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

SUPPLEMENTAL BRIEF OF APPELLEE

ORAL ARGUMENT GRANTED
(Per Order dated April 3, 2008)

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1. Despite the Court's decision on whether or not *Barnes* and its progeny has been overruled, Appellants' claim was time-barred under the one (1) year limitations period contained in the MTCA as the underlying injury was not a latent injury or, assuming it was latent, Appellants knew or should have known of the potential cause of action days after Caves' death.

2. There is no statutory authority for the tolling of the limitations period until such time as the plaintiff discovers, or reasonably should discover, the cause of action ("Discovery Provision") for claims filed under the MTCA.

3. There is judicial authority, or at least judicial precedence, to create such a Discovery Provision but the Court should not continue to recognize the Provision.

4. This Court should overrule *Barnes* and its progeny and the ruling should apply retroactively, not prospectively.

5. The Court can and should address whether a Discovery Provision applies to the MTCA despite those issues not being specifically addressed by the parties in their original briefing of this appeal.

STATEMENT OF THE CASE

The facts of the underlying case have been summarized in great detail in both Appellant and Appellees' Briefs previously submitted to this Honorable Court. In short, however, Jimmy Caves, deceased, was initially treated at Franklin County Memorial Hospital (hereinafter referred to as "Hospital") by Dr. Benjamin Yarbrough on or about April 16, 2000. (R. 30) In the early morning hours of April 17, 2000, Caves' condition worsened and he ultimately expired. (R. 50) Irene Caves, on behalf of the wrongful death beneficiaries of Jimmy Caves, filed suit almost two (2) years after Caves' death against

Appellees claiming that both entities were negligent in the treatment of Mr. Caves which Appellants assert resulted in his unfortunate death. It is undisputed that the Hospital falls within the definition of a political subdivision of the State of Mississippi and Dr. Yarbrough falls within the definition of an employee of a political subdivision. Therefore, the underlying lawsuit is governed by the MTCA.

Appellees filed their motion for summary judgment in the Circuit Court of Franklin County asserting that the lawsuit was barred by the statute of limitations as detailed in §11-46-11(3) of the Mississippi Code of 1972. In their Motion, Appellees argued that Caves' injury was not latent thereby eliminating the application of any Discovery Provision as applied to the MTCA. Alternatively, Appellees argued that even if a Discovery Provision tolled the limitations period, Appellants knew or should have known within a week of death of any possible negligence of the Appellees and their claim was still barred by the limitations period. Said motion was granted by the lower court which held that plaintiffs' claims were time-barred by the one (1) year statute of limitations noting specifically that any Discovery Provision contained in the MTCA was not applicable as there was no latent injury. (R.107) Appellants subsequently filed the current appeal.

On November 1, 2007, this Honorable Court affirmed the lower court's decision holding that the MTCA contained no Discovery Provision, overruling *Barnes* and its progeny. *Barnes v. Singing River Hosp. Systems,* 733 So.2d 199 (Miss.1999). In doing so, this Court recognized that the limitations period contained in the MTCA began to run on the date of Caves' death, April 17, 2000, applying a strict standard of statutory interpretation. This Court noted that Caves' injury occurred on a certain date, "it happened when it happened", refusing to acknowledge that the injury was latent. (*Caves,* Slip Op. at

7). Appellants filed their motion for rehearing which was granted and this Court requested additional briefing by the parties. Bear Creek Fisheries, Inc. (Hereinafter referred to as "Bear Creek") and Citizens Bank sought and were granted leave to file their amicus curia briefs.

SUMMARY OF THE ARGUMENT

By *Order* dated April 3, 2008, the Court identified four (4) issues to be briefed by the parties, Bear Creek and Citizens Bank. It should be noted, however, that none of those issues were proffered by Appellees in the underlying motion for summary judgment nor were the four (4) issues the subject of Appellants' underlying appeal. Appellees maintain their position that Caves' complaint was time-barred by the one (1) year limitations period in the MTCA, irrespective of whether or not *Barnes* and its progeny remains the law of the land. Appellees continue to assert that Caves' injury was not a latent injury and, even if it was, Appellants knew or should have known of the Appellees' possible negligence within a week of Caves' death.

Additionally, and in accordance with this Court's April 3, 2008 *Order*, Appellees assert that there is no statutory authority for a Discovery Provision within the MTCA which would toll the one (1) year limitations period. The MTCA says what is says and it does not say what Appellants and the amicus curia briefs urge this Court to interpret. Furthermore, recent Legislative activity dismisses any ideas that our Legislature intended for a Discovery Provision to be interposed into the MTCA. Likewise, although there may be judicial authority and/or precedence to create or to recognize the imposition of a Discovery Provision into the MTCA, the Court should not continue to recognize such a Provision.

This Court should overrule *Barnes* and its progeny, dismissing the judicially created

Discovery Provision, and should apply the ruling retroactively. Additionally, this Court can and should address whether a Discovery Provision applies to the MTCA despite those issues not being specifically addressed by the parties in their original briefing of this appeal.

ARGUMENT

A. Despite the Court's decision on whether or not *Barnes* and its progeny has been overruled, Appellants' claim was time-barred under the one (1) year limitations period contained in the MTCA as the underlying injury was not a latent injury or, assuming it was latent, Appellants knew or should have known of the potential cause of action days after Caves' death.

Mr. Caves was treated at Franklin County Memorial Hospital on April 16, 2000. (R. 30). On April 17, 2000, Mr. Caves' condition worsened and he ultimately passed away. (R. 50) Irene Caves, Mr. Caves' wife and experienced licensed practical nurse for twelve (12) years, was physically present the entire time Mr. Caves was a patient at the Hospital until his ultimate demise. (T. 24, 25) Mrs. Caves testified under oath that she immediately felt concerns about how her husband was treated while a patient at the Hospital. (T. 35-38) Following the autopsy that was completed on April 17, 2000, Mrs. Caves spoke with the coroner who relayed concerns about the cause of Mr. Caves' death. (T. 51) Mrs. Caves immediately requested and received Mr. Cave's medical records from the Hospital on April 21, 2000, five (5) days after Mr. Caves was originally hospitalized. (T. 31) Mrs. Caves met with an attorney a few short weeks after her husband's death, but the attorney chose not to take the case. (T. 44, 45) 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. These facts are undisputed.

The point need not be lost that Appellees' motion for summary judgment was granted on the lower court level after extensive briefing, oral arguments and direct/cross-

examination testimony. In their Motion, Appellees argued the injury suffered by Mr. Caves was not a latent injury, thereby obviating the application of a Discovery Provision which would toll the limitations period. Since Appellants waited almost two (2) years to file their lawsuit, Appellees argued and continue to assert that their claim was time-barred under the MTCA's one (1) year limitations period. Alternatively, Appellees argued that, even if the Discovery Provision applied to the case, Appellants knew or should have known of the Appellees' potential negligence within a few short weeks of her husband's death. Accordingly, their claims were barred by the MTCA limitations period.

The Court has identified four (4) important issues to be addressed by the parties, all dealing directly with the existence or not of a Discovery Provision in the MTCA. However, Appellees humbly suggest that Appellants' claims must still fail, regardless of whether or not the Court recognizes, adopts or otherwise mandates a Discovery Provision within the Act. In other words, with or without a Discovery Provision and whether or not *Barnes* and its progeny remain the force that it was prior to November of 2007, Appellants' claims are still time-barred as a matter of law. As decided by the Honorable Forrest A. Johnson, Caves' injuries were not latent and the Discovery Provision under the MTCA, whether it existed or not, was inapplicable. (R.107)

Although detailed in Appellees' previously submitted Brief, 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)). 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. *Gray v. University of MS School of Medicine*, 2008 WL 570430 (Miss.App. 2008)(Emphasis added).

Mrs. Caves was a licensed practical nurse who was physically present during her husband's treatment at the Hospital. She admitted, under oath, that she immediately had concerns about her husband's treatment. She spoke with the coroner who also expressed concerns. She possessed the medical records within days of her husband's death. She spoke with an attorney. Again, these facts are undisputed and, based on these facts, Mr. Caves' injuries were not latent. His death thereby triggered the running of the one (1) year limitations period. If the injury was not latent, which the Honorable Judge Johnson so concluded, it matters not whether the MTCA contains a Discovery Provision. The injury must be latent for the discovery rule to apply! No latent injury, no tolling of the limitations period. As such, Appellants' claims must fail as a matter of law, irrespective of this Court's interpretation of the MTCA and the existence, or not, of a Discovery Provision and irrespective of the fate of *Barnes* and its progeny.

B. <u>There is no statutory authority for a Discovery Provision which would toll the limitations period for claims filed under the MTCA.</u>

As the Majority accurately stated in its November *Opinion* in the case at bar, "the MTCA has no 'discovery' rule" and there is no statutory authority for same. The absence of a Discovery Provision is clear from the plain language of the MTCA:

> All actions brought under the provisions of this chapter **shall** be commenced **within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based**, and not after.... **The limitations period provided herein shall control and shall be exclusive in all actions** subject to

> and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Mississippi Code Annotated §11-46-11(3)(Emphasis added).

The MTCA requires that all actions shall, *not 'may' or 'might'*, be brought within one (1) year after the "tortious, wrongful, or otherwise actionable conduct." The Act specifically mandates that the one (1) year limitations period "shall control and shall be exclusive." This language undeniably attaches a one (1) year limitations period to any and all claims and it clearly mandates that this requirement govern all actions brought under the MTCA.

Appellants herein, along with Bear Creek and Citizens Bank, proffer that the above language contains a secret coded message and reflect some Legislative intent which would allow for the application of a Discovery Provision. Bear Creek and Citizens Bank have pointed to the phrase "actionable" as creating a Discovery Provision while Appellants simply argue that Legislative activity, or inactivity in this case, engrafted a Discovery Provision into the MTCA. Unfortunately, these assertions are simply not correct.

Fortunately, for the benefit of all interested parties, the Legislature has recently eradicated any and all doubts as to its intent in drafting the MTCA, specifically addressing the Discovery Provision. This Court is intimately familiar with the history of the MTCA as noted in its November *Opinion* and as cited by Appellants, Bear Creek and Citizens Bank but now any and all doubts regarding the Legislature's intent can be laid to rest based on recent developments. On January 24, 2008, House Bill 214 was drafted and proposed in the Mississippi House of Representatives. Said bill contained the following amendments to the MTCA:

> (3) All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date **that the claimant has discovered, or by reasonable diligence should have discovered**, the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after....

House Bill 214, Mississippi Legislature (2008 Regular Session)(Proposed amended section identified in bold). Said Bill was proposed adding "that the claimant has discovered, or by reasonable diligence should have discovered" in a direct attempt to add a Discovery Provision in the MTCA. Interestingly, on February 4, 2008, the same language was proposed in the Mississippi Senate via Senate Bill 2720. *Neither of these bills were passed into law as both House Bill 214 and Senate Bill 2720 "died in committee."* If there was ever a question as to whether or not our Legislature intended to engraft a Discovery Provision in the MTCA, in accordance with *Barnes* and its progeny, the question has now been answered. Appellants' argument that by *not* amending the MTCA to overrule *Barnes* and its progeny was somehow an acceptance of *Barnes* is simply not the case. The Legislature, since this Court's decision in *Caves*, had an opportunity to install a Discovery Provision into the MTCA and declined to do so. Not only is there currently no Discovery Provision contained in the MTCA but we know now that our Legislature never intended such a Provision to exist.

B. <u>There is judicial authority, or at least judicial precedence, to create such a Discovery Provision but the Court should not continue to recognize the Provision</u>

This Court has a long history of judicially creating Discovery Provisions where none otherwise existed. See *Tabor Motor Company v. Garrard*, 233 So.2d 811 (Miss.1970)(two year **workers' compensation** limitations period tolled by Discovery Provision not specifically contained in statute); *Kilgore v. Barnes*, 508 So.2d 1042 (Miss.1987)(Discovery Provision applied to **medical malpractice** case before creation of §15-1-36); *Staheli v.*

Smith, 548 So.2d 1299 (Miss.1989)(statute of limitations in suit for **defamatory material** held not to run until reasonable discovery of the material); *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704 (Miss.1990)(Discovery Provision applied to product liability case under **general catch-all** limitations statute prior to amendment adopting statutory Discovery Provision); *Schiro v. American Tobacco Company*, 611 So.2d 962 (Miss.1992)(applying rule in *Owens* adopting Discovery Provision prior to amendment of **general catch-all** limitations period); *Williams v. Kilgore*, 618 So.2d (Miss.1993)(Discovery Provision applied to **general catch-all** limitations statute); *Smith v. Sneed*, 638 So.2d 1252 (Miss.1994)(Discovery Provision applied to legal malpractice case under the **general catch-all** limitations statute); *Sweeney v. Preston*, 642 So.2d 332 (Miss.1994)(Discovery Provision applied to **medical malpractice** case before creation of §15-1-36); *Evans v. Boyle Flying Service, Inc.*, 680 So.2d 821 (Miss.1996)(notice of claim provision in **§69-21-123** did not begin to run until discovery of the injury).

However, applying a Discovery Provision on the one hand does not make it right as to the other. It is important to remember that our leaders in the Capital considered amending the MTCA to include a Discovery Provision but refused to do so. This consideration was done on two (2) separate occasions, once in the House of Representatives through House Bill 214 and once in the Senate via Senate Bill 2720. We now know what the legislative intent was behind the MTCA - proposed amendments including a Discovery Provision were emphatically rejected.

This Court has previously cited some general guidelines with respect to statutory interpretation.

> The primary rule of construction is to ascertain the intent of the legislature from the statute as a whole and from the language used therein. Where the

> statute is plain and unambiguous there is no room for construction, but where it is ambiguous the court, in determining the legislative intent, may look not only to the language used but also to its historical background, its subject matter, and the purposes and objects to be accomplished.

Clark v. State ex rel. Miss. State Med. Ass'n, 381 So.2d 1046 (Miss.1980). The language used in the MTCA is clear, plain, concise and unambiguous.

> All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after....

Under the guidelines of *Clark*, there is no room for construction of the MTCA. The MTCA says what it says and what it says is clear. Additionally, it is now clear that the addition of a Discovery Provision was plainly rejected by the Legislature. Again, the MTCA says what it says and the legislators, by rejecting its amendment, have confirmed what it says. Although there may be judicial precedence to create a Discovery Provision in other, less than precise and emphatic limitations periods, that is simply not the case under the MTCA limitations period. This Court should *not*, therefore, continue to recognize an interpretation of the MTCA that we now understand to be inconsistent with legislative intent.

C. <u>This Court should overrule Barnes and its progeny and the ruling should apply retroactively, not prospectively.</u>

Appellees would direct the Court to its prior opinion in *Hall v. Hilbun*, 456 So.2d 856 (Miss. 1985) (overruled on other grounds). At issue in *Hall* was an evidentiary rule and whether its application should be applied retroactively or prospectively. *Id.* Speaking to this issue, this Court stated:

> [i]t is a general rule that *judicially enunciated rules of law are applied* ***retroactively. Legislation applies prospectively only***, and we are not thought to be in the business of legislating. Rather, our function is to decide cases justly in accordance with sound legal principles which of necessity must be formulated, articulated and applied consistent with the facts of the case.

Id. at 875 (emphasis added). This approach is all Appellees are asking the Court to do here. The Court should simply apply its previous reasoning in *Hall*, recognizing that the Mississippi Legislature is the only body that can apply law ***prospectively***. It is important here to again remind the Court that the Legislature, despite being given opportunity, *has not* disturbed the Court's interpretation of the language of §11-46-11 to reflect any Discovery Provision. Therefore, there is nothing at issue here to apply prospectively.

In reaching its decision in *Hall*, this Court cited to several of its prior decisions, including *Keyes v. Guy Bailey Homes, Inc.*, 439 So.2d 670 (Miss.1983) (abolishing the requirement of privity of contract in home construction contracts applied retroactively); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454 (Miss.1983) (providing that punitive damages may be recovered in chancery court was applied retroactively); and *McDaniel v. State*, 356 So.2d 1151 (Miss.1978) (overruling cases which allowed voluntary intoxication as a defense to a crime applied retroactively). *Hall*, 456 So.2d at 876.

The *Hall* court also relied on the federal case of *Jones v. Thigpen*, 741 F.2d 805 (5th Cir.1984), wherein the Fifth Circuit Court of Appeals recognized that "'[j]udicial decisions ordinarily apply retroactively." *See Robinson v. Neil*, 409 U.S. 505, 507-08, 93 S.Ct. 876, 877-78, 35 L.Ed.2d 29 (1973). 'Indeed, a legal system based on precedent has a built-in presumption of retroactivity. *Solem v. Stumes*, 465 U.S. 638, ----, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984).'" *Hall*, 456 So.2d at 876 (citing *Jones*, 741 F.2d at 810).

The *Hall* Court went so far as to take notice that other jurisdictions had adhered to the general rule of retroactive application of judicial decisions. *Hall*, 456 So.2d at 876 (citing *Zills v. Brown*, 382 So.2d 528, 532 (Ala.1980) (applying this new rule retroactively in *Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So.2d 254, 256-8 (Ala.1982) and

May v. Moore, 424 So.2d 596, 597-601 (Ala.1982)); *Jenkins v. Parrish,* 627 P.2d 533, 537 n. 1 (Utah 1981) (rule to be applied retroactively); *Orcutt v. Miller,* 95 Nev. 408, 595 P.2d 1191, 1194-95 (1979) (new rule routinely applied); *Ardoin v. Hartford Accident & Indemnity Co.,* 360 So.2d 1331, 1339 n. 22 (La.1978) (overruling *Percle v. St. Paul Fire & Marine Insurance Co.,* 349 So.2d 1289, 1303 (La.Ct.App.1977), which had held abandonment of locality rule to be prospective only); *Bruni v. Tatsumi,* 46 Ohio St.2d 127, 134-35, 346 N.E.2d 673, 679 (1976) (new rule routinely applied); *Kronke v. Danielson,* 108 Ariz. 400, 403, 499 P.2d 156, 159 (1972) (same); *Wiggins v. Piver,* 276 N.C. 134, 141, 171 S.E.2d 393, 397-98 (1970) (same); *Naccarato v. Grob,* 384 Mich. 248, 253-54, 180 N.W.2d 788, 791 (1970) (same); *Brune v. Belinkoff,* 354 Mass. 102, 108-09, 235 N.E.2d 793, 798 (1968) (same)). Therefore, it is readily apparent that this Court agrees, along with numerous courts from other jurisdictions, that judicial decisions should be applied retroactively. Furthermore, the *Hall* court went on to say that:

> [i]n any case in which an appeal is pending and in which the issue has been properly preserved, the...rule announced...and refined today must be applied and that the rule [announced] applies to all cases tried after this date (including, of course, cases where the operative events giving rise to the plaintiff's claim arose prior to this date). The rule may not be applied, however, to disturb judgments which on or prior to this date have become final.

Hall, 456 So.2d at 876. Accordingly, this Court should apply is holding in Caves retroactively.

The Appellants also argue fairness and equity. This Court has already provided, in its *Hall* opinion that:

> [i]njustice would necessarily attend our passing judgment on the conduct of a citizen by reference to substantive rules substantially different from those in effect and relied upon by the citizen at the time of his conduct. We recognize that the confidence of people in their ability to predict the legal

> consequences of their actions is vitally necessary to facilitate the planning of primary activity....

Id. at 877 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, L.Ed.2d 339, 358 (1970), quoted in *Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454, 465 (Miss.1983)). However, the Court recognized that "[t]hese fundamental premises have more validity in contracts, property and other business or economic contexts than in tort cases." *Hall*, 456 So.2d at 877. Therefore, the Court recognized the potential for unfairness and inequity, but found those arguments better placed in instances of arms-length negotiations, and not in instances such as is presently before the Court.

D. This Court can and should address whether a Discovery Provision applies to the MTCA despite those issues not being specifically addressed by the parties in their original briefing of this appeal.

In *PERS v. Hawkins*, the Mississippi Supreme Court has stated:

> This Court is not limited to only the issues stated in the Petition for Interlocutory Appeal. Rather, this Court's appellate jurisdiction extends to the full scope of the interests of justice, **as it does in any properly appealed matter**. This is not a novel concept. . . . The logic of providing a definitive answer on the ultimate issue of law in this case is compelling. . . . The resolution of this dispute at this time is the most efficient, least costly and fairest disposition of this unusual case. Any other approach would be a waste of judicial resources and would serve no beneficial purpose.

Public Employees Retirement Systems of Mississippi v. Hawkins, 781 So.2d 899, 900-901 (Miss. 2001)(Emphasis added). Additionally, in *McDaniel v. Ritter*, 556 So.2d 303 (Miss 1989), the Mississippi Supreme Court specifically addressed the issue of whether its appellate jurisdiction was limited only to those issues presented in the petition for interlocutory review. In resolving the issue, the *McDaniel* Court held that:

> Our appellate jurisdiction extends to cases and not just issues. While we normally limit our review to specific issues presented by the parties, that limitation is one of expedition and not jurisdiction . . . Moreover, once a case becomes subject to our appellate jurisdiction, we have authority to address all matters as may appear in the interests of justice and economy. . . . Appellate consideration of [issues not presented in a petition for interlocutory appeal] likely will 'materially advance the termination of litigation and avoid exceptional expense to the parties.'

Id. at 306-307.

While these cases refer to issues on an interlocutory appeal, the logic applies equally to the case at bar. Appellate jurisdiction is "one of expedition and not jurisdiction" which would allow this Court to address matters outside of the initial pleadings. Said considerations would "materially advance the termination of litigation and avoid exceptional expense." *Id.*

More importantly, the Court in its *Opinion* specifically identified a transfer from "substantial compliance" under the MTCA to a "strict compliance" when interpreting other areas of law. (*Caves*, Slip Op. at 10). See *Walker v. Whitfield Ctr., Inc.*, 931 So.2d 583 (Miss.2006), *Arceo v. Tolliver*, 949 So.2d 691 (Miss.2006) and *Pitalo v. CPCH-GP, Inc.*, 933 So.2d 927 (Miss.2006)(both requiring strict compliance with the sixty-day notice provisions of *§15-1-36); Walker v. Whitfield Nursing Ctr., Inc.*, 931 So.2d 583 (Miss.2006)(requiring strict compliance with the certification provisions of §11-1-58); *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815 (Miss.2006)(requiring strict compliance with the ninety-day notice provision of §11-46-11(1) and overruling cases permitting "substantial compliance"). Overruling *Barnes* and its progeny would bring the Discovery Provision issue in line with all other areas of the MTCA by requiring strict compliance with the statute under a strict and literal interpretation of the MTCA.

Additionally, MRAP 2(c), states that "[in the interest of expediting decision *or for other good cause shown*, the Supreme Court . . . may suspend the requirements or provisions of any of these rules in a particular case . . ., on its own motion and may order proceedings in accordance with its direction." MRAP 2(c) is yet another foundation which would allow this Court to consider issues not addressed specifically in the underlying pleadings. Based on the forgoing, this Court has the authority to, and in fact should, address the much broader issues not covered within the initial Briefs. Upon rehearing, this Court should uphold its previous ruling in *Caves* and it is clear that the Court acted within its discretion when it decided to address issues not originally appealed to this Court.

CONCLUSION

Appellees maintain their position that Caves' complaint was time-barred by the one (1) year limitations period in the MTCA, irrespective of whether or not *Barnes* and its progeny remains the law of the land. Appellees continue to assert that Caves' injury was not a latent injury and, even if it was, Appellants knew or should have known of the Appellees' possible negligence within a week of Caves' death. As such, Appellees respectfully urge this Court to uphold the lower court's ruling as detailed above dismissing the underlying action as a matter of law, effectively upholding this Court's November 2007 *Caves* Opinion.

Additionally, Appellees respectfully request that this Court find that there is no statutory authority for a Discovery Provision within the MTCA which would toll the one (1) year limitations period, and recognize that, although there may be judicial authority and/or precedence to create or to recognize the imposition of a Discovery Provision, the Court should not continue to recognize such a Provision.

Appellees further request that this Court apply its ruling retroactively.

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SO CERTIFIED, this the 6th day of May, 2008.

J. Scott Rogers