphasis added). Justice Dickinson, writing for the Court in *Long v. McKinney*, reiterated that procedural statutes are to be upheld unless to do so would impede justice or impinge upon the constitution. 897 So. 2d 160, 163-64 (Miss. 2004). "This Court is loathe to declare unconstitutional any statutory provision enacted by the legislature. To do so requires a careful and diligent review, and a conclusion that no constitutional alternative exists." *Id at 163.*

Under these standards, § 11-1-58 does not violate the separation of powers doctrine. In *Bean v. Broussard, supra*, this Court looked to Mississippi statutes, rules and cases before concluding there was no pre-filing expert witnesses consultation requirement; but the court noted that such a consultation "may be the better practice." 587 So. 2d at 913. Miss. Code Ann. § 11-1-58 provides the statute for which this Court searched in *Bean*, making the "better practice" a requirement of substantive law. It is difficult to conceive how a requirement this Court characterized as a "better practice" can be regarded as an "impediment to justice or an impingement upon the Constitution." Even Justice Robertson's epic opinion endorsing plenary rule making authority in *Hall v. State*

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[7]This Court has held that the Constitution authorizes the Court to adopt procedural rules, ruling that "[t]he inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts." *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975).

acknowledged that this Court should not strike down all legislation "arguably encroaching on its rule making turf." 539 So 2d 1338, 1346 n.23 (Miss. 1989). "Deference ought to be given such legislative expressions, not out of obligation but comity, not out of accession to authority, but in respect for the legislature. . . ." *Id.*

This Court has affirmed the Legislature's power to enact statutes that regulate healthcare litigation practices, even when the statutes directly address the scope of discovery and admissibility of evidence in the courts. *Claypool v. Mladineo*, 724 So. 2d 373 (Miss. 1998). In *Claypool*, this Court upheld privilege provisions in the peer review and quality assurance statutes (Miss. Code Ann.§ 41-63-9, & 23) which state that "the proceedings and records of any medical or dental review committee shall be confidential and shall not be subject to discovery or introduction into evidence in any civil action arising out of matters which are subject of evaluations and reviewed by such committee." Miss. Code Ann. § 41-63-9(1). *Claypool* also upheld a provision prohibiting any person from being "required to testify in any civil action as to any evidence or other matters produced or presented during" the person's involvement in a peer review matter. Miss. Code Ann.§ 41-63-23.

The Claypool family sued Dr. Mladineo for medical malpractice and sought to discover any hospital or other peer review information reflecting investigations of problems with Dr. Mladineo's care (including the care of Ms. Claypool). 724 So. 2d at 376-77. Dr. Mladineo objected, based on the two statutes quoted above, and the Claypools moved to compel responses, ultimately resorting to an appeal to this Court. *Id.* It can hardly be argued that the materials were beyond the scope of discovery under M.R.C.P. 26, nor could it be argued that the privileges claimed by the Defendants were of a judicial origin. The Defendants relied strictly on legislatively created privilege statutes to avoid the application of procedure and evidence rules of judicial creation. *Id.*

This Court found that the legislative privileges did not impermissibly "impede either of the judicially created rules of procedure or evidence" and that "the legislature did not intend to abrogate any procedural rules." *Id.* at 377, 381. Rather, the statutes were an enforcement of "the legislature's authority to police and regulate healthcare in Mississippi." *Id.* at 381. Since the *Claypool* holding clearly used a legislatively authored privilege to block discovery under judge made rules, the decision can only mean that the Legislature can in fact make laws that impact judge made rules if the statutes do not impermissibly impede those rules in advancing legitimate legislative policy. The *Claypool* holding is consistent with this Court's holding that "legislative suggestions concerning procedural rules . . . will be followed unless determined to be an impediment to justice or an impingement upon the constitution." *Newell*, 308 So. 2d at 76; *See Long*, 897 So. 2d at 163 ("This court is loathe to declare unconstitutional any provision enacted by the legislature. To do so requires a careful and diligent review and a conclusion that no constitutional alternative exists.")

Analyzed in this context, § 11-1-58 simply does not violate the separation of powers doctrine. In § 11-1-58, the Legislature is regulating public health, access to the courts, and the allocation of scarce state resources (the judicial system), all areas of traditional legislative policy making.[8] The Legislature sets numerous jurisdictional pre-requisites to a litigant's access to the courts. *See e.g.* Miss Code Ann. § 79-4-15.05 (2008) (unregistered foreign corporations barred from courts); Miss Code Ann. § 9-7-81 (1972) (jurisdictional limits of circuit courts); Miss Code Ann. § 11-46-11 (Miss. 2002) (notice of claim letter is pre-requisite to Mississippi Tort Claims Act suit).

Miss. Code Ann. § 11-1-58 limits court access to only one class of medical negligence plaintiffs: those with an attorney whose claim requires expert testimony under provisions of existing

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[8]*See Claypool*, 724 So. 2d at 378-79; *Carter v. Harrison County Election Comm'n*, 183 So. 2d 630, 633-34 (Miss. 1966).

law and whose attorney has not consulted with an expert witness and confirmed a good faith belief that there is a basis for the claim. This is nothing more than a pre-suit requirement that the attorney filing the claim confirm that his client has a prima facie case of medical negligence. In other words, the attorney determines if there is a prima facie claim before filing it, rather than imposing the expense of litigation on healthcare defendants and the courts while determining if the claimant has a claim.[9] This does not limit, repeal or impede the applications of the Mississippi Rules of Civil Procedure or the Mississippi Rules of Evidence. Under the clear dictates of this Court's prior rulings in *Claypool, Newell*, and *Long,* § 11-1-58 is neither an impediment to justice nor an impingement upon the Mississippi Constitution.

The expert consultation requirement does not conflict with and in fact complements the requirements of Rules 8(a)(2) and 12(b)(6) of the Mississippi Rules of Civil Procedure that a plaintiff allege facts sufficient to demonstrate the "the pleader is entitled to relief" (i.e. prima facie elements of the claim.) *See Newell v. S. Jitney Jungle Corp.*, 830 So. 2d 621, 625 (Miss. 2002) (holding that a complaint failing to sufficiently aver duty, breach of duty and foreseeability was insufficient to withstand a rule 12(b)(6) motion to dismiss for failure to state a claim). This Court has repeatedly reiterated that expert testimony is required to establish a prima facie claim in medical negligence actions. *See Coleman v. Rice*, 706 So. 2d 696, 698 (Miss. 1997).

The statute does not conflict with any of the Court's procedural rules governing conduct of the parties once suit is properly commenced and in fact lessens the Court's burden of dismissing medical malpractice claims for failure to state a claim against a healthcare provider. However, without impeding the just and efficient resolution of meritorious medical negligence claims, this

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[9]Of note, § 11-1-58 does not apply if an attorney has been unable to obtain the medical records. § 11-1-58(4). It also does not apply if no expert is required for the claim. § 11-1-58(1) and (3).

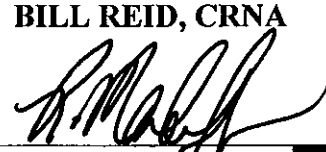
simple measure accomplishes the important public policy goals of protecting the health care system and preserving scarce judicial resources, areas clearly within the purview of traditional legislative power. To the extent that § 11-1-58 may have some procedural effect, this Court should uphold the law as a valid exercise of the Legislature's authority to direct the public policy of the state. As this Court stated in *Claypool*: "Where a statute is constitutional this Court must give effect to its substantiative nature, rather than use a procedural rule to overturn it." 724 So. 2d at 381.

CONCLUSION

Mississippi Code Annotated § 11-1-58 is a constitutional exercise of the Mississippi Legislature's authority to direct public policy by substantively limiting a litigant's ability to file a medical negligence action without obtaining an expert consultation confirming the litigant's prima facie claim. The statute does not encroach on the judiciary's procedural rule-making authority. To the extent that the Court determines the statute may have some procedural effect, the statute complements the Court's procedural requirement that a complaint sufficiently allege facts to demonstrate the prima facie elements of a claim. Therefore, the statute is a constitutional exercise of the Mississippi Legislature's power to enact the substantive law of this state without violating the separation of powers doctrine, and the Court should affirm the lower court's application of the statute to dismiss appellant's claim with prejudice.

Respectfully submitted, this the 11th day of July, 2008.

BILL REID, CRNA

By: 

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CERTIFICATE OF SERVICE

I, R. Mark Hodges, do hereby certify that I have this day caused to be filed via hand-delivery, a true and correct copy of the above and foregoing with the following:

Ms. Betty Sephton, Clerk
Mississippi Supreme Court
450 High Street
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and to be served via **United States Mail**, postage prepaid, to the following:

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This the 11th day of July, 2008.

R. MARK HODGES