

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANT

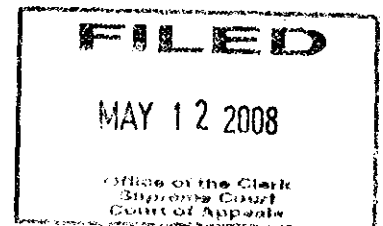
VS.

NO 2006-CA-01857

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

APPELLEES

SUPPLEMENTAL BRIEF OF APPELLANT



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2007-3439

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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 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
Plaintiff-Appellant |
| 3. Benjamin Yarbrough, MD
Franklin County
Memorial Hospital | Defendants-Appellees |
| 4. Lane Reed | Attorney for
Defendants-Appellees |
| 5. J. Scott Rogers
Wade G. Manor | Attorneys for
Defendants-Appellees |
| 6. Larry O. Lewis | Attorney for
Citizens Bank, <u>Amicus</u> |
| 6. William H. Liston
John M. Montgomery | Attorney for
Bear Creek Fisheries, <u>Amicus</u> |

SO CERTIFIED, this the 12th day of May, 2008.

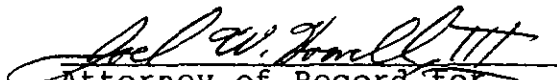

Attorney of Record for
Plaintiff-Appellant

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I. Factual background of the litigation

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, his wife Irene took him 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 taken to the x-ray facility where he suffered cardiopulmonary 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 the 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 secured the autopsy in March of 2001, shortly after March 24, 2001, when he received the bill for his father's hospitalization. (T. 9-10) Kevin related that the long delay was due to the death of the responsible coroner. (T. 12) Requests for the autopsy were made to the coroner's office on a weekly or biweekly basis from September of 2000 until it was finally received in 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 Diplomat 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) In this summary judgment situation, it must be taken as a factual given that Mrs. Caves had no knowledge that she had a viable cause of action for malpractice until the autopsy was received on March 25, 2001.

II. Appeal and current status

In its opinion, handed down on November 1, 2007, this Court has decided the instant case holding that the discovery rule does not apply under the Mississippi Tort Claims Act §11-46-1 et seq., a point not raised by or discussed by either party to these proceedings. In the process, the Court overruled its previous precedents, which had been incorporated into the statute in question by successive

reenactments of it by the legislature. The Court then applied that new interpretation, in effect a new statute, to enumerable unsuspecting litigants, including the plaintiff, who had come to rely upon the construction of the statute which had been previously ratified by legislative reenactment. Indeed, this plaintiff received information justifying a cause of action only shortly before the expiration of one year after the death in this case but justifiably relied upon the discovery rule and did not immediately file the notice and lawsuit which this court now retroactively requires.

Following a petition for rehearing joined by two motions for leave to file amicus briefs, this Court ordered briefing on several issues, which Mrs. Caves addresses below.

III. Questions posed by the Court.

A. Statutory Authority under the MTCA for a Discovery Provision

The statutory authorization for the discovery rule is §11-46-3(3) as interpreted by this Court and ratified by the legislature through subsequent reenactment.

This Court decided Barnes v Singing River Hospital, 733 So.2d 199, 205 (Miss. 1999) in January 1999, holding that the time limitation of §11-46-11(3) is subject to the "discovery" rule. That is, the time within which a suit

must be filed does not commence to run until the injured party discovers or in the exercise of reasonable diligence should have discovered the injury and the nature of the conduct which produced the injury. After Barnes was decided, §11-46-11(3) has been brought forward in legislation and re-enacted by the legislature at least three times. HB 778 was enacted in 1999, after Barnes, and amended §11-46-11(3) to address the operation of the notice and tolling provisions. SB 2974 was enacted in 2000, and added a new subsection §11-46-11(4) to provide for the tolling of the statute for persons under disability "at the time at which the cause of action accrued." SB 3052 was enacted in 2002 to amend §11-46-11(4) to make it applicable retroactive to April 1, 1993, rather than May 15, 2000 as provided in SB 2974.

In accord with familiar rules of construction, the legislature by re-enactment of a statute, which has been construed by the highest court of the state, adopts the construction placed upon the statute by the court. Garrett v. Mississippi State Highway Comm'n, 227 So.2d 856, 857 (Miss. 1969). Thus, by the several reenactments of the §11-46-11(3), Barnes "in effect became part of the legislation." Choctaw, Inc., v. Wichner, 521 So.2d 878, 880 (Miss. 1988). Accord, Dearman v. Dearman, 811 So.2d 308, 314 (Miss. 2001).

Especially in the instances of statutory construction

where the legislative branch has the power to overrule a court's decision by amending the statute, the injustice of inconsistent results is the principal reason this Court has given for its reluctance to disturb past decisions. "[S]tare decisis proceeds from that first principle of justice, that, absent powerful countervailing considerations, like cases ought to be decided alike." State ex rel Moore v. Molpus, 578 So. 2d 624, 634 (Miss. 1991).

The rubric of "strict construction" has no force in these circumstances where the previous construction has been given legislative approval in this manner. Indeed, a reversal under these circumstances is the opposite of strict adherence to the legislative will. It ignores the legislative will as expressed by reenactment after the initial construction. To adopt a new construction under these circumstances would offend the doctrine of stare decisis.

As the court of one of our sister states has recently put it,

The strength of that doctrine is at its apex '...when prior decisions construe a statute.' Galloway [v. Vanderpool, 205 Ariz. 252], 205 Ariz. at 256, 69 P.3d [123] at 27; see also State v. Hickman, 205 Ariz. 192, 201 38, 68 P.3d 418, 427 (2003) (noting that 'in cases involving statutory interpretation the burden [required to overrule a prior decision] is highest'). This is because if we have 'interpret[ed] the statute other than as the legislature intended, the legislature retains the power to correct us.' Galloway, 205 Ariz. at 256, 69 P.3d at 27. Therefore, [i]t is universally the rule that where a statute which has been construed by a court of last resort is

reenacted in the same or substantially the same terms, the legislature is presumed to have placed its approval on the judicial interpretation given and to have adopted such construction and made it part of the reenacted statute. [Hancock v. Bisner, 212 Ariz. 344, 349, 132 P. 3d 283, 288 (AZ 2006).]

Appellees' brief on the issue of statutory authorization fails to respond at all to the arguments put by amici in this case concerning the ramifications of the word "actionable." Mrs. Caves will rest on those arguments.

What defendants attempt to address is the legislative re-enactment argument. Here they suggest that the failure of House Bill 214 in the 2008 legislative is somehow instructive with respect to legislative intent. A brief recitation of the history of the statute should belie that argument. The statute in question, §11-46-11, was adopted in 1993. This Court interpreted it in early 1999 to include a discovery rule. A few weeks later it was reenacted by the legislature without addressing or attempting to "correct" the court's interpretation. The very next year it was reenacted again to add a tolling provision for persons under disability "at the time which the cause of action accrued."

The courts have treated legislative reenactment differently than legislative failure to act. "Certainly when a legislature reenacts a law using the same terms that have been judicially construed in a particular manner, one may reasonably infer that the legislature approved of the judi-

cial interpretation. There is considerably less force (though still some) to the argument that if a legislature does not agree with the judicial interpretation of the words or meaning of a statute, the legislature would surely have immediately changed the statute." State v. Medran, 67 S.W. 3rd 892, 902 (TX Crim. App. 2002). See also People v. Meloney, 30 CA4th 1145, 70 P.3d 1023, 1035 (Observing that where statute in question was amended three times in the ten years since it was interpreted without changing the interpretation there is strong presumption that the interpretation has been adopted despite the fact that mere legislative inaction is not convincing.)

"Insofar as legislative intent is concerned inaction demonstrates nothing more than that subsequent legislatures failed to act." Masse v. Board of Trustees, Public Employees Retirement System 87 N.J. 252, 432 A.2d 1339 (1981)

As the court put it in People v. Daniels, contrasting the legislative reenactment doctrine with a failure to act,

Legislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval, the weaknesses of which have been exposed elsewhere. But something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation such as to bar the court from reexamining its own premises. We are not here faced with a situation in which the Legislature has adopted an established judicial interpretation by repeated reenactment of a statute. (Italics added.) (Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211, 218, 11 Cal.Rptr. 89,93, 359 P.2d 457, 461; see, e.g., People v.

Curtis (1969) 70 A.C. 360, 368, 74 Cal.Rptr. 713, 450 P.2d 33.) The Legislature has neither reenacted nor amended nor rewritten any portion of sections 207 or 209 since the 1951 legislation construed in Chessman. The lawmakers, in short, have simply not spoken on the subject during the intervening years. [459 P. 2d 225, 230 (Cal. 1969)]

In this instance there were two bills, which might be described as companion bills, HB 214 and HB 215, which were passed out of the House. HB 214 would have made the discovery provision in the statute here in question more explicit. HB 215 would have ameliorated the pre-filing medical expert opinion certification provision. They passed out of committee together, passed the House together and died in the Senate Committee together, just as similar Senate bills died earlier in the Senate Committee. Neither was put to a vote in the Senate Committee.

This inaction is an exceedingly "weak reed" on which to base any construction. 2A Sutherland, Statutory Construction (6th Ed. 2000), §49.10 at 113. First, it would presume legislative acquiescence in a pronouncement of this Court which is not yet final. Second, it is not a positive re-enactment of anything. Third, it is inaction of a very short duration, when compared to the nine year history of the Barnes interpretation.

Passing legislation takes the concurrence of two houses and the signature of the governor. Legislation can fail at

the whim of a committee chair. It follows that reenactment of a provision carries more weight than the fact that legislation has failed. This is particularly so where as here, the prevailing tone attendant to the reenactments that followed close upon the heels of the Barnes decision were ameliorative and used "accrual" language rather than "conduct" language. The latter fact alone suggests that the term "actionable" modifying conduct was intended to convey accrual of a cause of action in the sense of both conduct and an injury which was discoverable through reasonable diligence.

§11-46-11(3) was properly interpreted in Barnes, an interpretation that was legislatively ratified by reenactments as the statutory authority for a discovery provision. If it is to be removed it should not be by court action, but rather by affirmative act of the legislature.

B. Judicial Authority to recognize a Discovery Provision

This Court in Barnes v. Singing River Hospital Systems, 733 So.2d 199 (Miss 1999) had no difficulty finding the discovery rule applicable to the Tort Claims Act:

Despite the absence of specific discovery language in the statute, we find that the discovery rule applies to §11-46-11(3). This finding is not without precedent. In Sweeney v. Preston, 642 So.2d 332 (Miss. 1994), this Court traced the history of application of the discovery rule in medical malpractice actions involving latent injuries. Before the enactment of §15-1-36, the six-year general statute of limitations applied to medical malpractice claims and did not contain a discovery rule provision for latent injuries as it does now.

Sweeney, 642 So.2d at 333. This Court did not interpret the general statute to include a discovery rule in medical malpractice cases at that time. Id. In passing §15-1-36, the Legislature shortened the time period for bringing a medical malpractice suit, but adopted a discovery standard for triggering the running of the statute. Id. Similarly, when the Legislature amended §15-1-49 (the general statute of limitations), shortening the limitations period from six years to three years, it included a discovery provision for latent injuries as a trade-off. [733 So.2d at 204]

The Barnes Court went on to cite, with approval, the Sweeney Court's rational between the application of the discovery rule:

Thus, where an injury or disease is latent, a determination of when the statute of limitation begins to run focuses not on the time of the negligent act or omission, but on when the plaintiff discovers the injury or disease. Moreover, knowledge that there exists a casual relationship between the negligent act and the injury or disease complained of is essential because 'it is well-established that prescription does not run against one who has neither actual nor constructive notice of facts that would entitle him to bring an action.' [642 So. 332, 334] [733 So.2d at 204]

Finally, the Court concluded

...we choose to incorporate a discovery rule in actions brought under the Mississippi Tort Claims Act involving latent injuries. Particularly considering the short, one-year status of limitations period in §11-46-11(3), we find that justice is best served by applying a discovery standard in such cases. As we stated in Smith v. Saunders, 485 So.2d 1051 (Miss. 1986): There may be rare cases where the patient is aware of his injury prior to the [expiration of the limitations period], but does not discover and could not have discovered with reasonable diligence the act or omission which causes the injury. In such cases, the action does not accrue until the latter discovery is made. [Saunders, 485 So.2d at 1052-53]

The line of reasoning set forth in Barnes v. Singing River Hospital and followed thereafter in all judicial authority until the instant case, is clear and should be observed.

Appellees admit that there is ample judicial precedent for a discovery rule. They then urge the court to reverse that and in support, once again cite failed legislation in the 2008 session. What appellees ignore is an almost thirty year history of both legislative acquiescence in the movement to shorter statutes of limitations with a discovery provision and legislative enactment in that direction chronicled in their own brief. Indeed, defendants misinterpret Kilgore v. Barnes to say that the court applied a discovery provision in that case before §15-1-36 was adopted. In fact what the court did there was to apply §15-1-36 after it was adopted, holding that that statute extended the six year statute until discovery because it was enacted prior to the time that the six year statute on Barnes' injury ran. 508 So.2d 1042 (Miss. 1987)

Both the court and the legislature moved forward together on this issue at the time that this statute was adopted, interpreted and reenacted. The direction of that movement was to allow reasonable time for discovery of causes of action before they are barred.

C. If the Court determines to overrule prior case law it should be prospective only.

Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971) dealt with just this situation. In it, the Court considered whether interpretation of the Outer-Continental Shelf Lands Act, 43 USC 1331 et seq., allowed use of a state statute of limitations.

The Court held that the state statute of limitations should be applied as per Rodrigue v. Aetna Casualty Insurance Company, 395 U.S. 352, 89 S.Ct. 1835 (1972), where it expressly held:

We hold that the Lands Act as interpreted in Rodrigue requires that the state statute of limitations be applied to personal injury actions. We affirm the judgment of the Court of Appeals; however, on the grounds that Rodrigue should not be invoked to require application of the Louisiana time limitation retroactively to this case. [404 U.S. at 100]

The Court explained this ruling by using three distinct factors. First, the decision to be applied nonretroactively must establish a new legal principle by overruling prior precedent or by deciding an issue of first impression that was not anticipated. Secondly, the Court must weigh the merits of the case and look to purpose and history of the rule. Lastly, the level of fairness must be assessed to determine if injustice would ensue due to the retroactive application. 404 U.S. at 107.

Based upon the foregoing, the U.S. Supreme Court had

decided, "...that the Louisiana one-year statute of limitations should not be applied retroactively in the present case." [404 U.S. at 107]

Moreover, the legislature cannot retroactively shorten the statute of limitations. See Wheeler v. Jackson, 137 U.S. 245, 258, 11 S.Ct. 76,79 (1890), CJS Limitations 7; AmJur2d Limitations 40-41. Neither can a court. See Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451 (1930). (rehearing was first time party had opportunity to object to court's sua sponte overruling of prior case law, which it applied retroactively to cut off any remedy for the state's misconduct).

The plaintiff in this case, and no doubt numerous other plaintiffs with claims under the Tort Claims Act, has relied on the rule this Court stated in Barnes. This was done in utmost good faith. Before the Court's opinion in this case, there was no reason to believe that this Court would overrule its prior cases, ignoring the almost immediate legislative reenactment of the statute ratifying its construction. The appellee in this case did not even argue for that result.

If this Court's decision is applied retroactively - including application to the plaintiff in this case - a great injustice will result. Parties who waited to file because they relied on the discovery rule will be thrown out

of court simply because they took this Court at its word. Out of respect for stare decisis, equity, and due process, this Court should not apply its new statutory interpretation retroactively in this case.

In Pressly v. Mississippi State Highway Comm'n, 608 So.2d 1288, (Miss 1992), this Court applied its holding purely prospectively. It relied on Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971). There, the United States Supreme Court had adopted a new rule that certain admiralty cases were governed by the applicable state statute of limitations. The plaintiff in Chevron had relied on prior law, which said that a longer federal statute of limitations applied. The Supreme Court held that its new rule did not apply retroactively because the plaintiff had relied in good faith on the old rule.

More recently, under similar circumstances the Supreme Court of Tennessee reached a like result. Calaway v. Schucker, 193 S.W. 3d 509 (Tenn. 2005). It overruled a prior Tennessee Court of Appeals construction of an aspect of a statute of limitations but stated that "in order to avoid undue hardship to potential plaintiffs who have justly relied upon federal court and lower court precedents erroneously stating the opposite rule, the new rule we announce today is to apply prospectively only." 193 S. W. 3d at 512. The question of prospective only application was briefed by

Mrs. Caves in her motion to reconsider. Nothing said by appellees seriously detracts from what she said there. This court in its infinite wisdom, gave fair notice to the government in Pressly. It should do no less here. The Court should recognize that when it chose to give prominence to doctrines of construction not previously honored in construing the same statutory language it acts unfairly if it does not act prospectively.

The doctrine of stare decisis as previously briefed by amici, is another guard against visiting harms upon those who have relied in good faith upon the previous decision. The Court should be wary of this effect at any time, but it should be especially wary where, as here, it views a previous statutory construction as merely wrong without any attendant evidence of a pernicious effect.

In the instant situation, the majority opinion retroactively applies its decision overruling Barnes. It is indisputable that this plaintiff relied upon the Barnes interpretation of the statute and delayed filing suit when suit was possible, albeit with great effort, with the one-year period despite the delay in receiving information, which was beyond this plaintiff's control. This result offends fundamental principles of equity and fairness. Beyond that, it constitutes a deprivation of appellant's due process rights under the 14th Amendment to the Constitution of

the United States and Section 14 of the Constitution of State of Mississippi and mandates that this Court's initial decision be modified. See Brinkerhoff-Farris Trust Co., supra.

D. Whether - by employing the Plain Error Doctrine or other principles - this Court should address the question of whether the Discovery Provision applies to the MTCA.

Mississippi Rule of Appellate Procedure 28(a)(3) states that "...the court may, at its option, notice a plain error not identified or distinctly specified."

In this circumstance, existing case law had engrafted the discovery rule onto the MCTA. This rule which was deemed to be legislatively adopted by successive re-enactments of the Tort Claims Act, leaving that case law intact. Appellant respectfully submits that this is not a case for the application of the Plain Error Rule.

However, this litigation was delayed for a considerable period of time by the length of time the trial court took in ruling on appellees' motion and this issue should be resolved at this time.

The question whether the statute of limitations is subject to a discovery rule may be a pure question of law, which this Court can reach with fair notice to the parties. This opportunity to brief the issue and provide further argument has cured any error in reaching the issue previously, assuming as Mrs. Caves does, that the Court has an open mind

on the issues and is not bound to adhere to its previous disposition.

IV. When the discovery rule is applied to the facts of this case, the judgment of the trial court should be reversed.

This case is presented on a grant of summary judgment for defendants-appellees. Obviously if there are triable issues of material fact, the case would have been reversed but for this court's abrogation of existing case law and imposition of a one year statute of repose. Given the merits of the claim, in which the facts must be viewed most favorable to the moving party, plaintiff-appellant should have otherwise prevailed. See Robinson v. Singing River Hospital Sys., 732 So.2d 204 (Miss. 1999) Here, Mrs. Caves made diligent effort to get the autopsy results on her husband's case but did not receive them, even after requesting them in September of 2000, until March 2001 (Transcript at 12). That must be accepted as uncontested on this record. The fact that Mr. Caves had a septic colon still does not create a cause of action, for plaintiff-appellee's expert testified that his conclusion of liability for failure to conduct appropriate diagnostic tests could not have been reached without the results of the post mortem examination. (Record at 84,105).

In its recent decision in Neglen v. Brezeale, 945 So.2d 988 (Miss. 2006) this Court found a plaintiff in a wrongful

death medical malpractice action to have exercised due diligence despite the fact that unlike Mrs. Caves, the plaintiff waited more than two years before she first requested the medical records. Surely, Mrs. Caves' actions in the instant case meet the requisite due diligence standard.

Appellees, in addition to responding to the court's questions, have chosen to assert an argument that they should prevail even if the discovery rule remains the law. Mrs. Caves addressed this question in her Petition for Re-hearing to which Defendants failed to respond.

Replying briefly to Appellees' assertions, Mrs. Caves reminds the court that the "injury" in this instance is an untimely death due to medical negligence. The fact that the patient has died does not make one aware of an actionable injury. See, e.g., Neglen v. Breazeale, 945 So. 2d 988 (Miss. 2006). In medical negligence cases, those who would be plaintiffs are required to obtain an opinion of an expert that there was negligence which proximately caused an injury. §11-1-58, Miss. Code Ann. (2003) (adopted after this case was filed) Here, it is uncontradicted that a medical expert could not have made that determination until there was access to the autopsy report which disclosed the cause of death. There is nothing in this record which supports the proposition that Mrs. Caves could have determined that there was a "probability" of an "actionable injury" earlier

than that. Appellees' brief at p. 6.

Mrs. Caves made diligent efforts to get both the medical records and the autopsy report but that there was a delay in getting the autopsy report through no fault of hers. As soon as that report was received, Mrs. Caves sought expert review and only then was the injury, the wrongfulness of this death, discovered. Neither Mrs. Caves' training as a practical nurse nor a preliminary expression of concern by the coroner support a conclusion that negligence was probable. Neither meets the standard of an opinion by a qualified medical expert to a reasonable degree of medical probability.

Mrs. Caves relied upon the discovery rule which existed through court interpretation and legislative reenactment and filed her claim within a year of that discovery. If the discovery rule survives, her claim should likewise survive.

Given the foregoing, even if this Court determines that its result should apply, it should be prospective only and not retrospective, so as not to deny plaintiff-appellant's due process rights.

CONCLUSION

In its initial opinion, this Court opined that the limitation period under the MCTA was a statute of repose, not one of limitation.

As Prosser on Torts points out, a statute of repose

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SO CERTIFIED, this the 12th day of May, 2008.


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