

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANT

VERSUS

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

APPELLEES

CAUSE NO. 2006-CA-01857

BRIEF OF APPELLEE

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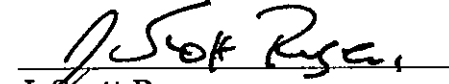
BENJAMIN YARBROUGH, M.D. AND
FRANKLIN COUNTY MEMORIAL HOSPITAL

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

- | | | |
|----|---|---------------------------------------|
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| 2. | Benjamin Yarbrough, MD
Franklin County Memorial Hospital | Defendants-Appellees |
| 3. | Joel W. Howell, III | Attorney for
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SO CERTIFIED, this the 26th day of March, 2007.



J. Scott Rogers
One of the Attorneys for
Defendants-Appellees

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STATEMENT OF ISSUE

Did the trial court err in granting summary judgment on the basis of the statute of limitations where the injury was not latent and the plaintiff knew or should have through reasonable diligence known of a potential claim within a week of her husband's death but delayed approximately two years before filing her claim?

STATEMENT OF THE CASE

On Sunday, April 16, 2000 at approximately 4:30 in the afternoon, Jimmy Caves was admitted to Franklin County Memorial Hospital's (hereinafter referred to as "Hospital") emergency room with severe episodes of vomiting and diarrhea which had begun with abdominal pain the previous day. (R. 30) His initial examination by the emergency room physician, Dr. Yarbrough, was essentially normal, including having a soft abdomen by palpation. (R. 30) Appropriate labs were ordered and an abdominal x-ray was found negative for bowel obstruction or perforation. (R. 37) Intravenous fluid therapy and medication were administered. (R. 50) In the early morning hours of April 17, 2000, it was noted that Mr. Caves' physical condition was beginning to deteriorate. (R. 50) His pain increased and his respiratory rate was rising. (R. 59) Lab studies were repeated and x-rays ordered. (R. 58) Unfortunately, Mr. Caves experienced a very rapid decline thereafter and coded at approximately 2:00 in the morning. He was resuscitated and coded again just prior to transfer. (R. 31, 32) He was pronounced dead at 3:35 in the morning. (R. 32)

Jimmy's wife, Irene Caves, was present with her husband at the Hospital upon his admittance and she remained there until his death. Mrs. Caves, the Plaintiff and Appellant in the underlying lawsuit, is a licensed practical nurse (hereinafter referred to as "LPN") who received her nurse's license in August of 1988. (T. 24, 25) She stated both in an

Affidavit and during the hearing on Hospital's Motion for Summary Judgment that she immediately felt there were several things the Hospital and/or Dr. Yarbrough did wrong in caring for her husband. (T. 35-38) Specifically, she stated that Mr. Caves coded while being transferred to obtain an x-ray and she felt that was due to lack of oxygen. (T. 35, 36) She further stated that she felt the Hospital should not have tried to do another x-ray before transferring Mr. Caves to a hospital in McComb because the ambulance was ready and the doctor in McComb would be doing an x-ray on him upon his arrival. (T. 36) Mrs. Caves also thought that Dr. Yarbrough should have ordered a urinalysis because there was blood in his urine. (T. 37) Moreover, she thought Dr. Yarbrough should have checked Mr. Caves more often that day. (T. 38) All of these allegations of negligence were perceived at the hospital, prior to and leading up to Mr. Caves' death. Additionally, these incidences were all gathered from the medical records which were provided to Mrs. Caves just days after her husband's death. Following his death, Mrs. Caves agreed to an autopsy of her husband's body to determine the cause of death. (T. 38).

Mrs. Caves requested and received Mr. Cave's medical records from the Hospital on Friday, April 21, 2000, five (5) days after Mr. Caves was hospitalized. (T. 31) She further spoke with Mr. Percy Peeler, the coroner, on the evening of April 17, 2000, immediately following her husband's autopsy and the day of her husband's death. Interestingly, Peeler called Mrs. Caves to inform her that her husband's death was caused by a "septic colon." (T. 31, 39) Mrs. Caves further admitted that Peeler seemed concerned during this telephone conversation regarding the cause of death. (T. 51)

Mrs. Caves began requesting a copy of the autopsy report shortly after her husband's death. (T. 31) She claims that she attempted to call once every week or so in an effort to

obtain a copy of this report until she subsequently moved out-of-state in September of 2000. (T. 32) Mrs. Caves claims that her son, Kevin, then continued to call the coroner's office to obtain a copy of the report, which was corroborated by Kevin's testimony at the hearing on Hospital's Motion for Summary Judgment. (T. 10, 32) The autopsy report was not completed until September 28, 2000. (R. 79, 80) The delay was due to the death of the physician who had performed the autopsy. (T. 32) Mrs. Caves further testified that an actual copy of the autopsy report was not obtained until March of 2001. (T. 33) Mrs. Caves first attempted to contact an attorney regarding the case in May of 2000 within a month of this unfortunate event, but the lawyer chose not to pursue the claim on Mrs. Caves' behalf. (T. 44, 45) Mrs. Caves did not contact her current lawyer, Mr. Howell, until some time between November of 2000 and March of 2001, well over seven months after her husband expired. (T. 45)

An expert was finally retained, Dr. Gary Pfortmiller, who signed an Affidavit regarding his opinions on April 11, 2001, almost a full year after Mr. Caves' death. (R. 84) Dr. Pfortmiller reported that the Hospital failed "to exercise the minimal standard of care in the evaluation and treatment of Mr. Caves," failed "to monitor promptly and respond appropriately to Mr. Caves' medical conditions," failed "to diagnose and treat his underlying conditions," and failed to "adequately assess and address Mr. Caves medical complaints." (R. 84) All of these allegations and opinions are clearly based solely from his review of the medical records. This is corroborated by Dr. Pfortmiller's own words where he states in his Affidavit that "based upon my experience and training, my review of the medical records, and a reasonable degree of medical probability," that Mr. Caves' care fell below the minimum standard. (R. 84)

Notice of the claim was not provided to the Hospital until February 13, 2002, almost two (2) years after Mr. Caves' death. (R. 75, 76) The Complaint was later filed on April 12, 2002. (R. 1) Appellee's timely filed their Answer and Defenses on July 8, 2002. (R. 9) Appellee's subsequently filed their Motion for Summary Judgment on August 20, 2002. (R. 17) A hearing was held regarding this motion on May 24, 2005. Honorable Forrest A. Johnson granted the Motion for Summary Judgment on October 27, 2006, holding that the Appellant's claim was time barred as the "injury was not latent" and "the discovery rule did not apply." (R. 107)

SUMMARY OF THE ARGUMENT

Appellant claims in her appeal to this Court that her case is not time-barred. She urges this Court to recognize the discovery rule in extending the one (1) year statute of limitations. Appellant further claims that the unfortunante death of her husband equates to a latent injury triggering the application of the discovery rule. Appellant admits that her Complaint was not filed until almost two (2) years following her husband's death, however, she claims that the statute of limitations was tolled until she received a copy of an autopsy report in March of 2001. This report is irrelevant as the discovery rule does not apply to this matter. The injuries suffered by Appellant's husband, Mr. Caves, are simply not latent. The record is clear that the Appellant had substantial knowledge of a claim right at or immediately following her husband's death. Specifically, she had a complete copy of the medical records within four (4) days of the death, she testified that she had immediate concerns regarding the death, she testified that the coroner had concerns as he called her the day of the death following the autopsy, she knew the cause of death was a septic colon, and she sought legal counsel within a month of the death. As stated herein, all of these

events occurred within a day to a month following Mr. Caves' death. Moreover, Mrs. Caves is a licensed practical nurse who had twelve (12) years of experience by the date of her husband's death. Despite all these instances of knowledge of a potential claim, Appellant relies on her expert's Affidavit filed after the hearing on Defendant's Motion for Summary Judgment which stated that he could not have come to the conclusion that the Hospital committed malpractice without the luxury of reviewing this all encompassing autopsy report. As set forth herein, in the original Affidavit filed by Appellant's expert regarding his opinions, he states that his opinions were based on his experience and his review of the medical records. It is apparent that Appellant had ample evidence with which to conclude that she potentially had an actionable injury within a week of her husband's death. As such, Appellant's claims are time-barred.

ARGUMENT

A. The Standard of Review

A trial court's grant of summary judgment is reviewed *de novo*, with the Supreme Court viewing the evidence in the light most favorable to the non-moving party. *Sarris v. Smith*, 782 So.2d 721, 723 (Miss. 2001). Furthermore, the application of a statute of limitations is a question of law to which a *de novo* standard of review applies. *Sarris*, 782 So.2d 721, 723. On appeal, the trial court's decision granting summary judgment is reversed only if it appears that there are triable issues of fact which remain, viewing the facts most favorable to the non-moving party. *Robinson v. Singing River Hospital System*, 732 So.2d 204, 207 (Miss. 1999). Therefore, the *de novo* standard applies to the review of the instant case by this Honorable Court.

It is undisputed that this claim is governed by the Mississippi Tort Claims Act (hereinafter referred to as “MTCA”). The MTCA provides a one-year statute of limitations that begins to run from the date of the “tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based.” Miss. Code Ann. § 11-46-11(3) (Rev. 2002). In general, the discovery rule has been held to apply to the one-year MTCA statute of limitations in tolling the statute “until a plaintiff **should have reasonably known** of some negligent conduct, **even if the plaintiff does not know with absolute certainty that the conduct was legally negligent.**” *Wayne General Hospital v. Hayes*, 868 So.2d 997, 1000 (Miss. 2004) (citing *Moore ex. Rel. Moore v. Mem’l Hosp. Of Gulfport*, 825 So.2d 658, 667 (Miss. 2002)). (Emphasis Added). However, the **injuries must be latent** for the discovery rule to apply. *Freeman v. University of Mississippi Medical Center*, 944 So.2d 75, 78 (Miss. 2006) (citing *Robinson*, 732 So.2d 204, 208). (Emphasis Added).

B. Jimmy Caves’ Injury was Not Latent and Therefore the Discovery Rule Does Not Apply

In granting summary judgment, the trial court stated that “it specifically finds that the discovery rule is not applicable in this case because there were no latent injuries or actions.” (R. 107) As stated herein, it is well established that the injury must be latent for the discovery rule to apply. *Battle v. Memorial Hospital at Gulfport*, 228 F.3d 544, 556 (5th Cir. 2000). A latent injury has been defined as “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 injury at the time of the wrongful act.” *Freeman*, 944 So.2d 75,

78 (citing *Staheli v. Smith*, 548 So.2d 1299, 1303 (Miss. 1989)). In *Robinson*, this Court affirmed the trial court's grant of summary judgment on this exact issue, that the discovery rule was not applicable as the plaintiff's injuries were not latent. *Robinson*, 732 So.2d at 208. The plaintiff allegedly suffered second-degree burns from hot packs used during physical therapy. *Id.* at 206. The Court reasoned that possible legal action was obviously the object of the inquiry by plaintiff's attorney when soon after the date of the injury, he wrote to the hospital requesting the medical records. *Id.* The Court held that the discovery rule applies only when the injured party is unaware of his injuries and the conduct that caused the injuries. *Id.* at 208.

Similarly, in *Davis v. Hoss*, the plaintiff suffered a groin and hip injury when a bar fell on his scrotum during surgery. *Davis*, 869 So.2d 397, 399 (Miss. 2004). The Court, in holding that the injury was not latent and the discovery rule did not apply, stated that it had "expressly rejected a bright line rule that the statute of limitations can never start to run until the plaintiff has access to medical records." *Id.* at 402 (quoting *Sarris*, 782 So.2d at 725). The Court further reasoned that the plaintiff's injury should have given rise to at least some knowledge of negligence even without the aid of his medical records. *Id.*

Even further, this Court rejected the discovery rule in *Wayne General* based on the fact that the plaintiffs, at the time of the death, "had enough information such that they knew or reasonably should have known that some negligent conduct had occurred, even if they did not know with certainty that the conduct was negligent as a matter of law." *Wayne General*, 868 So.2d 997, 1001. The Court reasoned that "since the death certificate listed sepsis as one of the causes of death, it should have been apparent to the plaintiffs that some negligent conduct had occurred." *Id.* This decision was reached regardless of the fact

that the Court found that the record did not reflect any type of due diligence by the plaintiffs in investigating the cause of injuries. *Id.* Appellant's reliance on this fact alone as a distinguishing factor from the instant case is therefore misplaced.

Lastly, in *Wright v. Quesnel*, 876 So.2d 362, 367 (Miss. 2004), patient brought a medical malpractice action against a hospital relating to the death of her unborn child during the eighth month of pregnancy. This Court found that the plaintiff "had enough information at the time of the death such that she knew or reasonably should have known that negligence occurred."

In the case at bar, Mrs. Caves, a licensed practical nurse, was physically present at the Hospital throughout her husband's treatment and testified, under oath, that she immediately had concerns about the treatment being rendered. (T. 35-38) Additionally, Mrs. Caves obviously knew of a potential claim because she requested and received the medical records just four days following her husband's death. (T. 31) Furthermore, approximately a month after his death, Mrs. Caves sought advice from a local attorney confirming once again that she immediately had specific concerns about her husband's treatment. (T. 44, 45) Moreover, she agreed to an autopsy and knew on the date of her husband's death that the cause of death was a "septic colon." (T. 31, 39) She further recognized that Mr. Peeler, the coroner, had concerns regarding the cause of death as he called her that very day to inform her of same after he completed the autopsy. (T. 31, 39) It is important to note that Mrs. Caves admitted that she had concerns regarding her husband's care on the date of his death as she named several things she thought should or should not have been done that day. (T. 35-38) Although she is not a doctor, by the date of her husband's death, Mrs. Caves possessed approximately twelve (12) years of nursing

experience and therefore more knowledge than a layperson with no medical background whatsoever. (T. 24, 25) Just as in *Robinson, Davis and Wayne General*, Mrs. Caves had ample evidence with which to be held to have knowledge of a potential injury and claim immediately following her husband's death, even if she did not know with certainty that the conduct was negligent as a matter of law. Like *Wright*, it is apparent that the injuries were not secretive or undiscoverable. In fact, the record is clear that the Appellant had substantial knowledge of a claim, including a complete copy of the medical records, within four days following Mr. Caves' death.

Furthermore, Appellant's reliance on *Carder v. BASF Corp.*, 919 So.2d 258, 261 (Miss. Ct. App. 2005) is also misplaced as this case deals with an injury that was undiscoverable due to the fraudulent concealment of information by the defendant. That is simply not the case in the instant matter as no documents have been fraudulently concealed from the Appellant. As stated herein, Ms. Caves had a copy of the medical records just a few days following her husband's death. (T. 31) Accordingly, the discovery rule does not apply to this matter as Mr. Caves' injuries were not latent.

C. Even if the Discovery Rule Applies, the Plaintiff Should Have Known Within a Week of Her Husband's Death of Potential Negligence by Defendants

If this Court chooses to find the discovery rule applicable to this matter, the record and hearing transcript have provided abundant evidence that the Appellant had sufficient knowledge of a potential claim within a week of the death of her husband. Although Appellant references many cases in her brief, she relies solely on *Barnes v. Singing River Hospital*, 733 So.2d 199 (Miss. 1999) to support her argument that the discovery rule applies and her claims are not time-barred. Appellees herein find *Barnes* inapplicable to

the case at bar as it was not raised by Appellant to support her argument in the pleadings, record, nor at the hearing on Defendants' Motion for Summary Judgment. It has been held that this Court will not consider an issue unless specifically plead or raised in a proper motion before the Court. *Martin v. Lowery*, 912 So.2d 461, 464 (Miss. 2005). Further, "the Court is limited to the issues raised in the pleadings and proof contained in the record." *Martin*, 912 So.2d at 464 (quoting *City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So.2d 742, 750 (Miss. 1996)). Given *Barnes*, nor its application to the instant case, was never raised by Appellant in her Response to Motion for Summary Judgment or at the hearing on Appellee's Motion for Summary Judgment, it cannot be considered on appeal.

If this Court finds *Barnes* does apply to the instant case, Appellant's interpretation of its holding is misplaced. Appellant argues that *Barnes* stands for the proposition that the statute of limitations does not begin to run until a medical expert notifies the plaintiff's attorney of possible negligence, even if the alleged injuries are not latent. This interpretation is extremely over broad. If this were the rule, there would be no reason to have a statute of limitations to govern tort claims. In other words, using Appellant's interpretation of *Barnes*, a potential plaintiff, years after the alleged wrong, could later consult with an expert and timely file the lawsuit claiming that the limitations period had not expired. *Barnes* does not lay out a bright line rule that receipt of an expert report triggers the running of the statute of limitations. This is not the purpose of the discovery rule exception to the statute of limitations. Further, *Barnes* has been explained by this Court since its ruling, stating that the logic in identification of negligence in a latent injury case is where a physical manifestation of an injury may be delayed. *Hays v. Lafayette*

County School District, 759 So.2d 1144, 1147 (Miss. 1999). A delayed physical manifestation of an injury has no application to the case at bar.

In applying the discovery rule, “the focus is on the time that the patient discovers, or should have discovered by the exercise of reasonable diligence, that he probably has an actionable injury.” *Forrest County General Hospital v. Kelley*, 914 So.2d 242, 245 (Miss. 2005) (quoting *Wayne General* at 1001). Further, the plaintiffs must take investigative action and be reasonably diligent in investigating the injuries. *Id.* Moreover, the “intent of the discovery rule is to protect plaintiffs who cannot, through reasonable diligence, discover injuries done to them.” *Id.* Unlike the interpretation provided by Appellant, the rule does not state that you have to know of a potential claim with absolute certainty.

The Court held the discovery rule applicable to *Kelley* due to the fact that the plaintiff presented sufficient evidence to support that he was diligent in his pursuit to obtain the medical records and could not have known of the wrongdoing until he had all the necessary records. *Id.* Unlike the plaintiff in *Kelley*, Mrs. Caves had the complete set of medical records just four days following her husband’s death. (T. 31) Further, she had personal knowledge from her nursing experience and observations made at the hospital of a potentially actionable injury. (T. 35-38) She too was aware of the cause of death the very date of her husband’s unfortunate demise. (T. 31, 39) Moreover, she sought legal counsel within a month of her husband’s death. (T. 44, 45) It can be stated with certainty that, pursuant to the law as laid out in *Kelley* and *Wayne General*, Mrs. Caves knew within a week of her husband’s death of a potential injury. Even giving her the benefit of the doubt, she had the medical records in her possession four days following her husband’s death. At the very latest, the statute would have begun to run on that date, April 21, 2000, making her

claim time-barred if not filed by April 21, 2001. Mrs. Caves delayed filing her notice of claim until February 13, 2002, almost two years after possessing knowledge of this potential claim.

Appellant too seems to rely on the notion that because she was allegedly diligent in trying to obtain a copy of the autopsy report, that this should excuse her from not filing her claim until two years following the date of the negligence. As argued herein, it is well established that Appellant had more than sufficient knowledge of the potential negligence of the Appellees within days of her husband's death. Therefore, the autopsy report was irrelevant in that it didn't provide the Appellant with any further information than that already possessed.

Dr. Pfortmiller's initial Affidavit, although in general states that he reviewed the autopsy report, does not state that the autopsy report was used to derive his conclusion that the Hospital was negligent. (R. 84) Instead, his Affidavit provides that "based upon my experience and training, **my review of the medical records**, and a reasonable degree of medical probability," Mr. Caves' care fell below the minimum standard. (R. 84)(Emphasis Added). Although a second Affidavit was filed by Dr. Pfortmiller stating that he could not have come to his opinion without the autopsy report, this supplementary Affidavit was not filed until a month *after* the hearing on the Motion for Summary Judgment or over four (4) years after submitting his initial Affidavit. (R. 105, 106) This blanket statement was never questioned or rebuked by Appellees as the trial judge gave Mrs. Caves and her attorney additional time, after the hearing, to provide additional evidence. It is important to note that the lower court was privy to this supplemental Affidavit prior to making its ruling where it held that this case did not involve a latent

injury and that the discovery rule did not apply to toll the limitations period. In short, the lower court determined that Dr. Pfortmiller's supplementary Affidavit was irrelevant. Moreover, the allegations in the Complaint trace the information provided exclusively in the medical records. (R. 2-4) Based on these reasons and the reasons stated herein, the Plaintiff knew or should have known of a potential claim at the very latest by April 21, 2000. She did not file her notice of claim until almost two years later. As such, her claim is time-barred.

CONCLUSION

The discovery rule does not apply to the instant case as Mr. Caves' injuries were not latent. There were no secretive or inherently undiscoverable elements to his death nor was it unrealistic to expect Mrs. Caves, a licensed nurse, to perceive the injury at the time of the alleged wrongful act. The record is clear that the Appellant possessed ample knowledge of a potential claim immediately following her husband's unfortunate death. Furthermore, Appellant requested and obtained a copy of the medical records from Hospital four (4) days after his death. She further sought advice from an attorney within a month after her husband's death. Just as the plaintiff's in *Robinson, Davis and Wayne General*, Appellant had enough information at the time of her husband's death such that she knew or reasonably should have known that some negligent conduct may have occurred. Moreover, even applying the discovery rule to the case at bar, Appellant had more than sufficient knowledge of a potential claim within days of her husband's death. Because she delayed almost two (2) years before filing her notice of claim, the Appellant's claim is time-barred and the ruling of the lower court should stand.

Respectfully submitted,
Benjamin Yarbrough, M.D. and
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CERTIFICATE OF SERVICE

I, J. Scott Rogers, do hereby certify that I have mailed via U.S. Mail a copy of the foregoing Brief of Appellee to:

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



J. Scott Rogers