

IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-CA-01857

IRENE CAVES,
Petitioner/Plaintiff,

vs.

BENJAMIN YARBOROUGH, MD AND FRANKLIN COUNTY MEMORIAL HOSPITAL
Respondents/Defendants.

BRIEF OF AMICUS CURIAE CITIZENS' BANK

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CERTIFICATE OF INTERESTED PERSONS

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

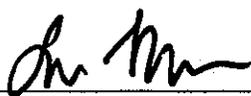
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INTRODUCTION

Citizens Bank submits this brief on its own behalf as well as on behalf of numerous other citizens who have been wrongfully injured by the State of Mississippi. Specifically, it submits this brief for those injured by “tortious, wrongful or otherwise actionable” conduct that took place before November 1, 2006, i.e., one year before this Court’s announcement of its reinterpretation of MISS. CODE ANN. § 11-46-11(3) (Rev. 2002) in this case.

This Court should reverse itself and maintain *Barnes v. Singing River Hosp.*, 733 So.2d 199, 205 (Miss. 1999) as the law of this state. It is a precedent which has gained legislative acceptance through repeated reenactment. The traditional criteria for setting aside the doctrine of *stare decisis* have not been met. At the very least, the limitations period should not begin to run until the plaintiff is injured, because only then does the state’s conduct become “actionable.”

Alternatively, if the Court adheres to a new interpretation then that new interpretation should not have retroactive effect, i.e., should not apply to the parties in this case or to any other party who files a claim within 30 days after the date this Court hands down its mandate in this case. It should apply prospectively only.¹

ARGUMENT

- 1. Where, as here, private interests have come to rely upon an established precedent, and the precedent has not been shown to adversely affect the public or other interests, that precedent should not be disturbed simply because the court later concludes that it was wrong.**

The “discovery rule” as applied to the Mississippi Tort Claims Act is not broken. It has not broken the Mississippi Tort Claims Act, nor has it broken the State of Mississippi. The ruling here in question nevertheless reverses this precedent upon which many have relied and

¹ This Court has said that generally the retroactivity rule applied to other litigants should be the same as the rule applied to the parties in the case. *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1092-1094 (Miss. 2000) (applying doctrine retroactively where it was applied in the case in which doctrine was adopted).

which has since continuously been reenacted by the Legislature without change², with no better reason than that, in the view of today's majority, the decision was not legally sound when made.

While the majority complains that the original ruling offends the principle of strict adherence to legislative language, it leaps headlong into a decision which offends both the doctrines of legislative reenactment and *stare decisis*. Moreover, it does so without any apparent justification in terms of identifying any harmful effects of the precedent that it overrules. And, more important, it does so without even a passing reference to the interests of those who ordered their affairs in reliance upon the long-standing precedents which were in consonance with an even longer line of precedents dealing with statutory limitations.

The doctrine of *stare decisis*, put simply, is that it is not sufficient to be "right" but rather one must be right at the right time, before many have come to rely upon the "wrong" view. This is especially so when dealing with statutory interpretations where the "wrong" can be corrected by the legislature. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173, 109 S.Ct. 2363, 2370 (1989) ("[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [a court has] done.") *See, e.g., Square D*

² In her Motion for Rehearing, Mrs. Caves has cogently and persuasively argued the doctrine of legislative reenactment. Those arguments will not be repeated here except to say that it is a principle which has guided this court and others, even where it thought that the prior decision was wrong, practically throughout the history of the republic. *See, e.g., Shotwell v. Covington*, 12 So. 260 (Miss. 1892) ("In view of the interest of the public in having officers elected by them inducted into office, we should have preferred that line of authorities holding the power of approving officers to be ministerial rather than judicial; but since the decision of *Swan v. Gray* our laws have undergone codification, and we find nothing in the Code of 1880 evincing a purpose of the legislature to alter the rule announced in that case. We have uniformly declined to overrule a case settling the construction of a statute where, after the decision, the statute has been reenacted.") That doctrine, however, works hand in glove with the doctrine of *stare decisis*. The failure of the legislature to adjust the statute is a rationale for leaving settled issues settled. The legislative reenactment doctrine goes beyond that, however, and deems the legislature to have acted, positively incorporating the court's interpretation in the statute. Amicus argues here that in addition to legislative reenactment, the court's decision violates principles of *stare decisis* standing alone.

Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424, 106 S.Ct. 1922, 1930-31 (1986);
Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S.Ct. 2061, 2069-70, 52 L.Ed.2d 707 (1977).

Additionally, the court must consider whether the “wrong” decision is working some mischief which cries out for correction, i.e., is “pernicious,” or “impractical,” or “mischievous in effect.”

This court has previously enunciated the prerequisites as follows:

In *stare decisis* generally, we look for error, but, finding that, we look for more and we look largely in the area of public or widespread disadvantage. Ordinarily, we do not overrule erroneous precedent unless it is “pernicious,” *Stone v. Reichman-Crosby Co.*, 43 So.2d 184, 190 (Miss.1949); “impractical,” *Robinson v. State*, 434 So.2d 206, 210 (Miss.1983) (Hawkins, J., concurring); or is “mischievous in its effect, and resulting in detriment to the public.” *Childress v. State*, 188 Miss. 573, 577, 195 So. 583, 584 (1940). We look for “evils attendant upon a continuation of the old rule.” *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 467 (Miss.1983).

One accepted ground for judicial overruling of a demonstrably erroneous prior constitutional interpretation is that, across the years, it has produced great and sustained harm; in *Power's* words, if it is “clearly ... hurtful ...” 130 Miss. at 235, 93 So. at 777. The test is an objective one, that we find over time the precedent has repeatedly had a substantial adverse or significantly harmful effect upon the people.

State ex rel. Moore v Molpus, 578 So.2d 624, 635 (Miss. 1991). While the court in *Molpus* spoke to constitutional interpretations, as we have seen, the same policy applies with even greater force with statutory interpretations because such interpretations are subject to legislative correction.

The *Barnes* decision was by a unanimous court. There is nothing approaching a showing that the *Barnes* decision has had a “pernicious” effect. Nor has it been shown to be impractical, mischievous or detrimental to the public.³ In short there is no showing of “substantial adverse or

³ The “notice” cases to which the majority alluded, do not foreshadow this ruling. In the notice cases the court observed that because of the passage of time and increased familiarity with the provisions of the

significantly harmful effect upon the people.”⁴ Indeed, a discovery rule is the norm not an exception. If anything is an exception, it is the relatively short duration of our statute of limitations for claims against government actors. To the knowledge of undersigned counsel, not one bill has been introduced in the legislature to try to nullify the discovery rule. Surely if there were a perceived pernicious effect, some legislator would have sought to address it. The absence of any evidence of any detrimental or mischievous effect standing alone should force this court to stay its hand.

Additionally, however, the court should consider the effect of its ruling on those who have come to rely upon the status quo, the statute of limitations as construed by *Barnes*. Caves is but one of many plaintiffs and potential plaintiffs who are adversely affected if this decision is allowed to stand. They are from all walks of life with similar circumstances in common, i.e., they all claim or will claim to have been injured at the hands of the state or one its employees and believe they are entitled to remedy.

The state injures its citizens in many ways. Amicus Citizens Bank suffered injury when the Secretary of State negligently failed to index the right years on a farm loan lien the bank submitted. The state can sell defective agricultural products. State doctors, hospitals, nurses and

act, there was little excuse for not complying with the relatively simple provisions of the notice provision. See, e.g., *University Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006) (“Since the MTCA’s passage in 1993, a considerable amount of time has passed for the legal profession to become aware of the ninety-day notice requirement in section 11-46-11(1).”). This is especially so after legislative modification of the provision in 1999 which clarified the identity of persons to be served. There is no amount of familiarity with the statute which can make one discover what cannot be discovered with reasonable diligence or discover latent injuries or to act before any injury has occurred.

⁴ According to the Mississippi Tort Claims Board, for the year 2006, the State of Mississippi, not including its universities or local governmental entities, paid \$1,380,449 to defend and settle 991 tort claims, or approximately \$1,400 per claim. At the end of that year, 120 claims totaling \$2,638,302 had not yet been resolved. These claims arose out of slip-and-fall accidents, faulty roadway design, medical professional liability, automobile collisions, and other occurrences. One recent claim arose out of an incident in which a bull got loose at the state fair. To the extent government agencies have purchased insurance, the Court’s reinterpretation would just provide a windfall to the insurers.

highway engineers may commit malpractice. State vehicles can cause accidents. Sometimes the act that causes the injury may take place years before the actual injury. Even when it takes place less than 12 months before the injury, the injury may not be discovered immediately.

The plaintiff here and other victims of state wrongdoing have relied in good faith on the interpretation of the Tort Claims Act set out in *Barnes v. Singing River Hosp.*, 733 So.2d 199 (Miss. 1999). They have believed that they generally have had at least one year after discovery of their injury to file a tort claim against the state. For example, if an injury were discovered six months after the wrongful act, a victim would believe reasonably that he had until 18 months after the wrongful act to file his claim. Nothing has even suggested to victims that this court might change that interpretation. No party in this case sought the overruling of *Barnes*. The Mississippi Tort Claims Board, when it has appeared before this Court, has not sought the overruling of *Barnes*. In short, *Barnes* remained unchallenged before November 1, 2006, the date this Court handed down its decision in this case.

All of these claimants were intended beneficiaries of the Mississippi Tort Claims Act. All have a right to rely upon settled principles of *stare decisis*, especially where there has been legislative reenactment. When this court fails to consider these interests and fails to weigh the adverse affect of the precedent, if any, against the adverse affect of a sudden reversal, it fails to conform to settled principles of law which have guided this society for centuries.

2. Alternatively, this court should modify its ruling to hold that the statute does not begin to run until an injury is sustained.

The one-year statute does not begin to run until the wrongful conduct becomes "actionable," i.e., the plaintiff is injured. The Court's opinion characterizes the statute as a statute of repose and then appears to conclude, from that characterization, not only i) that there is no discovery rule but ii) that the statute cuts off causes of action even before the plaintiff is injured.

But if the guiding principle is plain meaning, then the words should be given their plain meaning without any need for characterization. As in the Merchant of Venice, if Shylock is to have his bond, he can have it only according to its strict terms. If the state is to be stingy to its citizens, it should be allowed to do so only according to the exact words the state has used. Those words say the statute does not begin to run until a wrong is “actionable,” i.e., has caused damage.

The statute runs from the date of the “tortious, wrongful or otherwise actionable conduct...” MISS. CODE ANN. § 11-46-11(3). In other words, it runs from the date of only that conduct which is “actionable.” In turn, “actionable” means “furnishing grounds for a lawsuit” or, as some would put it “act-on-able.” B. Garner, A DICTIONARY OF MODERN LEGAL USAGE 20 (1995). See also BLACK’S LAW DICTIONARY 29 (1990) (“[t]hat for which an action will lie”). But an “action,” or lawsuit, is available only when the conduct has resulted in damages. Otherwise it is a legal injury without damages, or *injuria absque damno*, a wrong “from which no loss or damage results, and which, therefore, will not sustain an action.” BLACK’S LAW DICTIONARY, *supra*, at 785.

For these reasons, this Court should grant rehearing and, at the very least, modify its ruling to clarify that the one-year statute does not begin running until the wrongful conduct has caused damages, i.e., is “actionable.”

3. Any new interpretation should apply prospectively only.

The doctrine of *stare decisis* protects those who have relied on past decisions of a court. They have “zigged” when the law told them to “zig.” Because court decisions normally apply retroactively to the parties in the case and others, *stare decisis* prevents the law from telling them “tough luck, you should have zagged instead.”

If this Court should choose not to honor *stare decisis*, then it should use another method to protect those who “zigged.” It should give its reinterpretation of the statute purely prospective effect only.

Fairness requires prospective application only.

Turn about is fair play. This Court has in a past sovereign immunity case limited a ruling to prospective application because the state had presumably set its budgets in reliance on prior law that defeated claims against the state. *Presley v. Mississippi State Highway Comm’n*, 608 So.2d 1288 (Miss. 1992). Now tort victims should receive the same reasonable consideration. This Court should limit this ruling to prospective application because victims of state negligence have relied on prior law that afforded them a discovery period extension of the limitations statute governing claims against the state.

In *Presley*, this Court declared unconstitutional a law that had reduced the liability of the state as sovereign. This Court limited its ruling to prospective application only because state entities had relied on prior law. Nothing had “clearly foreshadowed” the Court’s declaration of unconstitutionality. The invalidated statute had limited state liability, and prospective application furthered that policy. Finally, it was inequitable to impose liability on the state retroactively. *Id.*

The same three factors apply in the opposite direction here. Nothing in this Court’s decisions “clearly foreshadowed” the overruling of *Barnes*. The purpose of the old rule was to toll limitations until the damages were discovered, i.e., to protect victims. It would be the height of inequity for the court to cut off the right to sue simply because a party or lawyer failed to anticipate this Court’s unexpected change in the law.

Nor would such a cut-off square with legislative intent. Whatever the legislature intended when it wrote § 11-46-11(3) (Rev. 2002), it did not intend for victims to arbitrarily lose

the right to sue. In other words, even if the legislature intended for the statute to be a statute of repose, it did not intend for those who had claims allowed by such a statute to lose their rights simply because this Court did not get the interpretation right in the first instance.

In similar circumstances, the Supreme Court of Tennessee recently held that a decision interpreting a medical malpractice statute of limitations should be applied prospectively only. *Calaway v. Schucker*, 193 S.W.3d 509 (Tenn. 2005). Before that decision, some courts had interpreted the Tennessee statutes to toll limitations during minority for minors injured by medical malpractice. In *Calaway*, the Court held that minors, like others, were bound by a three year statute of repose for medical malpractice actions. But, because retroactive application of that holding would work a hardship on those who justifiably relied on prior precedent, the Court held that its ruling would apply only prospectively. It quoted Justice Benjamin Cardozo's statement that state courts are constitutionally free to apply their holdings prospectively:

A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions ... [N]ever has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted.

Calaway, supra, at 518, quoting *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 365, 53 S.Ct. 145 (1932). Similarly, this Court, if it adheres to its reinterpretation of the limitation statute, should apply that reinterpretation prospectively only. See also *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (Barksdale, J.) (new rule governing forfeiture of right to appeal from magistrate decision would be applied prospectively only).

If reached, a retroactive shortening of the statute of limitations would deny due process under the federal constitution

This court can, on grounds of equity, limit its reinterpretation to prospective application only and so avoid any constitutional question that might arise. But, if it does not do so for equitable reason, it will have to face that constitutional question. And the answer to that question is that retroactive application of a shortened limitations period denies due process.⁵

A new statute of limitations denies due process if it unreasonably interferes with an existing right of action. So, if a state shortens a statute of limitations, it must provide “ a reasonable time . . . for bringing the action after the passage of the statute and before the bar takes effect.” U.S. Government Printing Office, CONSTITUTION OF THE UNITED STATES ANN. 1838 (2002), citing *Wheeler v. Jackson*, 137 U.S. 245, 258 (1890). If it fails to do so, it has taken a vested right without affording the litigant due process.

In this case, due process requires that this Court provide a reasonable time for the bringing of claims under *Barnes* before this Court’s reinterpretation takes effect. To be sure, court decisions are not legislative decisions. Court decisions normally operate retroactively on the theory that the court just “discovers” the law and private parties should be rewarded for urging the court to adopt a new interpretation. See L. Fuller, *MORALITY OF THE LAW* 57 (1969 rev. ed.). But here the Court has not just interpreted the statute, it has, without warning, overruled a prior interpretation. And it has done so without being urged to do so by any party.

Also, this claim is a claim against the state itself, which imposes on the state an especial duty to afford due process. In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S.Ct.

⁵ The case now before the Court is a wrongful death claim. Wrongful death claims are created by statute. They are not common-law claims. If a common law claim were in issue, however, retroactive application of the reinterpretation would be also barred by MISS. CONST. OF 1890, Art. III § 24, which requires that individuals are to have “remedy by due course of law,” i.e., that state regulations governing lawsuits must be reasonable. See G. Ethridge, *MISSISSIPPI CONSTITUTIONS* 125 (1928) (legislature must permit time of “sufficient length to permit proper investigation”).

451 (1930), the Supreme Court held that a state court denied due process when it reversed a prior precedent in a manner that unreasonably prevented the plaintiff from pursuing a claim against the state for back taxes. There the Missouri Supreme Court had held that applicants for tax refunds were not to apply to the state tax commission, but were to sue the county treasurer. The taxpayer sued the treasurer for a taking of his property. On appeal, however, the Missouri Supreme Court reversed prior ruling. It held that, because the taxpayer had not sued the state tax commission, it was not entitled to recover a refund.

Justice Louis Brandeis held that the state could not get away with such a maneuver. Missouri denied due process, he said, when it deprived the taxpayer of “an opportunity to present his case and be heard in its support.” *Id.* at 681. He added:

Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 682. See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148 (1982) (requirements that foreclose litigation must be reasonable). In the same way, Mississippi cannot constitutionally shorten its Tort Claim Act statute of limitations through reinterpretation retroactively applied, a step which would prevent injured persons from having a “real opportunity” to pursue their claims.

Only this Court can prevent retroactive application of its holding in this case

This Court is the only branch of government that can prevent retroactive application of its holding. The Court’s ruling is based on statutory interpretation. For that reason, it might be thought that the legislature could, if it disagreed, amend the statute and make the amendment retroactive. That is not true.

The problem is that MISS. CONSTITUTION OF 1890 Art. IV § 97 deprives the legislature of "power to revive any remedy which may have become barred by . . . any statute of limitation of this state." For that reason, if a claim is barred by the present statute, the legislature cannot revive it. *See Gulf & S.I.R. Co. v. Bradley*, 110 Miss. 152, 163, 69 So. 666, 667 (1915).

For this additional reason, this Court should hold that its reinterpretation of the statute is to have prospective effect only. This Court should not apply its reinterpretation of the statute retroactively, and should, as in *Presley*, limit its application to claims filed more than 30 days after this Court issues its mandate on rehearing.

CONCLUSION

Citizens Bank, as amicus curiae, respectfully prays that this Court will do the following:

1. Withdraw its opinion overruling *Barnes* and decide this matter on the issues raised by the parties to this appeal without disturbing the discovery rule.
2. In the alternative, this Court should at the very least rule that the one-year statute does not begin to run until the date the plaintiff suffers damages.
3. If it adheres to any reinterpretation of the statute, it should adopt that reinterpretation prospectively only so that it affects only claims filed more than 30 days after the Court issues its mandate on rehearing.

Respectfully submitted,



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I hereby certify that a copy of the foregoing has been sent to the following by first class mail, postage prepaid, this the 13th day of December, 2007:

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