

BILLY MACK SULLIVAN; TERESA SULLIVAN
RANKIN; BILLY H. SULLIVAN; ALICE M. LOWTHER;
JAMES H. LOWTHER, JR.; JULIAN BARRY LOWTHER;
PAUL EDWARD LOWTHER, and SHERRI LYNN LACY

APPELLANTS

VERSUS

EUGENE C. TULLOS and JOHN RAYMOND TULLOS,
Individually and d/b/a Tullos & Tullos; CRMYES G.
PITTMAN; BILLY MEANS, and JOHN DOES 1-10

APPELLEES

Appeal from Order Granting Summary Judgment
Circuit Court of Hinds County, Mississippi
First Judicial District
Case Number 251-06-496CIV

ORAL ARGUMENT IS NOT REQUESTED

BRIEF FOR APPELLEES, EUGENE C. TULLOS,
JOHN RAYMOND TULLOS, AND BILLY MEANS

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CERTIFICATE OF INTERESTED PERSONS

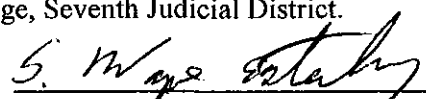
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Juliette Sullivan, plaintiff/appellant.
Alice M. Lowther, plaintiff/appellant.
James H. Lowther, plaintiff/appellant.
Julian Barry Lowther, plaintiff/appellant.
Paul Edward Lowther, plaintiff/appellant.
Sherri Lynn Lacy, plaintiff/appellant.
W. Terrell Stubbs, attorney of record for plaintiffs/appellants.
Eugene C. Tullos, defendant/appellee.
John Raymond Tullos, defendant/appellee.
Tullos & Tullos, defendant/appellee.
Crymes G. Pittman, defendant/appellee.
Billy Means, defendant/appellee.

S. Wayne Easterling, attorney of record for appellees, Eugene C. Tullos, John Raymond Tullos, Tullos & Tullos, and Billy Means.

G. David Garner, attorney of record for appellees, Eugene C. Tullos, John Raymond Tullos, Tullos & Tullos, and Billy Means.

Robert G. German, attorney of record for appellee, Crymes G. Pittman.
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Pam A. Ferrington, attorney of record for appellee, Crymes G. Pittman.
Honorable Bobby Burt DeLaughter, Circuit Judge, Seventh Judicial District.


S. WAYNE EASTERLING, Of Attorneys
for Appellees, Eugene C. Tullos, John Raymond
Tullos, Tullos & Tullos, and Billy Means

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primary issue before the Court is whether the trial judge was correct in determining that plaintiffs' cause of action was barred by the three-year statute of limitations authorized in Section 15-1-49 of the Mississippi Code of 1972. John Raymond Tullos, Billy Means, and the law firm of Tullos & Tullos also assert that they are entitled to judgment because no cause of action has been asserted against them and no basis exists for them to have been named as defendants.

STATEMENT OF THE FACTS

Jeff Wooley was a widower who died intestate without issue in 1998. A retired school teacher and part-time farmer, he owned an approximately 423-acre farm in Smith County, Mississippi, as well as substantial personal property. Wooley's sister, Annie Boone, employed defendant Eugene C. Tullos to represent her as the administratrix of the Wooley estate. Some of the statutory heirs who are now plaintiffs initially challenged this administration and employed the Raleigh, Mississippi, law firm of Sorey & Sorey to represent their interests. The contest was eventually dismissed, and all statutory heirs joined in the petition for approval of the final accounting and closing of the estate. On August 21, 2000, Chancellor Larry Buffington entered a judgment approving the final report and accounting and confirming the interests in the estate's personal property in the statutory heirs. The order also confirmed ownership of the real estate which had already passed to the statutory heirs at Wooley's death pursuant to the laws of intestate distribution in Mississippi. A third party had filed a probated claim, which resulted in three acres of the 423-acre farm being conveyed to that party in settlement of his claim. (R.E. 8-22.)

an undivided one-third interest in the estate property. Annie Boone is deceased; and her grandson, Donald Boone, is one of the present owners of her former interest. Boone and McAlpin have made no complaint against the defendants. The eight plaintiffs collectively owned an undivided one-third interest in the estate property. They make no complaint concerning the administration of the estate or the disposition of the estate property. Their claim is that they were “wrongfully and fraudulently” induced to sell their one-third interest in the 420-acre tract after the estate was closed. Donald Boone and Vernon Tullos McAlpin were originally named as defendants. The trial judge found that plaintiffs and their attorney had violated the Accountability in Litigation Act in pursuing a claim against Boone and awarded \$8,758.14 sanctions against plaintiffs and their attorney. (R.127-128.) Plaintiffs voluntarily dismissed their claim against McAlpin. (R 121.)

The complaint alleges that the plaintiffs were present at the estate closing on August 21, 2000, and that they sold their undivided interest in the 420-acre tract for the pro rata price of \$710.00 per acre, an allegedly inadequate consideration, based upon false or incomplete representations made by Eugene C. Tullos after the entry of the judgment approving the final reporting and accounting. (R.E. 8-22.) The only evidence concerning valuation of the property is an appraisal prepared by the estate which valued the property at \$500.00 per acre. (R.E. 59, R. 194.)

Specifically, they claim they were misled by allegedly false representations by Tullos that defendant Crymes G. Pittman had submitted the best bid for the property and the property was being sold to him. All the statutory heirs executed a warranty deed conveying the 420 acres to Crymes G. Pittman on August 21, 2000, and received in return a check for their pro rata interest in the land

STATEMENT OF THE CASE

The plaintiffs only request is for monetary relief based upon the claim that on August 21, 2000, they were induced to sell their interest in the property for less than its true value. (R.- Exhibit "8" pages 19-20 at Vol. 1, R. 8-22.)

The land sale about which complaint is made occurred on August 21, 2000. The suit was filed on April 8, 2005, (R.E. 8.) almost five years after the sale. Thus, the primary question for decision is whether the statute of limitations was tolled.

ARGUMENT

1. The Trial Court Did Not Commit Error in Converting Defendants' Rule 12(b)(6) Motions into a Rule 56 Motion for Summary Judgment.

Defendants' raised the defense of the statute of limitations through a 12(b)(6) motion. This is an appropriate method of raising this defense. *Stephens v. Equitable Life Assurance Society of the United States*, 2002-CA-00498-SCT, 850 So.2d 78 (Miss. 2003). Rule 12(b) of the Mississippi Rules of Civil Procedure requires the trial court to treat a 12(b) motion as one for summary judgment if "matters outside the pleading are presented to and not excluded by the Court." In this case, the plaintiff requested permission to introduce matters outside the pleading. The defendants announced that they had no objection to this action by plaintiff, and the Court thereupon announced its intention to treat the motion as one for summary judgment as opposed to a 12(b) motion. (R. 16-17 of Vol 3.) The trial judge rendered an opinion 27 days later, and the plaintiffs actually submitted additional

action of the plaintiffs' attorney in presenting new material into the proceeding; and the plaintiffs' attorney not only had adequate time to respond to the motion but also actually did so.

The documents introduced by the plaintiff attorney during argument and during the additional period allowed by the Court were irrelevant to the action of the Court. The issue was the statute of limitations, and the Court was authorized to rule on this issue either through a Rule 12(b) motion or a Rule 56 motion. Thus, the plaintiffs' argument is moot as well as being triggered by their own action.

2. The Statute of Limitations Began
to Run on August 21, 2000.

While the complaint is full of sound and fury, the relief sought therein and plaintiff attorney's representation to the Court (R. 19-20 of Vol. 3.) clearly reveal plaintiffs' claim to be that they sold their land for less than its true value.

The plaintiffs cannot argue that they were unaware of the sale itself – they accepted payment and executed the deeds. Likewise, they cannot argue that they were unaware of the purchase price on August 21, 2000 – the six checks introduced by their attorney establish that they accepted the checks on that date. (R.E. 28-29.)

This Court has consistently held that the statute of limitations begins to run upon the completion of a sale induced by fraud. One of the earliest cases so holding is *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934). In this case, the plaintiff purchased property fronting on the Gulf of Mexico. The price was based upon \$150.00 per front foot. The seller represented the property to

brought an action for deceit. The Supreme Court stated the following:

An action of deceit will lie for a false representation as to the acreage or the number of feet in a tract of land sold, although the representation was made in good faith, *Lundy v. Hazlett*, 147 Miss. 808, 112 So. 591; and the purchaser's right of action for such deceit accrues upon the completion of the sale induced by such false representation, or upon the consummation of the fraud, and will be barred if suit therefor is not filed within six years thereafter, unless the grantor "fraudulently conceal the cause of action from the knowledge of the person entitled thereto." Section 2312, Code 1930: 37 C. J. 935. In the case of *Lundy v. Hazlett*, supra, it was held that by reason of continued false representations after the sale whereby the purchaser was lulled into security and deterred from investigating, the cause of action was fraudulently concealed, and consequently since the suit was filed within six years after the discovery of the fraud, it was not barred by the statute of limitations.

In the case at bar, the record is barren of any such proof. It affirmatively shows that, after the delivery of the deed, the appellant had no communication with the appellees, and it fails to show that they did anything that could be construed as a concealment of the falsity of the representation as to the amount of land conveyed, or a concealment of the cause of action. This suit was not filed until more than seven years after the cause of action accrued to the appellant, and therefore it was barred. Section 2292, Code 1930.
153 So. 798-799.

Dunn v. Dent, supra, has been cited with approval in *Stephens v. Equitable Life Assurance Society of the United States*, supra. The *Stephens* case involved claim of alleged fraud and oral misrepresentation of life insurance policies involving so called "vanishing premiums." The following quotation from the *Stephens* case is applicable:

The plaintiffs base their appeal of the trial court's ruling to grant the motion to dismiss the complaint on a three-part argument. First, they claim that the allegations set forth in the complaint easily clear the threshold and withstand a Rule 12(b)(6) motion. Second, Equitable and Bell engaged in fraudulent concealment which tolls the statute of limitations. Therefore, the trial court's dismissal based upon a bar by the statute of limitations was in error. Third, the plaintiffs claim that

An analysis based on whether the plaintiffs' claims are barred by the statute of limitations is of paramount importance and must be addressed by this Court prior to any examination of the issues as presented by the plaintiffs. In the event that the alleged claims by the plaintiffs withstand the applicable statute of limitations, then, and only then, is full review of the issues warranted by this Court.

A. The Trial Court Ruling

The trial court ruled the following in pertinent part:

B. LAW IDENTIFICATION:

5. The applicable statute of limitations is found in Miss. Code Anno. § 15-1-49 which imposes a three year limitation on claims of fraud.

6. "A fraud claim accrues upon the completion of the sale induced by false representation, or upon the consummation of the fraud." *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934).

7. The cause of action for fraudulent concealment accrues when the person, with reasonable diligence, first knew or first should have known of the fraud. Miss. Code Anno. § 15-1-67.

C. LEGAL APPLICATION

8. In accordance with *Dunn*, the statute of limitations on all Plaintiff's fraud claims ran in 1975 for the Plaintiffs.
850 So.2d at 81 (¶ 7, ¶ 8, ¶ 9).

In *Andrus v. Ellis*, 2003-IA-01842-SCT, 887 So.2d 175 (Miss. 2004), the Supreme Court of Mississippi again rejected an attempt by plaintiffs to utilize Section 15-1-67 of the Mississippi Code of 1972 to toll the three-year statute. The Court stated the following:

In the other case, this Court considered § 15-1-49 and statutory exceptions thereto. See *Stephens v. Equitable Life Assur. Soc'y*, 850 So.2d 78 (Miss. 2003) (relied on in *Ross v. CitiFinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003)). In *Stephens*, the plaintiffs sued Equitable Life and its agent based on theories of fraudulent

in 1972 when the insurance was purchased. *Id.* At 83. Because the complaint was not filed until 2001, the claims were barred under the applicable statute of limitations. *Id.* The Court stated that under this Court's precedent, insureds are charged with knowledge of the contents of written agreements notwithstanding whether they actually read such agreement. *Id.*

The Court then considered § 15-1-67, which provides:

If a person liable to any personal action shall fraudulently conceal the cause of 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.

Miss. Code Ann. § 15-1-67. (Rev. 2003). Under the doctrine of fraudulent concealment, the running of the statute of limitations is tolled. *Stephens*, 850 So.2d at 83 (quoting *Robinson v. Cobb*, 766 So.2d 883, 887 (Miss. 2000)). This requires proof of two elements: subsequent affirmative acts of concealment and due diligence. That is, there must be some subsequent affirmative act by the defendant which was designed to prevent and which did prevent discovery of the claim. *Stephens*, 850 So.2d at 83-84. Proof of this act must also be coupled with proof that despite his or her due diligence, the plaintiff was unable to discover the claim. *Id.* Here, Plaintiffs fail as to both elements. 887 So.2d at 180-181 (¶ 29, ¶ 30).

In *Warren v. Horace Mann Life Insurance Company*, 2004-CA-02291, Miss. 2006, an agent for Horace Mann Life Insurance Company persuaded plaintiff to purchase what she thought to be individual life insurance policies on her two sons. Approximately ten years later, she determined that the policy was actually a joint life policy that expired on the death of the first insured. The Court of Appeals determined that the cause of action accrued upon completion of the sale induced by fraud, and plaintiff's claim was barred by the statute of limitations.

The plaintiffs were vested in their undivided interest in the real estate at the death of Wooley in 1998. *Beach v. State*, 178 Miss. 336, 173 So. 429 (1937). Tullos only represented the

descended from the deceased to the brother of the executor. The willingness of the executor to purchase real property from another beneficiary of the estate did not violate any fiduciary obligation. Eugene Tullos did not represent the plaintiffs, and his representation of the administratrix had ended upon closing of the estate which occurred shortly before the execution of the deed.

The plaintiffs cite *Smith v. Snead*, 638 So.2d 1252 (Miss. 1994); *Channel v. Loyacono*, 2005-CA-01395-SCT, 954 So.2d 415 (Miss. 2007), and others as support for their contention that the statute of limitations starts running only upon discovery of the alleged fraud. These attorney malpractice cases indicate that in the field of legal malpractice this Court has adopted a “discovery” standard in those case when

... “the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question,” or it may be applied “when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act. *McCain v. Memphis Hardwood Flooring Co.*, 725 So.2d 788, 794 (Miss. 1998) (citing *Sneed*, 638 So.2d at 1257; *Staheli v. Smith*, 548 So.2d 1299, 1303 (Miss. 1989)). Given this precedent, it must be determined whether the alleged injury in this case was secretive or inherently undiscoverable, or in the alternative, whether the plaintiffs, as laymen, could not have reasonably been expected to perceive the injury at the time of the alleged wrongful act. 638 So.2d at 4 (¶ 19).

In the case at bar, the issue was not the identity of the purchaser. Rather, the issue was whether the plaintiffs received an inadequate price for their land as a result of fraud and, if so, whether they exercised the due diligence required to discover the alleged fraud. The only evidence before the Court concerning valuation of the property was an appraisal showing the value to be \$500.00 per acre as of 2000. (R.E. 59.) The sale was based upon a valuation of \$710.00 per acre

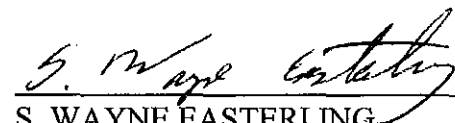
substantially more than the amount of the sale, the case of *Dunn v. Dent, supra*, is controlling – the sales price was known by all plaintiffs on August 21, 2000, and the plaintiffs had three years from that date to challenge the sale.

CONCLUSION

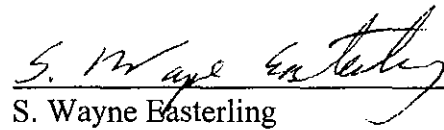
The learned trial judge carefully considered the statute of limitations defense raised by the defendants and analyzed the affect of Section 15-1-67 of the Mississippi Code upon this assertion. The Court concluded that any claim based upon fraud is governed by the three-year statute of limitations contained in Section 15-1-49 of the Mississippi Code and that plaintiffs were required to prove two elements if the statute was to be tolled. The Court then determined that there were no subsequent affirmative acts designed to prevent, or which prevented, discovery of plaintiffs' claims and further concluded that the plaintiffs had not been diligent in pursuing their claim. Having concluded that they did not meet either of the required tests, the Court held that the statute of limitations was an absolute bar to their claim and ruled accordingly.

It is respectfully submitted that this decision is proper and this decision should be affirmed.

Respectfully submitted,


S. WAYNE EASTERLING,
Of Attorneys for Appellees, Eugene C.
Tullos, John Raymond Tullos, Tullos &
Tullos, and Billy Means

Honorable Bobby B. DeLaughter, Circuit Court Judge, Seventh Judicial District, Post Office Box 327, Jackson, Mississippi 39205-0327; to the Honorable W. Terrell Stubbs, Post Office Box 157, Mendenhall, Mississippi 39114-0157, attorney for appellants; and to the Honorable Robert G. Germany, Post Office Box 22985, Jackson, Mississippi 39225-2985; the Honorable Pam A. Ferrington, Post Office Box 92, Natchez, Mississippi 39121-0092, and the Honorable Cynthia A. Stewart, Post Office Box 2629, Madison, Mississippi 39130, attorneys for Crymes G. Pittman, on this 16th day of November, A.D., 2007.


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