SUPREME COURT OF MISSISSIPPI

NO. 2005-CA-2086

STEVE WINDHAM, JAMES E. SMITH, AND CHAD L. GARVIN — **APPELLANTS**

v.

LATCO OF MISSISSIPPI, INCORPORATED, JEFF HUFF D/B/A HUFF CONSTRUCTION, FABRAL, INC. AND CHOCTAW MAID FARMS, INC. — **APPELLEES**

FABRAL, INC.'S SUPPLEMENTAL BRIEF FOLLOWING GRANT OF CERTIORARI

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Introduction

Each plaintiff grows chickens for poultry companies. Each plaintiff had chicken houses built in 1995 or 1996. Each plaintiff knew that their chicken houses leaked before or shortly after construction was completed. But plaintiffs inexplicably waited until after the chicken houses leaked for eight or more years to file this suit, which was at least two years after the statute of repose expired.

The suit alleges that defendants' defective design and construction caused the leaks. In an attempt to get around the six-year statute of repose, MISS. CODE ANN. § 15-1-41 (2003), plaintiffs allege that defendants fraudulently concealed the cause of the leaks. Plaintiffs incorrectly argue that the fraudulent concealment statute, MISS. CODE ANN. § 15-1-67 (2003), saves their claims from dismissal. Plaintiffs also incorrectly claim that the decision of the Court of Appeals in this case, which rejects their argument, is somehow contrary to this Court's decision in *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1998).

According to *Reich*, the statute of repose runs upon occupancy of the building. *Id.* at 552. *Reich* makes clear that the statute of repose cannot be tolled because it runs without regard to when or even whether the cause of action accrued. *Id.* The Court of Appeals followed this settled law, and correctly upheld the trial court's dismissal of plaintiffs' claims.

This result is mandated by the language of the statute of repose itself, and this Court's decisions that accrual is irrelevant to when the statute of repose begins to run. *See, e.g., Evans v. Boyle Flying Serv., Inc.*, 680 So. 2d 821, 827 n. 4 (Miss. 1996); *Reich*, 526 So. 2d at 552. It is also consistent with the rationale of the statute of repose itself – i.e., the statute "incorporates a policy judgment" that at the end of six years after occupancy, no cause of action exists. *Reich*, 526 So. 2d at 552.

If this Court's decisions regarding the irrelevance of accrual to the operation of the statute of repose are correct – which, of course, they are – then the decision of the Court of Appeals in this case cannot be wrong. Accordingly, the decision of the Court of Appeals should be affirmed.

In addition, an independent reason exists to affirm: There was no fraudulent concealment. The alleged fault, that expanding and contracting metal panels loosened screws and made the roof leak, was open, obvious, and well known to plaintiffs. Even read in the light most favorable to plaintiffs, the evidence simply does not support a finding of fraudulent concealment. *See Ferrell v. River City Roofing, Inc.*, 912 So. 2d 448, 456 (Miss. 2005) (rejecting fraudulent concealment tolling claim both because no authority supported it and also because problems with roof were well known and not fraudulently concealed).

I. Facts.

Plaintiffs sued defendants Latco of Mississippi, Inc., Jeff Huff, Fabral, Inc., and Choctaw Maid Farms, Inc. Plaintiffs' voluntarily dismissed their claims against Choctaw Maid. Plaintiffs have settled with Latco and Jeff Huff. Fabral is the only remaining defendant.

Choctaw Maid processed chickens. In 1995, Choctaw Maid undertook an expansion project that included having their growers build additional chicken houses. (R. 4). Latco was the general contractor for the project. (R. 5). Jeff Huff was the subcontractor who actually built the chicken houses. (R. 5). Fabral designed and manufactured the "Grand Beam" metal roofing that was installed on the chicken houses by Jeff Huff. (R. 5-6).

As part of the Choctaw Maid expansion project, each of the three plaintiffs built four chicken houses. Plaintiffs allege that "defendants" negligently designed and built plaintiffs' chicken houses and that, as a result, the houses leak when it rains. (R. 7-8).

All parties agree that the statute of repose provides the prescriptive period applicable to plaintiffs' claims. As summarized in this chart, none of the plaintiffs timely sued within the six-year period mandated by the statute of repose:

Plaintiff	Initial Occupancy or Use	Barred by Statute of Repose	Date Complaint Filed
James Smith	July or August 1995[1]	August 2001	May 17, 2004
Steve Windham	January 1996[2]	January 2002	May 17, 2004
Chad Garvin	Summer 1996[3]	Summer 2002	May 17, 2004

James Smith filed his complaint nearly three years after the statute of repose expired; Steve Windham and Chad Garvin did so approximately two years after it expired.

II. Statute of Repose Cannot be Tolled.

A. Statute of Repose Runs Upon Occupancy of the Building.

The statute of repose provides that no action may be brought to recover damages for injury to real or personal property more than six years after the written acceptance or actual occupancy of the building, whichever occurs first. MISS. CODE ANN. § 15-1-41. This Court confirms that the statute of repose begins to run on the date of occupancy of the building. *Reich*, 526 So. 2d at 552. No other event triggers the running of the statute of repose.

B. Accrual of Cause of Action Irrelevant to Statute of Repose.

When the cause of action accrues is irrelevant to the running of the statute of repose. This is mandated by the language of the statute of repose itself, and the decisions of this Court. The statute says: "***No action may be brought***" after six years from when the building is first occupied. This Court has repeatedly enforced this statutory language.

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[1]T. 5.

[2]T.5, 175, 178.

[3]T. 5, 206.

For example, this Court has found that the statute of repose cuts off the cause of action after a specified period following the completion of the work, "regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." *Evans*, 680 So. 2d at 827 n. 4, *quoting Universal Eng'g Corp. v. Perez*, 451 So. 2d 463, 465 (Fla. 1984).

The statute of repose "applies in the case of deficiencies patent or latent and the clock starts ticking on the date of occupancy." *Reich*, 526 So. 2d at 552.

The statute of repose bars actions "after a period of time beginning with an act of the alleged wrongdoer unrelated to the date of injury." *Rector v. Mississippi State Highway Comm'n*, 623 So. 2d 975, 977 (Miss. 1993), *superseded by statute on other grounds as noted in Gressett v. Newton Separate Mun. Sch. Dist.*, 697 So. 2d 444 (Miss. 1997).

C. Because Accrual is Irrelevant, Statute of Repose Cannot be Tolled.

These authorities, all from the legislature or this Court, make clear that the statute of repose cannot be tolled because it runs independently of and without regard to:

- when the cause of action accrued;
- whether plaintiff has notice of the claim;
- whether the defect is latent or patent; or
- the date of injury.

These decisions of this Court are critical because the fraudulent concealment statute only affects the accrual of a cause of action. Section 15-1-67 provides that if the cause of action is fraudulently concealed, then "the cause of action shall be deemed to have first accrued" when it is first discovered. But a cause of action subject to the statute of repose begins to run when the building is first occupied. No other event or accrual triggers the statute of repose.

Because the accrual of the cause of action is irrelevant to when the statute of repose begins to run, the statute the repose cannot be tolled for alleged fraudulent concealment or any other event dependent upon accrual – e.g., notice of the claim, latency of the claim, or date of injury. This Court's decisions that the statute of repose runs independently of the accrual of the cause of action cannot be reconciled with the plaintiffs' erroneous argument that alleged fraudulent concealment can somehow toll the statute of repose.

This is why the Court of Appeals has correctly held on three separate occasions – affirming the trial court's grant of summary judgment to the contractor each time – that the statute of repose cannot be tolled. For example, in this case, the Court of Appeals, after citing numerous cases from this Court, correctly concluded that "the six year limitation of section 15-1-41 is not affected by the date of accrual, and, by extension, not tolled by section 15-1-67." *Windham v. Latco of Mississippi, Inc.*, ___ So. 2d ___, 2007 WL 331310 at ¶ 8 (Miss. Ct. App. February 6, 2007).[4]

Similarly, in *Baldwin v. Holliman*, 913 So. 2d 400, 409 (Miss. Ct. App. 2005), the Court of Appeals correctly said: "Section 15-1-41, a statute of repose, begins to run at occupancy. Fraudulent concealment does not toll a statute of repose."

And in *Estes v. Bradley*, 954 So. 2d 455 (Miss. Ct. App. 2006), the Court of Appeals again held that the fraudulent concealment statute does not apply to the statute of repose:

> The statute is like a warranty, which expires even if there is a yet-undiscovered problem. *Reich*, 526 So. 2d at 552. Section 15-1-67 says that the cause of action accrues on the date that the effect of the concealment ends. The statute of repose operates independently of causes of action and by its nature bars hidden claims. Accruals of causes of action are irrelevant to its operation. Thus, the concealment statute will not affect the statute of repose.

[4] *Accord, Farber v. Lok-N-Logs*, 701 N.W. 2d 368, 378 (Neb. 2005) (statute of repose is not tolled for alleged fraudulent concealment); *Joyce v. Garnass*, 982 P. 2d 369, 372 (Mont. 1999) (same); *Carven v. Hickman*, 763 A. 2d (Md. Ct. App. 2000) (same).

Id. at 465. *Accord, Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1218 (11th Cir. 2001) ("defining characteristic of the rule of repose is that its time period does not begin to run when the action accrues, but rather when the relevant action occurs").

D. Irrelevance of Accrual is the Key (and Correct) Distinction.

The irrelevance of the accrual of the cause of action to the running of the statute of repose is universally recognized as the key distinction between a statute of limitations and a statute of repose.

"Unlike statutes of limitation, statutes of repose may not be 'tolled' for any reason, as tolling would deprive the defendant of the certainty of the repose deadline and thereby defeat the purpose of a statute of repose." 54 C.J.S. *LIMITATIONS OF ACTIONS* § 114 (2005).

As this Court said in *Reich*: "That [plaintiff] did not know or have reason to know of the design and construction deficiencies in the chicken house is of no moment. The ten year limitation period [now six] applies in the case of deficiencies patent or latent and the clock starts ticking on the date of occupancy." *Reich*, 526 So. 2d at 552.

After a statute of repose expires, no cause of action exists, nor can one arise. "While a statute of limitations bars a cause of action if not brought within a certain time period, a statute of repose prevents a cause of action from arising after a certain period." 54 C.J.S. *LIMITATIONS OF ACTION* § 4 (2005).

This point is recognized by a leading treatise on Mississippi law: "statutes of limitation begin to run as soon as a cause of action exists. A statute of limitation has no effect where a cause of action has not yet accrued. A statute of repose does not depend upon the existence of a cause of action or an injury, but will absolutely cut off the remedy after the prescription period."

ENCYCLOPEDIA OF MISSISSIPPI LAW, LACHES AND LIMITATIONS, § 44:16 (Jeffrey Jackson and Mary Miller eds., 2001 & Supp. 2005).

For these reasons, a statute of limitations "extinguishes the remedy rather than the right," but a statute of repose "extinguishes both the remedy and the actual action." 51 AM. JUR. 2D LIMITATION OF ACTIONS § 32 (2000). Thus, "[c]ompliance with a statute of repose is a condition precedent to a party's right to maintain a lawsuit." *Id.* In this case, plaintiffs failed to satisfy the condition precedent because they did not bring their claims within the mandatory six-year period.

E. Rationale of Statute of Repose Consistent With No Tolling.

As this Court said in *Reich*, the statute of repose "incorporates a policy judgment that at the end of ten years [now six] following actual occupancy contractors . . . are entitled to close their books on the . . . project." *Reich*, 526 So. 2d at 552. Contractors can "close their books" because, at the end of six years, no cause of action exists, as the statute of repose runs independently of when the cause of action accrues.

This rationale is widely recognized in other states: "a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989).

This is precisely the balance the Mississippi legislature struck in enacting § 15-1-41. It is perfectly fair. The statute of repose places on notice anyone who has a building built that it is necessary to have the building inspected for defects within six years of occupancy, so the owner can "speak now or forever hold his peace." Because the owner has possession of the building, the owner is in complete possession of the relevant facts, i.e., the way the building is constructed.

The owner also exercises total control over whether and when to have the building inspected by a suitable expert if the owner himself cannot determine the cause of the problem.

III. No Fraudulent Concealment Occurred.

Even if the alleged conflict between the statute of repose and fraudulent concealment existed in the law, it is not presented by the facts of this case. This Court can affirm on this alternative ground. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996).

To prove fraudulent concealment, a plaintiff must show an affirmative act by the defendant which was designed to prevent and did prevent discovery of the claim, despite due diligence by the plaintiff. *Andrus v. Ellis*, 887 So. 2d 175, 181 (Miss. 2004).

All defendants except Fabral have settled and been dismissed. There is no evidence in the record that Fabral concealed anything at all from plaintiffs. Plaintiffs nonetheless allege that fraudulent concealment occurred when "defendants" replaced some screws in the roofs of plaintiffs' chicken houses and allegedly told them that this would stop the leaking; and, by failing to tell plaintiffs that the leaks were allegedly caused by the expansion and contraction of the metal roofing. (T. 32-35).

A. No Concealment Regarding Screws.

Plaintiffs' deposition testimony demonstrates that their argument regarding the screws as the focus of fraudulent concealment is contrived. James Smith testified that nobody ever told him anything about the screws. (R. 168). In fact, he does not remember having any conversations with anyone from Fabral, Latco or Choctaw Maid. (R. 171). His roofing screws were never replaced. (R. 171).

Chad Garvin testified that Latco told him that they were having problems with screws backing out of the roofs. He admitted that Latco was honest with him about this. (R. 206-07).

Garvin has never spoken with anyone from Fabral. (R. 213). His screws have not been replaced. (R.212-14).

Smith and Garvin cannot now claim that the replacement of their roofing screws deceived them into sleeping on their rights, as their screws were never actually replaced.

The only thing that Steve Windham says he was told about the screws is that the new screws "would hold better." (R. 187). But once the new screws were installed, Windham knew almost immediately that this repair did not work:

> Q. Based on your observations, did the new screws and wooden blocks do any good at all?
>
> A. No, sir. The blocks weren't meant to stop the leaking, I don't think. They were just repairing the ones that didn't work.
>
> Q. So, for instance, the first rain event after the new screws, did you know that it didn't fix the problem?
>
> A. Yes, sir, especially on the end walls. (R. 196).

The repairs did not "prevent discovery of the claim" because they did not stop the leaking and Windham knew that they did not. *See Andrus v. Ellis*, 887 So. 2d at 181. Accordingly, the repairs to Windham's chicken houses cannot constitute an affirmative act of concealment, as the repairs concealed nothing.

B. No Concealment of Expansion and Contraction.

Fabral did nothing to prevent plaintiffs from determining the cause of the leaks or that the roofs on their chicken houses expanded and contracted. There is no evidence in the record to the contrary. And plaintiffs' claim that they did not "discover" that the alleged cause of the leaks was expansion and contraction until they hired an inspector after the statute of repose expired is

not supported by the record, and, even if it were true, it does not constitute fraudulent concealment.

Steve Windham testified that he knew all along that the roofs on his chicken houses were expanding and contracting:

> Q. Did anybody explain to you why the metal was moving to begin with?
>
> A. They didn't need to explain that.
>
> Q. Why don't you tell me?
>
> A. Well, your metal heat – heat up and cool down; its going to expand and contract. (R. 189).

James Smith testified that, based on his own "personal thinking," he suspected that expansion and contraction had something to do with the leaks. (R. 213).

The fact that plaintiffs' roofs were leaking is undisputed. Plaintiffs admit they knew that their chicken houses leaked before or shortly after they were built. (R. 165, 178, 206). The problem with the leaks was open and obvious, and plaintiffs knew it was occurring. They had six years to have their chicken houses inspected to determine the cause of leaks, although they knew or suspected on their own that it had something to do with expansion and contraction.

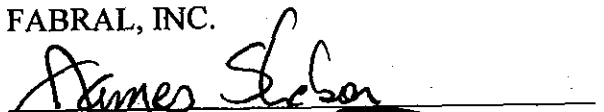
Plaintiffs could have hired the inspector sooner than they did. They just chose not to do so. Certainly Fabral did nothing to prevent plaintiffs from hiring an inspector sooner, or to hide the problem from them. (R.168, 171, 196, 206-07, 212-14). Nor does plaintiffs' inaction constitute due diligence.

Conclusion

The Court of Appeals followed settled law. Moreover, the record facts do not and cannot support a claim for fraudulent concealment against Fabral. The Court of Appeals properly affirmed the Circuit Court's judgment.

Respectfully submitted,

FABRAL, INC.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been sent to the following counsel of record by first class mail, postage prepaid, this the 17th day of September, 2007:

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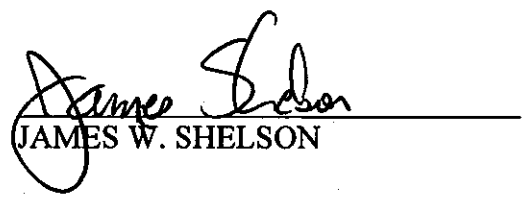

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