



# Summerville v. Thrower, 253 S.W.3d 415 (Ark. 2007)

Topics Covered: Affidavit of Merit, Certificate of Merit

## **Outcome: Somewhat Unfavorable**

### **Issue**

This case addressed the constitutionality of the Arkansas affidavit of merit law, which applied to medical malpractice cases requiring expert testimony.

### **AMA Interest**

The AMA supports timely filing of affidavits/certificates of merit as conditions for the prosecution of legal actions against physicians.

### **Case Summary**

Ark. Code § 16-114-209(b) requires that, in medical malpractice cases requiring expert testimony, an affidavit attesting to a breach of the standard of care must be filed within 30 days of the filing of the complaint. Further, the statute stated: "If the affidavit is not filed within thirty (30) days after the complaint is filed with the clerk, the complaint shall be dismissed."

The plaintiff, Tomosa Summerville, sued Dr. Rufus Thrower and two other defendants in the Circuit Court of Pulaski County, Arkansas (Little Rock) for negligent obstetrical and gynecological care. She did not file an affidavit of merit within 30 days of the filing of her complaint, and thus it was dismissed. The Order of Dismissal stated: "In so ruling, the Court specifically finds that Ark. Code Ann. § 16-114-209(b) is constitutional."

Summerville appealed to the Arkansas Supreme Court, which on March 15, 2007, reversed the trial court's dismissal, finding that the affidavit of merit requirement was unconstitutional in part. The Arkansas Supreme Court reasoned that the regular court rules do not require dismissal of a case for failure to file an affidavit of merit within a specified time period, and the Arkansas Constitution empowers the Supreme Court (but not the legislature) to establish procedural rules for the courts. Thus, the constitutional infirmity in the affidavit of merit requirement is the rigidity of the dismissal requirement. Under the Supreme Court ruling, courts can delay the dismissal of a medical malpractice lawsuit until such time as they think would be proper, even if the plaintiff is unable to proffer expert testimony to support his or her claim.

### **Litigation Center Involvement**

The Arkansas Medical Society and the Litigation Center filed an amicus curiae brief to support the statute requiring an affidavit of merit.

Arkansas Court of Appeals brief