IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEVE WINDHAM,
JAMES E. SMITH, and CHAD L. GARVIN — PLAINTIFFS

VS. — NO. 2005-CA-2086

LATCO OF MISSISSIPPI, INCORPORATED, JEFF HUFF,

D/B/A HUFF CONSTRUCTION, FABRAL, INC. AND
CHOCTAW MAID FARMS, INC. — DEFENDANTS

APPELLANTS SUPPLEMENTAL BRIEF FOLLOWING GRANT OF WRIT OF CERTIORARI

PREPARED BY:

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ARGUMENT

This Court is faced with the task of balancing the two statutes that are at question in this matter. Miss. Code Ann. § 15-1-41 (1972), is the six year statute referring to construction of improvements and buildings. It states as follows:

> No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mississippi or any agency, department, institution or political subdivision thereof as well as for any private or nongovernmental entity.

Mississippi Code Ann. §15-1-67, deals with the fraudulent concealment of a claim from the aggrieved persons and states as follows:

> If a person liable to any personal action shall fraudulently conceal the cause the action from the knowledge of the person entitled thereto the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be or with reasonable diligence might have been, first known or discovered.

These statutes would appear not be opposed to each other. Both talk of causes of action arising. The statute on construction is drawn so that "contractors can close their books on a project." *Riech v. Jesco, Inc.* 526 So.2d 550 (Miss 1988) The *Reich* case seems to be the pivotal case for the dilemma that the Appellants face in this litigation. The *Reich* case never once refers to the construction statute, §15-1-41

as a statute of repose. It is always referred to as a statute of limitations. It discusses the insufficiency of the proof of fraudulent concealment, that the Plaintiff in that case tried to introduce and found that it did not rise to the level necessary to prove fraudulent concealment.

Seventeen years later, the Court of Appeals changed all that. In *Baldwin v. Holliman,* 913 So.2d 400 (Miss.App.2005), the Court of Appeals announced "Fraudulent concealment does not toll a statute of repose. *See* Reich, 526 So.2d at 552." *Baldwin* at 409. Never mind that *Reich* refers to the same statute, as a statute of limitations and that the word "repose" is never mentioned in the case. There is no language in the *Reich* case that would lead the Court to reach the result that the Court of Appeals did in the Baldwin case.

The term "statute of repose" has been in recent years modified to have a separate and distinct meaning from a statute of limitations. As far back as 1911, this Court in *Hammer v. Yazoo Delta Lumber Co.* 100 Miss. 349, 56 So. 466 (Miss. 1911), stated, "statutes of limitations are statutes of repose..." In the case at bar, Fabral cites various treatise and other legal periodicals to support their position, but little case law to show how Mississippi law has arrived at that point. When these statutes were written, there was no intent by the legislature, that a statute of repose would be exempt from the fraudulent concealment statute. If there were such an intent, the statute would contain an exception.

The question that is posed to this Court is why it is necessary that contractors, builders, etc, that fall under §15-1-41, are entitled to special protection from allegations of fraudulent concealment that §15-1-67 is designed to prevent. Granted,

we should allow contractors to close their books on a job. But what about contractors who actively construct something, knowing it is problem ridden, but are able to escape the six year limit? Are they also entitled to protection? To more protection that any other tortfeasor, who is not associated with a construction project? To do so, rewards an unscrupulous contractor for being good at pulling the wool over the eyes of the consumer.

There is ample law from across the nation, where other jurisdictions have determined that a statute of repose such as ours will be tolled by a showing of fraudulent concealment. See Kansas- *Robinson v. Shah* 23 Kan.App.2d 812, 936 P.2d 784 (Kan.App.,1997.); New Mexico-*Tomlinson v. George, 138* N.M. 34, 116 P.3d 105 (N.M.2005); Georgia-*Esener v. Kinsey* 240 Ga.App. 21, 522 S.E.2d 522 (Ga.App.1999) *(Citations omitted.) citing:* Hill v. Fordham, 186 Ga.App. 354, 357-358, 367 S.E.2d 128 (1988)*;* Illinois-*DeLuna v. Burciaga,* 359 Ill.App.3d 544, 295 Ill.Dec. 897 (Ill.App. 1 Dist. 2005); Oregon-*Jones By and Through Jones v. Salem Hosp*, 93 Or.App. 252, 762 P.2d 303 (Or.App.1988.); Texas-*Vorth v. Saadeh* ,2006 WL 684490 (Tex. App. Amarillo 2006). Ft. note 1.

The Appelles have previously cited several cases from other jurisdictions, where those states have sided with our Court of Appeals, taking the position that a statute of Repose is not subject to tolling. What is unclear in cases of other jurisdictions, is whether those states have a specific statute dealing with fraudulent concealment, as a tolling of actions.

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ft.1. Most of these cases refer to Medical Malpractice claims. The Texas case is referring to a construction claim. Most of the jurisdictions this writer has checked did not have much by the way of construction statutes of repose. But the same principle applies, that the courts there have allowed fraudulent concealment to toll a statute of repose. Those cases are cited, along with a short paragraph about the case, in the Appellants original brief.

To not allow that tolling in this case, ignores §15-1-67. Obviously the legislative intent of the tolling statute, was to protect the consumer. Is the legislative intent of one statute, to allow contractors to close their books, greater than the intent to protect the consumer from unscrupulous tortfeasors? I think not.

To initiate the tolling provision of the fraudulent concealment statute, additional action is required on the part of the contractor, the fraud, to estoppe him from hiding behind the protection of §15-1-67. Those unscrupulous contractors should not be entitled to the same protection as contractors who have nothing to hide. The price of protecting a fraudulent contractor, builder etc, is too great, when a blanket provision such as this is invoked.

Fabral's supplemental brief discusses a lack of evidence of fraudulent concealment, even should the Court rule in the Appellants favor. However, the Appellants would assert that they have not had their day in court on this matter. Because of the Holliman case and others, the lower Court granted summary judgment solely on the grounds of the ruling that the statute repose could not be tolled by fraudulent concealment. There was no decision by the lower court on the sufficiency of the evidence. The plaintiffs should be entitled to their day in court on this matter. There is evidence, which the court should consider, of fraudulent concealment of the problems associated with the Appellants poultry houses. The appellants relied on Fabral and the other defendants. Whether or not other defendants have been settled out or not is irrelevant as to the issue before the Court. Further, there are over 80 other poultry houses that will be affected by this decision of the Court.

Again, the Appellants would urge the Court to reverse the decision of the lower court, in the *Baldwin* case and apply the law of Mississippi's fraudulent concealment statute, as was the legislatures intent. If the Appellants cannot overcome the burden of proving fraudulent concealment, then their claim will fail. However, they should be afforded the opportunity to have their case heard.

Respectfully submitted,

P. Shawn Harris
Attorney for the Appellants

CERTIFICATE OF SERVICE

I, P. Shawn Harris, hereby certify that a true and correct copy of the above and foregoing Appelles Brief has this day been forwarded, via U.S. Mail, postage prepaid, to counsel of record as follows:

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Honorable Judge Vernon Cotten
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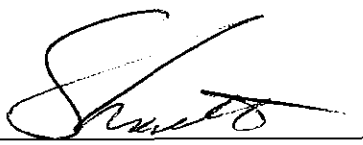
SO CERTIFIED, this the 3rd of October, 2007.



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