IN THE SUPREME COURT OF MISSISSIPPI

CASE NUMBER 2013-IA-02068 SCT

JOHN H. MALLET, M.D., STEPHEN C. JONES, M.D. AND BILOXI OBGYN CLINIC, P.A. **APPELLANTS**

vs.

AMY DYE AND TODD DYE **APPELLEES**

BRIEF OF APPELLEES

Interlocutory appeal from the Circuit Court of Harrison County, Mississippi First Judicial District

Oral Argument Requested

L. Christopher Breard, MSB No. 4352
BREARD LAW FIRM, LTD.
1317 B 24th Avenue
Gulfport, MS 39501
Telephone: 228-897-2222
Facsimile: 228-575-9218
Email: breardlawfirmltd@bellsouth.net

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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 the case. The presentations are made in order that the Justices of the Supreme Court and/or Judge of the court of appeals may evaluate possible disqualification or recusal:

John H. Mallet, Appellant

Stephen C. Jones, Appellant

Biloxi OBGYN Clinic, P.A.

George F. Bloss, III, Attorney for Appellants

Mary Margaret Kuhlmann, Attorney for Appellants

Jones Walker, L.L.P., Attorney for Appellants

Amy Dye, Appellee

Todd Dye, Appellee

L. Christopher Breard, Attorney for Appellee

Honorable Lisa Dodson, Circuit Court Judge

Mississippi State Medical Association, *Amicus*

Mississippi Hospital Association, *Amicus*

Mississippi Nurses Association, *Amicus*

Mississippi Dental Association, *Amicus*

Mississippi Health Care Association, *Amicus*

C.R. Montgomery, Attorney for *Amicus Curiae*

Whitman B. Johnson, Attorney for *Amicus Curiae*

Rebecca B. Cowan, Attorney for *Amicus Curiae*

/s/ L. Christopher Breard
L. Christopher Breard, MSB No. 4352
BREARD LAW FIRM, LTD.
1317 B 24th Avenue
Gulfport, MS 39501
Telephone: 228-897-2222
Facsimile: 228-575-9218
Email: breardlawfirmltd@bellsouth.net

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STATEMENT OF ISSUES

I: THE TRIAL COURT DID NOT ERR BY FAILING TO APPLY MISS. CODE ANN. SECTION 11-11-3 (3) AS WRITTEN, AS THE STATUTE DOES NOT ADDRESS ANY SITUATION WHERE THERE ARE MULTIPLE DEFENDANTS.

II: THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION OF DEFENDANTS TO SEVER AND TRANSFER THE CLAIMS AGAINST THEM TO THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY.

III: MISS. CODE ANN. SECTION 11-11-3 (3) IS AMBIGUOUS AND THE TRIAL COURT DID NOT ERR OR FAIL TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION.

IV: THE TRIAL COURT DID NOT ERR IN OVERRIDING THE MANDATORY LANGUAGE OF THE SPECIAL MEDICAL PROVIDER VENUE STATUTE, MISS. CODE ANN. SECTION 11-11-3 (3) BY APPLICATION OF RULE 82 (C) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

V: THE TRIAL COURT DID NOT ERR IN THE ANALYSIS AND APPLICATION OF THE RULE AGAINST "CLAIM SPLITTING" AND STATUTORY PURE APPORTIONMENT OF FAULT AS PART OF THE RATIONAL IN DENYING DEFENDANTS MOTION TO SEVER AND TRANSFER VENUE.

ORAL ARGUENT REQUESTED

STATEMENT OF THE CASE

Plaintiffs, Amy Dye and her husband Todd Dye, are adult resident citizens of Biloxi, Harrison County, Second Judicial District, Mississippi. Defendant, John H. Mallet, M.D. and Stephen C. Jones, M.D. are licensed practicing physicians who have offices in Biloxi, Harrison County, Second Judicial District, Mississippi. Dr. Mallet performed the outpatient surgery on Mrs. Dye at the Biloxi Outpatient Surgery and Endoscopic Center Inc. d/b/a Cedar Lake Surgery Center, 17720 B Medical Park Drive, Biloxi, Harrison County, Second Judicial District, Mississippi. Dr. Jones made phone calls to Plaintiffs and/or Dr. Ronnie Ali at the Emergency Room at Garden Park Medical Center in Gulfport, Harrison County, First Judicial District Mississippi from either the Second Judicial District of Harrison County or Ocean Springs, Jackson County, MS where he resides. (TR21; R156)

Defendant, Douglas P. McBride, M.D. is a licensed physician practicing emergency medicine at various emergency rooms throughout the State of Mississippi including Garden Park Medical Center a/k/a GPCH-GP, Inc. through Paragon Contracting Services, Inc. d/b/a TeamHealth Coastal. Dr. McBride resides at 282 Southern Circle, Gulfport, Harrison County, First Judicial District, Mississippi.

Defendant, Ronnie Ali, D.O. is a licensed practicing doctor of osteopathy practicing emergency medicine at various emergency rooms within the State of Mississippi and more particularly Garden Park Medical Center a/k/a GPCH-GP, Inc. located at 1500 Community Road, Gulfport, Harrison County, First Judicial District, Mississippi. Dr. Ali practices emergency room medicine through Paragon Contracting Services, Inc. d/b/a TeamHealth Coastal. Dr. Ali's home address is believed to be 11564 Stanton Circle, Gulfport, Harrison

County, First Judicial District, Mississippi.

Defendant Paragon Contracting Services, Inc., a/b/a TeamHealth Coastal (hereinafter referred to as "Paragon",) is a Mississippi Corporation in good standing that provides emergency room doctors, in this case Douglas P. McBride, M.D. and Ronnie Ali, D.O. to various emergency rooms including Garden Park.

Garden Park Community Hospital a/k/a GPCH-GP, Inc., (hereinafter referred to as "Garden Park",) is a duly qualified Mississippi Corporation providing hospital and emergency room services to the residents of South Mississippi and is located at 1500 Community Road, Gulfport, Harrison County, First Judicial District, Mississippi.

On or about the 8th day of July, 2011, Amy Dye had an outpatient laparoscopic bilateral tubal ligation, endometrial ablation, dilation and curettage, and hysteroscopy preformed at Cedar Lake Surgery Center by Defendant, John H. Mallet, M.D. At all times, Dr. Mallet was acting as owner/employee/agent of Biloxi OBGYN Clinic, P.A.

Plaintiffs alleged that Dr. Mallet negligently performed the laparoscopic procedure by blindly placing the blunt introducer and trocar which perforated the transverse colon of Mrs. Dye. It is further alleged that Dr. Mallet negligently failed to discover and repair the damage to the transverse colon during the procedure.

It is further alleged that Dr. Mallet negligently rushed through the procedure due to the fact he had a scheduled C-Section to be performed at 9:00am at Biloxi Regional Medical Center and therefore was inattentive during the procedure.

Later that day, which was a Friday, Mrs. Dye continued to have increasing abdominal pain. Plaintiffs called Dr. Mallet to report the problem, however they were unable talk with him because he was not on call. His associate and Defendant, Dr. Stephen C. Jones took the call from the Dye's.

At that time, Dr. Jones attributed the problem to expected benign consequence of the laparoscopic procedure. Dr. Jones only increased her pain medication, Lortab, by doubling it, but failed to request to see Mrs. Dye at that time.

Over the next twenty four (24) hours, Mrs. Dye continued to have increased pain and abdominal distension as opposed to a reduction of her symptoms. A reduction of pain and bloating from CO2 insufflation from a laparoscopic procedure is reasonably expected, absent complications from surgery. Mrs. Dye should have been getting better instead she was getting worse.

On Saturday, July 9th, 2011, due to the continued abdominal distention and pain, Plaintiffs called Dr. Jones twice since he was still the on call physician for Biloxi OBGYN Clinic, P.A. Dr. Jones prescribed a new pain medicine and reassured Mrs. Dye that her symptoms were normal after a laparoscopic procedure. He again failed to request to see her.

Mrs. Dye, at all times, followed the instructions of Dr. Mallet and Dr. Jones, taking the medications as ordered. Plaintiffs alleged on Saturday, July 9th, Dr. Jones negligently failed to offer or recommend a physical assessment and evaluation and failed to recognize that the continuing and worsening symptoms were a sign of a serious post-operative complication which reasonably would include perforation of the bowel and/or abscess formation.

By the next day, Sunday, July 10, 2011, Mrs. Dye's condition had further worsened with greater abdominal distension, pain, and now, blood in her stool. Mrs. Dye again contacted Dr. Jones, still the on call physician for Biloxi OBGYN Clinic, P.A. Mrs. Dye was, at that time, told if she believed her condition was severe enough she should go to the emergency room or she could wait until Monday to be seen at the Biloxi OBGYN Clinic. Dr. Jones again negligently failed to offer to personally exam Mrs. Dye relative to her continuing and increasing complaints or appreciate their significance. He also did not suggest to her which emergency room to use if she

needed one or the potential urgency of the situation.

Since Plaintiffs reside in the Woolmarket community, Mr. and Mrs. Dye chose to go to the nearest and most convenient hospital/ emergency room, which is Garden Park Medical Center. Upon arrival, Mrs. Dye had complaints of increased abdominal pain, nausea, blood in her stool and severe abdominal bloating.

Mrs. Dye was initially seen by a Garden Park nurse and nurse practitioner. Upon the initial examination, Mrs. Dye's bowel sounds were hypo active (reduced). There was bloating and abdominal tenderness noted, but there was no guarding noted in the chart. The nurses, nurse practitioner(s), and emergency room doctors failed to understand and appreciate Mrs. Dye's complaints that her condition was getting worse not better.

According to the records, Mrs. Dye was evaluated by physicians, Dr. Douglas T. McBride and Ronnie Ali, M.D. At all times, Dr. McBride and Dr. Ronnie Ali, D.O., were the employees and/or agents, real or apparent, of Garden Park and/or an agents, servants, and/or employees of Paragon.

While there was an evaluation performed to determine if there was blood in Mrs. Dye's stool, there was no rectal or vaginal examination performed to determine the presence of peritonitis or abscess, a known surgical complication. The failure to conduct such examination was negligence, particularly in light of the CT scan findings performed at Garden Park. There was no definite evidence of an abscess according to the report. There was also a left pleural effusion and bibasilar atelectatic changes with consolidation at the lung base noted. The CT scan also showed a pneumoperitoneum (air in the abdomen) and multiple fluid pockets. The radiologists, however, recognized the possibility of a bowel perforation or infection which could not totally be excluded by his CT Scan. A close clinical follow up was indicated, including an additional CT evaluation.

The radiologists impression further could not rule of the possibility of developing infection given the multiple fluid pockets as seen on one of the films. It is recorded that Dr. Ali discussed the matter with Dr. Jones over the telephone and Mrs. Dye was to follow up first thing in the a.m. at the Biloxi OBGYN office.

Plaintiffs further allege Dr. Ali either failed to fully appreciate and inform Dr. Jones of the significance of Mrs. Dye's clinical symptoms, lab results, and CT Scan findings or Dr. Jones negligently failed to appreciate the severity of the condition. Dr. Jones was negligent in not conducting a personal examination that evening and/or admitting Mrs. Dye into the hospital for further evaluation and follow up. Dr. Jones and Dr. Ali were also negligent in their communications, assessments and recommendations.

It is further alleged Dr. McBride and/or Dr. Ali were negligent in failing to fully examine, assess, and appreciate Mrs. Dye's deteriorating condition as a severe post-operative complication and failed to insist on an in person gynecology and/or surgical consult and/or immediately recommend hospitalization for further evaluation of possible bowl perforation and abscess formation.

Plaintiffs further allege the nurses and/or nurse practitioner(s), employees of Garden Park Hospital, negligently failed to take an adequate history, to fully exam Mrs. Dye and fully advise Dr. McBride and Dr. Ali of Mrs. Dye's complaints. In the alternative, Dr. McBride and Dr. Ail relied too heavily on the nurses and/or nurse practitioner(s) as opposed to taking their own history and conducting their own examination and evaluation of Mrs. Dye's worsening complaints. There was a negligent lack of supervision of nurses/nurse practitioner(s) on behalf of Dr. McBride and Dr. Ali.

Mrs. Dye was in the emergency room for approximately 10 hours and through a shift

change. This shift change may have contributed to her misdiagnosis. Garden Park negligently failed to have reasonable protocol established in cases, such as this, for the transfer of information during a shift change.

Mrs. Dye was discharged from Garden Park on pain medicines. While in the emergency room, Mrs. Dye was given pain medications. These pain medications may have masked her symptoms and made it seem as though she was getting better when actually she was not. Mrs. Dye's condition was deteriorating and not getting better. The real prospect of a bowel perforation was being negligently overlooked, *as* she should have been getting better and not worse.

The following day, Monday, July 11, 2011, Mrs. Dye returned to Biloxi OBGYN Clinic and saw Dr. Mallet. She still had continued complaints of abdominal pain and increasing abdominal distention, to the point where she appeared pregnant and about to give birth. Dr. Mallet admitted Mrs. Dye into Biloxi Regional Medical Center for observation with a diagnosis of post-operative ileus. However, this was negligence and a misdiagnosis. Dr. Mallet was negligent in not recognizing the symptoms displayed by Mrs. Dye at that time were most consistent with and most certainly associated with a post-operative complication secondary to a perforated bowel and/or abscess formation and not a mere post-operative ileus. Time was of the essence to diagnose this serious post-operative complication.

Dr. Mallet was also negligent in not ordering an immediate surgical consult and further abdominal radiological work up. Rather, Dr. Mallet negligently waited until the next morning, Tuesday, July 12, 2011, before ordering an abdominal CT scan and subsequently ordered a surgical consult by Dr. Frank Martin. The CT scan was performed on Tuesday, July 12th and showed increased free air and fluid levels throughout the abdomen and pelvis. A bowel perforation still could not be ruled out.

Dr. Martin ordered a culdocentesis. Dr. Mallet performed the culdocentesis. He noted a moderate amount of strong smelling fluid was produced evidencing the severity of the problem. Having preliminary diagnosed an acute surgical abdomen, Dr. Martin proceeded to perform an exploratory laparotomy. He found a one centimeter perforation in the transverse colon, which he immediately repaired. Dr. Martin further found fecal material, peritonitis and an abscess formation. Due to the nature and extent of the contamination found, the wound was left open and was not sutured closed. A wound VAC (vacuum assisted closure) was placed instead and Mrs. Dye was placed in a medically induced coma.

Postoperatively, Mrs. Dye suffered from pneumonia which progressed to respiratory failure requiring ventilation assistance. Over the course of the next several days, Dr. Martin was forced to re-operate on Mrs. Dye some seven (7) times with the wound unable to be surgically closed. On July 22, 2011, after offering all he felt reasonably capable of offering, Dr. Martin referred Mrs. Dye to Ochsner Hospital for further surgical and respiratory treatment and consultation.

On July 27, 2011, Mrs. Dye was weaned from the ventilator and brought out of her medically induced coma. She realized then that she had been moved from Biloxi Regional to Ochsner Hospital's Critical Care Unit. Mrs. Dye has undergone numerous corrective abdominal and bowel surgeries.

To this date, Mrs. Dye's abdominal incision and fistula still has not healed and remain open and draining, although her ostomy was reversed on December 2013. There is no guarantee, at least at this time, that the surgical procedures will close her wound and resolve her problems, as she continues to experience recurrent abdominal infections.

Plaintiffs, herein, would show that the failure to meet the standard of care and the

negligence of Defendants, Dr. Mallet. Dr. Jones, and their employer Biloxi OBGYN Clinic, P.A. as well as Dr. McBride and Dr. Ali and their employer Paragon and Garden Park, individually and/or collectively, including its nurses and nurse practitioner(s), was the sole proximate cause or proximate contributing cause of the severe and permanent damages alleged herein by Plaintiffs. Had the Defendants acted reasonably Mrs. Dye's severe and permanent injuries, to a reasonable degree of medical certainly, would have been prevented.

Mrs. Dye was required to be on a ventilator and in a medically induced coma as previously described herein and such may be required again. Mrs. Dye has been forced to undergo well over a dozen operative procedures in an effort to repair her open and draining abdominal wound and fistula, as a result of the negligence of the Defendants. She continues to have significant medical and surgical problems. Mrs. Dye's wound/fistula has been draining causing embarrassment and painful skin irritation.

Mrs. Dye has further suffered from severe and extensive intra-abdominal adhesions which will have dire consequences for her in the future. She will never be able to undergo another laparoscopic procedure and she is at high risk for future small bowel obstructions, the need for further surgeries, and a shortened life expectancy, even if the most recent surgical procedure closes her gaping wound.

Mrs. Dye, at the time the Complaint was filed and as a result of Defendants, individually and collectively, had incurred over 1.5 million dollars in medical bills and further medical bills and surgeries are a certainly.

Mrs. Dye is employed at Keesler Air Force Base making $40,000.00 a year. The Defendant's negligence has caused her to miss a substantial amount of work and adversely affecting her wage earning capacities. She has lost substantial income and her future ability to

work is in doubt.

Suit was filed against the Defendants by the Plaintiffs in the Circuit Court in Gulfport, Harrison County, First Judicial, Mississippi, on May 20, 2013. Defendants sought transfer of venue and severance which the trial court correctly denied.

SUMMARY OF ARGUMENT

This case is about venue and severance. It is about a venue statute, Miss. Code Ann. Section 11-11-3 (3), created specifically for medical care providers who are sued for medical negligence, but it does not require joint medical tortfeasors from different counties or judicial districts to be tried in their respective venues. In such a situation where there are joint medical tortfeasors, if venue is good for one, venue is good for all.

The language of the statute is not clear and is ambiguous on this point. The rules of the statutory construction do apply, as the trial court found. The argument that the specific venue statute controls over the general venue statute does not apply to this case. Statutory language in this case does not trump the Rules of Civil Procedure. While, this is not a case about a wrongful death claim or the Wrongful Death Statute, the rationale behind not dividing the case, claim splitting, and apportionment of fault overrides the venue claims of the defendant.

While venue is generally a creature of the Legislature, it must be viewed in light of the Mississippi Rules of Civil Procedure and other long standing rules of venue. The venue statute in questions was enacted in response to Mass Tort Litigation forum shopping and not the routine medical malpractice case as the case *sub judice*.

The trial court did not commit error by failing to find Section 11-11-3 was clear and unambiguous on its face and in denying Defendant's Motion to Sever. The trial court did not commit error and applied the proper rules of statutory construction. The court did not fail to

recognize the legislative intent for the creation of the statute. Further, the trial court did not err in applying the proscription against splitting of claims and apportionment of fault as a part of its decision on the venue issue. Claim splitting or splitting of the case by severance defeats judicial economy and the rights of both the plaintiff and defendant. Apportionment of fault is sometimes handled with an absent defendant but it is an important issue to be considered in a case such as this. The defendants' ultimate goal is to divide and conquer, making the plaintiffs try their case twice, with an empty chair. All defendants and witness will have to take part in both trials at double the cost.

Finally the trial court did not employ flawed reasoning at the urging of the Plaintiffs and did not err in denying Defendant's Motion to Sever. The theory that "where venue is good for one, it is good to all," is applicable in this case where these are joint medical tortfeasors.

ARGUMENT

STANDARD OF REVIEW

ISSUE I: THE TRIAL COURT DID NOT ERR BY FAILING TO APPLY MISS. CODE ANN. SECTION 11-11-3 (3) AS WRITTEN, AS THE STATUTE DOES NOT ADDRESS ANY SITUATION WHERE THERE ARE MULTIPLE DEFENDANTS.

The Trial Court when analyzing Section 11-11-3 (3) noted:

> "…..there is no disagreement Section 11-11-3 (3) provides that an action against a physician or a medical provider is to be brought in the county in which the alleged act or omission occurred. The Statute however does not address any situation in which there are multiple medical defendants…nor does it address any situation in which a doctor may have his office in one county and admit someone to a hospital in another county and be alleged to have committed act of malpractice in both locations against the same patient. That being the case the court has to look beyond the Statute to determine what our legislature may have been thinking and what would be appropriate venue is situations of that nature." (TR26-27)

Section 11-11-3 (3) cannot be said to be unambiguous in this situation. As this court has

already found in *Rose v Bologna,* 942 So. 2d 1287, 1290 (Miss 2006): "…it is equally clear that the wrongful death statute, Section 11-7-13, was not considered concerning events and multiple defendant doctors such as what we have before us now, when these changes various statute were made." This is clear evidence of ambiguity. The Trial Court correctly considered, in light of previous and subsequent case law, the same should be said for multiple medical defendants in non-wrongful death cases as well.

The Mississippi Supreme Court in *Adams v Baptist Memorial Hospital Desoto* Inc. 965 So. 2d 652 (Miss 2007) found it was improper to sever a wrongful death action against Gold Strike Casino, where the fall occurred, and the subsequent treating physicians, who were charged with medical negligence in treating the injuries. The court held:

> "Severance of this action is also inconsistent with Mississippi Code Annotated Section 85-5-7 (1999) which addresses the limitations of joint and several liability for damages caused by two or more persons; contribution between joint tort-feasors and determination of percentage of fault. Adams correctly asserts in his brief that separate trials would create, and almost certainly would result in, inconsistent holdings, including apportionment of fault. **This analysis is applicable not only in wrongful death actions, but in other suits as well, because splitting the cause of action is prohibited by prior decisions of this Court and most certainly would lead to inconsistent verdicts by separate juries.** (Citation omitted) *Adams 655* (emphasis added)

The legal logic behind the Supreme Court's ruling remains solid today.

The Court in *Trustmark Nat'l Bank v ROXCO Ltd*, 82 So. 3d 573, 577 (Miss 2011) stated: "We will not engage in statutory interpretation if a statute is plain and unambiguous. However, statutory interpretation is appropriate if a statute is ambiguous or **is silent on a specific issue**." Id 577 (emphasis added) The statute in question is clearly silent on the venue for multiple medical defendants, as in the case *sub judice*.

The Court in *Lawson v Honeywell International, Inc*. 75 So 3d 1024, 1027 (Miss 2011) cited by the defense, states the well-recognized principal that:

> "In general a new statute will not be considered as reversing long established principals of law and equity **unless the legislative intent to do so clearly appears**. *Id 1039* "This Court" cannot..add to the plain meaning of a statute or pressure of the legislature failed to state something other than what was plainly stated" (Citations omitted) *Id 1030* (emphasis added)

The legislature did not clearly state the statute applied to joint medical tortfeasors of different counties that severance was required in such a case thus the court may not presume that it was the legislature's intent for such cases to be severed.

The Defendants assertion that *Adams v Baptist Memorial Hospital- Desoto Inc.*, 965 So. 2d 652 (Miss 2007) stands for the proportion that Section 11-11-3 (3) is clear and unambiguous is totally misplaced, particularly as it applies to the facts of this case. It is clear that the *Adams* court was **only** referring to the fact the medical venue statute Section 11-11-3 (3) would take priority over the general statute when dealing with medical and nonmedical joint tortfeasors. Such was the case in the medical malpractice wrongful death case of *Rose v Bologna*, 942 So. 2d 1287 (Miss 2006)

M.R.C.P. are relevant to the discussion of venue, since the court found *Rose* involved a M.R.C.P. 19 compulsory joinder case. It must be remembered the court in *Rose* stated only that M.R.C.P. 82 (c) and M.R.C.P. 20 did not apply to the facts of that joint tortfeasor medical malpractice wrongful death claim. Id 289 *Rose* was an M.R.C.P. compulsory joinder case. Therefore, M.R.C.P. 82 (c) must be considered relevant and controlling in case *sub judice*.

Defendants correctly state, in general terms, the allegations of negligence against the employees of Biloxi OBGYN Clinic, P.A., Dr. Mallet and Dr. Jones, as well as the emergency

department doctors at Garden Park at Gulfport, Dr. McBride and Dr. Ali, and Paragon who provided the emergency room physicians to Garden Park. However, the Defendants failed to set forth the allegations of the collaborative negligence of Dr. Ali. and Dr. Jones regarding the conversation they had about Mrs. Dye's condition on Sunday, July 10, 2011 as recorded in the emergency room record. It is alleged in Paragraph 15 of the Complaint,

> "Plaintiffs further alleged Dr. Ali either failed to fully appreciate and inform Dr. Jones of the significance of Mrs. Dye's clinical symptoms, lab results, and CT Scan findings or Dr. Jones negligently failed to appreciate the severity of the condition. Dr. Jones was negligent in not conducting a personal examination that evening and/or admitting Mrs. Dye into the hospital for further evaluation and follow up." (R 26)

There are clear allegations that the medical Defendants are joint tortfeasors combining in whole or in part to cause Plaintiffs injuries.

Section 11-11-3 of the Mississippi Code Annotated (revised 2004) addresses both general venue and venue in medical malpractice actions. Venue in Medical Malpractice actions is addressed in Section 11-11-3 (3) and states as follows:

> "Notwithstanding subsection (1) of this section, any action against a license physician...a hospital, or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of the standard of care shall be brought only in the county in which the alleged act or omission occurred.

Section 11-11-3 (3) does not say notwithstanding any other venue statute, statute or court rule. It only refers to subsection (1).

The statute goes further in addressing venue, considering the interests of justice and the convenience of the parties, as follows:

Section 11-11-3 (4) (a) states:

> "If a court of this state, on written motion of a party, finds that

> in the **interest of justice** and **for the convenience of the parties** and witnesses a claim or action would be more properly heard in a forum outside this state or **in a different county of proper venue within this state**, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, **the court shall give consideration to the following factors:**
>
> (i). Relative ease of access to sources of proof;
> (ii) Availability and cost of compulsory process for attendance of unwilling witnesses;
> (iii) Possibility of viewing of the premises, if viewing would be appropriate to the action;
> (iv) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;
> (v) Administrative difficulties for the forum courts;
> (vi) Existence in local interests in deciding the case at home; and
> (vii.) **The tradition deference given to the plaintiff's choice of forum**." (emphasis added)

Clearly, factors weighting against severance includes the interest of justice and the administrative difficulties for the forum court if the case is severed, as well as other factors, such as judicial economy and the tradition deference given to Plaintiffs choice of the venue forum. The interest of justice dictates there be but one medical negligence suit against these Defendants who are joint tortfeasors. Section 11-11-3 (3) does not require or authorize two, three, or more medical malpractices trials springing from the same general facts which combine to cause the injury to a Plaintiff such as Mrs. Dye.

The author of MS Practice Civ. Proc. Section 3:12 relating to Venue in Actions Against Health Care Providers" wrote:

> "Although the medical venue provision contained mandatory language regarding where claims against physicians "shall" be brought, the statute should not require that a plaintiff with a single claim against different physicians sue each physician in the county where that

> individual physician's act or omissions occurred. This would be cause a substantial fragmentation of actions, and wreak havoc on orderly judicial administration. Rejecting this approach in *Rose v Bologna*, [4] the court held that a plaintiff in a wrongful death action did not have to file three separate action (sic) against health care providers in order to sue defendant physicians in the separate counties where their care of the decedent occurred. Instead, the plaintiff could bring one action against all health care providers laying venue in a county that was proper for one. Although the court relied on the history of the wrongful death statute in reaching its conclusions, it seems that the rule would be the same if the malpractice action were not one arising from death. 1 MS Practice Civil Proc. Section 3:12 (2014)

Section 11-11-3 (3) is not all controlling regarding medical malpractice venue, as the law is clear; venue can be waived even under the 2004 Amendment. *Fredrick v Malouf*, 82 So. 3d 579, 583 (Miss 2012) Review of the trial court's ruling on venue is still based upon abuse of discretion. Id 583. The ability to waive venue and the use of the abuse of discretion by the court is additional evidence the mandatory language of Section 11-11-3 (3) is not unlimited.

Rule 82 of the Mississippi Rules of Civil Procedure covers Jurisdiction and Venue. Rule 82 (b) states as follows, "Venue of Actions. **Except as provided by this rule**, venue of all actions shall be as provided by statute." (emphasis added) Contrary to prior interpretations, the plain language of 82 (b), put in another way, states: **venue is provided for by statute, except as provided by this rule.** The rule could have also more clearly stated: "unless otherwise provided for by statute, venue shall be as provided by this rule." To read the rule any other way takes away any plain meaning of the language, "except as provided by this rule." The point being, Rule 82 places legitimate and reasonable restrictions and interpretations on venue statutes, as a part of the court's constitutionally mandated rule making authority and managing court activities in the interest of justice. Either the plain

meaning of the rule is constitutional or it's not and should be enforced accordingly.

Rule 82 (c) is the portion of the rule which is referred to under the "**except as provided by this rule**" language of 82 (b). Rule 82 (c) states, "Venue Where Claim or Parties Joined. Where several claims or parties **have been properly joined**, the suit may be bought in any county in which any one of the claims could properly have been brought...." There should be no doubt M.R.C.P. 82(c) takes precedence over the venue statute as the Supreme Court has rule making authority controlling actions in the courts and this has long since been the law in questions of venue. This would be particularly true when the question of venue is not clearly stated in Section 11-11-3 (3), as in the case *sub judice*. The parties **were properly joined in the original complaint** and therefore venue is proper for all in Harrison County, First Judicial District, Mississippi. (See M.R.C.P. 18 re Joinder of claims, M.R.C.P. 19 re Joinder of Persons for Just Adjudication and M.R.C.P. 20 re Permissive Joinder.)

Equally important in analyzing this issue is Rule 1 of the Mississippi Rules of Civil Procedure which relates to the scope of the rules. Rule 1 specifically states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."

The comments to Rule 1 state:

> "There probably is no provision in these rules more important than this mandate: It reflects the spirit in which the rules were conceived and written and in which they should be interpreted. **The primary purpose of procedural rules should be to promote the ends of justice**; these rules reflect the view that this goal can best be accomplished by the establishment of a single form of action, known as a "civil action," thereby uniting the procedures in law and equity through a simplified procedure that minimizes technicalities and places considerable discretion in the trial judge for construing the rules in a manner that will secure their objectives..."
>
> "The mandate in the final sentence of **Rule 1** is only one of a number of similar admonitions scattered throughout *the* rules **directing that the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice** and facilitates decisions on the

> merits, rather than determinations on technicalities...." (emphasis added)

The ends of justice demand venue not to be changed and there be no severance. Severance would cause judicial chaos and inefficiency, vastly increase the cost of the litigation, severely prejudicing Plaintiffs access to the courts, constitutional right to a jury by trial and likely result in conflicting rulings on the same facts.

The trial court noted correctly severance would require two separate trials, one in Biloxi, one in Gulfport, on the same evidence and on the same facts simply because the doctors wants to be tried either in Gulfport or Biloxi. This would not serve judicial economy especially when the statue is silent on severance. (TR29). This is particularly true under the facts of this case.

All of the arguments by the Defendants as to whether a more specific venue statue controls over a more general statute is misplaced irrelevant to the proceedings herein. There is nothing in the medical malpractice venue statutes that states joint medical tortfeasors are entitled to have their cases heard separately in different counties or in different judicial districts of the same county. A plain reading of the statutes shows severance was never even contemplated in that section. The court in *Rose v Bologna* recognized that such a severance and change of venue would violate the Mississippi Rules of Civil Procedure, the intent of other Venue Statutes, and the long standing principles of Mississippi law.

Mississippi Rules of Civil Procedure Rule 20 (A) addresses permissive joinder and states as follows:

> "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any

> right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action....

The comment to Rule 20 goes further to state, "The purpose of Rule 20 is to **promote trial convenience** and expedite the final determination of disputes, thereby **preventing multiple lawsuits**. (emphasis added). Multiple lawsuits based on identical facts is exactly what will happen if severance is ordered.

Mississippi Code 85-5-7 as amended 2004 deals with joint and several liability and states as follows in pertinent part:

> 85-5-7 (1) "As used in this section, "fault" means an act or omission of a person which is a proximate cause of injury or death to the other person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent." (emphasis added)
>
> 85-5-7 (4) states: "Joint and several liabilities shall be imposed on all who consciously or deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any persons held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.
>
> 85-5-7 (5) states: "In action involving joint tortfeasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tortfeasors is immune from damages.

Obviously the legislature intended for joint tortfeasors to have liability allocated in one action and recognized joint tortfeasors liability was to be considered in medical negligence cases. Forcing Plaintiff to try this medical malpractice action peacemeal, one case in Harrison County First Judicial District and one case in Harrison County Second Judicial District, does not serve the ends of justice and frustrates the ability of the court to handle and try joint tortfeasors in a single action and destroys judicial economy. Trying multiple malpractice cases against joint tortfeasors and determining the percentage of fault in severe cases will cause

chaos, prejudicial to the Plaintiffs. It would be impractical, costly and a judicial nightmare. Venue is proper and there should be no severance.

M.R.C.P. 82 (c) stands for the proposition that when venue is proper for one claim, it is proper for all. The Defendants cite *Rose v Bologna*, 942 So. 2d 1278 (Miss 2006) in an attempt to support their position for severance and separate trials. Plaintiff would point out that the Defendants are cites *dicta* to support their position when the court in *Rose* stated, "[B]ut for the fact that this is a wrongful death claim, the trial court **might** very well have been correct in transferring venue." (emphasis added) Id 1290 Regardless, the court in *Rose* ruled, despite the medical malpractice venue statute, the case could not be separated into three medical malpractice eases because it was a wrongful death claim. This is different from the *dicta* in the latter case of *Adams*. The court did **not rule** that M.R.C.P. 20 (a) and Rule 82 (c) would not be dispositive in the correct case, such as the case *sub judice*. It was ruled that those rules were not applicable in the *Rose* case because it involved a wrongful death. The *Rose* court stated, This is not a Rule 20 permissive joinder case nor a Rule 82 (c) case, but instead is a Rule 19 compulsory joinder case and clearly governed by Mississippi Code Ann. Section 11-7-13, which states that "there shall be but one (1) suit for the same death which shall be ensue for the benefit of all parties concerned." *Rose* at 1289 All factors in the case sub judice demand severance be denied and venue remain in the Harrison County, First Judicial District. While the case *sub judice* is not a wrongful death case, it does involve joint tortfeasors. Trying these suits separately would defeat the interests of judicial economy, ignore the Plaintiffs right to choose venue from multiple appropriate venues, cause the Plaintiffs to fragment their cause of action and in turn try two or more medical malpractice suits with one or more absent Defendants. Severance and splitting the cause of action would leave an empty chair due to absent Defendants and frustrate the ends of justice.

MS Prac. Civil Proc. § 3:2 (2014 ed.) analyzes venue for multiple defendants where venue is proper for one claim. It states:

> "Rule 82 (c) [1] announces a theme which is also woven throughout the statutes discussed below. In transitory causes of action, if venue is proper in a county for any party, then the action may be commenced in that county and venue is deemed proper for all other parties to the action regardless of whether venue would have been improper if such other parties had been sued alone."
>
> "The general circuit court venue statute, Mississippi Code Annotated Section 11-11-3, adds additional clarity regarding the legislature's intention where multiple plaintiffs join their claim in a single action [12] Section (2) of Section 11-11-3, which is effective in all action filed after September 1, 2004, provides:
>
> (2) In any civil action where more than one (1) plaintiff is joined, **each plaintiff shall independently establish proper venue**; it is not sufficient that venue is proper for any other plaintiff joined in the civil action. [13]
>
> The provision governs claims joined by multiple plaintiffs requires that each plaintiff establish the propriety of venue for his, her, or his or it claims. **Note, however that the provisions does not apply to claims by a single plaintiff against multiple defendants. In such cases, absent other statutory mandates, if venue is proper as to the claim against one defendant, it would be proper as to all defendants joined by a single plaintiff.** As is illustrated in Chief Justice Smith's opinion in *Rose v Bologna*, [14] this conclusion is necessary for orderly administration of courts. In *Rose*, defendant physicians in a wrongful death action sought a transfer of venue under the special venue provision for health care providers, [15] to the separate counties where the physicians examined the decedent. That transfer would have fragmented the wrongful death action into three separate actions against health care providers in different counties. Wisely, the court ignored the mandatory language of the medical venue statute. [16] The court found that the wrongful death statute provides that there can be only one action for wrongful death, and thus refused to force the plaintiff to litigate related claims in different counties. The court thus reinforced its rule that where venue is proper for one defendant is proper as to others, as long as the defendants are properly joined in the action." (emphasis added)

If the legislature wanted venue to be separately established for each defendant, they would have said so as they did for suits involving multiple plaintiffs.

MS Prac. Encyclopedia MS Law § 13:282 also deals with proper venue for one party or claim being proper for all, stating as follows:

'Rule 82 (c) provides that, in multi-party or multi-claim actions, if venue is proper for any one claim, it is proper for all claims. [1] Therefore, where venue is proper on a claim against any one defendant, venue is proper for all other defendants and claims in the action."

As argued above there are legally sound, practical, economical and fair reasons for this proposition.

Also of importance is M.R.C.P. 19 dealing with joinder of persons needed for just adjudication. Rule 19 (A) states as follows:

"Persons to be joined if feasible. A person who is subject to the jurisdiction of the court **shall** be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of action in his absence may

(i) as a practical matter impair or impede his ability to protect that interest or

(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." (emphasis added)

The comments to Rule 19 state: There are at least four main questions a court must consider when deciding a question of joinder under Rule 19, "First Plaintiffs interest in having a forum…" The fourth factor is

..... "…the interest of the courts and the public in complete, consistent, and efficient settlement of controversies".....

There is no precise formula for determining whether a particular nonparty must be joined under Rule 19 (a). The decision has to be made in terms of the **general policies to avoiding multiple litigation**, providing the parties with **complete and effective relief in a single action**, and protecting the absent persons from the **possible prejudicial effect of deciding the case without them**. Account also must be taken of whether other alternatives are available to the litigants. By its very nature, Rule 19 (a) calls for determinations that are heavily influenced by the facts and circumstances of individual cases." (emphasis added).

Certainly the interest of avoiding multiple lawsuits, litigating the same questions of law and facts and the fragmentation of Plaintiffs case against joint tortfeasors, favors compulsory joinder as was the case in the wrongful death action addressed in *Rose v Bologna*. There must be

no severance in this case.

Rule 42 of the Mississippi Rules of Civil Procedure deals with Consolidation; Separate Trials. M.RC.P. 42 (a) states;

> "(a) Consolidation. When actions involving **a common question of law and fact** are pending before the court, it may order a joint hearing or trial of any matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning proceeding therein as may tend to avoid unnecessary costs or delay
>
> (b) Separate Trials. The court, in furtherance of convenience **or to avoid prejudice**, or when separate trials **will be conducive to expedition and economy**, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate, the right of trial by jury as declared by Section 31 of the Mississippi Constitution of 1890." (emphasis added).

Clearly Plaintiffs right to trial by jury and access to the courts, judicial economy, avoidance of unnecessary delay, avoidance of multiple trials on the same facts, prejudice and duplication of costs demands consolidation of these trials and is in opposition to separate trials in this case. The comment to the Rule 42 states:

> "Consolidation of actions presenting a common issue of law or fact is permitted as a matter of trial convenience and judicial economy. **The court is given broad discretion to decide whether consolidation would be desirable; the consent of the parties is not required.** It is for the court to weigh the savings of time and effort that consolidation would produce against any inconvenience, delay, or expense it would cause." (emphasis added).

This certainly supports Plaintiffs position that change of venue and severance is not appropriate and would be an abuse of discretion if ordered.

It cannot be over emphasized that Plaintiffs cannot try two medical malpractice suits at the same time i*n* different counties. The actions and determinations of the jury in the First Judicial District are likely to influence and conflict with the issues and remedies from a jury in

the Second Judicial District. Judicial chaos will ensue if these actions are fragmented and tried separately against joint tortfeasors under the facts of the case *sub judice*. The same facts and issues will have to be tried to both juries and res judicata could become an issue depending upon the verdict and inconsistent verdicts is virtually a certainty. Most of these factors were certainly recognized by the trial court. (TR 29)

In *Mississippi Crime Laboratory v Douglas*, 77 So. 3d 196 (Miss 2011), the Mississippi Supreme Court reviewed a case of severance and transfer of venue. The case involved a lawsuit filed against Dr. Vig and Sunshine Medical Clinic for medical negligence and the Mississippi Crime Laboratory and Dr. Steven Hayne for wrongful incarceration. The Court analyzed M.R.C.P. 20 (a) regarding joining defendants in one action if the claims asserted against them arise out of the same transaction, occurrence or series of transactions and occurrences, and if the same questions of law and fact apply to all defendants arise out of the action. The court held:

> "In this case, no distinct litigable event links the claims against them (sic) medical-negligence defendants with the claims against the wrongful-incarceration defendants. Although the tragic death of Kaddarius is the nucleus of these claims, the claims involve difference actors, different witnesses, different evidence, and different areas of law." Id 201.

This case certainly stands for the proposition that in a medical negligence case, Rule 20 (a) can and should be used to join like claims with common questions of law, as is the case in the case *sub judice*. The wrongful incarceration was separate and distinct from medical malpractice. This is not the so in the case *sub judice* as there are like medical malpractice claims with common questions of law. Why would this court even analyze the issue if severance was demanded in such a case? The reasonable answer is that the rule of venue "being good for one, it is good for all" is still viable in such cases.

The Mississippi Supreme Court in *Bullock v Lott,* 964 So. 2d 1119 (Miss 2007)

dealt with a medical malpractice wrongful death claim filed December 2002. At the time it was claimed the venue was correct in Covington County, Forrest County, and Lamar County. The court held:

> "Of right, the Plaintiff selects among the permissible venues, and **his choice must be sustained unless in the end there is no factual basis for the claim on venue." (Citations omitted)…. Put another way, the trial court "must give the plaintiff the benefit of the reasonable doubt, and we do so on appeal** as well." *McMuillian v Puckett,* 678 So. 2d 652, 656 (Miss 1996). Therefore, the trial court was correct in denying Dr. Bullock's motion to change venue. *Bullock* at 1127. (emphasis added)

In the case *sub judice,* there are two possible venues and Plaintiffs choice of venue must be sustained. The principles set forth in *Bullock* remain sound even today.

The Mississippi Supreme Court in *Kiddy v Lipscomb,* 628 So. 2d 1355 (Miss 1993) held severance was improper in that case of medical malpractice. The Court noted:

> "Kiddy asserts that the circuit court improperly granted the severance because the cases involved the same nucleus of common facts and arises from the same transaction or occurrence. We agree. **The facts of the case against the two physicians are too closely intertwined to warrant the time and expense of trying them separately. More importantly, allowing separate trial sets the scene for the two doctors to play a game of "divide and conquer." Doctor Lipscomb, without having to take any shots from Dr. Chepko, would be perfectly situated to point his finger at the empty chair" and assert that all the liability for Kiddy's injuries stemmed from the second doctor's treatment. Doctor Chepko, at his trial, likewise without any opposition from Dr. Lipscomb, would then assert that Kiddy's injuries stemmed exclusively from the first procedure performed by Dr. Lipscomb.** Bifurcation of the actions thus would prevent any jury from hearing all of the evidence relevant to Kiddy's injuries and the liability of the defendants and greatly increases the expense of litigation. **Without both doctors as parties, the issues of liability and damages might be indeterminable.** As we have stated, "there may be more than one proximate cause of an accident or injury, and where there is more than one proximate cause each of the concurrent efficient causes contributing directly

> to the accident or injury is the proximate cause thereof." (Citations omitted.) *Kiddy* 1357-1358
>
> "…When there is more than one possible proximate cause of an injury, bought about by the negligence of more than one party, **the purposes of the applicable rules best would be served by a single trial**. Id 1358.
>
> **"…Joinder of Dr. Chepko was appropriate under Rule 20, which provides for permissive joinder of parties "to promote trial convenience and expedite the final determination of disputes"**. Official Comment, Rule 20. Rule 20 requires only that the plaintiffs' right to relief against each defendant arise from the same transaction or occurrence and that there is some question of law common to all of the parties. Id Similarly, actions against Dr. Lipscomb and Chepko could have been consolidated under M.R.C.P. 42 (a). Id 1358 (emphasis added)

Joinder was appropriate under M.R.C.P. 20, since they were not addressing venue statute alone. Even though this was a pre-2004 Amendment case, the sound legal logic of *Kiddy v Lipscomb* is clearly applicable to the case *sub judice* even today. This is particularly true when the venue statute is silent on the issue.

The logic in *Kiddy* v *Lipscomb* was followed in the *Estate of Jones v Quinn,* 716 So. 2d 624 (Miss 1998). The court in *Estate of Jones* reaffirmed the fact that "In suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. *Estate of Jones*, 627. *Estate of Jones* involved municipalities and the State. The court recognized that the suit was properly filed in a venue good as to one defendant and therefore, it was good as to all. Although the State defendants were properly joined in Hinds County, the only acts of negligence plead were in Simpson County and therefore venue should have been transferred to Simpson County. *Estate of Jones at 628.* In the case *sub judice*, Plaintiffs have more than sufficiently plead acts of negligence in both the First and Second Judicial Districts of Harrison County, Mississippi.

As a side note, while the courts recognized the First and Second Judicial District as

separate counties, this venue statute does not directly address that issue and only states that the action shall be brought **in the county where the alleged negligence took place**. If this statute is all controlling then it would take precedence over any statute stating counties with judicial districts must be treated as separate counties. Again, this is somewhat irrelevant as negligence took place in both the First and Second Judicial District of Harrison County, Mississippi. However the Defendants argue on one had the specific medical malpractice venue statute must take precedence over a more general statute, yet they look to another statute to consider separate judicial districts as separate counties.

The Mississippi Supreme Court in *Adams v Baptist Memorial Hospital-Desoto* Inc. 965 So. 2d 652 (Miss 2007) found it was improper to sever a wrongful death action against Gold Strike Casino and the subsequent treating physicians, who were charged with medical negligence. The court held:

> "Severance of this action is also inconsistent with Mississippi Code Annotated Section 85-5-7 (1999) which addresses the limitations of joint and several liability for damages caused by two or more persons; contribution between joint tort-feasors and determination of percentage of fault. Adams correctly asserts in his brief that separate trials would create, and almost certainly would result in, inconsistent holdings, including apportionment of fault. **This analysis is applicable not only in wrongful death actions, but in other suits as well, because splitting the cause of action is prohibited by prior decisions of this Court and most certainly would lead to inconsistent verdicts by separate juries**. (Citation omitted) *Adams* 655 (emphasis added)

Adams involved the amended version of the venue statute, we are dealing with in the case *sub judice* and the legal logic behind the Supreme Court's ruling continue to remains solid today.

The Mississippi Supreme Court in *Mississippi Department of Human Services v S. C. As Court-Appointed Guardian of UC, a minor,* 119 So. 3d 1011 (Miss 2013) dealt with venue in a

Tort Claim Act case. Plaintiff filed suit against the Mississippi Department of Human Services and against the children's psychiatric facility for alleged statutory rape. The basis of venue in Hinds County for the Department of Human Services was that it was headquartered in Hinds County. There was no alleged negligence that took place in Hinds County. The alleged rape took place in Lauderdale County. The Mississippi Supreme Court reiterated the long- standing principle of law as follows:

> "In venue disputes courts begin with the well-pleaded allegations of the complaint. These, of course, may be supplemented-and contested-by affidavits or other evidence in cognizable form." *Flight Line, Inc. v Tanksley*,, 608 So. 2d 1149, 1155 (Miss 1992) **The Plaintiff is allowed to select among the permissible venues, "and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue."** *Id* Furthermore, "[i]n suits involving multiple defendants, where venue is good to one defendant, it is good as to all the defendants." *Estate of Jones*, 716 So. 2d at 627 Id 1013
> (emphasis added)

Venue was denied in Hinds County against the Mississippi Department of Human Services because there was not a well plead separate act of negligence alleged against the department which occurred in Hinds County. Plaintiffs did not appear to argue, that any negligence took place in Hinds County. *Id 1014*. If the venue is good for one, it is good for all, as in *Mississippi Crime Laboratory v Douglas*. If argument is not valid, then why did the court even address the issue in the context of the M.T.C.A.? In the case *sub judice*, Plaintiffs have well plead allegations of negligence against joint tortfeasors taking place in both the First and Second Judicial Districts of Harrison County, Mississippi. Therefore, there is no reasonable basis whatsoever to sever the case, much less to transfer venue to the Second Judicial District of Harrison County, Mississippi for any of the defendants. To sever this case and transfer venue would be an abuse of discretion.

In accordance with the above cited case law, rules of civil procedure, and statutes, the medical malpractice actions against Mallet, Jones, Biloxi OBGYN Clinic, Garden Park, McBride, Ali, and Paragon are properly brought together in Gulfport, Harrison County, First Judicial District, Mississippi. There is no reasonable basis for transferring venue for any of these Defendants to Biloxi, Harrison County, Second Judicial District, Mississippi and absolutely no basis under statutes, case law, or rules of civil procedure for, in this case, to have separate trials. To have granted Defendants motion would have highly prejudiced Plaintiffs, **violated their constitutional rights to free access to the courts and trial by jury and would have been a clear abuse of judicial discretion.**

ISSUE II: THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION OF DEFENDANTS TO SEVER AND TRANSFER THE CLAIMS AGAINST THEM TO THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY.

Contrary to Defendants assertions this assignment of error is redundant and without merit. As argued above and even restated as recently as 2013, this court, when reviewing the even more narrow M.T.C.A. venue statute Section 11-46-13 (2), reaffirmed the rule that "in suits involving multiple defendants, where venue is good as to one defendant it is good as to all defendants. *Mississippi Department of Human Services v S.C*. at 1013. If this was not a true statement of law to rely upon why go to the effort to restate it and confuse the issue? Litigants and the courts should be able to rely upon the rulings of the court as stated in *Flight Line* supra, "Of right, the Plaintiff selects among the permissible venues, and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue. (citations omitted) *Id 1155* Change of venue is still subject to review based upon an abuse of discretion; *Adams* supra at 655.

The trial court here did not abuse its discretion in refusing to transfer venue and sever the

joint tortfeasors medical defendants. The Defendants analysis of this court's decision in *Adams*, of a wrongful death claim with a casino defendant and a medical defendant, and the applicability of M.R.C.P. 82 (b) is misplaced as previously argued, particularly since it did not involve joint medical tortfeasors.

Again, M.R.C.P. 82 (b) clearly states: "**Except as provided by this rule,** venue of all actions shall be as provided by statute." Plaintiff realizes there has been interpretations to the contrary but the rule **does not say, "Unless otherwise provided for by statute,** venue will be a provided by this rule**."** This would make, by plain language, the venue statute controlling in all instances. M.R.C.P. 82 (b) plainly reads venue shall be controlled by statute **unless (except**) when the rule provides otherwise. The rule was amended in February 2004 and no changes were made to 82 (b) to make it any clearer. Even if Plaintiffs plain reading and interpretation of the rule is incorrect, it does not alter the correctness of the trial judge's ruling.

Section 11-11-3 (3) does not plainly address the situation of multiple medical joint tortfeasors and therefore the courts rationale is correct and cannot be said to be an abuse of discretion.

Plaintiffs have reasonably shown there were adequate, reasonable and sufficient contacts with Gulfport, particularly by Dr. Jones and his employer Biloxi OBGYN through his phone contact and consultation with Dr. Ali which was not merely incidental.

The venue statutes argument of the Defendants is misplaced since we are dealing only with Section 11-11-3 (3) and multiple joint tortfeasors medical defendants. This is an attempt to mislead court in its analysis of this matter. To argue that this trial court was misled into the same flawed logic as in *Senatobia Community Hospital v Orr*, 607 So. 2d 1224 (Miss 1992) is specious at best, since the facts and venue statute in *Orr* are nothing like what was analyzed in

the case *sub judice*. *Orr* was not cited as a basis for the trial court's decision.

The trial courts findings that the medical venue statute Section 11-11-3 (3) was ambiguous under the facts of this case was well founded and not an abuse of discretion. It was found that statute did not address multiple medical joint tortfeasors from different counties any more than it addressed the issue in a wrongful death claim. When reasonable people differ on the plain meaning of a statue perhaps it is not so plain, particularly when it does not address the issue of multiple parties as Section 11-11-3 (2) did with multiple plaintiffs each having to establish venue separately. If the plaintiffs do not each establish venue separately, then the plaintiffs' cases are severed according to the plain reading of Section 11-11-3 (2). Noso with multiple joint tortfeasors medical defendants.

Contrary to the Defendants and Amicus assertions, the new venue statute was almost completely in reaction to the mass tort litigation as previously noted and not the traditional medical negligence claim. It was intended to make the place where the negligence took place the primary venue and eliminate the unfair forum shopping that was taking place. As here, there can be multiple places where the negligent acts occurred. The statute does not even remotely suggest there must be severance involving multiple medical joint tortfeasors who committed their acts in separate districts.

This court has already ruled mere inconvenience is not sufficient for a change of venue. *Pisharodi v. Golden Triangle Regional Medical Center*, 735 So.2d 353 (Miss 1999). The way the Defendants are arguing this case, one would think Plaintiffs were trying to drag them to Holmes County. Biloxi and Gulfport are adjacent to each other. The surgery center where Mrs. Dye initially had surgery performed by Dr. Mallet in Biloxi is close to the Gulfport/Biloxi city limits. All witness will need to take part in both cases, even if severed. Depositions will not be useful

when there is an empty chair and an effort by the Defendants to divide and conquer. There is also the unfairness one Defendant going to be school on the other for the second trial, perhaps taking subtly and/or blatantly contradictory positions.

Had the venue statute stated joint medical joint tortfeasors from differing venues has to be severed and tried in separate cases there is a likelihood that statute would not have passed constitutional muster. It would have violated Plaintiff's constitutional right to a fair trial by jury, due process of law and equal protection under the law.

The Defendant argued that it was perceptible by the legislature that there would be "occasional severed claims or multiple litigations." The fact is, it is probably a rare instance and it was for that reason the legislature did not address severance or require it. If it were a problem they should have left no doubt in the statue and been specific of their intent.

There is absolutely no evidence the trial court failed to properly analyze the medical venue statute. The issue of assigning priorities when reviewing of the medical venue statute is not relevant, as the statute itself, Section 11-11-3 (3), was being reviewed as it relates to the facts of this case and no other. The M.T.C.A. venue statutes as previously argued, is helpful, however in analyzing legislature intent.

Plaintiffs would show the actions of Dr. Jones, individually and on behalf of Biloxi OBGYN Clinic, placed part of their negligent acts within the First Judicial District by having a telephone consult and giving medical advice effecting Mrs. Dye's care at Garden Park Emergency Room in Gulfport. Even viewing Dr. Jones affidavit, he cannot say if any of the telephone conversations with the Dye's or Amy's care originated in Biloxi or Ocean Springs in Jackson County. Thus, it could be said that an omission involving the same Defendants and facts could be easy heard in three different counties, Gulfport, First Judicial District, wherein the ER

committed negligence, Biloxi, Second Judicial District, wherein the initial injury, negligence, and omission occurred, and Ocean Springs, Jackson County, wherein another negligence and/or omission occurred in the telephone conversation. It is obvious that neither the Plaintiffs nor the Biloxi Defendants want this lawsuit heard in Jackson County and in Biloxi, as that would also defeat judicial economy and any since of fairness or reason.

There are numerous cases that set venue in a particular jurisdiction even though the Defendant never stepped foot in that venue or jurisdiction. See *U.S. v Rommy,* 506 F. 3d 108 (2nd Cir. 2007) (Venue could be established in the Southern District of New York by a telephone call placed by an undercover agent to the Defendant *Rommy* in the Netherlands) *Brown v Flowers Industries Inc*., 688 F. 2d 328, 333 (N.D. Miss 1982) (long distance phone calls from Indiana to Mississippi established jurisdiction under the long arm statute- the number of contracts with forum state is not determinative. *Thomas v Skrip,* 876 F. Supp. 2d 788 (S.D. Miss 2012) (phone calls and emails to Mississippi was sufficient to support an alienation of affection suit minimum contacts for long arm jurisdiction. *Knight v Woodfield,* 50 So.3d 995, 998 (Miss 2011) (emails and texts from out of state was sufficient to support jurisdiction in alienation of affection case and did not offend traditional notation of fair play and substantial justice.

In *Earwood v Reeves*, 798 So. 2d 508, 513 (Miss 2001), this court citing *Flight Line Inc., v Tanksley*, 608 So. 2d 1149 stated: "At the very least, the word "occur" connotes each county in which a **substantial component of the claim takes place**…Id at 1157 (emphasis added) It is not unreasonable to view *Reeves* receipt of the check for an allegedly insufficient amount as a substantial component of the claim." *Id 513* Likewise, it is not unreasonable to view the medical advice and consultation given by Dr. Jones over a telephone to Dr. Ali at Garden Park's Emergency Room located in the First Judicial District of Harrison County, as a substantial

component of where the act occurred.

There should be sufficient evidence to show Dr. Jones and his employer Biloxi OBGYN had sufficient contacts with the First Judicial District to bring him under the umbrella of the medical venue statute Section 11-11-3 (3) regardless of any other arguments of venue being good for one is good for all. This would make it even less sensible to sever the case and separate the Biloxi Defendants and try Jones and Biloxi OBGYN in Gulfport and/or Jackson County and Mallet and OBGYN in Biloxi. Section 11-11-3 (3) certainly did not contemplate this factual scenario either.

ISSUE III: MISS. CODE ANN. SECTION 11-11-3 (3) IS AMBIGUOUS AND THE TRIAL COURT DID NOT ERR OR FAIL TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION.

The Defendants have failed to provide any meaningful legislative history of why the medical venue statute Section 11-11-3 (3) was enacted in its present form. The Court noted the "legislature history doesn't speak to that and so that question can't be answered." (TR27)

The Defendants cited *Willow Bend Estates, LLC v Humphrey's Co. Bd. of Supervisors*, 213 WL 5649041 (SCT Oct. 17, 2013) which has not been released for publication and is subject to withdrawal or revision. The trial court in the case *sub judice* specifically looked at the *Adams* case and based on the analysis in *Adams* concluded:

> "This analysis is applicable not only in wrongful death actions but other suits as well because splitting the cause of action is prohibited by prior decisions of this court and most certainly would lead to inconsistent verdicts by separate juries."
>
> "Based on that and having no guidelines elsewhere either from statute or any other case law…(TR 28) It would not serve judicial economy for this court and these parties to have to go through two full separate trials nor would the issue of joint and several liability be easily handled pursuant to our statute in two separate trials, and venue is, in fact, proper in the First Judicial District." (TR29)

While the word "shall" in Section 11-11-3 (3) is generally considered mandatory, it is not without limitations. *Fredrick v Malouf,* 82 So 3d 579 (Miss 2012) (Venue can be waived even under the new venue statute) The "notwithstanding" language of Section 11-11-3 (3) only applies to subsection (1). Section 11-11-51 Miss. Code Ann. allows for a change of venue based upon, "…under influence, prejudice, or other cause…" M.R.C.P. 42 (a) gives the court broad discretion on consolidating trials involving common questions of law and fact. Section 85-5-7 (5) Miss. Code Ann. regarding joint and several tortfeasors, demands the jury determine percentage of fault. To do so in separate trials, when not absolutely necessary, frustrates judicial economy and leads to inconsistent verdicts. *Adams v Baptist Memorial Hospital-Desoto, Inc., Id 655* M.R.C.P. 82 (b) and (c) contemplate a suit brought against several parties, properly joined, may be brought in any county any one of the claims could have been commenced.

It should be remembered Defendants, Mallet and Jones, in their seventeenth defense pled contribution as may be allowed under Mississippi law. (R55, 71) They further adapted and incorporated by reference in their answer the defense of any co-defendant. (R56, 72) Therefore, it may certainly be presumed at some point in time there will be significant finger pointing and severance would allow an empty chair, highly prejudicing Plaintiffs and depriving them of their fair day in court and constitutional right to a fair trial by a jury and due process of law.

M.R.C.P. 20 (a) clearly allows joinder of Defendants with common questions of law and fact. It must be remembered Section 11-11-3 (2) requires each Plaintiff to establish venue but there is no such provision for medical defendants in Section 11-11-3 (3).

Venue under the Mississippi Tort Claim Act Section 11-46-13 (2), unlike the medical venue statute Section 11-11-3 (3) provides relative to venue:

> "…shall be in the county in which the act, omission
> event on which the liability phase of the action is based,

> occurred or took place… the venue specified in this subsection shall control in all actions filed against governmental entities, **notwithstanding other defendants which are not governmental entities may be joined in the suit**, and notwithstanding the provisions of any other venue statute that otherwise would apply." (emphasis added)

While Section 11-46-13 (2) is narrower than Section 11-11-3 (3), it still does not address the issue of joint Governmental tortfeasors and the necessity of severance. Section 11-46-13 (2) clearly shows venue for the government defendant controls even when a non-government defendant is sued. This Court in *Mississippi Department of Human Services v S.C.*, 1195 So. 3d 1011 (Miss 2013) declined to decide the issue of venue against two governmental agencies in different counties because the plaintiff failed to plead a sufficient factual basis that Hinds County was a permissible venue. Id 1015 However, the court clearly stated, given a well pled facts venue may well be appropriate in either venue where it stated citing *Flight Line, Inc., v Tanksley*, 608 So. 2d 1149, 1155 (Miss 1992)

> "In venue disputes courts begin with well-pleaded allegations of the complaint….The Plaintiff is allowed to select among the permissible venues, "and his choice must be sustained unless there is no credible evidence supporting the factual basis for the claim of venue." Id Furthermore, "[i]n suits involving multiple defendants, where venue is good as to one defendant it is good as to all defendants." Estate of Jones, 716 So. 2d at 627" *Id. 1013*

Plaintiffs would show venue being good for one defendant being good for all in Section 11-11-3 has long been the law in the state. Section 11-46-13 (2) modified that principle as to nor governmental joint tortfeasors, but no such language is found in Section 11-11-3 (3). However, the court in *Adams* required venue to be transferred to the county where the medical negligence took place in a wrongful death action based upon ranking ruling of the venue statute, which does not apply here. However as previously stated, severance of the non-medical tortfeasors claim

was not allowed.

It is true that Miss. Code Ann. Section 1-3-33 states: "words used in the singular shall extend to and embrace the plural number….except where contrary intent is manifest." Plaintiffs would show intent is manifest in the Section 11-11-2 dealing with multiple plaintiffs each being required to separately establishes venue for multiple plaintiffs. No such manifest intent language is found in the medical venue statute for multiple defendants and this is evidence of a contrary intent to use the plural rather than the singular. It does not defeat the "venue is good for one, it is good for all" logic. .

The medical venue statute was obviously changed to defeat the practice of forum shopping in mass tort cases such as the Phen Phen or Propulsid litigation to get venue in a plaintiff friendly county such as Holmes County. It was not as the result of the typical medical malpractice claim such as in the case *sub judice*. The medical professionals and medical insurance companies now want to use it as a means to divide and conquer which was never contemplated. The medical professionals, medical insurance companies and the Amicus groups have a large active lobby that helped pass the medical venue statute. You would have to believe they would have specifically added language to Section 11-11-3 (3) to prevent this problem if it was the intent to achieve the result they **now** advocate.

The court in *Mississippi ex rel Hood v Madison County*, 873 So. 2d 85, 90 (Miss 2004) noted:

> "Another related rule is the doctrine of in part material, which provides that if a statute is ambiguous, then this court must resolve this ambiguity by applying the statute consistently with other statutes dealing with the same or similar subject matter. (citations omitted)

Mississippi law has long provided if venue is good for one joint tortfeasor, it is good for all. This

should hold true for joint medical tortfeasors, as well a joint governmental tortfeasors.

Regardless of Defendants assertions of a more specific statute controlling over a more general statute, this is again irrelevant to severing claims of joint medical tortfeasors which Section 11-11-3 (3) does not address the issue or require severance.

Defendants make the argument that the 2004 amendment to Section 11-11-3 (3) was to keep doctors from having to leave his practice for extended periods of time and travel to other locations. The Defendants, in this case, will be involved in two lawsuits, at least as witnesses, if severance is allowed. Rest assured their lawyers will monitor both cases. The Gulfport Defendants and Biloxi Defendants will still be involved in separate trials. Dr. Jones could have very well made some or all of his phone calls from his home in Jackson County, which could complicate matters even more.

This court has already held inconvenience and high cost in trying a medical malpractice case in a different county is not sufficient for a change of venue. *Pisharodi v Golden Triangle Regional Medical Center*, 753 So. 2d 353,355 (Miss 1999)

Contrary to the Defendants assertions, it is obvious from the trial court transcript Judge Dodson considered Section 11-11-3 (3) ambiguous as it relates to the facts in the case *sub judice*. The honorable trial court did not fail to apply the appropriate rules of statutory construction or analysis of Section 11-11-3 (3).

ISSUE IV: THE TRIAL COURT DID NOT ERR IN OVERRIDING THE MANDATORY LANGUAGE OF THE SPECIAL MEDICAL PROVIDER VENUE STATUTE, MISS. CODE ANN. SECTION 11-11-3 (3) BY APPLICATION OF RULE 82 (C) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

The Defendants continue to misinterpret the “notwithstanding” language of Section 11-11-3 (3). It only applies to subsection (1). Insight may again be gained from reviewing Section 11-11-3 (2) as it applies to establishing separate venue for multiple plaintiffs. Also as previously

argued, M.R.C.P. 82 (b) clearly states, "**Except as provided by this rule**, venue of all actions shall be provided by statute."

The court in *Adams v Baptist Memorial Hospital-Desoto*, supra did not stand for the proportion that MRCP 82 (b) or (c) never applied to the analysis of Section 11-11-3 (3). The court said it did not apply to that case because it was a wrongful death case not a compulsory joinder case. M.R.C.P. 82 (c) is not in conflict with Section 11-11-3 (3) but must be viewed in conjunction with it since Section 11-11-3 (1) does not specifically address the point. M.R.C.P. 82 (c) was in place prior to the 2004 amendment to Section 11-11-3 (3). The legislature and the amicus lobbyists certainly knew M.R.C.P. 82 (c) and (b), yet did nothing to specifically address the issue with the legislature now before the court.

Even in *Adams,* the court did not say Gold Strike Casino was "improperly joined" as a defendant. The ruling was, since there was a medical defendant, the more specific venue statute applied over the general venue statute, but the court would not order severance. The bottom line ruling is *Adams* is without doubt instructive but distinguishable from the case *sub judice.* The Court in *Adams* rightly noted:

> "Adams correctly asserts in his brief that separate trials would create and almost certainly result in inconsistent holdings, including apportionment of fault. This analysis is applicable not only in wrongful death actions, **but in other suits as well**, because splitting the cause of action is prohibited by prior decisions of the court and most certainly would lead to inconsistent verdicts by separate juries." Id 655 (emphasis added)

The trial court was correct in finding Gulfport, First Judicial District, to be an appropriate venue. Certainly, there were sufficient contacts by Dr. Jones and his employer Biloxi OBGYN through the telephone consultation and advice with Dr. Ali at Garden Park. Dr. Jones also offers in his affidavit some of his telephone calls may be been made from Jackson County.

A substantial issue over the doctor's failure to act on Sunday may very well be made by the defense, as the infection from Mrs. Dye's perforated bowel continued to leak and become more serious by the minute, hour, and day.

Severing these Defendants would be extremely prejudicial to the Plaintiffs, substantially increase the cost of litigation and hamper their constitutional right to a fair trial, due process and equal protection under the law.

ISSUE V: THE TRIAL COURT DID NOT ERR IN THE ANALYSIS AND APPLICATION OF THE RULE AGAINST "CLAIM SPLITTING" AND STATUTORY PURE APPORTIONMENT OF FAULT AS PART OF THE RATIONAL IN DENYING DEFENDANTS MOTION TO SEVER AND TRANSFER VENUE.

The trial court did not solely use the rule against "claim splitting" and apportionment of fault to decide the venue question. This has been previously discussed in detail and is shown by the trial court's opinion and comments from the bench.

The use of the ruling in *Adams v Baptist Memorial Hospital-Desoto, Inc*., 965 So. 652, 655 (Miss 2007) was not misplaced as the logic and prejudice of severing the defendants remains the same even if it was not technically the traditional splitting of a claim. It certainly is splitting or fragmenting the case and claims in which joint tortfeasors should be joined.

The appellate courts are loathe to reverse a case where the trial court has reached the right result even if one of the reasons is not correct. See *Dunn v Yeager*, 58 So. 3d 1171, 1190 (Miss 2011) and *Green v Cleary Water, Sewer, and Fire District*, 17 So. 3d 559,572 (Miss 2009) The vagueness of the statute, the M.R.C.P., judicial economy, the prospect of two trials with the same facts and the problems with inconsistent verdicts and Section 85-5-7 apportionment of fault are all well founded reasons to rule against severance and change of venue in a case of multiple medical joint tortfeasors.

The Defendants logic is flawed. The legislature had the opportunity to be very specific about venue and if they wanted to adopt the defendants logic. They had every opportunity to do so, especially in light of M.T.C.A. Venue Statutes Section 11-46-13 (2) and the intense lobbying of the medical professionals and the amicus medical insurance companies. The arguments and exhibits by the amicus professionals are not suited for judicial review. They are abstract in nature and not subjected to review, verification or explanation. They are suited for legislature lobbying and might be used to address the specific issue which they apparently failed to do. Obviously, it was not the legislature's intent to address the issue now advocated by defense and the amicus professionals.

Article 6 Section 144 of the Constitutional of the State of Mississippi vests the judicial power of the State in the Supreme Court. Defendants are now, in a roundabout way, attempting to make a constitutional challenge to the trial court's ruling. While the legislature has constitutional authority to enact venue statues, as previously argued, that power is not limitless and a medical defendant is not guaranteed by Section 11-11-3 (3) venue the county where his negligence occurred in all circumstances, as previously argued.

The court in *Adams* supra recognized severance in that case would not promote judicial efficiency citing M.R.C.P. 1. *Id 655* M.R.C.P. 1 controls construction of all the Rules of Procedure and they are to provide just speedy and inexpensive determination of every action. This is the same goal of the rules against claim splitting or severing a case of joint tortfeasors.

In the case *sub judice,* if the cases are severed, there will be two trials, with the same parties and almost guaranteed inconsistent verdicts. The inconsistent verdicts considering apportionment of damages between joint tortfeasors will create judicial chaos and arguments over who is to pay what percentage and what precedent the Gulfport jury sets over the Biloxi

jury's decision. No good will come of severance only more litigation and appeals.

As admitted by Mr. Coleman, attorney for Paragon, who contracted with Defendant, Garden Park to provide Emergency Room doctors, such as McBride: Paragon does not have the benefit of the medical venue statute claimed by Mallet, Jones, and Biloxi OBGYN. (TR14) If the case is split, a motion to consolidate Paragon with the Biloxi Defendant could be filed since venue would be good for all. If this does not amount to case splitting or fragmenting the case, it certainly splits the trial on the issues even further than previously argued with Jones, Biloxi OGBYN and Mallet.

On the other hand, what happens if the case had been filed in Biloxi and the Gulfport Defendants wanted a change of venue? Would Paragon stay in Biloxi, as venue being good for one is good for all or be transferred to Gulfport? The basic problem remains, trying multiple cases with the same facts, the same applicable law, facing the likelihood of different verdicts and the proportional fault dictates of Section 85-5-7 is a real threat to Plaintiffs constitutional rights to a fair trial, due process and equal protection under the law.

The Defendants argument to the effect that severance is no big deal since there are cases were plaintiffs try cases with an absent party is almost laughable. It may be no big deal for these defendants to be involved in two cases but it is a big deal for the plaintiffs who do not have the funding of doctors on their insurance companies to fight a case on multiple fronts or face a defendant pointing to an empty chair when the situation of an empty chair is clearly avoidable. This is merely a procedural game to divide and conquer, not to mention, increasing the odds of a biased jury pool. Regardless, the big issue here remains severance and the precedent this will set, unnecessarily multiplying litigation and its costs for future litigants.

Defendants argue they have no reason to believe juries are not preforming their duties

and therefore change of venue should not be problem for the Plaintiff. If that is true then Gulfport should not be a threatening venue for the Biloxi Defendants. Gulfport is no Holmes County. It is unthinkable to have two juries, at different trials, hearing the same evidence, except for what may be testified differently to at the first trial, rendering different verdicts and apportioning of fault on the same facts involving the same doctors/ health care providers. There is no way the testimony will be identical in severed trials. For the defense to infer, it gives the Plaintiff two bites at the apple is disingenuous at best.

While under the M.T.C.A., a judge decides the M.T.C.A. portion of the case and a jury decides the other, at least all facts are tried at the same time and there are not separate trials. So comparison of severance to a M.T.C.A. trial is of no relevance or comfort. This is not a M.T.C.A. case.

The trial court in the case *sub judice* got the correct result. Defendants who are joint medical tortfeasors do not have a *ve*sted right to tried in separate venues and Section 11-11-3 (3) does not say that they do. As stated by the trial court, severance will most certainly lead to inconsistent verdicts.

In Mississippi and other states, there is a long standing policy that a plaintiff is entitled to but one compensation for their losses and injuries. *Medlin v Hazlehurst Emergency Physician's,* 889 So. 2d 496, 500 (Miss 2004); *Brown v North Jackson Nissan Inc.,* 856 So. 2d. 692 (Miss. App. 2003); *Whitehurst v Charles Town Hospital,* 626 F. 2d 357 (11th Cir. 1980)

A problem arises with a Gulfport jury assessing total damages and percentage of fault in Gulfport, against the Gulfport and Biloxi Defendants, and a Biloxi jury assessing different total damages and percentage of fault. The principle of double recovery, depending on the verdict, and proper apportionment of damages is not only frustrated but rendered unworkable and fedder for

future litigation. Which verdict or portion of the verdict applies or do both? This trial court was certainly wise in seeing that splitting or fragmenting the cause of action **or case** by severance would not serve the ends of justice. At worst the trial judge got the right result even if partially for the wrong reason. As a result it was a harmless error. M.R.C.P 61

CONCLUSION

For the many reasons stated above, the trial court did not commit reversible error in denying the motion of the Defendants, Mallet, Jones, and Biloxi OBGYN, to sever or in the alternative transfer venue to the Biloxi, Second Judicial District of Harrison County. The Defendants sought in the alternative to transfer the entire action to Biloxi, Second Judicial District pursuant to M.R.C.P. 82 and Section 11-11-3 (4) (a) based upon the doctrine of forums non conveniens. (R 44, 60, 76, and 97) Such a move, while preferable to severance is not authorized or appropriate as the other Defendants have clearly asserted their rights to venue in the First Judicial District of Harrison County and mere inconvenience is not sufficient to change venue.

Defendants' argument ignores the long standing legal principle that when venue is good for one, it is good for all. As argued above, this principle has been restated by this court in 2013 in *Mississippi Department of Human Services*. Id

The legislature was well aware of this legal principle yet took no steps to clarify or rectify the situation except as applying to multiple plaintiffs. 11-11-3 (2). They were also clearer in the venue statute for M.T.C.A. Section 11-46-13 (2), wherein it states:

> "The Venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of **any other venue statute** that otherwise would apply. (emphasis added)

The Defendant and the Amicus professionals had ample opportunity and motive to lobby the legislature and address this specific issue during the 2004 amendment process. The documents attached to the Amicus brief are not in any way directly relevant or supportive of the specific issue before the court. There are a myriad of reasons for problems with medicine, malpractice and doctors coming to or leaving the state. None of which is the fear of a Biloxi doctor being sued in Gulfport or Pascagoula in a **pure** routine medical negligence case with true joint tortfeasors.

The trial court used sound reasoning and discretion is analyzing Section 11-11-3 (3) and denying the defendants motion to sever and/or transfer. Therefore, Plaintiffs, Amy Dye and her husband Todd Dye, respectfully request this court affirm the trial court's ruling denying change of venue and severance, which would split or fragment this action.

RESPECTFULLY SUBMITTED, this the 1st day of August.

/s/ L. Christopher Breard
L. Christopher Breard, MSB No. 4352
BREARD LAW FIRM, LTD.
1317 B 24th Avenue
Gulfport, MS 39501
Telephone: 228-897-2222
Facsimile: 228-575-9218
Email: breardlawfirmltd@bellsouth.net

CERTIFICATE OF SERVICE

I hereby certify that on this day I have electronically filed the above and foregoing Brief of Appellee with the Clerk of the Court using the MEC which sent notice to the following counsel of record:

William E. Whitfield, III, Esq.
Kimberly S. Rossetti, Esq.
COPELAND, COOK, TAYLOR, & BUSH, P.A
P.O. Box 10
Gulfport, MS 39502-0010

Paul J. Delcambre, Jr., Esq.
BALCH & BINGHAM, LLP
P.O. Box 130
Gulfport, MS 39502

J. Michael Coleman, Esq.
HAGWOOD, ADELMAN, TIPTON, PC
P.O. Box 14188
Jackson, MS 39236-4188

C.R. Montgomery, Esq.
MONTGOMERY MCGRAW, PLLC
On behalf of Amicus
P.O. Box 1039
Canton, MS 39046

Whitman B. Johnson, III, Esq.
Rebecca B. Cowan, Esq.
CURRIE, JOHNSON, GRIFFIN, & MYERS, P.A.
P.O. Box 750
Jackson, MS 39205

George F. Bloss, III, Esq.
Mary Margaret Kuhlmann, Esq.
JONES WALKER, LLP
2510 14th Street
Gulfport, MS 39501

Honorable Lisa Dodson
Harrison County Circuit Court Judge
P.O. Drawer 1461
Gulfport, MS 39502

SO CERTIFIED, this the 1st day of August, 2014.

/s/ L. Christopher Breard

L. Christopher Breard, MSB No. 4352
BREARD LAW FIRM, LTD.
1317 B 24th Avenue
Gulfport, MS 39501
Telephone: 228-897-2222
Facsimile: 228-575-9218
Email: breardlawfirmltd@bellsouth.net