IN THE MISSISSIPPI SUPREME COURT

LEON STUART, Individually, and As Wrongful Death Beneficiary and On Behalf of All Other Wrongful Death Beneficiaries of SHIRLEY STUART, DECEASED, — APPELLANT

VERSUS — No. 2007-CA-00864

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER and/or THE UNIVERSITY HOSPITALS & CLINICS — APPELLEE

SUPPLEMENTAL BRIEF OF PLAINTIFF/APPELLANT LEON STUART ON PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Plaintiff filed this action alleging medical malpractice on the part of physicians employed by The University of Mississippi Medical Center (UMMC). In his complaint Plaintiff Leon Stuart, surviving husband of Shirley Stuart, alleged that on December 10, 2002, Shirley Stuart was admitted to through the emergency room of UMMC with complaints of shortness of breath. Plaintiff alleged that the Defendant's employees were negligent in failing to rule out pulmonary embolism and that Shirley Stuart died from a pulmonary embolism approximately 27 hours after she was admitted to UMMC.

COURSE OF PROCEEDINGS IN TRIAL COURT BELOW

UMMC, of course, is an entity of the State of Mississippi, and as such it is undisputed by Plaintiff that UMMC is subject to the provisions of the Mississippi Tort Claims Act, Miss. Code Ann. §11-46-1 et. seq. (the MTCA). It is further undisputed by Plaintiff that the MTCA requires that a governmental entity be given written notice of the claim at least 90 days prior to filing suit. *See* Miss. Code Ann. §11-46-11(1).[1] The statute is entirely silent, however, on what remedy or penalty, if any, should be enforced in the event the requisite 90 day notice is not given.[2]

In this case Plaintiff served a notice of claim on the Chief Executive Officer of UMMC on December 4, 2003, within one year of the alleged negligent conduct. (R. 9-10). This action was filed against UMMC on January 14, 2004, 41 days (not the prescribed 90 days) after service

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[1] "(1) After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity."

[2] This function has fallen solely upon the courts.

of Plaintiff's Notice of Claim. (R. 11) [3]. UMMC was served with process on January 20, 2004. After being served with process, UMMC did not make a motion to dismiss or to stay the proceedings. Instead, UMMC promptly filed its "Answer and Defenses" on February 13, 2004, (71 days after notice). (R. 14-18) UMMC also simultaneously served its "First Interrogatories and Requests for Production". The parties proceeded to prepare the case for trial, including written discovery, depositions and disclosure of experts.

UMMC's Answer, while making a boiler plate assertion that it reserved rights pursuant to Miss. Code Ann. §11-46-1 et. seq., "including bar of limitations, trial by judge without jury, limitation of liability and exclusion of punitive damages", did not assert as a specific affirmative defense that Plaintiff had not complied with the notice provisions of the MTCA, or otherwise specifically object in any manner to the proceeding as being premature. (R. 14-18).

On April 6, 2006, two years and five months after Plaintiff filed this action, this Court decided *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815 (Miss. April 6, 2006). In *Easterling*, this Court affirmed dismissal of the plaintiff's complaint for failing to strictly comply with the 90 day notice provision of Miss. Code Ann. §11-46-11, overruling six prior decisions of this Court that it was the defendant's duty to move for a stay for the remainder of the 90 days, and failing that the defense was waived [4].

On June 14, 2006, UMMC filed a Motion for Summary Judgment. (R. 3 - 7). The sole

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[3] The complaint was filed by this firm, but not the undersigned counsel.

[4] *Easterling* asserts in 2004 "this Court announced in *Davis [v. Hoss*, 869 So.2d [397] (Miss. 2004)] it was no longer the defendant's duty to request a stay or face a waiver or the ninety days when the plaintiff failed to wait the statutory notice period." *Easterling*, 928 So.2d at 818. With deference to the court, *Davis* did not say this, and even if it did *Davis* was decided in April 2004, making it impossible to predict when this action was filed in January 2004.

basis of the Defendant's motion, raised for the first time some 2 ½ years after Plaintiff filed this action, was Plaintiff's failure to strictly comply with §11-46-11(1) by waiting only 41 days prior to filing suit.[5] *Id.* In it's motion, UMMC requested the Court to "grant its Motion for Summary Judgment for failure of the notice of claim provision of the MTCA" and "dismiss UMMC from this action with prejudice". (emphasis added) (R. 6) Plaintiff responded to Defendant's motion, asserting UMMC had waived its objection, or in the alternative, that *Easterling* should not be applied retroactively.

The trial court heard UMMC's motion on September 15, 2006. On September 26, 2006, the trial court rendered it's written decision granting UMMC's motion. (R. 41). In it's Memorandum Opinion and Order, the trial court stated:

> Plaintiffs' decent (sic), Shirley Stuart, was admitted to the emergency room of the Defendant, University of Mississippi Medical Center (hereinafter "UMMC"), on December 10, 2002 complaining of shortness of breath. Plaintiff alleges in this lawsuit that UMMC's employees were negligent in failing to rule out pulmonary embolism, which proximately caused Ms. (sic) Stuart's death twenty-seven (27) hours of (sic) her admittance.
>
> Because UMMC is a State entity, Plaintiff was required by the Mississippi Tort Claims Act (hereinafter "MTCA"), more specifically, Miss. Code Ann. §11-46-11(1), to send UMMC written notice of the claim at least ninety (90) days before filing suit. The parties agree that this was not done, but disagree on the appropriate remedy. UMMC seeks summary judgment, while Plaintiff contends that UMMC's failure to request a stay in the proceedings constitutes a waiver of the right to object to the Plaintiff's non-compliance with the statutory waiting period.
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> Indeed, if the purported purpose of that waiting period is to afford UMMC ninety (90) days within which to investigate an attempt to reach an amicable resolution of the claim, then logically speaking the alternative of the stay, as

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[5] Defendant did not contend that notice was not given and/or that the notice was inadequate. Defendant, through the same counsel that represented it in *Easterling*, belatedly complained, only, that Plaintiff did not wait the requisite 90 days.

sought by the Plaintiff, would have some validity....

> Unfortunately, for the Plaintiff, the logic once afforded by the Mississippi Supreme Court to a stay, under circumstances such as today before the Court, has been abandoned by that higher authority. The erosion of the cases cited by the Plaintiff began in 2004 with [*Davis v. Hoss, 869 So.2d 397* (Miss. April 1,2004) and *Wright v. Quesnel* (Miss. July 1,2004)].... Interestingly, [in such cases] there was no discussion of a stay or any mention of, much less any attempt to distinguish, the host of previous decisions preferring a stay over dismissal.

The *coup de grace* came earlier this year in *Easterling v. Univ. Of Miss. Med. Ctr...*:

> In order to make it perfectly clear to all that strict compliance is required, as stated in *Davis* and *Wright* [6], we hereby overrule *Tomlinson* and its progeny, including *Booneville, Givens, City of Wiggins, Mississippi School for the Blind, and Clay County....* In other words, the rule set forth in *Tomlinson*, that the responsibility falls on the defendant to request a stay of the lawsuit when a plaintiff is not in compliance with the 90-day notice requirement, is abrogated.

...

Trial Court's Order at 1-3 (emphasis added) (R. 41-43).

Though obviously disagreeing with *Easterling's* holding, the trial court, finding *Easterling's* rule mandatory, granted UMMC's motion for summary judgement and dismissed the case with prejudice.

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[6]At footnote 5 to the trial court's opinion, the **trial court** stated as follows:

> "Actually what the court said in *Davis v. Hoss*, 869 So.2d 397, 400 (Miss. 2004) was this: "under the MTCA we require *substantial* compliance with regard to the filing of a notice of claim in the institution of a suit.... However, "substantial compliance is not the same as, nor a substitute, for, non-compliance"." [emphasis added] *Wright* says nothing different, yet the *Easterling* court proclaims that these cases require strict compliance."

Course Of Proceedings On Appeal

Pursuant to Miss. R. App. Proc. 4, Plaintiff timely filed this appeal with the Mississippi Supreme Court on October 4, 2006.

First, Plaintiff/Appellant Stuart asserted that *Easterling* should not be applied in a retroactive manner based upon the three part test adopted by the Mississippi Supreme Court in *Presley v. Mississippi State Highway Commission*, 608 So.2d 1288 (Miss. 1992).

Second, Plaintiff asserted that UMMC had waived any objection to lack of notice pursuant to Miss. R. Civ. P. 8(c) by failing to specifically plead improper notice as required by Rule 8(c). UMMC had asserted only that it "reserved all rights pursuant to the Mississippi Tort Claims Act". Plaintiff asserted that such pleading was insufficient to place the Plaintiff on notice of Defendant's contention, and that if Defendant had properly plead and raised the issue, Plaintiff could have simply dismissed the action and re-filed it within the applicable statute of limitations;

Third, Plaintif asserted that UMMC after the 90 day period and, by failing to timely and reasonably raise and pursue enforcement of the defense of lack of appropriate notice and by actively participating in the litigation process for more than 2 ½ years prior to filing its motion, had waived this defense.[7]

Finally, Plaintiff argued the trial court was in error in dismissing the case with prejudice, citing *Pitalo v.G.P.C.H. - G.P., Inc.*, 933 So.3d 927, 929 (Miss. 2006) *and Nelson v. Baptist*

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[7] In *Whitten v. Whitten*, 956 So.2d 1093 (Miss. App. 2007), *Mississippi Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006) and *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007) this Court and the Court of Appeals had ruled a defendant's failure to timely raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate the litigation, coupled with active participation in the litigation process, would ordinarily constitute a waiver.

Memorial Hospital-North Mississippi, Inc., 972 So.2d 667 (Miss. Ct. App. 2007).[8]

This Court subsequently assigned this case to the Mississippi Court of Appeals, which rendered its original opinion on June 24, 2008.

The Court Of Appeals Original Ruling

In its original decision, Mississippi Court of Appeals held:

> UMMC effectively asserted the defense of the Stuart's failure to comply with MTCA time limits by stating in its answer that it "reserved all rights and defenses accorded to it pursuant to Miss. Code Ann. § 11-46-1 et seq., including, but not limited to the bar of limitations...." M.R.C.P. 8(c). Stuart's other waiver arguments are rendered moot by the fact that *Easterling* had a retroactive effect, as will be further discussed [below].

The Court of Appeals held that UMMC's pleading that it "reserves all rights... including the bar of limitations" accorded to it pursuant to MTCA was sufficient to place Plaintiff on notice that Defendant, in fact, contended that Plaintiff had not given adequate notice. The Court cited no authority in support of such position.

In the second part of the Court of Appeal's original decision, the Court of Appeals held that it had no choice but to apply the *Easterling* ruling retroactively, stating "we are bound to retroactively apply the rule of strict compliance to his case", ignoring cases decided after *Easterling* which recognized a second type of waiver not addressed in *Easterling* - waiver by active participation in litigation and failing to timely raise and pursue a defense.

Finally, the Court of Appeals ruled that *Easterling* affirmed the grant of summary

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[8] On petition for re-hearing this Court in *Pitalo* modified the original opinion, without comment or any explanation, by changing one word. Instead of dismissal "with" prejudice the Court ordered dismissal without prejudice. In *Nelson* the Court of Appeals, relying on *Pitalo*, held dismissal "without" prejudice was warranted for failure to give 60 days notice to a medical practitioner as required by Miss. Code Ann § 15-1-36.

judgment where the plaintiff did not strictly comply with the MTCA 90 day notice requirement. Again, the Court of Appeals' decision totally ignored, and did not in any respect address *Pitalo* or *Nelson*[9].

Plaintiff/Appellant's Rule 40 Motion For Rehearing

Following the Court of Appeals' decision, Plaintiff timely filed a Rule 40 Motion for Rehearing. In this pleading, Plaintiff asserted that the Court of Appeals' decision was (1) in conflict with prior decisions of the Supreme Court and decisions of the Court of Appeals; and (2) the Court's opinion overlooked or misapprehended material propositions of law.

Petitioner first asserted that the Court erred in affirming dismissal with prejudice. Specifically, Plaintiff/Appellant asserted that the Court of Appeals had ignored totally this Court's decision in *Pitalo*, the Court of Appeals' own decision in *Arceo v. Tolliver*, 949 So.2d 691 (Miss., Nov. 16, 2006) (decided subsequent to *Easterling* (April 6, 2006) - finding that dismissal without prejudice to be warranted for failure to give 60 days notice to a private physician)); and the Court of Appeals' decision in *Nelson* - also post-*Easterling*; same).

Second, Plaintiff asserted that the Court of Appeals failed to address the application decisions of the Court of Appeals, and this Court, holding a defendant's failure to actively and timely pursue a motion to dismiss based upon an affirmative defense, and actively participating in the litigation, waived the defense. The Plaintiff pointed out that although *Easterling* had been held to be retroactive, there was no language in *Easterling* to suggest that an objection to lack of

[9] *Pitalo and Nelson,* both decided subsequent to *Easterling,* held that dismissal without prejudice was warranted in circumstances where no egregious conduct occurred.

proper notice could not be waived by actively participating in a case for 2 ½ years prior to filing a motion to dismiss.[10]

Modified Opinion On Motion For Rehearing

Following Plaintiff's motion for rehearing, on December 16, 2008, the Mississippi Court of Appeals issued its modified opinion on motion for rehearing. Again, the Court of Appeals affirmed the dismissal of the action, including affirming dismissal with prejudice.

First, the Court of Appeals held that *Horton* concerned only the defendant's waiver of the right to compel arbitration, not notice under the MTCA. In making this distinction, the Mississippi Court of Appeals wholly failed to consider this Court's decision in *Grimes v. Warrington*, 928 So.2d 365 (Miss. 2008) (decided Feb. 21, 2008; rehearing denied June 5, 2008). In *Grimes*, this Court specifically held that the holdings of this Court in *Horton* and *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007) are applicable to the defenses under the MTCA. In, *Grimes*, the Court found that while the individual defendant would have been entitled to immunity as an employee of a community hospital, his unreasonable delay in pursuing this defense and his active participation in discovery on the merits had waived this defense.

The Court of Appeals again affirmed dismissal with prejudice. The Court of Appeals reasoned that although *Arceo* and *Nelson* held dismissal without prejudice was the appropriate

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[10]Cases subsequent to *Easterling* have made clear that active participation in litigation without timely raising and pursuing a defense constitutes a waiver of an affirmative defense. *See, e.g., Whitten v. Whitten*, 926 So.2d 167 (Miss 2006); (defendant waived defenses of insufficiency of process and insufficiency of service of process through his participation in litigation together with his unreasonable two-year delay in pursuing defenses); *Mississippi Credit Center, Inc. v. Horton*, 926 So.2d 167, 179-81 (Miss. 2006)(the requirement of arbitration waived by active participation in litigation); *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007)(failure to serve Attorney General with process waived by participation in litigation).

remedy for lack of proper notice under non-MTCA cases, the Court found these decisions inapplicable under the MTCA. No explanation or authority for this distinction was given.

Petition For Certiorari

Following the Court of Appeals' modified opinion, Plaintiff timely tiled a Rule 17 Petition for Certiorari to the Supreme Court. By majority vote, that Petition was granted on March 13, 2009. Plaintiff now submits this brief in accordance with Rule 17.

ARGUMENT

Pursuant to Miss. R. App. Pro.17 that the matter is to be decided on the briefs and record previously submitted, along with supplemental briefing not to exceed 10 pages. Accordingly, Plaintiff incorporates his prior briefing and arguments to this Court[11] and the Court of Appeals, including his arguments that (1) *Easterling* should not be applied retroactively based on the standards of retroactivity announce by this Court in *Presley v. The Mississippi State Highway Commission*, 608 So.2d 1288 (Miss. 1992); (2) UMMC waived the defense pursuant to *Grimes v. Warrington*, 928 So.2d 365 (Miss. 2008) by participating in this litigation for 2 ½ years before filing its motion for summary judgment; (3) Defendant's pleadings were insufficient to preserve the defense under Rule 8; and (4) the case should not have been dismissed with prejudice under *Pitalo*, *Arceo* or *Nelson.*

In addition, as allowed by rule 17, Appellant submits the supplemental briefing below.

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[11] Prior to assignment to the Court of Appeals.

SUPPLEMENTAL BRIEFING

1. *Caves v. Yarbrough* Mandates Reversal Of The Application Of *Easterling.*

This Court's unanimous [12] holding in *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. Sept. 25, 2008)(holding that in cases where this Court concludes a statute was incorrectly interpreted in a previous case, the Court will nevertheless continue to apply the previous interpretation, pursuant to the doctrine of *stare decisis,* upon finding the Legislature amended or reenacted the statute without correcting the prior interpretation) mandates reversal of this case and mandates a finding that *Easterling* cannot be applied as to the facts of this case [13].

In *Caves* this Court held:

> ¶¶ 11. We handed down our original decision, holding that - because the MTCA has within its provisions no discovery rule - Mrs. Caves's claims were time-barred, and any prior judicial findings of such a rule for claims under the MTCA were erroneous and overruled. Mrs. Caves filed a motion for rehearing, arguing primarily that this Court - having recognized a discovery rule for claims under the MTCA - should continue to apply a discovery rule on the basis of *stare decisis.*
>
> ¶¶ 12. Without dissent, we granted the motion for rehearing to examine the question....
>
> ¶¶ 13. Now, after careful review of the record, the excellent briefs submitted by the parties and amici, and the excellent arguments presented by counsel, we are persuaded that, although the MTCA includes no discovery rule, we are nevertheless bound by the doctrine of *stare decisis* to apply a discovery rule to cases filed pursuant to the MTCA. We therefore withdraw our original opinion and substitute this opinion as the opinion of the Court. ...

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[12] The opinion was authored by Justice Dickinson, and joined in full by Justices Smith, Waller, Carlson and Randalph. Justices Diaz, Graves and Easley concurred in part and dissented in part. No concurring or dissenting justice expressed disagreement about this Court's core holding - that *stare decisis* prevented abolishment of the discovery rule. Thus, to this reader, it appears this Court's core holding was unanimous.

[13] There is no doubt application of *Caves* to the facts of this case mandates *Easterling* cannot be applied to this Plaintiff. It is up to this Court to determine, or simply leave for another day, whether *Easterling* applies to other cases involving other parties and other facts.

¶¶ 41. [T]he need for a clear, consistent rule is apparent. The bench and bar should not be left to guess when, and upon what basis, this Court might decide to reverse prior interpretations of statutes. Although we cannot agree with Justice Brandeis that "it is more important that the applicable rule of law be settled than it be settled right," we do think there comes a point when the Legislature may incorporate an incorrect interpretation of a statute.

¶¶ 42. While we do not agree that the Legislature's mere silence is enough, we do agree with the view offered by Justice Roberts in *Helvering v. Hallock,* 309 U.S. 106, 130-32, 60 S.Ct. 444, 84 L.Ed. 604 (1940), that congressional re-enactment of a statute creates a presumption of legislative approval of the Court's prior interpretations of that statute's interpretation when it re-enacts a statute without change.

¶¶ 43. We agree with this reasoning, and hold that in cases where this Court concludes a statute was incorrectly interpreted in a previous case we will nevertheless continue to apply the previous interpretation, pursuant to the doctrine of *stare decisis,* upon finding the Legislature amended or reenacted the statute without correcting the prior interpretation. In our view, such action on the part of the Legislature amounts to incorporation of our previous interpretation into the reenacted or amended statute. The Legislature is, of course, free to preclude our incorrect interpretation by specific provision, failing which, we must conclude that the legislative silence amounts to acquiescence. Stated another way, the incorrect interpretation becomes a correct interpretation because of the Legislature's tacit adoption of the prior interpretation into the amended or reenacted statute. We must now determine whether the doctrine of *stare decisis,* as defined today, applies to this Court's previous interpretations of the MTCA.

¶¶ 44. Nine years ago, without citation of any authority to do so, this Court "incorporated" a discovery rule into the MTCA, stating simply that we choose to:

> incorporate a discovery rule in actions brought under the [MTCA] involving latent injuries. Particularly considering the short, one-year statute of limitations period in §11-46-11(3), we find that justice is best served by applying a discovery standard to such cases.

Barnes v. Singing River Hosp., 733 So.2d 199, 205 (Miss.1999).

¶¶ 45. Following *Barnes,* this Court continued to apply its judicially-created discovery rule to claims filed under the MTCA. *See Wayne Gen. Hosp. v. Hayes,* 868 So.2d 997, 1000-1001 (Miss.2004) ("[t]he discovery rule applies to the one-year MTCA statute of limitations"); *Wright v. Quesnel,* 876 So.2d 362, 366 (Miss.2004) (MTCA's statute of limitations is "subject to a discovery rule"); *Moore v. Mem'l Hosp.,* 825 So.2d 658, 667 (Miss.2002) ("[w]e have held that the discovery rule applies to the MTCA's statute of limitations"); *Henderson v. Un-Named Emergency Room,* 758 So.2d 422, 427 (Miss.2000)

("this Court incorporated a discovery rule in actions brought under the Mississippi Tort Claims Act").

¶¶ 46. Although the MTCA's discovery rule was judicially created, Mrs. Caves argues in her brief that, subsequent to this Court's incorrect interpretation in *Barnes,* Section 11-46-11(3) has been brought forward in legislation and re-enacted by the legislature at least three times.... In accord with familiar rules of construction, the legislature by re-enactment of a statute which has been construed by the highest court of the state, adopts the construction placed upon the statute by the Court.

¶¶ 47. We agree, and hold today that by reenacting Section 11-46-11(3) without addressing or countermanding this Court's decision in *Barnes,* the Legislature acquiesced and tacitly approved and incorporated into the statute a discovery rule as announced in *Barnes.* Pursuant to the doctrine of *stare decisis,* we therefore shall continue to recognize a discovery rule with respect to Section 11-46-11(3). Having held that a discovery rule applies to claims under the MTCA, we must now proceed to discuss its effect on the case before us today.

Caves, at paragraphs noted.

Factually and legally this case is virtually identical to *Caves*.

Mississippi Code Annotated Section 11-46-11(1) provides:

(1) After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity....

The statute itself is silent as to what should take place in the event the requisite 90 day waiting period is not met. The statute absolutely does not mandate dismissal with prejudice or even dismissal at all. When this Court was faced with the issue, it fashioned a judicial remedy. The Court first did so in 1999 *in City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999), holding:

It does not necessarily follow, however, that the proper remedy for failure to comply with the applicable waiting period should be the dismissal of the lawsuit. This Court concludes that the dismissal of a lawsuit based on a failure to comply with the waiting period is a

The legislature has never expressed displeasure with *Tomlinson,* and *Easterling* found no harm to the government mandating a sweeping abrupt change in the law. In achieving strict statutory construction the *Easterling* court completely failed to consider the harm to plaintiffs (and the lawyers who rely on this Court's rulings to advise and pursue the claims of their clients). This Court was unanimous in *Caves* in recognizing "[t]he need for a clear, consistent rule....The bench and bar should not be left to guess when, and upon what basis, this Court might decide to reverse prior interpretations of statutes."[14]

Undeniably (through no fault of his own and relying entirely on counsel to guide him), Plaintiff filed suit without waiting the full 90 days as required by §11-46-11(1). Despite his imperfect notice, counsel did so with full reliance on this Court's six prior decisions, and obvious legislative concurrence. *Caves* found that type of reliance justified, and *Caves* mandates the same result be reached in this case. From day one, this Plaintiff has consistently asserted that *Easterling* should not be applied to him. When he filed this action in January 2004 neither *Easterling* (2006), nor the cases upon which it relied, *Davis (April 1, 2004)* and *Queznel (July 1, 2004)*, had been decided. Plaintiff had no way to predict the sweeping change brought on by *Easterling.*

Caves made a fundamental holding which is clearly applicable to this case:

> [We] hold that-in cases where this Court concludes a statute was incorrectly interpreted in a previous case we will nevertheless continue to apply the previous interpretation, pursuant to the doctrine of *stare decisis,* upon finding the Legislature amended or reenacted the statute without correcting the prior interpretation.... Stated another way, the incorrect interpretation becomes a correct interpretation because of the

[14] There is no problem perceived by the undersigned in this Court modifying or overruling prior precedent so long as it is done in a prospective manner and sufficiently far in the future those affected can protect their rights. *See, e.g., Pruett.* and *Presley, supra.*

> from the date of this decision forward *and* stripping immunity from Mississippi State Highway Commission in this case).... We conclude that the first option - pure prospective application of the new rule - is the correct course.
>
> Without doubt, the State and its political subdivisions have relied upon their immunity under Miss. Code Ann. §11-46-1 et., seq. and conducted non-propriety activities with this knowledge of this immunity. It therefore seems the only appropriate resolution of this case, in light of a new rule and its effect on old (and unsuspecting) parties, would be to apply this decision prospectively. In *Cain [v. McKinnon*, 552 So.2 91, (1989) at], 552, 92, we observed that where a new rule of law is created, where the defendant was not aware of the new rule at the time the cause of action arose and where the new rule was not "clearly foreshadowed," it would be unfair to apply the new rule retroactively....

Presley, 608 So.2d at *34 - *38.

This Court went on to adopt and follow a three-part test announced by the U.S. Supreme Court in determining whether judicial decisions should be applied retroactively. Specifically, this Court held:

> The United States Supreme Court has been faced with a question of retroactive application of a new rule. In *Chevron Oil*, 404 U.S. [97 (1971)] at 105-8...., the United States Supreme Court held a laborer injured on an oil rig may continue to maintain an action against the owner of the rig, even though case law decided since the initiation of the action would currently prohibit filing the action. A blind, retroactive application of this "new rule" would cause an unjust result as the laborer would be barred from recovery based on the intervening precedent that was entirely unforeseeable.... The *Chevron* court developed a three factor ... test for determining the rights of a party to remain undamaged by a new rule:
>
> > First, the decision be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied... or by deciding an issue of first impression whose resolution was not clearly foreshadowed....
> >
> > Second, it has been stressed that 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further retard its operation.'...
> >
> > Finally, we have weighed the inequity imposed by a retroactive application for 'where a decision of this court could produce

> substantial and inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by holding of non-retroactivity.'

Presley, at *37. Applying such factors, the Court found prospective, rather than retroactive, application was warranted. This allowed all those potentially affected an opportunity to protect themselves.

This Court found those principles to have merit in *Pruett* to the extent the government's interests were affected. It thus begs the question: **how can this Court possibly apply a different, and inequitable, standard to ordinary citizens who are adversely affected by an abrupt and unpredictable change in the law?** *Caves* has now recognized this Court won't.

Conclusion

The facts and legal principles involved in *Caves* are virtually identical to the present case. *Caves* mandates reversal.[16]

Respectfully submitted,

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[16] Plaintiff attaches, with permission, the excellent brief of Amicus Curiae Citizen's Bank in *Caves v. Yarbrough*, which this Court has previously considered.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

Senith C. Tipton, Esq.
Wilkins, Stephens & Tipton, P.A.
Post Office Box 13429
Jackson, MS 39236-3429

Honorable Bobby B. DeLaughter
Hinds County Circuit Judge
P.O. Box 327
Jackson, MS 39205

THIS, 26th day of March, 2009.

WILLIAM B. RAIFORD, III