

IN THE SUPREME COURT OF MISSISSIPPI

**MONTY C. FLETCHER and
SANDRA L. FLETCHER**

APPELLANTS

V.

CAUSE NO. 2007-CA-00949

**JIMMIE L. LYLES, LEONEZE C.
LYLES and KELLY DABBS REALTY, INC.**

APPELLEES

**APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY
Civil Action No. 2003-00278**

BRIEF OF APPELLEES JIMMIE L. LYLES AND LEONEZE C. LYLES (DECEASED)

**ORAL ARGUMENT IS NOT REQUESTED
I. 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.

1. Kelly Dabbs Realty, Inc. ("Dabbs"), whose sole owner is H. Kelly Dabbs;
2. G. Todd Burwell and Julie P. Ratliff of Latham & Burwell, PLLC, counsel for Kelly Dabbs Realty, Inc.;
3. Monty C. Fletcher and Sandra L. Fletcher (the "Fletcher Parties");
4. K.F. Boackle, counsel for Monty C. Fletcher and Sandra L. Fletcher;
5. Jimmie L. Lyles and Leoneze C. Lyles, Deceased (collectively, "Lyles");
6. Eddie J. Abdeen, counsel for Lyles; and
7. Hon. Samac S. Richardson, Circuit Court Judge, Madison County, Mississippi.

So certified, this the 20th day of March, 2008.



Eddie J. Abdeen (MSB [REDACTED])
Attorney at Law
Post Office Box 2134
Madison, Mississippi 39130
Telephone: 601-898-7972

II. TABLE OF CONTENTS

	<u>Page</u>
I. CERTIFICATE OF INTERESTED PERSONS	i
II. TABLE OF CONTENTS	ii
III. TABLE OF AUTHORITIES	iii
IV. STATEMENT OF THE ISSUES	1
V. STATEMENT OF THE CASE/OPERATIVE FACTS	1
VI. SUMMARY OF ARGUMENT	3
VII. ARGUMENT	3
VIII. CONCLUSION	12

III. TABLE OF AUTHORITIES:

CASES

Arbor Village Condominium Assoc. V. Arbor Village, Ltd, 642 N.E. 2d 1124 (Ohio Ct. App. 1996)	6
Andrus v. Ellis, 887 So. 2d 175 (Miss. 2004)	9
Berry v. Chrysler Corp., 150 F. 2d 1002 (6th Cir. 1945)	8
Burton v. Terrell, 368 F.Supp. 553 (W.D. Va. 1973)	9
Canadian National/Illinois Central Railroad Co. v. Hall, 953 So. 2d 1084 (Miss. 2007)	10
Carder v. BASF Corp., 919 So. 2d 258 (Miss. Corp. App. 2005)	10
Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d 1052 (Miss. 2005)	10
Coffee v. General Motors Acceptance Corp., 30 F.Supp. 2d 1376	9
Estate of Kidd, 435 So. 2d 632 (Miss. 1983)	5
Ferrone v. Resnick, 2002 WL 442314 (Conn. Super. Ct. Feb. 25, 2002)	9
In re Estate of Blake, 723 N.Y.S. 2d 563 (N.Y.A.D. 2001)	9
Joiner Ins. Agency, Inc. v. Principal Casualty Ins. Co. 684 So. 2d 1242 (Miss. 1996)	5
Kilgore v. Barnes, 508 So. 2d 1042 (Miss. 1987)	5
Lee v. Thompson, 859 So. 2d 981 (Miss. 2003)	3
PPG Architectural Finishes, Inc. v. Lowery, 909 So. 2d 47 (Miss. 2005)	11
Pollard v. Sherwin-Williams Co., 955 So. 2d 859	5
Reich v. Jesco, Inc., 526 So. 2d 550 (Miss. 1988)	3
State Industries, Inc. v. Hodges, 919 So. 2d 943 (Miss. 2006)	10

STATUTES:

<i>Miss. Code Ann. § 89-1-501</i>	1
<i>Miss. Code Ann. § 89-1-503</i>	1,6
<i>Miss. Code Ann. § 89-1-511</i>	2,6
<i>Miss. Code Ann. §89-1-513</i>	2,6
<i>Miss. Code Ann. § 15-1-49(2)</i>	3,5, 10,11
<i>Miss. Code Ann. § 15-1-67</i>	10

IV. STATEMENT OF THE ISSUE(S)

1. Whether the claims of the Fletcher Parties accrued, for statute of limitation purposes, on or before September 16, 2000, the date the Fletcher Parties entered into the subject real estate purchase contract with Lyles, or on October 30, 2000, the date of the closing of the purchase transaction.
2. Whether the claims of the Fletcher Parties are time barred under the applicable statute of limitation.
3. Whether the trial court properly granted summary judgment to Lyles and Dabbs on the basis that the claims of the Fletcher Parties are time barred.

V. STATEMENT OF THE CASE/OPERATIVE FACTS

Pursuant to M.R.A.P. 28(i), Lyles adopts herein by reference the statement of the case set forth in the brief of Dabbs. However, as to Lyles, the operative facts that are dispositive of the issues in this appeal are as follows:

- a. Sometime prior to September 16, 2000, Lyles provided the Fletcher Parties with the seller's disclosure statement required by *Miss. Code Ann. § 89-1-501*, et. seq. (R.16-17). *See Miss. Code Ann. § 89-1-503* (in case of transfer of real property by contract, written disclosure shall be delivered to prospective transferee as soon as practicable before execution of the contract);
- b. On September 16, 2000, the Fletcher Parties entered into a real estate contract with Lyles ("Bridge Water Drive Purchase Contract") to purchase a home owned by Lyles located at 136 Bridge Water Drive, Madison, MS ("Bridge Water Drive Property")(R.14-15);
- c. The Fletcher Parties retained AmeriSpec to conduct their own home inspection of the Bridge Water Drive Property, which inspection occurred on or about September 28, 2000 in the presence of at least one of the Fletcher Parties (R.222-223; R. 244; R.242-255). AmeriSpec issued its home inspection report to the Fletcher Parties on or about September 29, 2000 (R.241-255).
- d. The closing of the subject transaction at issue in the Bridge Water Drive Purchase

Contract between the Fletcher Parties and Lyles took place on October 30, 2000 (R.12-13);

d. The Fletcher Parties filed their complaint in this action on October 29, 2003 (R.7); and

e. Lyles asserted the Fletcher Parties' claims were barred by the applicable statute of limitations as an affirmative defense (R.32 and R.42).

The core allegations and claims the Fletcher Parties have made against Lyles are as follows:

a. Lyles falsely represented that Lyles was not aware of any defects or needed repairs in relation to the Bridge Water Drive Property in the statutorily required Seller's Disclosure Statement, thereby breaching *Miss. Code Ann. §§ 89-1-511 and 89-1-513*. (R.8-10 and 16-17 – Fletcher Parties' Complaint at paras. 8 and 23 and Exhibit C thereto);

b. Lyles fraudulently induced the Fletcher Parties to enter into the Bridge Water Drive Purchase Contract by making a false contractual representation that Lyles had no actual knowledge of any defects in the condition of the property (R.8-9 and 15 – Fletcher Parties' Complaint at paras. 7, 14-16 and Exhibit B thereto);

c. Lyles materially breached the Bridge Water Drive Purchase Contract by falsely representing Lyles had no actual knowledge of any defects in the condition of the Bridge Water Drive Property (R.8,10 and 15 – Fletcher Parties' Complaint at paras. 7 and 22 and Exhibit B thereto); and

d. Lyles breached the implied covenant of good faith and fair dealing in the Bridge Water Drive Purchase Contract (R.10 – Fletcher Parties' Complaint at para. 23).

As will be demonstrated herein, based on the arguments (oral and written) made by the Fletcher Parties, Dabbs and Lyles, the trial court properly found the claims of the Fletcher Parties accrued more than three years prior to the time the Fletcher Parties' Complaint was filed in this action (October 29, 2003) and correctly ruled Dabbs and Lyles were entitled to summary

judgment based upon their asserted statute of limitation defense.

VI. SUMMARY OF THE ARGUMENT

Pursuant to M.R.A.P. 28(i), Lyles incorporates herein by reference the Summary of the Argument of Dabbs related to the trial court's ruling regarding the date the claims of the Fletcher Parties accrued for statute of limitation purposes. Furthermore, the Fletcher Parties are precluded from attempting to raise, for the first time on appeal, the application of the fraudulent concealment doctrine and/or that they are entitled to assert the latent injury provision of *Miss. Code Ann. § 15-1-49(2)*. In any event, such theories have no application based upon the pleadings and facts of this case.

VII. ARGUMENT

The trial court properly granted summary judgment to Lyles and Dabbs on the basis that the claims of the Fletcher Parties are time barred.

A. *Miss. Code Ann. § 15-1-49, Mississippi's General Three Year Statute of Limitation Applies to all of the Claims of the Fletcher Parties.*

As to all of the Fletcher Parties' claims, Mississippi's general statute of limitations, *Miss. Code Ann. § 15-1-49*, imposes a three-year period within which to file suit. That statute states, in pertinent part, that "all actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." The Fletcher Parties concede this point so the applicable period of limitation is not in dispute. (R.294 – Fletcher Parties' Response to Summary Judgment at p. 7 ["Dabbs also stated that Fletcher filed the Complaint on October 29, 2003, **clearly within the three year statute.**"]).

B. The Limitations Bar is Absolute.

As this Court has observed,

Statutes of limitations are like other affirmative defenses. They proceed on the premise that the plaintiff can prove everything he has alleged. They represent a legislative judgment that, notwithstanding the presence of an other wise viable and enforceable claim, the case ought not to proceed.

Reich v. Jesco, Inc., 526 So. 2d 550, 551 (Miss. 1988); *See Lee v. Thompson*, 859 So. 2d 981, 992

(Miss. 2003)(discussing the purpose of statutes of limitations and stating, among other things, “the fact that a barred claim is a just one or has the sanction of a moral obligation does not exempt it from the limitation period”).

The approach adopted by the Fletcher Parties in their appellants’ brief has been to assert that there are many facts in dispute and that “[t]here have been depositions taken that support and prove most of the Fletchers’ claims.” (Fletcher Parties Appellants’ Brief at p. 7). Based on such assertion, the Fletcher Parties attempt to argue the trial court incorrectly granted summary judgment because there are “many genuine factual issues”. (Fletcher Parties Appellants’ Brief at p. 7).

While Lyles takes exception to such assertions, the Fletcher Parties fail to recognize that the viability or lack thereof of the underlying claims has no bearing on the propriety of the ruling of the trial court that, based on the arguments presented by the parties, the claims of the Fletcher Parties are time barred. As will be demonstrated herein, the claims of the Fletcher Parties accrued more than three years before their complaint in this action was filed. Moreover, since the Fletcher Parties did not attempt to argue and/or otherwise plead that any tolling principles and/or any other point of law created a fact question on when their claims accrued at the trial court level, the ruling of the trial court was correct despite the Fletcher Parties now attempting, for the first time on appeal, to argue tolling principles apply and/or that a fact question exists in relation to when their claims accrued.

C. The Claims of the Fletcher Parties Accrued More than Three Years Prior to the Time the Fletcher Parties Filed Their Complaint in this Action.

As set forth herein, the Fletcher Parties filed their Complaint in this Action on October 29, 2003. In the trial court, the dispositive issue presented by the parties in relation to the statute of limitation defense of Lyles and Dabbs, was whether the claims of the Fletcher Parties accrued on or before September 16, 2000, the date the parties executed the Bridge Water Drive Purchase Contract, or October 30, 2000, the date of the closing of the subject transaction at issue in the Bridge Water Drive Purchase Contract. Lyles and Dabbs contended the former date controlled and the Fletcher

Parties contended the latter date was the proper date their claims accrued. (R.284-286 (Lyles Joinder in Summary Judgment of Dabbs – the claims accrued on or before September 16, 2000, the date the Fletcher Parties entered into the Bridge Water Drive Purchase Contract with Lyles); R.268 (Dabbs’s Summary Judgment Brief – same); R.294 (Fletcher Parties’ Response to Summary Judgment – “[n]o cause of action could possibly have accrued before October 30, 2000, because the house was not purchased until that date”).

- (1) The claims of the Fletcher Parties accrued on or before September 16, 2000, the date they entered into the Bridge Water Purchase Contract, because their right to sue vested no later than upon execution of the contract.**

When analyzing a statute of limitations issue under Mississippi law, “the initial determination must resolve the question of when the cause of action accrued, for it is at the moment of accrual that the clock begins to run on the statute of limitations.” *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 859, 861 (Miss. Ct. App. 2005), *rev’d on other grounds*, 955 So. 2d 764 (Miss. 2007); *See Kilgore v. Barnes*, 508 So. 2d 1042, 1044 (Miss. 1987) (under general statute of limitations, *Miss. Code Ann.* §15-1-49, “claims accrue and the clock begins to tick on the date of the wrongful act complained of”). For statute of limitations purposes, a claim accrues when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested. *Joiner Ins. Agency, Inc. v. Principal Casualty Ins. Co.*, 684 So. 2d 1242, 1244 (Miss. 1996); *Estate of Kidd*, 435 So. 2d 632, 635 (Miss. 1983).

- (2) Lyles’ violation of *Miss. Code Ann.* §§ 89-1-511 and 89-1-513 based upon Lyles allegedly falsely representing that Lyles was not aware of any defects or needed repairs in relation to the Bridge Water Drive Property in the statutorily required Seller’s Disclosure Statement (R.8-10 – Fletcher Parties’ Complaint at paras. 8 and 23).**

Based upon the only authority the undersigned counsel could locate that was directly on point, any breach and/or violation of Lyles’ statutory disclosure obligation in relation to the Bridge Water Property was consummated and the related cause of action accrued when Lyles allegedly violated the disclosure statute, which was when Lyles provided the Fletcher Parties with an allegedly

false Seller's Disclosure Statement. *Arbor Village Condominium Assoc. V. Arbor Village, Ltd.*, 642 N.E. 2d 1124, 1128-1129 (Ohio Ct. App. 1996)(in context of claim related to alleged violation of statutory disclosure duty in sale of condominium, court held claim accrued when violation of statute occurred which was when disclosure made). Such disclosure statement was provided to the Fletcher Parties prior to September 16, 2000, the date the Fletcher Parties and Lyles executed the Bridge Water Drive Purchase Contract. *See Miss. Code Ann. § 89-1-503* (in case of transfer of real property by contract, written disclosure shall be delivered to prospective transferee as soon as practicable before execution of the contract). As a result, the Fletcher Parties' claim against Lyles for allegedly violating *Miss. Code Ann. §§ 89-1-511 and 89-1-513* accrued more than three years before the Fletcher Parties filed their complaint (on October 29, 2003) and such claim is therefore time barred.

(3) Lyles alleged breach of the Bridge Water Drive Purchase Contract, including the implied covenant of good faith and fair dealing contained therein (R.8 and 10 – Fletcher Parties' Complaint at paras. 7, 22 and 23).

While the Fletcher Parties misrepresented to the trial court that they were not seeking relief against Lyles on a contract theory, the Fletcher Parties, through their counsel, have admitted that any contractual claims the Fletcher Parties had against Lyles accrued on September 16, 2000, the date the Fletcher Parties and Lyles executed the Bridge Water Purchase Contract. Specifically, Mr. Boackle, the Fletcher Parties' counsel, argued as follows before the trial court:

[Y]our Honor, this is not a breach of contract case. The Fletchers are not suing the Lyles because they breached a contract. **If the Lyles breached a contract and the Fletchers had not closed, then I agree that their cause of action against the Lyles would have started or come into existence on the date of the contract.** However, the Fletchers did close on this house on October the 30th, 2000, and before that time they did not have a cause of action against any of the other parties in this lawsuit.

(R. Supplemental Volume 1 of 1 filed 2/26/08 – March 12, 2007 hearing transcript at pp. 9 and 10).

Despite the Fletcher Parties' representations to the contrary, the Fletcher Parties have asserted a breach of contract claim, including the implied covenant of good faith and fair dealing, against Lyles in relation to the Bridge Water Drive Purchase Contract. (R.8 and 10 – Fletcher Parties'

Complaint at para. 7, 22 and 23). Specifically, the Fletcher Parties have alleged that Lyles materially breached paragraph 13 of the Bridge Water Drive Purchase Contract by making the following alleged false express contractual representation: "Seller furthermore specifically covenants and represents that he has no actual knowledge of any defects in the condition of the property ...". (R.8, 10 and 15 – Fletcher Parties' Complaint at paras. 7 and 22 and Exhibit B thereto).

Since the Fletcher Parties have admitted that their breach of contract claim accrued on the date the Bridge Water Drive Purchase Contract was executed (September 16, 2000) and such accrual date was more than three years before the Fletcher Parties filed their complaint (on October 29, 2003) the Fletcher Parties contractual claims are time barred. Even if the Fletcher Parties now try to distance themselves from this admission in their rebuttal, they cannot legitimately do so.

The ONLY asserted breach of such contract was Lyles alleged false express contractual representation in paragraph 13 of the contract that Lyles had no actual knowledge of any defects in the condition of the property. As a result, the Fletcher Parties right to sue Lyles for the alleged breach became vested (and hence their claim accrued) upon the Fletcher Parties' contractually obligating themselves to purchase the Bridge Water Drive Property through the execution of the Bridge Water Drive Purchase Contract that contained the alleged false express contractual representation. Despite the clarity of this reasoning, the Fletcher Parties boldly assert they did not have a cause of action against Lyles until the closing of the subject transaction, which occurred on October 30, 2000. Apparently, the Fletcher Parties would try to convince this Court that they could not have sought rescission of the Bridge Water Drive Purchase Contract for Lyles alleged material breach (i.e., the Fletcher Parties breach of contract claim did not accrue) until after the closing of the transaction. Any such argument has no basis in fact or law. Simply put, the closing date of the subject transaction has no bearing on when the Fletcher Parties had a vested right to sue Lyles for a material breach of the Bridge Water Drive Purchase Contract and/or when their breach of contract claim accrued.

- (4) **Lyles alleged fraudulent inducement of the Fletcher Parties to enter into the Bridge Water Drive Purchase Contract by making a false contractual representation that Lyles had no actual knowledge of any defects in the condition of the property (R.8-9 and 15 – Fletcher Parties' Complaint at paras. 7, 14-16 and Exhibit B thereto).**

As set forth herein, the Fletcher Parties admit they purchased the Bridge Water Drive Property in accordance with the Bridge Water Drive Purchase Contract. (R.8 – Fletcher Parties' Complaint at para. 7). The ONLY alleged false representation that Lyles made to the Fletcher Parties upon which they relied to induce them to purchase the Bridge Water Drive Property was the express contractual representation (contained in paragraph 13 of the contract) that Lyles had no actual knowledge of any defects in the condition of the property. The Fletcher Parties can not legitimately dispute this point. Paragraph 18 of the Bridge Water Drive Purchase Contract clearly and unambiguously provides, in pertinent part,

This contract incorporates all prior agreements between the parties, contains the entire and final agreement of the parties, and cannot be changed except by their written agreement. **Neither party has relied upon any statement or representations made by the other party or the sales representative bringing the parties together not contained herein.** Neither party shall be bound by any terms, conditions, oral statements, warranties, or representations and not herein contained.

(R.15 – Bridge Water Drive Purchase Contract at para. 18).

Any alleged fraudulent inducement of the Fletcher Parties to enter into the Bridge Water Drive Purchase Contract (through the express contractual representation by Lyles that Lyles had no actual knowledge of any defects in the condition of the property) was consummated and complete upon the execution of the contract by Lyles and the Fletcher Parties because such contract forms the basis for the Fletcher Parties' fraud claim. Thus, the Fletcher Parties were vested with the right to sue and their fraud claim accrued upon the execution of the contract. The law on this point is clear. *See Berry v. Chrysler Corp.*, 150 F. 2d 1002, 1004 (6th Cir. 1945)(in context of fraudulent inducement claim, court held alleged fraud consummated and cause of action accrued when contract

entered into); *Coffee v. General Motors Acceptance Corp.*, 30 F.Supp. 2d 1376, 1380 (S.D. Ga. 1998)(fraudulent inducement in execution of contract accrues on date of execution of contract); *Burton v. Terrell*, 368 F.Supp. 553, 557 (W.D. Va. 1973)(same); *In re Estate of Blake*, 723 N.Y.S. 2d 563,564 (N.Y.A.D. 2001)(same) ; *Andrus v. Ellis*, 887 So. 2d 175, 180 (Miss. 2004)(in the context of a claim where plaintiff alleged fraudulent inducement into entering into a loan agreement, claim accrued at the time the loan agreements were executed).

In *Ferrone v. Resnick*, 2002 WL 442314 (Conn. Super. Ct. Feb. 25, 2002), a case directly on point with the factual scenario presented by this case, the plaintiffs entered into a purchase and sale contract to purchase a home from the defendant seller on November 30, 1995. *Ferrone*, 2002 WL 442314 *1. On March 15, 1996, the parties closed on the property. *Id.* In analyzing the defendant's statute of limitation defense regarding plaintiffs' contract based claims and claim for fraud, the court concluded plaintiffs' claims accrued upon the execution of the purchase and sale contract, not the date the parties closed on the property. *Id.* at 5¹. Based on the foregoing authorities, the Fletcher Parties' claim of fraud in the inducement accrued upon the execution of the Bridge Water Drive Purchase Contract on September 16, 2000. As a result, their Complaint (filed on October 29, 2003) was untimely and the Fletcher Parties' fraud in the inducement claim is time barred. The ruling of the trial court in this regard was correct and should be affirmed.

Apparently recognizing the problem with their argument that their fraud in the inducement claim accrued on October 30, 2000 (the date of the closing of the subject transaction, the Fletcher

¹ While the statute of limitation for plaintiffs' contract based claims turned on the "accrual" date of the cause of action and the limitation period for the tort based fraud claim turned on the date "of the act or omission complained of", the courts analysis as to all claims focused upon the contract execution date and not the closing date. Such approach is consistent with the other authorities cited herein which address contractual and/or tort based claims outside the context of a real estate purchase contract.

Parties now raise, for the first time on appeal, that the applicable three year statute of limitation was tolled under the fraudulent concealment statute, *Miss. Code Ann. § 15-1-67* and/or that they sustained a latent injury, within the meaning of *Miss. Code Ann. § 15-1-49 (2)*, thereby making their claims timely. As will be addressed below, such an approach is improper and, in any event, neither of such theories have merit in this case.

C. The Fletcher Parties' assertions related to statute of limitations.

Assertion No. 1: The Fletcher Parties assert, for the first time on appeal, that the fraudulent concealment statute, *Miss. Code Ann. § 15-1-67*, operated to toll the applicable statute of limitation in this case. (Appellants' Brief at p. 13 and pp. 19-21).

Response: The Fletcher Parties are procedurally barred from raising this assertion for the first time on appeal. *Canadian National/Illinois Central Railroad Co. v. Hall*, 953 So. 2d 1084, 1098 (Miss. 2007); *Chantey Music Publishing, Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1060 (Miss. 2005)(same; "a trial judge cannot be put in error on a matter not presented to him."). Nowhere in the Fletcher Parties' response to Dabbs's summary judgment motion and/or Lyles separate joinder, did the Fletcher Parties make a fraudulent concealment argument. (R.258-259 and R. 288-296).

In addition to the procedural defects related to this argument, a party "who seeks to avail himself of the fraudulent concealment doctrine must plead fraudulent concealment and then prove that some affirmative act or conduct was done by the defendant which prevented discovery of a claim and that due diligence was performed on his part to discover it". *Carder v. BASF Corp.*, 919 So. 2d 258, 261 (Miss. Corp. App. 2005); See *State Industries, Inc. v. Hodges*, 919 So. 2d 943, 946 (Miss. 2006). In this case the Fletcher Parties neither pled fraudulent concealment nor offered proof that the defendants took some affirmative act which prevented discovery of their claim. (R.7-11 – Fletcher Parties Complaint). This is particularly true given the

fact that the Fletcher Parties obtained their own independent inspection report on the Bridge Water Drive Property.

Assertion No. 2: The Fletcher Parties likewise assert, for the first time on appeal, that their claims are based upon a latent injury, within the meaning of *Miss. Code Ann. § 15-1-49 (2)*, and that their claim did not accrue until they discovered their alleged injury, thereby making their complaint timely filed. (Appellants' Brief at pp. 7, 21 and 24).

Response: Once again, the Fletcher Parties are procedurally barred from raising this assertion for the first time on appeal. Moreover, the Fletcher Parties assert that they didn't know about their alleged "latent injury" until they became aware of the Advanced Engineering report referred to in their brief, until after the deposition of Mary Rodriguez, which occurred in 2005, over two years after their complaint in this action was filed. Such facts simply do not support the assertion of a latent injury because the Fletcher Parties had to have knowledge of their alleged injury at the time they filed their complaint in October of 2003 because of the requirements of M.R.C.P. 11.

In addition to the foregoing, for an injury to be latent it must be undiscoverable by reasonable means. *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 51 (Miss. 2005). The home inspection report of Advanced Engineering, which allegedly discloses the defect in the foundation of the Bridge Water Drive Property complained of by the Fletcher Parties, states, in pertinent part, "[a] three-inch change in elevation over 28 feet is considered to be a VISIBLE DEFECT. (R.300 – emphasis added). Under such circumstances, the Fletcher Parties are precluded from asserting a latent defect on the basis of such report and/or otherwise because any asserted visible defect is, by definition not undiscoverable. This is particularly so since the Fletcher Parties obtained their own independent home inspection as well.

D. Lyles adopts herein by reference the arguments advanced by Dabbs in relation to the issues that impact and relate to the allegations of the Fletcher Parties against Lyles.

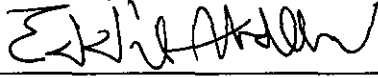
Pursuant to M.R.A.P. 28(i), Lyles adopts herein by reference all of the arguments of Dabbs that relate to and/or concern any of the claims of the Fletcher Parties asserted against Lyles.

VIII. CONCLUSION


For the reasons set forth herein, the trial court properly granted summary judgment to Lyles in relation to Lyles's statute of limitation defense. Lyles respectfully requests the Court to affirm the ruling of the trial court in relation to such motion.

Respectfully submitted this the 20th day of March, 2008.

Jimmie L. Lyles and Leoneze C. Lyles (deceased)

By: 

Their Attorney

Attorney for Lyles Appellees:
Eddie J. Abdeen (MSB )
Attorney at Law
Post Office Box 2134
Madison, Mississippi 39130
Telephone: 601-898-7972
Facsimile: 601-427-0040

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this day mailed by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to the following:

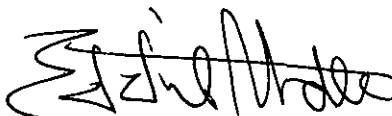
K.F. Boackle
Boackle Law Firm, PLLC
1020 Northpark Drive, Suite B
Ridgeland, MS 39157-5299

G. Todd Burwell, Esq.
Latham & Burwell, PLLC
618 Crescent Blvd., Suite 200
Ridgeland, Mississippi 39157

Honorable Samac Richardson
Madison County Circuit Court Judge
Post Office Box 1626
Canton, MS 39046

Ms. Lee Westbrook, Clerk
Madison County Circuit Court
Post Office Box 1626
Canton, MS 39046

This the 20th day of March, 2008.



EDDIE J. ABDEEN