

**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

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INTRODUCTION

Mississippi Code Annotated § 11-1-58 is unconstitutional because it violates the Separation of Powers Doctrine by instituting procedural rules which are in direct conflict with the Mississippi Rules of Civil Procedure. Mississippi Rules of Civil Procedure, Rule 8(a)(1) only requires the plaintiff to submit a “a short and plain statement of the claim” when filing a civil action. Section 11-1-58 creates an additional procedural rule which requires attorneys in medical malpractice actions to attach a certificate of consultation to the complaint before filing a lawsuit against a physician or health care provider.

Plaintiffs re-adopt each argument presented in their original brief filed with this Court, and all additional arguments set forth herein.

ARGUMENT

I. The Separation of Powers Doctrine and the Powers of the Judiciary are Set Forth in the Mississippi Constitution.

Articles 1 and 6 of the Mississippi Constitution of 1890 address the role of the judiciary and the constitutional powers bestowed upon it. In each of these articles the drafters and those that have revised the Constitution since that time set forth an unambiguous pronouncement of the authority vested in the Mississippi Supreme Court.

A. The Separation of Powers Doctrine is Explicitly Provided for in the Constitution and Must Be Adhered to by the Legislature.

The Separation of Powers Doctrine, memorialized in Miss. Const., Art. I, §§ 1 and 2, was meant to prescribe limitations on the power of each of the three co-equal governmental branches. The Doctrine serves to ensure that each body refrains from encroaching upon the authority of the other. The legislative history of the Constitution

illustrates that the drafters of the 1890 version intentionally deleted a single phrase from the 1832 and 1869 Constitutions that questioned the strict mandate of the separation of powers. See, *Alexander v. State By and Through Allain*, 441 So. 2d 1329 (Miss. 1938).

The United States Supreme Court spoke on the significance of the separation of powers in *O'Donoghue v. United States*, 289 U.S. 516 (1932). The case concerned whether the Congress of the United States or the United States Constitution governed the salaries of judges in the District of Columbia. The Court stated:

“This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital ... namely, to preclude a commingling of these essentially different powers of government in the same hands ... If it be important thus to separate the several department of government and restrict them to the exercise of their appointed powers, it follows ... that each department should be kept completely independent of the others.” *Id.* at 530.

A strict mandate of the Doctrine prohibits the legislative branch from enacting laws that diminish the power given to the judiciary by the Constitution.

Hall v. State of Mississippi, concerned the admissibility of testimony allowed by state law, but not permissible under the hearsay evidence rules adopted by the Court. 539 So. 2d 1338 (Miss. 1989). The Court stated, “What is important to remember is that this Court’s rule-making power is a function of our constitution’s command that the three great governmental powers be separate.” *Id.* at 1345. It logically follows that if legislative enactments violate the Separation of Powers Doctrine on their face due to a direct conflict with the rules, then those laws are per se unconstitutional and thus void.

B. §144 of the Mississippi Constitution Grants the Supreme Court the Authority of a Co-equal Branch of Government.

Article 6, § 144 of the Mississippi Constitution of 1890 clearly states, “The judicial power of the State shall be vested in a Supreme Court ... as ... provided for in

this Constitution.” These judicial powers include the authority to hear and adjudicate cases before the court, instituting methods to efficiently manage the state’s court system, and promulgating the procedural rules of the court.

Matthews v. State, is one of many cases interpreting Miss. Const. Art. 6, § 144. 288 So. 2d 714 (Miss. 1974). See, for example, *Ivy v. Merchant*, 666 So. 2d 445 (Miss. 1995); *Glenn v. Herring*, 415 So. 2d 695 (Miss. 1982); *Brown v. Water Valley*, 319 So. 2d 649 (Miss. 1975). The Court’s decision made it abundantly clear that only this Court has the authority to adopt procedural rules governing the courts of the state. “The inherent power of the Supreme Court to promulgate procedural rules for the efficient disposition of its case load stems from the *fundamental constitutional precepts of separation of powers* and the vesting of judicial powers in the Courts.” *Matthews*, 288 So. 2d at 715. (Emphasis added.) The *Matthews* court added that the statute would be “considered a suggestion,” further reasserting that the Court’s authority to conduct the business of the judiciary could not be usurped by legislation, despite the legislatures good intentions. *Id.*

While the sole power to adopt rules is vested in the Court, as per the edicts of the Constitution, this Court has demonstrated that it will adopt procedural rules created by statute whenever possible. It is only when those rules proposed by the legislature are, “determined to be an impediment to justice or an impingement upon the constitution” that they will not be followed by the Court. *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004) (quoting, *Newell v. State*, 308 So. 2d 71 (Miss. 1975).

II. The Mississippi Supreme Court is the Sole Governmental Body Able to Promulgate and Adopt Procedural Rules for the Courts.

Section 11-1-58 was enacted by the Mississippi Legislature in October 2002 and went into effect on January 1, 2003 along with the other provisions of the tort reform act. Because the act is relatively new, § 11-1-58 is one of the least litigated provisions of the Mississippi Code with only five cases citing it.¹ Since none of the cases citing § 11-1-58 have addressed its constitutionality, and thus are not on point, this is an issue of first impression for this Court.

A. The Mississippi State Legislature Does Not Have the Authority to Create Procedural Rules which Conflict with the Rules Promulgated by the Court.

The seminal case in Mississippi Supreme Court jurisprudence relating to the Court's inherent power to create rules of procedure is *Newell v. State of Mississippi*, 308 So. 2d 71 (Miss. 1975). *Newell* dealt with Miss. Code Ann. §§ 11-7-155 and 99-17-35, two statutory restrictions upon judges imposed by the state legislature regarding jury instructions in criminal proceedings. The Court's decision described the procedural laws at issue in *Newell* as "legislative suggestions."

While the Court noted that it would give some deference to the legislature whenever possible, the holding of *Newell* was in the Court's novel announcement that, "The phrase 'judicial power' in section 144 of the Constitution includes the *power to make rules of practice and procedure*, not inconsistent with the Constitution, for the efficient disposition of judicial business." (Emphasis added.) (Quoting, *Southern Pacific Lbr. Co. v. Reynolds*, 206 So. 2d 334, 335 (Miss. 1968)). See also, *Davis v. Nationwide Recovery Serv.*, 797 So. 2d 929 (Miss. 2001) (finding that the Court has the power to

¹ It is important to note that none of the five cases that cite § 11-1-58 speak to its constitutionality and thus are not on point for this analysis. Of the five decisions, the Mississippi Court of Appeals decision in *Nelson v. Baptist Memorial Hospital-North Mississippi, Inc.*, has thus far been the only court to hold that the failure to file a certificate of consultation was not so egregious as to warrant dismissing the case with prejudice. 972 So. 2d 667 (Miss. App. 2007).

adopt appellate rules and that those rules are to be followed over statutes to the contrary); *Bolton v. State*, 643 So. 2d 942 (Miss. 1994) (rejecting the recommendations of the Mississippi Judicial College by stating that it is the prerogative of the Supreme Court alone to promulgate and adopt rules of procedure and practice).

Newell and its progeny, ranging from the Mississippi lower trial courts to the United States Court of Appeals for the Fifth Circuit, have established that the Mississippi Supreme Court is the sole promulgator of procedural rules for the Court. See, *Tighe v. Crosthwait*, 665 So. 2d 1341, 1347 (Miss. 1995) (finding, *inter alia*, that the Mississippi Supreme Court has “inherent power... for the fair administration of justice.... [and] the promulgation of rules....” Even the Fifth Circuit Court of Appeals cited the *Newell* decision in *Jordan v. Watkins*, a Mississippi capital case where the petitioner appealed the procedures used by the state trial judge when imposing the death sentence. 681 F. 2d 1067 (5th Cir. 1982). The Court of Appeals held that, “the Mississippi Supreme Court has ‘inherent power to prescribe rules of procedure to facilitate the administration of justice in (Mississippi) courts.’” *Id.* at 1080.

Newell further notes, “no citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield.” *Newell*, 308 So. 2d at 77. Section 11-1-58, as enacted by the Mississippi Legislature, is a procedural law in that it mandates a process every attorney must follow before being able to bring a cause of action for medical malpractice. This is precisely the kind of procedural rule that *Newell* cautions against since procedural rule making by the Legislature that “clashes” with the Court’s rules is unconstitutional.

B. The Mississippi State Legislature Has Recognized Through Its Own Statute the Supreme Courts Authority to Promulgate Procedural Rules for Itself.

Miss. Code Ann. § 9-3-61, originally adopted by the legislature in 1975, sets forth the authority of the Supreme Court to promulgate rules:

“As part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals....”

While the title of this act, “General rule-making power vested in Supreme Court” seems self-explanatory, for several years the legislature has made it its prerogative to ignore its own law and to take on this authority by itself.

1. Repealed Laws of the Legislature which Conflicted with the Rules Promulgated by the Court.

In 1981, this Court adopted the Mississippi Rules of Civil Procedure, effective January 1, 1982. With the adoption of these procedural rules of the Court, many previous laws enacted by the legislature were deemed unconstitutional since they did not afford deference to the judiciary to promulgate their own procedural rules. Since that time, the legislature has repealed several procedural laws it enacted that did not adhere to the Courts rules, thus violating the Separation of Powers Doctrine.

In 1991, the legislature repealed Miss. Code Ann. § 13-1-9 which mandated Circuit Judges to instruct grand juries in the treatment of prisoners. This law was clearly procedural insofar as it interfered with how a Circuit Judge conducted business in his courtroom. In 1996, the legislature was forced to repeal Miss. Code Ann. § 9-3-71 which attempted to require the judiciary to submit procedural rules it created for itself to the

legislature for prior approval. In 1998, the legislature repealed Miss. Code Ann. § 9-3-70 which would have mandated a review of proposed rules and changes to the rules. Together, these laws which were enacted 15 and 17 years, respectively, after the Court adopted the Mississippi Rules of Civil Procedure would have given no effect to any rules promulgated by the Court that the legislature did not first approve of.

This Court held in the case of *Franklin Collection Serv. v. Kyle*, that the statute at issue in that case, Miss. Code Ann. § 13-1-21, did not apply because it was superseded by the Mississippi Rules of Evidence, which the Court promulgated, adopted, and made effective on January 1, 1986. 955 So. 2d 284 (Miss. 2007). All of the above-mentioned legislative enactments attempted to create laws that overstepped the boundaries of the authority given to the legislature by the Mississippi Constitution. This pattern of the legislature enacting laws that do not respect the province of the judiciary in terms of allowing this co-equal branch of government to promulgate its own rules explains why many of its laws have been repealed.

III. Federal Courts and Other Jurisdictions Have Held Similar Laws Invalid Insofar as they Conflict with the Rules.

Several jurisdictions in the past few decades have adopted some form of certificate or expert screening requirement to stem the effects of frivolous tort litigation. See, for example, Colo. Rev. Stat. § 13-20-602; Fla. Stat. ch. 766.203(2); Ga. Code Ann. § 9-11-9.1; Ill. Rev. Stat. ch. 110, para. 2-622(a)-(g); N.J. Stat. Ann. § 2A:53A-27 et seq; N.D. Cent. Code § 28-01-46. None of these jurisdictions, however, have examined the issue of the constitutionality of these procedural legislative enactments in terms of whether they violate the Separation of Powers Doctrine.

Many federal courts have held that statutes meant to limit tort actions that require plaintiffs to affix certain materials to their complaints are in conflict with the Federal Rules of Civil Procedure and thus are invalid.² These court procedures enacted by state legislature's conflict, most often, with Fed. R. Civ. P. 8 which only requires pleadings to contain "a short and plain statement." See, *Gates v. L.G. DeWitt, Inc.*, 528 F. 2d 405 (5th Cir. 1976) (finding that a Georgia law that required plaintiffs to submit a reproduction of their insurance policy with their complaint conflicted with Fed. R. Civ. P. 8).

Similarly, Mississippi Rules of Civil Procedure, Rule 8(a)(1), requires "a short and plain statement of the claim." As this Court wrote when it promulgated the Mississippi Rules of Civil Procedure, "in the event of a conflict between these rules and any statute or court rule previously adopted *these rules shall control.*"³ (Emphasis added.) It logically follows that any laws enacted by the legislature requiring anything more than what is required by M.R.C.P. 8(a)(1), such as the certificate of consultation required by § 11-1-58, that conflict with the rules adopted by the Court are invalid.

The comments to Rule 8 specifically state that, "The purpose of Rule 8 is to give notice, *not to state facts and narrow the issues....*" (Emphasis added.) The comments further acknowledge that, "Rule 8 abolishes many technical requirements of pleadings...." A plain reading of M.R.C.P. 8(a)(1) and the comments to the rule make it abundantly clear that a plaintiff need *only* plead a short, plain statement of their claim—the rule *does not* mandate that any certificates or other documents be included. Thus, any

² See also, *Baird v. Celis*, 41 F. Supp. 2d 1358, 1361-62 (N.D. Ga. 1999); *Braddock v. Orlando Regional Health Care Sys. Inc.*, 881 F. Supp. 580, 583 (M.D. Fla. 1995); *Boone v. Knight*, 131 F.R.D. 609, 611 (S.D. Ga. 1990).

³ M.R.C.P. Supreme Court Order, adopted May 26, 1981.

law that prescribes otherwise is not only inconsistent with the M.R.C.P, but is beyond the scope of the legislature's constitutional authority.

CONCLUSION

The Separation of Powers Doctrine prescribed in the Mississippi Constitution of 1890, Art. I, §§ 1 and 2 clearly establishes the drafters intent to create three separate, but co-equal, branches of government. For this type of government to function properly there must be a system of checks and balances to prevent any single branch from procuring omnipotent power. Miss. Const. Art. 6, § 144 was written to authorize the power of the judiciary in its own sphere, yet the legislative branch attempted to usurp that authority by enacting Miss. Code Ann. § 11-1-58—a procedural law that conflicts with the Rules. Three decades after *Newell* it should be known to the legislature that this Court is the best authority to make procedural rules to ensure that they do not unconstitutionally conflict with the Rules.

Respectfully submitted, this the 10th day of July, 2008.

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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:

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