

**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

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), 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 disqualification or recusal:

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

SO CERTIFIED this 10th day of October, 2007.

Respectfully submitted,

CHARLIE DOYLE WIMLEY, individually
and on behalf of all Wrongful Death
Beneficiaries of Jeanette Doyle, Deceased

By:

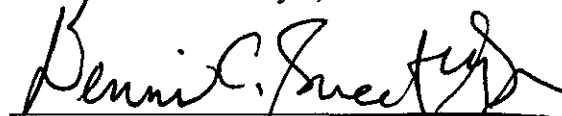

DENNIS C. SWEET, III, 
Counsel for Appellant

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STATEMENT OF THE ISSUE

- I. Whether Failure to File a Certificate of Consultation with the Complaint Pursuant to Mississippi Code Annotated Section 11-1-58 Entitles a Defendant to a Dismissal with Prejudice and Plaintiff is not Entitled to any Opportunity to Correct the Deficiency.

STATEMENT OF THE CASE

I. Nature of the Case

The instant action involves the wrongful death of Ms. Jeanette Doyle. Charlie Doyle Wimley (hereinafter referenced as "Appellant") brought a claim for medical malpractice on behalf of Ms. Doyle against Coleman Cataract and Eye Laser Surgery Center, Inc., Michael Coleman, M.D., Denise Young, R.N., Bill Reid, CRNA, B. Robbins, R.N., C. Larry, R.N., and John Does 1-10. This appeal arises from an order of the Circuit Court of Leflore County, Mississippi granting Appellee, Bill Reid's, CRNA, (hereinafter referenced as "Appellee") Motion to Dismiss and dismissing plaintiff's cause of action with prejudice. R. at 183. Contrary to the trial court's conclusion, Appellant contends that they should have been allowed to amend their complaint when a Motion to Amend had been filed well within a reasonable time after discovering that the certificate had not been filed.

II. Course of Proceedings and Disposition in the Court Below

On or about February 22, 2005, Appellant timely filed a complaint alleging *inter alia*, wrongful death and medical malpractice against Coleman Cataract and Eye Laser Surgery Center, Inc., Michael Coleman, M.D., Denise Young, R.N., Bill Reid, CRNA, B. Robbins, R.N., C. Larry, R.N., and John Does 1-10. R. at 1. At the time of filing the complaint, Omar L. Nelson, Esq. failed to attach an attorney's certificate of consultation or an expert disclosure in lieu of the certificate as required by Mississippi Code Annotated Section 11-1-58 (Supp. 2006). R. at 33; 37. On or about May 6, 2005, Appellee filed his answers and defenses. R. at 22. Within his answer, Appellee states that Appellant failed to comply with the "medical malpractice reform laws passed in

2002 and 2003.” R. at 22. Appellee did not file a separate motion and did not bring this matter for hearing. On or about May 11, 2005, Omar L. Nelson, Esq. filed the attorney’s certificate of consultation. R. at 33. Thereafter, on or about May 25, 2005, Omar L. Nelson, Esq. filed a motion for leave to amend the complaint in an effort to attach a copy of the attorney’s certificate of consultation to the filed complaint. R. at 37, *et. seq.* Appellant’s motion for leave to amend was filed within a reasonable time after discovery that the certificated of consultation had not been filed. The trial court refused to rule on Appellant’s motion or grant any relief. Appellee as well as the other defendants responded in opposition to Appellant’s Motion for Leave and at that time, filed motions to dismiss. The motion for leave to amend as well as the motions to dismiss was heard before the Honorable W. Ashley Hines on or about October 24, 2005. T. R. at 1-12. Even though Plaintiffs timely filed their motion for leave to amend and brought it on for hearing, the trial court failed to ever rule on said motion. On or about March 19, 2007, Appellee later filed a renewed motion to dismiss filed. On April 6, 2007, the motion was granted and the court dismissed the case with prejudice. R. at 176; 183. Appellant then filed a Notice of Appeal. Appellant asks this court to reverse the Circuit Court’s dismissal of this action.

III. Statement of the Facts

On or about May 13, 2003, Jeanette Doyle, accompanied by her daughter, Charlie Doyle Wimley, presented to the Coleman Eye Surgery Center for cataract extraction. At the time of her treatment, Jeanette Doyle, was sixty-two years old and had a history of asthma, diabetes and other respiratory diseases. Prior to her May 13, 2003 visit, Jeanette Doyle was diagnosed by Dr. Michael Coleman as having glaucoma and right eye

cataract. During the May 13, 2003 procedure, Jeanette Doyle was put under via a local anesthetic. During her treatment, Ms. Doyle had an asthmatic attack and/or some other respiratory difficult while at the Coleman Eye Surgery Center. Thereafter, personnel at the Coleman Eye Surgery Center, sought emergency medical services for Jeanette Doyle and transferred her to Greenwood Leflore Hospital. On or about May 15, 2003, Jeanette Doyle subsequently died. Appellant contends that Jeanette Doyle died an untimely and preventable death.

Appellant contends that there were several breaches of the standard of care in the instant matter, including but not limited to Appellee's failure to interpret the diagnostic tests and properly identify and treat Ms. Doyle's abnormal signs, symptoms, previous diagnosis, medical history and etc. on or before May 13, 2005. Appellants further contend that if Appellee had properly investigated Ms. Doyle's prior medical history, they would have determined that outpatient surgery was inappropriate for Ms. Doyle. Further, Appellee breached the standard of care for a certified registered nurse anesthetist. As a result of Appellees' numerous breaches of the standard of care, Ms. Jeanette Doyle's life unnecessarily ended on May 15, 2003.

STANDARD OF REVIEW

On appeal, the standard of review for granting a motion to dismiss is *de novo*. *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss. 2006); *Carter v. Citigroup, Inc.*, 938 So.2d 809, 817 (Miss. 2006). The Mississippi Supreme Court and the Court of Appeals review a trial court grant or denial of a motion for summary judgment or to dismiss under a *de novo* standard. *Monsanto v. Hall*, 912 So.2d 134, 136 (Miss. 2005). *De novo* review means that the appellate court reviews the grant of summary judgment or motion to dismiss without according any deference to the trial court's decision. *Id.* “[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 151 (2000), 120 S.Ct. 2097, 147 L.Ed.2d 105. The appellate court applies the same standard as the trial court in determining the propriety of summary judgment. *Moore ex rel. Benton County v. Renick*, 626 So.2d 148 (Miss. 1993); *Cities of Oxford, Carthage, Louisville, Starkville and Tupelo v. Northeast Mississippi Elec. Power Ass’n*, 704 So.2d 59 (Miss. 1997). When construing the meaning of a statute, this Court must seek the intention of the Legislature, and knowing it, must adopt that interpretation which will meet the Legislature’s real meaning. *Caldwell v. N. Miss. Med. Ctr., Inc.*, 956 So.2d 888, 894 (Miss. 2007).

The clearly erroneous standard applied to findings of facts made by trial courts is not applicable because the trial court “cannot try issues of facts on a Rule 56 motion; it may only determine whether there are issues to be tried.” *Brown v. Credit Center, Inc.*, 444 So.2d 358 (Miss. 1983).

SUMMARY OF THE ARGUMENT

The trial court's grant of Appellee's motion to dismiss should be reversed. The paramount issues raised in this appeal are whether failure to file a certificate of consultation as required by Miss. Code Ann. § 11-1-58 entitles a defendant to a dismissal with prejudice or whether the plaintiff is entitled to a reasonable opportunity to cure the deficiency. A line of recent cases holds that strict compliance with Miss. Code Ann. § 11-1-58 is required, and in the absence of such, a dismissal with prejudice is warranted. *Caldwell v. North Miss. Med. Ctr., Inc. v. Brown*, 956 So.2d 888, 891 (Miss. 2007); *Walker v. Whitfield Nursing Ctr., Inc.*, 931 So.2d 583, 588-89 (Miss. 2006). Unfortunately, this scheme does not afford litigants with an opportunity to cure any deficiencies with the requirements of the statute. Appellants contend that such a harsh and egregious result should never be rendered for a mere error on the part of an attorney.

In the case *sub judice*, Appellant argues that the instant suit was filed well within the statute of limitations but without a certificate of consultation. Appellee filed his answer with a vague and amorphous reference to "malpractice reform laws passed in 2002 and 2003," which does not rise to the proper assertion of an affirmative defense. A few days after the answer was filed, counsel for Appellant filed a certificate of consultation well within the statute of limitations. Out of an abundance of caution, counsel for Appellant filed a motion for leave to amend the complaint. Afterwards, Appellee filed a motion to dismiss. Both the motion to dismiss and the motion for leave were brought up for hearing on the same day. Nearly six (6) months after both motions were heard, the trial court granted Appellee's motion to dismiss with prejudice. In the case *sub judice*, Appellant contends that where a dismissal is granted for noncompliance

with the statute, the dismissal must be without prejudice and/or the plaintiff must be afforded an opportunity to cure the defect.

Further, at the time the instant suit was filed, the Court had not addressed the issue of correcting deficiencies as to the requirements of Miss. Code Ann. § 11-1-58. Only after this matter was dismissed did the Mississippi Supreme Court hand down rulings as to the type of compliance which this statute requires. Appellant argues that filing a lawsuit for medical negligence without a certificate of consultation should not be fatal where once discovery and before a motion to dismiss is heard, the Appellant made all reasonable efforts to cure the defect.

Appellant will contend that Miss. Code Ann. § 11-1-58 should not be strictly construed so as to bar a wholly meritorious claim due to a technical failure on the part of an attorney. The statute in question was designed and drafted by the Mississippi Legislature to control a perceived problem regarding medical negligence cases; specifically to filter out possibly non-meritorious claims. It was not created to bar valid claims, nor to trump the constitutional guarantees of the federal and state constitutions. Appellant contends that because this statute infringes upon constitutional rights, this Court should review it under strict scrutiny. For these reasons, Appellant contends that the trial court's grant of dismissal was improper and violative of the spirit and legislative intent behind Miss. Code Ann. § 11-1-58.

Lastly, Appellee failed to affirmatively assert this now claimed procedural defect at the earliest state of the litigation as required by Rule 12(b) of the Mississippi Rules of Civil Procedure. Appellee waited until after Appellants filed their Motion for Leave to Amend to assert its Rule 12(b)(6) motion for dismissal for failure to state a claim upon

which relief can be granted. Specifically, Appellee argued that in light of Appellant failure to contemporaneously file with their complaint, an attorney's certificate of consultation or an expert disclosure in lieu of the certificate pursuant to Miss. Code Ann. § 11-1-58, Appellant failed to state a claim upon which relief can be granted. Appellant argues that Appellee had an affirmative duty to assert this affirmative, procedural defense during his first responsive pleading.

ARGUMENT

I. Failure to File a Certificate of Consultation Does Not Entitle a Defendant to a Dismissal with Prejudice Where the Plaintiff is not Allowed an Opportunity to Cure the Defect.

A. MISSISSIPPI CODE ANNOTATED SECTION 11-1-58 (2006).

Pursuant to Section 11-1-58(1) (2006):

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 15-1-3 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 consultation.

Id.

The paramount issues raised in this appeal are whether failure to file a certificate of consultation as required by Miss. Code Ann. § 11-1-58 entitles a defendant to a dismissal with prejudice and whether the plaintiff is entitled to an opportunity to cure the deficiency. In the case *sub judice*, the conduct giving rise to Appellant's cause of action occurred on or about May 13, 2003. R. at 3. As the Court is aware, Mississippi has a two (2) year statute of limitations period for medical malpractice claims. See *Sarris v. Smith*, 782 So.2d 721, 723 (Miss. 2001) (interpreting Miss. Code Ann. § 15-1-36 (Supp. 2002)). The instant suit was filed on or about February 22, 2005, well within the statute of limitations, without a certificate of consultation nor an expert report. At the time the instant suit was filed, this Court had not addressed the issue of correcting deficiencies as to the requirements of Miss. Code Ann. § 11-1-58. All of the defendants timely filed answers to the complaint. Thereafter, on or about May 11, 2005, Omar Nelson, Esq., counsel for Appellant, filed his certificate of consultation, well within the statute of limitations. R. at 33. Out of an abundance of caution, Omar Nelson, Esq. filed a motion for leave to amend the complaint to attempt to cure any deficiencies under the statute. Appellee filed his response to the motion for leave to amend as well as a motion to dismiss. On October 24, 2005, both the motion to dismiss and the motion for leave were brought up for hearing. On April 2, 2007, nearly six (6) months after both motions were heard and after the statute of limitations had run, the trial court granted Appellee's motion to dismiss with prejudice. R. at 183.

In the case *sub judice*, Appellant contends that the trial court's grant of Appellee's motion to dismiss with prejudice was improper for several reasons. First, where a dismissal is granted for noncompliance with the statute, the dismissal must be without

prejudice and/or the plaintiff must be afforded an opportunity to cure the defect. It is wholly unfair to allow a dismissal with prejudice where the error is so minute and inconsequential to the merits of the case. Further, Miss. Code Ann. § 11-1-58(1) does not state that the dismissal shall be with prejudice. Miss. Code Ann. § 11-1-58(1)(b) states in part, "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." In the absence of any language in the statute as to the type of dismissal, Appellant argues that the litigant should be given the benefit of a dismissal without prejudice. "Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases." *Wallace v. Jones*, 572 So.2d 371, 376 (Miss. 1990) (citing *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir. 1982)). "In cases where the plaintiff has 'imply jumped the gun in filing suit,' we should afford them the opportunity to meet the requirements of Section 11-1-58, without depriving them of a cause of action. *Comty. Hosp., v. Goodlett*, 2007 Miss. LEXIS 528 (September 20, 2007) (dissenting opinion). By reading a remedy into the statute that does not exist, our Court fail to adhere to the tenets of strict construction and seeks to legislate a remedy which the Court itself has rejected as harsh and extreme. *Dinet v. Gavagnie*, 948 So.2d 1281, 1285 (Miss. 2007) ("dismissals should be granted only when less drastic alternatives have been considered and such lesser sanctions would not serve the best interest of justice")(citing *Wallace*, 572 So.2d at 376-77). Appellant asserts that the trial court should have afforded the Appellant a reasonable opportunity to cure the statutory defects prior to dismissing the instant action with prejudice.

Appellant argues that filing a lawsuit for medical negligence without a certificate of consultation should not be fatal where (i) this Court had not yet addressed this issue; (ii) the certificate was filed shortly after the complaint was filed; (iii) a motion for leave to amend the complaint to attempt to attach the certificate with the complaint; and (iv) any prejudice to the defendants was minimal at best. Appellant attempted to cure the defect by filing a motion for leave to amend her complaint which the trial court heard five (5) months after it was filed. After Appellant filed her motion for leave to amend, counsel for the Appellee and other defendants filed their motions to dismiss. Then, nearly six (6) months after the hearing, the trial court granted Appellee's motion to dismiss with prejudice.

This Court now requires strict compliance in examining whether the requirements of a statute have been satisfied. *Caldwell*, 956 So.2d at 891; *Walker*, 931 So.2d at 588-89. However, the instant case is distinguishable from *Caldwell* and *Walker* in that before the statute of limitation had run, counsel for Appellant in the instant action filed the certificate of consultation. Further, out of an abundance of caution, counsel for Appellant filed a motion for leave to amend the complaint. Unlike the holdings in *Caldwell* and *Walker*, Appellant's counsel make all reasonable efforts to cure the statutory defect. Essentially, after reasonable efforts have been made to cure the defects under Miss. Code. Ann. § 11-1-58, a dismissal with prejudice is wholly inappropriate where the error is totally harmless and unintentional. Counsel for Appellant made reasonable efforts to ensure that the letter and the spirit of the statute were followed so as not to prejudice these defendants.

Appellant respectfully submits that Miss. Code Ann. § 11-1-58(1)(a) was never designed to bar valid claims, nor to trump the constitutional guarantees of the federal and state constitutions. Further, the statute in question was designed and drafted by the Mississippi Legislature to control a perceived problem regarding medical negligence cases. Appellant submits that the statute in question was specifically created to filter out possibly non-meritorious claims. However, the spirit of Miss. Code Ann. § 11-1-58 should not be strictly construed so as to bar a wholly meritorious claim due to a technical failure on the part of an attorney.

This argument is eloquently captured by Justice Oliver Diaz, Jr. writing for the dissent in *Walker*. *Id.* at 895-897. Justice Diaz writes, “[f]or ‘a cause of action is a species of property protected by the *Fourteenth Amendment’s Due Process Clause*.” (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265 (1982)) *Id.* The dissent proceeds by declaring, “[u]nder the majority’s interpretation of the statute at hand, the Caldwells are denied a right to pursue their claims without due process [of law].” *Id.* As an alternative to barring a litigant’s right to his day in court, Justice Diaz suggest following the California system which subject attorneys to sanctions for failure to comply with technical matters. Also, Justice Diaz notes that an exception for good faith errors should be made so as to prevent such a harsh result when an attorney can demonstrate that the omission of a certificate was simply a mistake. Justice Diaz writes:

I remain determined that out of caution, out of respect for the rights of Mississippians, we should not default to barring claims. Instead, we should always defer to the federal and state constitutional rights of Mississippians that grant and protect their access to the court system. These constitutional rights trump all lesser statutes which would purport to bar citizens from a day in court.

Id. at 897

Appellant submits that this case should be allowed to proceed inasmuch as any prejudice claimed by the Appellee was minor and inconsequential at best. Further, any prejudiced alleged by the Appellee could certainly be resolved by the trial court during the proceedings. Appellant believes that a dismissal with prejudice of the case *sub judice* would result in a disproportionate sanction for the alleged procedural defect. Because of this, Appellant believes that the statute in question infringes upon her constitutional rights and should be reviewed by this Court under strict scrutiny. The rights to a jury trial and access to the court system of the State of Mississippi are fundamental rights and should be reviewed accordingly. See *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1011 (Miss. 2004) (restrictions on First Amendment-guaranteed speech are reviewed with strict scrutiny); *Associated Press v. Bost*, 656 So.2d 113, 117 (Miss. 1995) ("Strict scrutiny review has also been applied when a statute infringes upon a fundamental right"); *Doe v. Doe*, 644 So.2d 1199, 1210 (Miss. 1994) (parents' right to raise children is fundamental and any deprivation is reviewed with strict scrutiny); *Miss. H.S. Activities Ass'n, Inc. v. Coleman*, 631 So.2d 768, 774 (Miss. 1994) (noting that the right to travel is fundamental and restrictions are reviewed with strict scrutiny).

Appellant respectfully submits she has a property interest in this cause of action which is protection under both state and federal constitutions. To this end, it is incumbent upon this Court to protect the constitutional guarantees afforded to Mississippi litigants seeking to have their day in court.

B. AFFIRMATIVE DEFENSES

Pursuant to Rule 12(b) of the Mississippi Rules of Civil Procedure:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

Id. Essentially, Rule 12(b) requires a party to present affirmative defenses early on in the litigation. Appellant contends that the Appellee failed to assert the affirmative defense of failure to comply with Miss. Code Ann. § 11-1-58 as required by Rule 12(b). To this end, Appellee effectively waived the right to assert failure to comply with the statute as an affirmative defense.

On or about May 6, 2005, Appellee filed his answer and affirmative defenses to Appellant's complaint. R. at 22 *et. seq.* In his answer, Appellee sets forth his first affirmative defenses and labeled the first paragraph as "FIRST DEFENSE / MOTION TO DISMISS." R. at 22. Further, Appellee stated under this heading, "Plaintiffs have

failed to comply with the requirements of the medical malpractice reform laws passed in 2002 and 2003 and their complaint is therefore subject to summary dismissal.” R. at 22. Appellant argues that such a vague, amorphous and ambiguous reference to “malpractice reform laws passed in 2002 and 2003” certainly does not equate to a proper assertion of an affirmative defense under Rules 8(c) and 12(b) of the Mississippi Rules of Civil Procedure. In his answer, Appellee fails to effectively assert (i) the name of the specific defense asserted; (ii) the statute name and/or number wherein he alleges Appellant failed to comply with; (iii) the nature of such deficiency; and (iv) when this deficiency occurred. Our Courts have routinely held that affirmative defenses must be asserted in the answer to the complaint and must be proven at trial. *Merchants & Planters Bank v. Williamson*, 691 So.2d 398, 422 (Miss. 1997); *Walls v. Swilley*, 562 So.2d 1252, 1258 (Miss. 1990).

On or about May 25, 2005, Appellant filed her motion for leave to amend her complaint. R. at 37. Appellee waited until after Appellant filed her motion to assert its “renewed motion to dismiss.” R. at 176. Realizing that the alleged assertion in his answer was ineffective pursuant to Miss. R. Civ. P. 8(c) and 12(b), Appellee brought the issue before the trial court again via a separate pleading. In paragraph 2 of his “renewed motion to dismiss,” Appellee states,

Defendant Reid filed his Answer and Defenses on May 6, 2005, raising as his “First Defense/Motion to Dismiss” that Wimley’s Complaint “failed to comply with the requirements of the medical malpractice reform law passed in 2002 and 2003” and was “therefore subject to summary dismissal.” One of the reform laws passed in the 2002 extraordinary legislative session was the expert consultation certificate required when filing a complaint, Miss. Code Ann. § 11-1-58.

R. at 176. Appellant submits that this renewed motion was the first time that Appellee effectively raised the affirmative defense of failure to comply with the statutory requirements of Miss. Code Ann. § 11-1-58. Certainly, Appellee did not raise this affirmative defense by using such broad and vague language described above. Considering this, Appellant submits that the Appellee had an affirmative duty to assert this affirmative, procedural defense during his answer. Inasmuch as this affirmative defense was not asserted in his answer, Appellee waived this defense; thereby making the trial court's dismissal of the case *sub judice* improper.

CONCLUSION

The trial court's grant of dismissal was erroneously granted in the instant matter. Appellant contends that where a dismissal is granted for noncompliance with the statute, the dismissal must be without prejudice and/or the plaintiff must be afforded an opportunity to cure the defect within the statute of limitations. Upon discovering the defect, counsel for the Appellant made all reasonable efforts to cure the defect in a reasonable fashion. Further, Appellant contends that Appellee never properly asserted failure to comply with the statute at issue in his first responsive pleading. Vague and amorphous references to a number of statutes passed by the Mississippi Legislature over a two (2) year period certainly does not rise to a proper assertion of an affirmative defense. Further, Appellant submits it was never the intent of the Mississippi legislature to use Miss. Code Ann. § 11-1-58 (2004) to prevent or deny meritorious claims. The reasonable interpretation of the legislative intent would clearly lend itself toward allowing meritorious claims like the case *sub judice* to proceed to trial; rather than being


dismissed due to alleged procedural deficiencies. Therefore, the lower court's grant of dismissal should be reversed and the case should be remanded for trial.

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

CHARLIE DOYLE WIMLEY, individually
and on behalf of all Wrongful Death
Beneficiaries of Jeanette Doyle, Deceased

By: 
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CERTIFICATE OF SERVICE


The undersigned counsel for the Appellants certifies that he has this day mailed a true and correct copy of the foregoing to the following:

Honorable Ashley Hines
Circuit Court Judge
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So certified, this the 10th day of October, 2007.


DENNIS C. SWEET, III