IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CT-00864-SCT

LEON STUART, INDIVIDUALLY, AND AS WRONGFUL DEATH BENEFICIARY AND ON BEHALF OF ALL OTHER WRONGFUL DEATH BENEFICIARIES OF SHIRLEY STUART, DECEASED — APPELLANT

VS

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND/OR THE UNIVERSITY HOSPITALS & CLINICS — APPELLEE

APPELLEE/DEFENDANT'S SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF THE CASE

This is a medical malpractice and wrongful death action filed against University of Mississippi Medical Center and/or The University Hospital & Clinics ("UMMC") on December 11, 2002, as the result of a pulmonary embolism. Plaintiff, Leon Stuart ("Stuart") asserts that UMMC was negligent in failing to rule out the pulmonary embolism, proximately causing the death of Shirley Stuart.

It is undisputed that Stuart must follow the requirements of the Mississippi Tort Claims Act (*Miss. Code Ann.* §11-46-1 et seq) ("MTCA") in this suit, as UMMC is a governmental entity otherwise protected by sovereign immunity. The MTCA requires that a notice of claim to be filed within its one-year statute of limitation, and that, for governmental entities like UMMC, the filing of this notice of claim must precede the filing of a plaintiff's lawsuit by 90 days. This law is well known to the Court, and undisputed in this case.

Stuart filed a notice of claim with the chief executive officer of UMMC on December 4, 2003, which was within the one-year time limitation. It is undisputed that Plaintiff ignored the statutorily required 90 day period in which no claim could be filed, and prematurely filed his lawsuit on January 14, 2004, just 41 days after filing his notice of claim. UMMC filed the motion for summary judgment at issue here after the mandate was issued in *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815 (Miss. 2006) (rehearing denied June 2, 2006). The trial court[1] granted UMMC's motion for summary judgment. Plaintiff appealed this dismissal on October 4, 2006, and Stuart's appeal of that

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[1] The trial judge was Judge Bobby Delaughter, who also presided over *Easterling*.

order was assigned to the Mississippi Court of Appeals. The Court of Appeals initially affirmed the trial court on June 24, 2008, but on December 16, 2008, the Court of Appeals withdrew its initial opinion, and issued a new opinion which addressed Stuart's motion for rehearing.[2]

Throughout the course of this appeal, Stuart has made the same three arguments: 1) that *Easterling* should not be applied retroactively; 2) that UMMC has waived any defense related to the 90 day notice provision; and 3) that any dismissal of this action should have been without prejudice. Now, Stuart asserts that this Court's opinion in *Caves v. Yarborough*, 991 So.2d 142 (Miss. 2008), and equitable principles also mandate reversal. As briefed below, UMMC contends these arguments must fail.

SUMMARY OF SUPPLEMENTAL ARGUMENT

Of course, UMMC incorporates all the arguments and authorities it has previously brought to the attention of this Court and the Court of Appeals in this matter, and UMMC argues again now that, based on all of those arguments, the trial court and Court of Appeals should be affirmed.

With regard to Stuart's new arguments related to this Court's holding in *Caves v. Yarborough*, 991 So.2d 142 (Miss. 2008) and equitable principles, UMMC contends that Stuart's arguments fail, and the lower courts should be affirmed for the following reasons:

1. *Caves* is distinguishable from the present case because *Caves* dealt with the "discovery rule" rather than the well established "notice" provision of the MTCA, and the rationale justifying this Court's application of a discovery rule to the MTCA in *Caves* does not justify reversing this Court's precedent with regard to the notice provision;

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[2] The Motion for Rehearing was denied, but the opinion was slightly modified.

2. Respectfully, this Court's decision in *Caves* should be reversed as an improper intrusion by this Court into the domain of the Legislature. With *Caves*, this Court acknowledged that the MTCA has no discovery rule provision, and then the Court essentially wrote one into the statute. This is improper, and the Court should not compound that error by adopting Stuart's bootstrapping argument here;

3. Stuart's "equitable principles" argument demonstrates the fundamental flaw in his entire argument about retroactive application of this Court's opinions. Specifically, the applicable rule of law is that *all* opinions of this Court are retroactive *unless* this Court specifically states otherwise in the opinion. Under that rule, *Easterling* is retroactive, but *Pruet* was not. Thus, *Pruet* does not stand for an equitable exception to the rule. It is merely the application of the rule in action.

SUPPLEMENTAL ARGUMENT

A. *Caves* is Distinguishable from the Present Case.

When considering *Caves,* this Court was faced with a particular conundrum with very particular variables. The case involved the effect of a very short statute of limitations which contains "within its provisions and language no discovery rule." *Caves*, 991 So.2d 142 at ¶32. This Court had to consider the fact that other statutes of limitations in this State with longer limitations periods do have built-in discovery rules. *Caves*, 991 So.2d 142 at ¶¶48-53. This Court had also, prior to *Caves*, created a discovery rule for the MTCA, even though the Legislature had not done so, and was specifically realizing, perhaps for the first time, that its decision to insert a discovery rule into the MTCA was not, in the Court's estimation, "mischievous," or "pernicious." *Caves*, 991 So.2d 142 at ¶40. And, this Court was obviously concerned with justice under this particular set of facts in spite of the Court's acknowledged difficulty in applying, "a judicially-created discovery rule for which there is no statutory guidance." *Caves*, 991 So.2d 142 at ¶52.

To even the most defense-minded strict constructionist, the potential problems inherent in a one year statute of limitations with no discovery rule are apparent. With no discovery rule, a plaintiff could potentially lose the chance to file his claim before he even realizes he has a cause of action, and this Court was obviously concerned about the effect that situation has on justice in this State. As such, it is of no wonder that this Court looked to Justice's Brandeis' famous dissenting remarks, and otherwise went to the lengths it did to yet again create a portion of the MTCA which the Legislature has specifically chosen not to draft. When one reads the final *Caves* opinion, one can almost feel this Court straining to fashion a just result in the face of harsh statutory language.

However, those issues are not facing the Court in the present case, and that is precisely the distinguishing factor here. The present case deals only with the well established "notice" provision of the MTCA - *Miss. Code Ann.* §11-46-11(1). If this provision of the MTCA is enforced by its terms, there is no concern that a plaintiff's case will slip away from him before he even knows he has a cause of action, and as this Court noted in *Easterling*, "Since the MTCA's passage in 1993, a considerable amount of time has passed for the legal profession to become aware of the ninety-day notice requirement in section 11-46-11(1)." *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815, 820 (¶23)(Miss. 2006).

In the present case, the Court is asked to address a notice provision, well known to the legal community, and specifically enacted by the Legislature to protect the integrity of sovereign immunity. Here, there is no over-arching and compelling reason for this Court to reverse and overturn existing precedent, or to resort to applying wrongly decided law under

the Court's admittedly vexing "pernicious/mischievous" test. Here, the prevailing concern should be protecting sovereign immunity, rather than a plaintiff's access to court. Why? Because the statutory provision in question is well known, and it was mandated by the Legislature as a way of protecting the State and its political subdivisions.

Further, at the time notice is to be provided under §11-46-11(1), a plaintiff should be fully cognizant of his claim, and if he is diligent and complies with the statute, there is little reason to suspect that he will be denied any substantive right. UMMC would also point out that when a lawsuit is not filed in accordance with relevant statutory notice provisions, then the "lawsuit was not lawfully filed, and it is of no legal effect." *Thomas v. Warden*, 999 So.2d 842, 846 (Miss. 2008). Thus, this Court has held that once a plaintiff is fully aware of his claim, he still has to comply with all applicable statutory notice provisions in order to file a claim with any legal effect. This rule is not exclusive to the MTCA, and the idea was not novel when the suit in question was filed, nor when *Tomlinson* was decided, nor now.

The simple truth is, this Court interpreted the MTCA incorrectly in *City of Pascagoula v. Tomlinson*, 741 So.2d 224, 228 (¶11) (Miss.1999), and the error was corrected in *Easterling*, which applied retroactively. All of this Court's opinions apply retroactively when the Court does not specifically declare them prospective only. *See Brown v. Southwest Mississippi Regional Medical Center*, 989 So.2d 933, 936 (¶7) (Miss. App. 2008); *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1093(¶54) (Miss.2000); *Thompson v. City of Vicksburg*, 813 So.2d 717, 721(¶15) (Miss.2002)(quoting *Anderson v. Anderson*, 692 So.2d 65, 70 (Miss. 1997) (citing *Ales v. Ales*, 650 So.2d 482, 484 (Miss. 1995); *Hall v. Hilbun*, 466 So.2d 856, 875 (Miss.1985)).

This Court's decision in *Caves* does not mandate a reversal of *Easterling* or a finding that *Easterling* cannot be applied to the present case. If Stuart's argument in that regard is true, then this Court has effectively bound its own hands with *Caves* by effectively ruling that because of the operation of *stare decisis*, the original interpretation of a statue made by this Court becomes forever binding merely through Legislative silence. As such, Stuart's argument here fails, and the lower courts should be affirmed.

B. The *Caves* Opinion Should not Control here Because it is Simply Wrong.

Respectfully, UMMC believes this Court should reconsider its opinion in *Caves*. In *Finn v. State*, this Court correctly held, "Finn is attempting to insert a condition that is not stated in the law; he wants the weight of the drug only to be considered as an alternative when the drug does not appear in dosage form. To do so would be to tread on the domain of the Legislature, as it alone has the power to create and modify statutes. It is not the province of the Court to insert requirements where the Legislature did not do so." 978 So.2d 1270, 1272-1273 (¶9) (Miss. 2008)(citing *Miss. Ethics Comm'n v. Grisham*, 957 So.2d 997, 1003 (Miss. 2007). Indeed, while this Court *must* interpret the language of statutes, it may not insert requirements or any other language into a statute when the Legislature did not do so.

Likewise, in *Grisham*, this Court held, "The privilege to amend a statute, not constitutionally infirm, does not rest with this Court." *Grisham*, 957 So.2d 997 at ¶14. This Court has never found that the MTCA's lack of a discovery rule rendered the MTCA unconstitutional, and this is certainly true with regard to the notice provision at issue in the present case. As noted in *Caves*, congressional re-enactment of a statute can create a presumption of legislative approval of court *interpretations* of that statute. See *Caves,* at

¶42. However, what the Court did in *Caves* was not interpretation but draftmanship.

Prior to *Caves*, and in the opinion itself, this Court expressly acknowledged that, "The MTCA *includes within its provisions and language no discovery rule* which tolls or delays the beginning of the statute of limitations until the claimant discovers the injury or claim." *Caves*, at ¶32 (emphasis added). Since there was no language or provision for this Court to "interpret," this Court essentially wrote a discovery rule into the statute with its decision in *Caves*. By this Court's own pronouncements, doing so was an improper trespass on the domain of the Legislature.

A statute should be interpreted starting with the premise that it *fully expresses whatever the legislature intended to accomplish.* In fact this Court has said:

> In sum, this Court cannot omit or add to the plain meaning of the statute or presume that the legislature failed to state something other than what was plainly stated. Thus, we are not justified in concluding that the legislature intended, but forgot, to include private parties in the list of those who may institute proceedings to enforce zoning ordinances.

City of Houston v. Tri-Lakes Ltd., 681 So.2d 104 (Miss. 1996) (in part quoting 82 C.J.S. Statutes §316(a) (1953). Likewise, this Court should not add to the plain meaning of the MTCA or presume that the Legislature forgot something.

As such, this Court's decision in *Caves* is simply wrong. The Court should have pointed out what it felt was an unjust situation, and called for Legislative action. What the Court did was rewrite the statute adding a discovery rule where one did not previously exist. Doing so was not mere interpretation. Thus, the rules cited by the Court regarding the affect of re-enactment of the MTCA after judicial interpretations are inapplicable. The mere fact that the Legislature has reenacted a statute does not destroy this Court's duty to recognize the separation of powers mandated by the Constitution,nor does it render *Easterling* inapplicable.

Certainly, under the principles of *stare decisis* discussed in *Caves*, the Legislature may adopt proper interpretations of statutes, and Legislative silence can and should raise a presumption of Legislative approval of such interpretations. However, with *Caves* the Court has held the it can rewrite statutes and mere silence by the Legislature changes the statute forever, even if the Court gets it wrong. This cannot be the law, and Stuart's argument in this case illustrates the problems with such a ruling by this Court.

In the present case, Stuart asks the Court to extend its holding in *Caves* so that *Easterling* is in effect overruled, and the law reverts to substantial compliance. Stuart contends that because of the logic used in *Caves*, this Court is bound by its initial incorrect interpretation of the notice provision in *Tomlinson*, even though this Court has acknowledged that *Tomlinson* is an incorrect interpretation and has explained the correct one in *Easterling*. Using *Caves* in this manner turns the doctrine of *stare decisis* on its head. The law is supposed to be improved through this doctrine; not mired in the mistakes of the past. Is the Court now doomed to follow its acknowledged errors merely because statutes have been reenacted without a word from the Legislature regarding those errors? Can the Court itself not right those errors? By Stuart's argument, the answer is no; the Court's hands are tied.

This cannot be the law. As much as this Court was trying to be fair in *Caves*, its decision was nonetheless an improper intrusion on Legislative authority. Having erroneously "tred on the domain of the Legislature," the Court should overrule *Caves*, and request that the Legislature address any inequities the Court sees with the MTCA. Allowing *Caves* to control the outcome of the present case will only compound the error made in *Caves*.

C. Equity Does Not Demand Prospective Application of *Easterling*.

Finally, Stuart argues that *Easterling* should only apply prospectively because this

Court has "previously applied the same equitable principles in protecting the government's rights under the MTCA." *Supplemental Brief of Plaintiff/Appellant*, at p. 6. Stuart then relies on *Pruett v. the City of Rosedale*, 421 So.2d 1046 (Miss. 1982) for this argument. Stuart's argument fails here because it does not acknowledge the well settled rule of law in this State that decisions of this Court are retroactive unless the Court specifically states that they are prospective only. *See Brown v. Southwest Mississippi Regional Medical Center*, 989 So.2d 933, 936 (¶7) (Miss. App. 2008); *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1093 (¶54) (Miss. 2000); *Thompson v. City of Vicksburg*, 813 So.2d 717, 721(¶15) (Miss. 2002)(quoting *Anderson v. Anderson*, 692 So.2d 65, 70 (Miss.1997) (citing *Ales v. Ales*, 650 So.2d 482, 484 (Miss. 1995); *Hall v. Hilbun*, 466 So.2d 856, 875 (Miss.1985)).

Pruett is an example of a case in which this Court announced in the opinion that the opinion was prospective only, and for good reason. The Court was warning the entire State, and Legislature, that it was about to do away with sovereign immunity altogether! Therefore, the Court announced that its decision was prospective only, and therefore it was. *Easterling* could have been prospective only, but this Court chose not to make it so.

CONCLUSION

This Court's decision in *Caves* does not control here. *Easterling* does. *Caves* is distinguishable from the present case because the provision at issue here was well known and does not act to unfairly preempt the assertion of a substantive right. Further, *Caves* should be overturned as an improper assertion of Legislative power by this Court. *Caves* was not interpretation of existing statutory language, but the drafting an entirely new provision in the MTCA. Finally, *Pruett*, does not support Stuart's argument. To the contrary, it proves

the general rule that opinions of this Court are retroactive unless the Court deems them prospective only. *Easterling* is retroactive, directly on point, and mandates that the lower courts be affirmed.

THIS the 9th day of March, 2009.

Respectfully submitted,

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER
AND/OR THE UNIVERSITY HOSPITALS & CLINICS

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CERTIFICATE OF SERVICE

I, J. Michael Coleman, attorney for defendant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing ***Appellee/Defendant's Supplemental Brief on Petition for Writ of Certiorari*** to the following:

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THIS, the 5th day of April, 2009.

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