

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANT

VS.

NO 2006-CA-01857

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

APPELLEES

REPLY BRIEF OF APPELLANT

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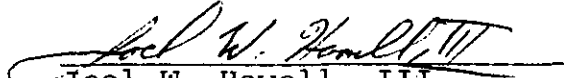
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

- |   |                                       |
|---|---------------------------------------|
| 1. Irene Caves  | Plaintiff-Appellant                   |
| 2. Joel W. Howell, III  | Attorney for<br>Plaintiff-Appellant   |
| 3. Benjamin Yarbrough, MD<br>Franklin County<br>Memorial Hospital | Defendants-Appellees                  |
| 4. Lane Reed  | Attorney for<br>Defendants-Appellees  |
| 5. J. Scott Rogers<br>Wade G. Manor                               | Attorneys for<br>Defendants-Appellees |

SO CERTIFIED, this the 13th day of April, 2007.

  
Joel W. Howell, III,  
Attorney of Record for  
Plaintiff-Appellant

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## I. REPLY ARGUMENT AND AUTHORITIES

### A. The Standard of Review

The parties are in agreement that a de novo standard of review applies to this appeal of a summary judgment. As Appellees note, "The trial court's decision granting summary judgment is reversed only if it appears that there are triable issues of material fact which remain, viewing the facts most favorable to the nonmoving party." Robinson v. Singing River Hospital System, 732 So.2d 204 (Miss. 1999) (Appellees' Brief at page 5)

Given this standard, it is clear, as detailed hereinafter, that the undisputed record demonstrates death due to causes which could only be discovered by an autopsy, which plaintiff diligently pursued but belatedly received. Both the time frame of the autopsy receipt and the expert's opinion as to culpability mandate that the discovery rule should apply, and this case should be reversed and remanded for trial.

### B. The Discovery Rule Applies to this Case

#### 1. The Undiscoverable Nature of the Wrongdoing Classifies the Injury as Latent

A latent injury is one in which the plaintiff is precluded from discovering injury because of the inherently undiscoverable nature of the wrongdoing in question or when it is unrealistic to expect a layman to perceive the nature

of the injury at the time of the wrongful act. Freeman v. University of Mississippi Medical Center, 944 So.2d 75 (Miss. App. 2006).

Here, there is no support in the record for the trial court's finding that the late Mr. Caves did not sustain a latent injury. It is uncontradicted on the record that Dr. Gary Pfortmiller opined that an autopsy was necessary to discover the cause of death. (R. 84,105; Appellant's Brief at page 3) He explained that, had appropriate diagnostic tests been conducted, they would have demonstrated the need for immediate surgery; instead, the late Mr. Caves died of sepsis caused by the failure to operate. (R. 84,105)

Appellees' citation of Robinson v. Singing River Hospital System, 732 So.2d 204 (Appellees' Brief at 7), is obviously inapplicable since in that action, plaintiff was burned with hot packs used during physical therapy.

Likewise, Davis v. Hoss, 869 So.2d 397 (Miss. 2004) is inapplicable where the plaintiff suffered a groin and hip injury caused by a falling bar. (Appellees' brief at 7).

Robinson and Davis are inapposite because in those cases rather grisly injuries were directly inflicted by medical personnel: hot packs burned Robinson and a metal bar fell on Davis' scrotum. These cases point out why the injury here was latent: Caves does not claim the Hospital caused or was responsible for her late husband's sepsis. There is

no evidence that Jimmy Caves' underlying illness was known either to him or to Mrs. Caves, or indeed to the Appellees.

This case is similar to Punzo v. Jackson County, 861 So.2d 340, 344 (Miss. 2003), where a trial court had ruled that the cause of the injury was unknown at the time, but the fact of injury was obvious and, therefore, the statute of limitations started to run. Here, the trial court ruled that Mr. Caves' death was patent and caused the statute to begin running. Obviously Mr. Caves' death was a devastating "injury" to Mrs. Caves, just as flood waters from a nearby creek injured Punzo's home.

As the Punzo Court explained, Punzo could not have known that the County's negligence caused his injuries until he learned that the County had made upstream modifications of the watershed allowing a much larger quantity of water to flow resulting in a series of floods in a place where floods had never before occurred. Id. Here, Mrs. Caves could not have known that her husband had any specific underlying illness leading to his death or that there was a possibility that the Hospital's negligence in its failure to diagnose and properly treat contributed to his death until she obtained all the medical records and had them reviewed by an expert.

In Barnes v. Singing River Hosp., 733 So.2d 199 (Miss. 1999), the Court repeated the rationale supporting the ap-

plication of the discovery rule to latent injury cases from Sweeney v. Preston, 642 So.2d 332 (Miss. 1994):

[W]here an injury or disease is latent, a determination of when the statute of limitation begins to run focuses not on the time of the negligent act or omission, but on when the plaintiff discovers the injury or disease. Moreover, knowledge that there exists a causal relationship between the negligent act and the injury or disease complained of is essential because '...it is well-established that prescription does not run against one who has neither actual nor constructive notice of facts that would entitle him to bring an action.' Id. at 204, quoting Sweeney, 642 So.2d at 334, quoting Williams v. Kilgore, 618 So.2d 51, 55 (Miss. 1992).

Knowing that her husband had a "septic colon" did not logically suggest a causal relationship between the Hospital's treatment and Jimmy Caves' death. An adverse medical outcome can occur without any negligent conduct. On this record it is not controverted that the autopsy was a necessary element in Caves' expert's consideration of the medical records to provide the probable causal relationship. It is also not contested here that Pfortmiller told Caves this verbally in time for her to give the Hospital statutory notice on February 3, 2002, within the MTCA's one-year prescriptive period. His actual affidavit corroborating this was not received until April 11. Focusing on when Caves knew through reasonable diligence that the Hospital's failure to diagnose and treat had contributed to Mr. Caves' death means that this action was timely filed.

Nor, on a summary judgment record, is it contested that Mrs. Caves and her son made persistent efforts to obtain a copy of the autopsy report. While the delay in the coroner's supplying the report was not the result of any intentional concealment, the delay also cannot be attributed to Caves.

This case is similar to McGraw v. United States, 281 F.3d 997 (9th Cir. 2002), amended 298 F.3d 754 (9th Cir. 2002), a Federal Tort Claims Act case with a similar claim accrual issue in the context of a "failure to diagnose and treat" case. As was true of Mrs. Caves and her husband, McGraw was unaware of her father's underlying condition. The district court ruled that her claim was barred by the FTCA's two year limitations provision because the claim accrued when McGraw learned of her father's cancer. Id. at 999.

As here, McGraw's father was also unaware of his underlying condition and rather suddenly became gravely ill. He subsequently died of what McGraw learned was metastatic cancer with a primary lesion in the lung. After several requests, McGraw received her father's medical records in October of 1997. After submitting the records to an expert, it was determined that Navy physicians had earlier failed to diagnose and treat the primary lesion. Id. at 1000.

As the Ninth Circuit explained:

The statute of limitations inquiry, however, becomes more complicated when the plaintiff proceeds under a failure-to-diagnose theory, because it is often very difficult for a plaintiff to determine the genesis of an injury resulting from a doctor's omissions. Whereas injuries directly inflicted by purported affirmative malpractice, such as an operation on the wrong limb or complications from surgery, are often readily identifiable, a failure to identify and treat a latent condition may not become manifest to the patient until years later at the onset of a serious malady. Id. at 1001.

McGraw dealt with the factual scenario of a long-existing but unknown pre-existing condition becoming a very serious one; this case involves a pre-existing condition that was unknown to Caves. When the pre-existing condition becomes rapidly lethal, claim accrual does not occur until the point in time when the plaintiff becomes, or through reasonable diligence should have become, aware of the Hospital's omission in treating the pre-existing condition.

As did the government in McGraw, the Hospital here argues that mere knowledge of a person's death starts the statute running. As the Ninth Circuit said, "[S]uch a rigid application of the rule would make little sense in the context of a failure-to-diagnose action where the plaintiff was never even aware of a pre-existing condition." Id. at 1002. The McGraw Court also pointed out the obvious public policy issue such an approach would produce:

...from a policy standpoint, such a position would promise the filing of preventive and often unnecessary claims, lodged simply to forestall the running of the statute of limitations. Indeed, every

heart attack, cancer, and other serious illness would trigger a legal cascade. [Id. at 1003].

The result in McGraw is consistent with the Supreme Court of Mississippi's flexible approach to claim accrual in medical malpractice cases. The Ninth Circuit held that until the plaintiff knew or should have known of the underlying condition, the accrual clock cannot begin to run. Id. Mrs. Caves, as related by Dr. Pfortmiller, could not have known of the nature and quality of her late husband's underlying condition until the autopsy report was available and an expert ferreted out what the Hospital could have or should have done and failed to do, thus contributing to Jimmy Caves' demise.

As Barnes, quoted supra, and other Mississippi cases point out, the policy rationale behind the discovery rule is one of fairness that saves the claims of the innocently ignorant. As McGraw suggests, the discovery rule serves the equally important policy of avoiding unnecessary preventive filings. The rule provides a balance by requiring diligence in discovering claims but allowing time for that to occur in order to avoid a "cascade" of filings. The discovery rule, then, serves important state interests by preserving potential claims, thereby supporting the policy stated in the Mississippi Constitution's open courts clause, and also protects the State's courts and potential defendants

from premature filings.

Mrs. Caves exercised reasonable diligence in obtaining the Hospital's records and the pathologist's post-mortem examination. With these medical records in hand, she consulted an expert prior to giving the Hospital statutory notice within one year of learning that the Hospital's failure to promptly diagnose and treat her husband may have contributed to his death.

Appellees refer to Wayne General v. Hayes, 868 So.2d 997 (Miss. 2004), where the Mississippi Supreme Court found that the record reflected no investigation whatsoever prior to a chance meeting some two years after the death which was the underlying subject of the cause of action. Here, while Mrs. Caves certainly questioned the reason for her apparently healthy husband dying within approximately a twelve-hour period, it is unquestioned that she diligently attempted to get the autopsy and, upon review by a doctor within the one year of the receipt of that document, gave statutory notice and filed suit.

The reasoning in Hayes also applied in Wright v. Quesnel, M.D., 876 So.2d 362 (Miss. 2004): the patient made no attempt during the limitations period to determine the cause of her unborn child's death.

Appellees makes much of the fact that Mr. Caves' cause of death was a "septic colon" (transcript 31, 39),

plication of the discovery rule.

In short, The trial judge's conclusion that Jimmy Caves' death alone provided sufficient information to the Caves family to suspect that negligent treatment had contributed to Jimmy's death has no support in this record.

2. The Undiscoverable Nature of the Failure to Meet the Standard of Care Merits Discovery Rule Application.

The focus of discovering causes of latent injuries is on what a diligent investigation reveals and when. Mere suspicion might well start the investigation, but no Mississippi appellate court has ever held that suspicion alone starts the limitations clock running. Other courts have reached similar findings: e.g., O'Connor v. Boeing North American, Inc., 311 F.3d 1139, 1148 (9th Cir. 2002) (collecting cases: mere suspicion without more does not commence limitations period).

The Hospital reasons that Caves should be precluded from prosecuting this suit not only because of her suspicions, but also because she "knew" her husband had died of complications from his sepsis on the same day he died. Again the Hospital confuses this case with ones where medical personnel directly inflict injuries. Having been told by the coroner that her husband had a "septic colon" speaks not at all to the issue of whether the Hospital omitted to treat Jimmy Caves in a manner that would have prolonged his

life. Again, Caves does not claim that the Hospital caused the sepsis.

In Barnes, supra, the Mississippi Supreme court held the statute of limitations in a medical malpractice claim may not run until a medical expert notifies the plaintiff's attorney of possible negligence, even where the injuries from which the action arose were not latent. In fact, the Mississippi Supreme Court has held the discovery rule applicable so as to toll the statute of limitations when the party is unaware of his injuries and the conduct that caused the injuries. Davis v. Hoss, 869 So.2d 397 (Miss. 2004) (emphasis supplied)

The plaintiff, a licensed practical nurse, could not possibly have had knowledge as to the cause of death without the autopsy. Absent the coroner's report, neither a claim in negligence nor the factual implications of negligence-based causation of death could be determined by a lay-plaintiff, even if she was a first-year LPN. Thus, no "reasonable knowledge" was attained by the plaintiff until receipt of this information and the statute of limitations was tolled.


## II. CONCLUSION

Virtually all authority cited by Appellees involve external open and obvious injuries, unlike those here, which could only be determined by an autopsy.

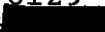
The uncontradicted record in this case establishes that the cause of the late Mr. Caves' death could only be revealed by the autopsy, which was not received by the Caves family until late March of 2001. Dr. Pfortmiller's opinion was not rendered until February of 2002. It is plain that Barnes, supra and its progeny control and the discovery rule should apply.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

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