

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.

**SUPPLEMENTAL
AMICUS BRIEF
OF BEAR CREEK FISHERIES, INC.
IN SUPPORT OF PETITION FOR REHEARING**

LISTON/LANCASTER PLLC

William Liston (MSB No. [REDACTED])
126 North Quitman Ave.
Winona, MS 38967
Telephone: (662) 283-2132

John M. Montgomery (MSB No. [REDACTED])
P. O. Box 891
Starkville, MS 39760
Telephone: (662) 323-6916

Counsel for Bear Creek Fisheries, Inc.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Bear Creek Fisheries, Inc. ("Bear Creek") 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.

Bear Creek Fisheries, Inc. – Amicus Curiae

Caves, Irene – Plaintiff – Appellant

Hill, Arthur – Owner of Bear Creek

Howell, Joel W., III – Attorney for Plaintiff – Appellant

Jones, Austin – Owner of Bear Creek

Liston/Lancaster, PLLC – Attorneys for Bear Creek

Liston, William H. – Attorney for Bear Creek

Manor, Wade G. – Attorney for Defendant – Appellee

Montgomery, John M – Attorney for Bear Creek

Phelps Dunbar, L.L.P. – Attorneys for Bear Creek

Reed, Lane – Attorney for Defendant – Appellee

Rogers, J. Scott – Attorney for Defendant – Appellee

Yarbrough, Benjamin, MD

Franklin County Memorial Hospital – Defendant – Appellee



WILLIAM H. LISTON

Counsel of Record for Bear Creek Fisheries, Inc.

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**SUPPLEMENTAL
AMICUS BRIEF
OF BEAR CREEK FISHERIES, INC.**

INTRODUCTION

Bear Creek Fisheries, Inc. ("Bear Creek") submits this Supplemental Amicus Brief to demonstrate to the Court the consequences that this Court's decision in *Caves v. Yarbrough*, No. 2006-CA-01857-CTA (Miss. Nov. 1, 2007) may have on Mississippi businesses and other citizens who are injured by products created by state agencies where defects in such products are latent and are not known, or capable of being discovered, within a one-year period after the products are delivered by the state agency to the buyer or consumer.

**BEAR CREEK'S CASE DEMONSTRATES WHY A
DISCOVERY REQUIREMENT IN THE MTCA IS THE
ONLY REASONABLE INTERPRETATION OF THAT STATUTE**

Bear Creek's original Amicus Brief demonstrates to the Court the consequences which the *Caves* decision may have on businesses and other citizens who may be injured by products created by state agencies in cases where the negligence and defects in such products are latent and are not known or capable of being discovered within a one year period after the products are delivered by the state agency to the buyer.

BACKGROUND OF BEAR CREEK'S CASE

While the *Caves* case involves personal injury and wrongful death from the result of alleged medical negligence, Bear Creek's situation illustrates that the rule adopted by this Court in the *Caves* case has far reaching implications for Mississippi businesses which do business with state agencies that derive financial benefit from distributing products to the public - an issue which was not addressed by this Court's opinion in the *Caves* case, but which reflects why assumption that the Legislature did not intend to allow such businesses a reasonable opportunity

to discover the negligence and damages sustained at the hands of state agencies is not well founded.

Bear Creek, a catfish fingerling producer from Sunflower County, bought catfish breeding stock from Mississippi State University ("MSU") which Bear Creek alleges in its pending lawsuit, and will demonstrate at trial, were not adequately tested for susceptibility to channel catfish virus ("CCV") disease in their offspring. The fish as sold were sexually immature and would not produce offspring until two or more years after they were released by MSU. When offspring were hatched, they died in a catastrophic outbreak of CCV disease – a latent condition that Bear Creek could not have discovered within one year of buying the fish from MSU. Thus, while Irene Caves became aware of the existence of a medical malpractice claim within one year of the defendants' negligence resulting in her husband's death and, thus, could have filed a claim within the one-year period, Bear Creek had no knowledge of MSU's negligence and breach of implied warranties until at least two years after the last negligent acts of MSU which gave rise to Bear Creek's claim.

In early 2001, MSU issued a notice announcing the sale of breeding stock of a new strain of catfish. The notice represented that these catfish (known as "NWAC103") were healthy, vigorous catfish which would perform well in a commercial catfish production program, had improved growth characteristics and were superior to other catfish then used in commercial catfish production. The Notice of Release contained no warning that the fry and fingerlings of NWAC103 catfish were susceptible to catastrophic outbreaks of CCV which, while latent in adult fish, is a threat to catfish fry and fingerlings under conditions encountered in commercial catfish fingerling production. Indeed MSU had not tested the NWAC103 under conditions of commercial production for possible susceptibility to CCV in their offspring nor had MSU attempted to breed the catfish with CCV resistant fish.

Bear Creek purchased breeding stock of NWAC103 catfish from MSU in five separate purchases, the first occurring on February 22, 2001, and the fifth and final purchase occurring on March 7, 2002, for an aggregate purchase price of \$195,000.00.

The catfish delivered to Bear Creek in 2001 and 2002 were not sexually mature when sold and would not spawn or produce fry and fingerling in commercially significant numbers until spring 2004.

In 2004, the NWAC103 breeding stock produced eggs which hatched into fry that grew into fingerlings. Then suddenly and without prior warning, beginning on June 6, 2004, Bear Creek suffered catastrophic mortality of catfish fry and fingerlings. These outbreaks resulted in the death of 94% of the catfish fry and small fingerlings in Bear Creek's production ponds. Tests by MSU's College of Veterinary Medicine showed that the NWAC103 catfish fry and fingerlings were positive for CCV, a deadly strain of viral contamination. All remaining NWAC103 catfish in Bear Creek's ponds were destroyed on MSU's recommendation to prevent production of additional fish susceptible to catastrophic outbreaks of CCV.

Representatives of MSU's Agricultural Economics Department consulted with Bear Creek to calculate the economic losses which Bear Creek had suffered from the massive outbreak of channel catfish viral disease which destroyed the 2004 hatch scheduled for sale in 2005. MSU's Agricultural Economics Department concluded that Bear Creek's loss from the 2004 outbreak of CCV disease was \$1,763,436.

Despite its role in Bear Creek's loss, MSU and its insurers did not pay Bear Creek's damages. As a result, on May 26, 2005, plainly within one year after June 6, 2004, the date on which the latent defect in the catfish breeding stock first manifest itself, Bear Creek notified MSU of its claims under the Mississippi Tort Claims Act based on negligence, products liability

and breach of implied warranties.¹ After denial of the claim by MSU's claims administrator², Bear Creek filed suit in Circuit Court, well within the 95-day period prescribed in Miss. Code Ann. § 11-46-11(3), after the denial of its claim. Based on the then settled interpretation of the Mississippi Tort Claims Act, Bear Creek assumed that filing was timely.³

BEAR CREEK IS A CLASSIC CASE OF A LATENT DEFECT CLAIM

Bear Creek's claim against MSU represents the classic case of a latent product defect which could not be discovered by the purchaser until more than one year after the purchase of the product, since the condition only became manifest when the fish delivered by MSU matured at the age of two to three years and produced offspring that might exhibit active CCV disease under conditions of commercial catfish production.

Bear Creek's currently pending case against MSU exemplifies the potential impact of the *Caves* decision. As explained in Bear Creek's Motion for Leave to File Amicus Brief, Bear Creek sustained a major economic loss due to a latent defect in a new strain of catfish, the breeding stock of which was sold by MSU to Bear Creek and other Mississippi catfish fingerling producers in 2001 and 2002. In 2004, the catfish fry and fingerlings produced by these catfish died of CCV, which only becomes manifest when catfish reach sexual maturity and produce offspring that suffer virulent outbreaks of the disease.

¹ Bear Creek also has contract claims for breach of MSU's express warranties which are not governed by the Mississippi Tort Claims Act.

² That denial did not cite the statute of limitations in the Mississippi Tort Claims Act as a bar to Bear Creek's negligence and implied warranty claims.

³ The pleadings of this case are available to the Court in the record in Case No. 2007-IA-00201-SCT, the interlocutory appeal in which this Court held that arbitration was not applicable and remand the case for trial. MSU did not raise the statute of limitations in that prior appeal to this Court. Indeed, while MSU generally pled "the applicable statute of limitations" as a defense in its Answer dated November 30, 2005, for the subsequent 24 months, despite filing extensive motions on other issues, MSU has never raised the statute of limitations defenses by motion and never asserted that Bear Creek's claims under the MTCA were barred at the time they occurred. Indeed, only after release of this Court's decision in *Caves* has MSU cited, in a letter, the Court's new interpretation of the MTCA statutes of limitations in that case as a possible defense in Bear Creek's pending case. Under the rule announced in *MS Credit Center, Inc. v. Horton*, 926 So2d 167, 180, 181 (Miss. 2006), MSU may have waived the affirmative defense of the statute of limitation in the Bear Creek Case. See *Munford, Mississippi Appellate Practice* (MLI Press, 2007) § 3-1. However, the issue of the application of this statute of limitations to latent conditions is one of public importance which Bear Creek feels should be considered in the *Caves* case.

Bear Creek has filed a claim against MSU under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq., based on negligence, products liability and implied warranties. This claim was presented to the Chief Executive Officer of MSU within one year after the latent defect in the fish became evident. However, due to the period of dormancy of the disease from delivery of the parent fish by MSU in 2001 and 2002, until the fish matured and had offspring in 2004, the claim, as a matter of necessity, was not filed, and *could not have been filed*, within one year after MSU's delivery of the catfish breeding stock to Bear Creek.

Bear Creek exemplifies a party injured by latent conditions that are not known or knowable until more than one year after the negligent manufacture or sale of a defective product by the state agency and whose claim could be barred before any injury had occurred. Bear Creek appears in this case as an amicus in this case on behalf of itself and similarly situated citizens suffering losses from such latent conditions.

JOINDER IN APPELLANT'S ARGUMENTS

Bear Creek joins in the arguments presented by Appellant, Irene Caves, in her Supplemental Brief and with Citizens Bank in its Supplemental Brief of Amicus Curiae:

1. Bear Creek agrees with Appellant and the other Amicus Curiae that this Court erred in overruling the established rule expressed in *Barnes v. Singing River Hospital*, 733 So2d 199 (Miss. 1999), that the time in which a claim under the Mississippi Tort Claims Act must be asserted does not commence until an injury occurs and the injured party can, with the exercise of reasonable diligence, discover the injury and the nature of the conduct that produced the injury.

2. Appellant demonstrates that this Court's statutory interpretation in *Barnes v. Singing River Hospital* has gained legislative acceptance and has been engrafted into the statutory framework through repeated reenactment of the subject provision by the Mississippi Legislature and that reversal of the *Barnes* decision which has been accepted for nearly a decade

by the Legislative Executive and Judicial Branches of state government, would be a step of unjustified judicial activism.

3. Finally, Bear Creek urges that any new interpretation should not have retroactive effect. It should not apply to the parties in the *Caves* case, nor to parties in other pending cases such as Bear Creek. None of these parties had a basis to anticipate a reversal of the Court's established precedent nor to avoid the Court's unanticipated reversal of established precedent such as by attempting to anticipate latent defects or to file preemptive claims before injuries were discoverable. Any decision to overrule *Barnes* and adopt the rule expressed in this Court's initial opinion in *Caves* should apply prospectively only to parties who file Mississippi Tort Claims Act proceedings 30 days or more after this Court hands down its mandate in this case.

STATUTORY INTENT AS TO LATENT CLAIMS

Latent claims should not be considered barred under the Mississippi Tort Claims Act until one year after the condition becomes manifest and the injury has occurred.

As Bear Creek argued in its original Amicus Brief, the limitations provision in the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(3), provides that actions brought under provisions of the Act shall be commenced within one year after the date of the "tortious, wrongful or otherwise actionable conduct." (emphasis added) A latent condition can only become "actionable" when the condition becomes manifest and causes injury.

The Court's attention is directed to Miss. Code Ann. § 11-46-13, the venue provision of the Mississippi Tort Claims Act, adopted at the same time as Miss. Code Ann. § 11-46-11(3). There, the Legislature used different language, separating conduct from injury. There, the terms used are "act, omission or event upon which the liability phase of the action is based." This demonstrates that the Legislature was perfectly capable of separating conduct from injury when it was of a mind to do so. Thus, the legislative intent that the statute of limitations does not begin to run until some injury occurs, making the conduct "actionable" is manifest.

While the rule may be different in some personal injury or malpractice actions where the injury is plainly known when it occurs, and only the basis for a claim remains to be discovered, a latent condition in a product that has not yet caused injury is plainly not actionable until it has manifested itself. In a number of cases, including *Schiro v. American Tobacco Co.*, 611 So2d 962 (Miss. 2002), *Owen-Illinois, Inc. v. Edwards*, 573 So2d 704 (Miss. 1990) and *Smith v. Sanders*, 485 So2d 1051 (Miss. 1986), this Court has recognized an exception to the bar of the statute of limitations for latent injuries. These cases remain the law of this state, as majority decision in *Caves* acknowledges [*Caves*, Slip Opinion at 8-9].

Any rule which absolutely bars the causes of action based on latent conditions before injury from the condition can be known raises significant issues with state constitutional rules guaranteeing citizens remedies for their injuries. See, Friesen, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (4th Ed. 2007 Supp.) § 6.05.

Article 24 of the Mississippi Constitution of 1890 provides:

“All courts should be open; and every person for an injury done to him in his lands, goods, person or reputation shall have a remedy by due course of law, and right and justice shall be administered without sale, denial or delay.”

A number of jurisdictions have found that an absolute bar of latent claims before they become manifest is unconstitutional under similar state constitutional provisions. See, e.g., *Kenyon v. Hammer*, 688 P2d 961 (Ariz. 1994); *Reynolds v. Porter*, 760 P2d 816 (Okla. 1998); *Heath v. Sears Roebuck, Inc.*, 464 A2d 288 (NH 1963).

In *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So2d 320 (Miss. 1981), this Court has found that the limitation in Miss. Code Ann. § 15-1-41 barring all claims arising from design and construction defects in real property after a ten-year period from acceptance of the building did not violate Article 24 or other provisions of the Mississippi Constitution. This result was reached by this Court only after considering various factors, including the long period of

time before undisclosed claims would be barred and decisions sustaining similar so-called “statutes of repose” from other jurisdictions.

A general rule is that such an absolute bar of latent claims are constitutional only if the time period for latent defects to be discovered is reasonable or alternative remedies remain. Friesen, *op. cit.* § 6.05[2][a] at 6-49-6.51. For example, in *Allied Signal, Inc. v. Herring*, 785 NE2d 1090 (Ind. 2003), the Indiana Supreme Court ruled that a ten-year statute of repose for sellers of asbestos products do not violate a state constitutional right to a remedy where the Court found that a lengthy ten-year period to discover claims was reasonable. See, also, *Shah v. Moss*, 67 SW3d 836, 841-842 (Tex. 2001) (a statute of repose does not violate the “open courts” guarantee only if plaintiffs have a reasonable opportunity to discover latent conditions before the limitations period expired).

A blanket one-year period suggested by *Caves* to apply to all claims under the Mississippi Tort Claims Act, when applied to latent defects raises substantial constitutional issues, not only under the standards applied in other states, but also under this Court’s approach in *Anderson* that a statute of repose must provide a reasonable period for claims to be discovered.

The Court’s assumption that the Legislature intended that all claims against state agencies must be asserted within one year after the negligent or wrong act by a state agency is not reasonable when applied to latent defects. A complete bar to claims on totally latent defects after a one-year period from the delivery of a product would be inconsistent with this Court’s reasoning in *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, *supra*, 402 So2d 320-324, and would present serious constitutional issues under Article 24 of the Mississippi Constitution which are not addressed or resolved in this Court’s opinion.

Bear Creek urges the Court to follow the logic of the literal wording of Section 11-46-11(3) that the limitations period does not run, in a case of latent defect, until the plaintiff is injured and the condition becomes "actionable."

CONCLUSION

Bear Creek, 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. If this Court reinterprets the statute of limitations in the Mississippi Tort Claims Act, that the Court will adopt that reinterpretation only in cases where the defect or other condition is not latent and the injury is known or reasonably discovered within the limitations period.
3. If the Court adheres to its interpretation of the statute set forth in the original *Caves* opinion, the reinterpretation should apply prospectively only so that it affects only claims asserted under the Mississippi Tort Claims Act by a claim then on file at the agency level or pending in court and to those claims filed more than the 30 days after the Court issues its mandate on rehearing.

Respectfully submitted,

BEAR CREEK FISHERIES, INC.

By: 

LISTON/LANCASTER PLLC

William Liston (MSB No. )

126 North Quitman Ave.

Winona, MS 38967

Telephone: (662) 283-2132

John M. Montgomery (MSB No. )

P. O. Box 891

Starkville, MS 39760

Telephone: (662) 323-6916

Attorneys for Bear Creek Fisheries, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to the following by first class mail, postage prepaid, this the 12th day of May, 2008:

Honorable Forrest A. Johnson
Circuit Judge
P. O. Box 1372
Natchez, MS 39121

Joel W. Howell, III, Esq.
Via e-mail: jwh3@mindspring.com
P. O. Box 16772
Jackson, MS 39236-6772

Lane B. Reed, Esq.
Via e-mail: mmtlaw@mmtlaw.net
McGehee, McGehee, & Torrey
P. O. Box 188
Meadville, MS 39653-0188

J. Scott Rogers, Esq.
Via e-mail: SRogers@ssf-ms.com
Wade G. Manor, Esq.
Via e-mail: wmanor@sssf-ms.com
Clark, Scott & Streetman
P. O. Box 13847
Jackson, MS 39236



WILLIAM H. LISTON