

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IRENE CAVES, STATUTORY REPRESENTATIVE  
OF THE WRONGFUL DEATH BENEFICIARIES  
OF JIMMY CAVES

APPELLANT

VS.

NO. 2006-CA-01857

BENJAMIN YARBROUGH, M.D. AND  
FRANKLIN COUNTY MEMORIAL HOSPITAL

APPELLEE

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IRENE CAVES

PLAINTIFF-APPELLANT

VS.

DOCKET NUMBER 2006-CA-01857

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AND FRANKLIN COUNTY MEMORIAL  
HOSPITAL

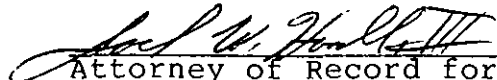
DEFENDANTS-APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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

- |   |                                       |
|---|---------------------------------------|
| 1. Irene Caves  | Plaintiff-Appellant                   |
| 2. Joel W. Howell, III  | Attorney for<br>Plaintiff-Appellant   |
| 3. Benjamin Yarbrough, MD<br>Franklin County<br>Memorial Hospital | Defendants-Appellees                  |
| 4. Lane Reed  | Attorney for<br>Defendants-Appellees  |
| 5. J. Scott Rogers<br>Wade G. Manor                               | Attorneys for<br>Defendants-Appellees |

SO CERTIFIED, this the 28th day of February, 2007.

  
Attorney of Record for  
Plaintiff-Appellant

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## I. STATEMENT OF ISSUE PRESENTED

Did the trial court err in granting summary judgment on the basis of the statute of limitations where the facts relating to the issue of Mrs. Caves' diligence in discovering the cause of her husband's death were controverted and the reasons for his death could only have been determined by an autopsy?

## II. STATEMENT OF THE CASE

### A. Facts

On Sunday, April 16, 2000, Jimmy Caves was fifty-one years old and in apparently good health. (T. 47) After lunch, he began experiencing unusual discomfort. When that later turned into a sudden onset of diarrhea and vomiting, Mrs. Caves took her husband to the Franklin County Memorial Hospital's emergency room, where he was admitted. (T. 47)

Around 8:00 p.m., he began experiencing increased symptoms of restlessness and his vital signs changed. (R. 67) He was treated with narcotics and sedatives. No diagnostic studies such as blood tests were conducted. (R. 67) Some time later (R. 68), after continued drug treatment only, Mr. Caves was transported to the x-ray facility where he suffered cardio-pulmonary arrest and died. (R. 32, 33)

Mrs. Caves received medical records from the Hospital soon after her husband's death and requested the coroner's report. While post-mortem examination report is dated

September 28, 2000 (R. 79-80), Mrs. Caves did not actually receive it until the Spring of 2001. (R. 81, 82)

The decedent's son, Kevin Caves, testified at an evidentiary hearing adjunct to the summary judgment proceedings. He related his mother's persistent efforts to secure the autopsy report after Jimmy's death. (T. 7-8)

Kevin continued trying to acquire the report from the coroner's office after his mother moved from Mississippi in September of 2000. (T. 7-8) He recalled that he finally obtained the post-mortem report in March of 2001, shortly after he received the final bill for his father's hospitalization on March 24, 2001. (T. 9-10) Kevin related that the long delay was due to the death of the responsible coroner. (T. 12) Requests were made to the coroner's office on a weekly or biweekly basis from September of 2000 until March of 2001. (T. 12)

Irene Caves Wilson, Jimmy Caves' widow, testified that the medical records, though promptly supplied, shed no light on why her husband had died. (T. 30-31) She immediately requested a post-mortem examination. (T. 31) According to Mrs. Caves, the coroner verbally told her that Jimmy had a "septic colon," but failed to produce the report until it was finally delivered to Kevin in March of 2001. (T. 33)

After reviewing the report, Mrs. Caves contacted counsel and had an expert assess the report and medical records

to determine whether the Hospital acted, or omitted to act, in a manner causing or contributing to Jimmy's death. Mrs. Caves' expert, Gary G. Pfortmiller, M.D., specializes in emergency medicine and is a Diplomate of the American Board of Internal Medicine. (R. 105) Dr. Pfortmiller reported that in his opinion, to a reasonable degree of medical certainty, the Hospital's treatment did not meet the minimum standard of care. (R. 84, 105) He stated that his conclusions could not have been reached without the results of the post-mortem examination. (R. 105)

Dr. Pfortmiller found that Jimmy Caves' death was the result of an infarcted intestine which, unless immediate surgery is performed, is life-threatening, as indeed was the case here. (R. 84) In Dr. Pfortmiller's opinion, timely performed blood studies and other diagnostic tests would have revealed this condition. (R. 84)

Despite Dr. Pfortmiller's uncontradicted opinion that without the autopsy report his conclusions could not have been reached, the trial court ruled that "the discovery rule is not applicable in this case because there were no latent injuries or actions." (R. 101) The trial judge may have been correct that with the information contained in the autopsy report there were no "latent" injuries. But it is uncontradicted on this record that the Caves family did not have that report until, at the earliest, March 25, 2001.

## B. Procedural History

In this Tort Claims Act case, Mrs. Caves provided proper notice to the Franklin County Memorial Hospital ("Hospital") on February 13, 2002. (R. 75-76) Unable to resolve the claim at the administrative level, suit was filed on April 12, 2002, alleging, inter alia, negligence in the treatment of her late husband. (R. 1) The Hospital answered and moved for summary judgment. (R. 17) The trial court, the Honorable Forrest A. Jackson, granted the Hospital's request on October 13, 2006, ruling that Mrs. Caves' claim was time barred. (R. 101) Caves timely filed her notice of appeal on October 27, 2006. (R. 108)

## III. SUMMARY OF ARGUMENT

In this appeal of a summary judgment, the standard of review is de novo, and the evidence is viewed in a light most favorable to the nonmoving party. The trial court plainly erred in determining that plaintiff's decedent sustained no latent injuries, a finding which has no support in the record, and which is flatly contradicted by plaintiff's medical expert that the breach of the standard of care could only have been determined by review of an autopsy.

In this Tort Claims Act case there is a one year statute, which is, however, subject to the discovery rule because of the latent nature of the injury of plaintiff's decedent.



The underlying record clearly shows that Mrs. Caves and her son were diligent in pursuing the autopsy report which they requested immediately after their husband and father died on April 16, 2000. That report was not received by them until late March of 2001, which is uncontested on this record.

In Barnes v. Singing River Hosp. Sys., 732 So.2d 199 (Miss. 1999), the applicable precedent shows that the Mississippi Supreme Court held that the statute of limitations in any medical malpractice case does not run until a medical expert notifies the plaintiff's attorney of any possible negligence. Here, the autopsy report was not received until late March of 2001, and the expert opinion was not received until February of 2002, when notice was given under the Tort Claims Act.

Since the uncontradicted record demonstrates that the cause of death of the late Mr. Caves could only have been determined by an autopsy, since the uncontradicted record demonstrates that the autopsy was not received until late March of 2001, and the expert's opinion that the standard of care was violated was received in February 2002, the same month in which notice was given under the Tort Claims Act, summary judgment was improvident and the judgment below should be reversed and this matter remanded for trial.

#### IV. ARGUMENT

A. The Standard of Review

Summary judgment is granted in cases where there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The Mississippi Supreme Court then conducts a de novo review to determine if the trial court properly granted a motion for summary judgment. Daniels v. GNB, Inc., 629 So.2d 595, 599 (Miss. 1993).

In conducting a de novo review, the evidence is viewed in a light most favorable to the nonmoving party. Daniels at 599. See also Conrod v. Holder, 825 So.2d 16,18 (Miss. 2002).

As detailed hereinafter, the trial court's finding that plaintiff's decedent sustained no latent injuries (R. 101) not only has no support in this record, but is plainly erroneous in view of the uncontradicted affidavit of Dr. Pformiller that the breach of the standard of care could only have been determined upon review of the autopsy. (R. 105)

B. The Discovery Rule Applies to the Case at Bar.

The Mississippi Tort Claims Act provides a one (1) year statute of limitations to all claims, though this time limitation is typically stretched under applications of the various subsections of Miss. Code. Ann. §11-46-11. The draconian nature of this statutory bar has consistently been

ameliorated by judicial application of the well-known discovery rule in claims filed under the Mississippi Tort Claims Act. Wright v. Quesnel, 876 So.2d 362 (Miss. 2004). Grounded in public policy concerns, this rule serves to protect plaintiffs who cannot, through reasonable diligence, discover injuries done to them and tolls the statute of limitations until a plaintiff should have reasonably known of some negligent conduct, even if plaintiff does not know with absolute certainty that the conduct was legally negligent. Blailock ex rel. v. Hubbs, 919 So.2d 126 (Miss. 2005).

1. The Undiscoverable Nature of the Wrongdoing Classifies the Injury as Latent

A latent injury to which the discovery rule applies is an injury in which the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question, or when it is unrealistic to expect a layman to perceive the nature of the injury at the time of the wrongful act. Freeman v. University of Mississippi Medical Center, 2006 WL 1073195 (Miss. Ct. App. 2006). The practical policy underlying this equitable balance is the logical realization that, absent analysis by a trained medical expert, any lay-plaintiff could not possibly be expected to reach the conclusion of negligence on their own. Under circumstances where the medical standard of care is involved, conclusions by an expert educated and trained within the profession in

question must necessarily be required for the plaintiff to have any "reasonable knowledge" of the existence of unnatural/negligence-based causes of death. Otherwise, the result would be an illogical bar to a plaintiff's claims for injuries of which he is unaware, or in the exercise of reasonable diligence could not have become aware--a result in direct contradiction to judicial policies underlying the discovery rule. Carder v. BASF Corp., 919 So.2d 258 (Miss. Ct. App. 2005).

This case is plainly distinguishable from Wayne General Hospital v. Hayes, 868 So.2d 997 (Miss. 2004), where Supreme Court determined that the plaintiffs were not reasonably diligent in investigating the cause of the decedent's injuries (868 So.2d at 1001). Here, the Caves family immediately requested an autopsy, but uncontestedly did not receive it until late March of 2001. Moreover, as Dr. Pfortmiller's affidavit points out, only through the results of an autopsy could the late Mr. Caves' condition and the underlying malpractice be determined.

Generally, the Hospital denies that the Caves' family's efforts to secure the post-mortem examination report evidence sufficient diligence or that their diligence is irrelevant anyway because Jimmy Caves' injuries were not "latent." In contrast, plaintiff has produced probative evidence through an expert that Mr. Caves' entirely internal

malady could not be discovered any other way than through post-mortem examination.

A review of recent precedent shows that the Supreme Court of Mississippi has adopted a definition for the term "latent injury" that, generally, simply means the injury is undiscoverable by methods reasonably available to a lay person. For instance, in Sarris v. Smith, 782 So.2d 721, 725 (Miss. 2001), the Court observed that sometimes medical records are required to discover the injury. Under other circumstances, a person may have enough knowledge through personal observation or experience to start the limitations clock. Robinson v. Singing River Hosp., 733 So.2d 204, 208 (Miss. 1999). Other times, injuries may remain unknown until a medical expert notifies the plaintiff of possible negligence. Barnes v. Singing River Hosp. Sys., 732 So.2d 199, 206 (Miss. 1999). Because there is no bright line rule, the specific facts of a case will determine whether the plaintiff knew or reasonably should have known that an injury existed. Sweeney v. Preston, 642 So.2d 332, 336 (Miss. 1994).

Here Mrs. Caves knew that her husband had unexpectedly died the same day after his initial symptoms. That is all she or anyone else knew. The hospital records were unenlightening because they covered an emergency admission spanning less than a day. The mere fact of Jimmy Caves'

death is not equivalent to legal "injury." Legal "injury" does not refer to loss or economic damages but to the invasion of a legally protected right. Jobe v. ATR Marketing, Inc., 87 F.3d 751, 753 fn. 2 (5th Cir. 1996); Restatement (2d) Torts §7, cmt. a. Without some way of learning the cause of death, let alone whether it was a result of negligence, Irene Caves could not responsibly initiate legal proceedings.

The trial judge's conclusion that Jimmy Caves' death alone provided sufficient information to the Caves family to suspect that negligent treatment had contributed to Jimmy's death has no support in this record.

## 2. The Undiscoverable Nature of the Failure to Meet the Standard of Care Merits Discovery Rule Application

In Barnes v. Singing River Hosp., 733 So.2d 199 (Miss. 1999), the Mississippi Supreme court held the statute of limitations in a medical malpractice claim does not run until a medical expert notified the plaintiff's attorney of possible negligence, even where the injuries from which the action arose were not latent. Though this recovery-favoring approach has been questioned by the current Mississippi Supreme Court, it has not yet been overruled to the extent that diligent plaintiffs' claims are time-barred where there was no possible way to know negligence was a cause of death. In fact, the Mississippi Supreme Court has held the discovery rule applicable so as to toll the statute of limitations

when the party is unaware of his injuries and the conduct that caused the injuries. Davis v. Hoss, 869 So.2d 397 (Miss. 2004) (emphasis supplied)

As the argument in Subpart 1 demonstrates, the plaintiff, a licensed practical nurse, could have not possibly have had knowledge as to the cause of death without the autopsy. Absent the coroner's report, neither a claim in negligence nor the factual implications of negligence-based causation of death could be determined by a lay-plaintiff, even if she was a first-year LPN. Thus, no "reasonable knowledge" was attained by the plaintiff until receipt of this information and the statute of limitations was tolled, pursuant to the precedent identified hereinabove. As the claim was properly brought adhering to the notice and claim requirements of the Mississippi Tort Claims Act, the complaint should be well taken and the dismissal reversed.

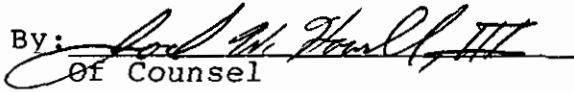
#### V. CONCLUSION

While defendants urge that the cause of the late Mr. Caves' death was obvious, a finding to that effect by the trial court is absolutely unsupported on this record.

To the contrary, Dr. Pfortmiller's uncontradicted affidavit establishes that the cause of death could only be revealed by the autopsy, which was not received by the Caves family until late March of 2001. Given that Dr. Pfortmiller's opinion was not rendered until February 2002,

this case falls squarely within the guidelines of Barnes v. Singing River Hosp., supra, and should, therefore, be reversed and remanded for trial.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

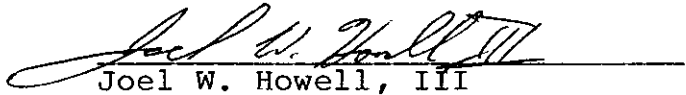
I, Joel W. Howell, III, do hereby certify that I have delivered or mailed a copy of the foregoing Brief of Appellant to:

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