

IN THE SUPREME COURT OF MISSISSIPPI

BERNIE WINKEL AND RACHEL WINKEL

APPELLANTS

V.

CASE NO. 2007-CA-01383

WINDSOR WINDOWS AND DOORS

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
COAHOMA COUNTY, MISSISSIPPI
CASE NO. 14-CI-02-0179-ABS-W

**BRIEF OF APPELLEE
WINDSOR WINDOWS AND DOORS**

ORAL ARGUMENT NOT REQUESTED

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WINDSOR WINDOWS AND DOORS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that in addition to the parties the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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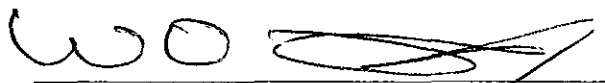

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I. STATEMENT OF THE ISSUE

Whether a window manufacturer, who designs component part windows and provides directions as to their proper installation, is a member of the class of persons entitled to the protection of MISSISSIPPI CODE ANNOTATED § 15-1-41.

II. STATEMENT OF THE CASE

The Circuit Court of Coahoma County, Mississippi granted Defendant, Windsor Window Company's Motion for Summary Judgment for the Plaintiffs' failure to file suit within the six-statute of repose provided by MISSISSIPPI CODE ANNOTATED § 15-1-41. (R. 258). The Plaintiffs appealed this decision and seek to have the decision reversed. (R. 261).

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The Plaintiffs filed their original Complaint against multiple Defendants on December 31, 2002, in the Circuit Court of Coahoma County, Mississippi. (R. 1). On June 1, 2004, the Plaintiffs filed their Second Amended Complaint naming Windsor Windows and Doors as an additional Defendant. (R. 7). Defendant, Windsor Window Company (incorrectly sued as Windsor Windows and Doors) filed its Answer, Affirmative Defenses, and Cross-Claim to the Second Amended Complaint on September 7, 2004. (R. 28). Windsor filed its Motion for Summary Judgment on April 4, 2007. (R. 41). On May 31, 2007, Circuit Court Judge Albert B. Smith, III conducted a hearing regarding Windsor's Motion for Summary Judgment. Counsel for Plaintiffs and Windsor attended and presented oral argument. On July 5, 2007, Judge Smith signed the Order Granting Defendant Windsor

Window Company's Motion for Summary Judgment. (R. 258). Said Order was filed with the Circuit Clerk of Coahoma County and entered on the docket on July 9, 2007. (R. 6, 258). On July 16, 2007, Judge Smith signed a Final Judgment, certifying the granting of summary judgment to be a final judgment for appeal purposes. (R. 259). Said Final Judgment was filed with the Circuit Clerk and entered on the docket on July 18, 2007. (R. 6, 259). It is this Final Judgment from which the Plaintiffs appeal.

B. STATEMENT OF RELEVANT FACTS

This action arises out of the Plaintiffs' claims of alleged construction deficiencies against multiple Defendants. (R. 42). Plaintiff, Bernie Winkel, was the general contractor for the building of his personal residence (subject house) located at 329 Westover Drive in Clarksdale, Mississippi. (R. 43). Plaintiffs took actual possession of the subject house in March of 1995. (R. 231).

Windsor designed, manufactured, marketed, advertised, and sold the windows installed in the subject house. (R. 43). Plaintiffs are seeking to recover damages from Windsor for the alleged defective windows which it designed, manufactured, and sold. (R. 43). Plaintiffs' Second Amended Complaint (filed on

June 1, 2004) relates back to the date of their initial complaint which was filed on or about December 31, 2002. (R. 1, 7, 43).

MISSISSIPPI CODE ANNOTATED § 15-1-41 provides the applicable six-year statute of repose regarding actions arising from construction deficiencies. The statute is triggered by the "written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof." The statute applies to actions brought to recover damages arising out of any alleged deficiency in the (construction) of an improvement to real property.

The windows which are the subject matter of the Plaintiffs' claims against Windsor constitute an improvement to real property pursuant to MISSISSIPPI CODE ANNOTATED § 15-1-41. The statute of repose applicable to the Plaintiffs' action against Windsor began to run in 1995 when the Plaintiffs occupied the subject house. The current action is time-barred because the statute of repose expired in 2001, six years after the Plaintiffs occupied the subject house.

III. SUMMARY OF THE ARGUMENT

MISSISSIPPI CODE ANNOTATED § 15-1-41 provides the applicable six-year statute of repose regarding actions arising from construction deficiencies. Manufacturers such as Windsor are entitled to § 15-1-41 protection. This statute was triggered by the Plaintiffs' actual occupancy in 1995. The Plaintiffs filed their original Complaint on December 31, 2002. The six-year statute of repose expired in this matter in 2001. Therefore, summary judgment was appropriate since there was no genuine issue as to any material fact and Windsor is entitled to judgment as a matter of law as the Plaintiffs' claim is clearly time barred by MISSISSIPPI CODE ANNOTATED § 15-1-41.

IV. ARGUMENT

In support of their argument that § 15-1-41 does not apply to Windsor, Plaintiffs cite Wolfe v. Dal-Tile, 876 F. Supp. 116 (S.D. Miss. 1995) and McIntyre v. Farrell Corporation, 680 So. 2d 858 (Miss. 1996). Plaintiffs argue that Windsor has misconstrued^{p. 3} the holding in Wolfe. Plaintiffs claim that Wolfe holds "that a supplier of a tile [floor] was not entitled to the protection of the statute of repose." However, Plaintiffs are incorrect. In Wolfe, the Court merely denied the defendant's motion for summary judgment, as it determined that there existed a genuine issue of material fact which should be submitted to the jury. Wolfe, 876 F. Supp. at 121. The Court specifically held "if the jury finds that defendant Dal-Tile either furnished the 'design' of the tile or 'planned' the construction of the tile, then plaintiffs' action will be dismissed as barred by Section 15-1-41." Id. Thus, it is the Plaintiffs - not Windsor - who have misconstrued the holding in Wolfe.

Next, Plaintiffs cite McIntyre for their argument that § 15-1-41 never applies to manufacturers and only applies to engineers, architects, and contractors. In McIntyre, the Mississippi Supreme Court answered a specific certified question from the Fifth Circuit:

Is an original equipment manufacturer, such as Farrell-Birmingham, Inc. and its corporate successors, that designs, manufactures, and ships a completed piece of industrial machinery an entity that performs or furnishes the "design, planning, supervision of construction, or construction" of an improvement to real property for [the] purpose of § 15-1-41? McIntyre, 680 So. 2d at 861.

The Court's answer to this certified question was "no." Id. at 866. However, the Court did not take the leap and hold that § 15-1-41 never applies to manufacturers. Instead, as Plaintiffs recognize, the Court said "the Legislature intended for § 15-1-41 to apply to architects, contractors and certain other professionals who are engaged in the real estate construction business and not to manufacturers of machinery or other products, which, for whatever reason, become attached to real property." Id. at 858. (Emphasis added.) Windsor notes that the Court did not finish its sentence with "manufacturers." Instead, the court intentionally added fourteen (14) words after "manufacturers" in order to clarify exactly which manufacturers are not afforded the repose protection of § 15-1-41. In fact, the next sentence of the Court's opinion states "[a]ccordingly, this Court concludes that § 15-1-41 does not provide repose protection for such a manufacturer." Id. (Emphasis added.) If the Court had

intended to exclude all manufacturers from § 15-1-41 repose protection, then it could have easily done so by excluding the above italicized words from its opinion.

In Theunissen v. GSI Group, 109 F. Supp. 2d 505 (N.D. Miss. 2000), the District Court dealt with the same issue - which entities are entitled to the protection of § 15-1-41. Defendant GSI designed a grain bin structure and manufactured its component parts. Id. at 511. Plaintiff argued that GSI was an original equipment manufacturer which, according to McIntyre, was not entitled to the repose protection of § 15-1-41. Id. The Court ultimately held that GSI was not an original equipment manufacturer and that GSI was in fact entitled to § 15-1-41 protection, as a designer and supplier of an improvement to real property. Id. at 511-12. The Court further held that § 15-1-41 barred all of Plaintiff's claims, including strict liability, warranty, and negligence. Id. at 512-13.

As in McIntyre and Theunissen, the only real issue in the case *sub judice* is whether Windsor is a member of the class protected by § 15-1-41. If a defendant supplier either designed or planned the construction of an improvement to real property, then such a supplier is entitled to § 15-1-41 protection. Wolfe, 876 F.Supp. at 121. Windsor designed and

installment?

planned the construction of the windows in the Plaintiffs' home. Thus, under Wolfe, Windsor would be entitled to § 15-1-41 protection. In McIntyre, the Court held that § 15-1-41 does not apply to a manufacturer of a piece of industrial machinery that just happens to become attached to real property. 680 So. 2d at 858. In the case *sub judice*, Windsor did not manufacture a piece of industrial machinery it designed and manufactured windows. (R. 258). Furthermore, the Mississippi courts have not specifically held that § 15-1-41 never applies to manufacturers. Wolfe, McIntyre, and Theunissen indicate that some types of manufacturers may still be entitled to § 15-1-41 protection.

Since the trial court granted Windsor's Motion for Summary Judgment in early July of 2007, a Mississippi District Court has granted summary judgment for a glass company in an almost identical situation. Jones v. Neema, Inc., No. 1:03cv113WJG-JMR, 2007 WL 2159327, at *3 (S.D. Miss. July 24, 2007). In Jones, the Defendant glass company filed a motion for summary judgment on the basis of the repose protection provided under MISSISSIPPI CODE ANNOTATED § 15-1-41. Id. at *1. The District Court granted the Defendant's motion, specifically holding "[t]he component part which Jones Glass supplied in this case, the glass itself, is part of an

improvement to real property, and Jones Glass may be afforded protection under the statute of repose." Id. at *3. The District Court also stated "[d]espite Plaintiffs assertions to the contrary, a company involved in the design, planning and supplying of an improvement to real property is entitled to protection under the statute [Section 15-1-41] provided all the conditions outlined in the statute are met." Id. Windsor is in virtually an identical position as the glass company in Jones. The windows manufactured by Windsor were a component part of Winkels' home. Therefore, Windsor is within the class of persons who may be entitled to the repose protection of Section 15-1-41.

Windsor was a manufacturer, not a mere supplier, that designed windows to be installed in the Plaintiffs' home following its guidelines for installation. (R. 258). The trial court held that Windsor "falls squarely within the terms of Miss. Code. Ann. § 15-1-41 and is entitled to its protections." (R. 257-58). Manufacturers such as Windsor can be protected depending on the specific facts of a case. The trial court recognized this fact in its Order granting Windsor's Motion for Summary Judgment, and the Court distinguished the case *sub judice* from the facts found in Wolfe and McIntyre. (R. 256-57). The instant Court explained

that Wolfe "dealt with a mere supplier, not a manufacturer." (R. 257). The instant Court further stated Windsor "designed the component window and provided directions to the contractor as to proper installation of the window. This clearly involves design, if not planning, on the part of the Defendant." (R. 257). The Court then distinguished McIntyre by stating that it involved a piece of machinery called a calender which "was a completely functional unit when it left the manufacturer and only needed to be reassembled and secured to a foundation when it arrived at the factory. In the case at bar, a window is only functional and serves its intended purpose when it is installed as part of the construction of real property." (R. 257).

In summary, the trial court was correct when it ruled that Windsor "falls squarely within the terms of Miss. Code Ann. § 15-1-41 and is entitled to its protections." (R. 257-58). The trial court accurately distinguished Wolfe and McIntyre from the case *sub judice* and held that MISSISSIPPI CODE ANNOTATED § 15-1-41 does apply to a manufacturer such as Windsor. (R. 257). The Circuit Court's ruling should be affirmed.

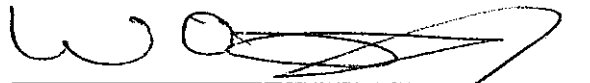
CONCLUSION

MISSISSIPPI CODE ANNOTATED § 15-1-41 provides the applicable six-year statute of repose regarding actions arising from construction deficiencies. As fully explained herein, some manufacturers may be entitled to § 15-1-41 protection. This statute was triggered by Plaintiffs' actual occupancy in 1995. Plaintiffs filed their Complaint on December 31, 2002. The statute of repose expired in this matter in 2001. Therefore, summary judgment was appropriate for Windsor since there was no genuine issue as to any material fact and Windsor is entitled to judgment as a matter of law as Plaintiffs' claim is clearly time barred by MISSISSIPPI CODE ANNOTATED § 15-1-41.

For the foregoing reasons, Appellee requests that the Final Judgment of the Circuit Court of Coahoma County, Mississippi be affirmed.

Respectfully submitted,

WINDSOR WINDOW COMPANY



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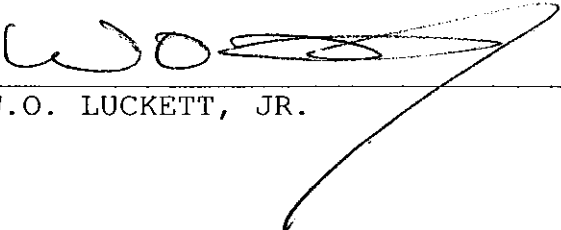
I, W.O. LUCKETT, JR., counsel for Appellee, Windsor Window Company, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing brief to:

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THIS, the 13th day of February, 2008.



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