

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-TS-01383

BERNIE WINKEL AND RACHEL WINKEL

APPELLANTS

V.

Case No. 2007-CA-01383

**TIM KEITH, TROY KEITH, TOMMY KEITH,
BARBARA KEITH, KEITH'S DRYWALL INC.
KEITH'S DRYWALL SUPPLY, INC., ETHRIDGE
CONSTRUCTION COMPANY, INC., STO
CORPORATION, WINDSOR WINDOWS AND DOORS
AND JOHN DOES 1-100**

APPELLEES

**APPEALED FROM THE CIRCUIT COURT OF COAHOMA COUNTY
CASE NO. 14-CI-02-0179-ABS-W**

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

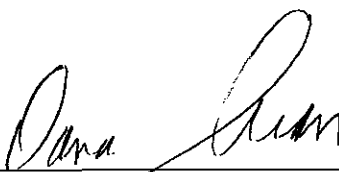
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal.

Honorable Albert B. Smith
Circuit Court Judge
P.O. Box 478
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BRIEF OF APPELLANT

COME NOW THE APPELLANTS/PLAINTIFFS, by and through counsel, and files this their Brief of Appellant and would show unto the Court that the trial court was in error in granting the Defendant Windsor Windows and Door motion for summary judgment.

I.

COURSE OF PROCEEDING BELOW

This cause of action arises out of a Complaint which was filed on or about December 21, 2001. An Amended Complaint was filed on or about June 1, 2004. Defendant Windsor Windows and Doors, (hereinafter referred to as "Windsor") filed their Answer on or about September 7, 2004. A Motion for Summary Judgment was filed by Windsor on or about April 4, 2007. On July 18, 2007, the lower court granted Windsor's Motion for Summary Judgment, from which the Plaintiffs Bernie Winkel and Rachel Winkel (hereinafter referred to as the "Winkels") filed their appeal.

II.

FACTS

This cause of action arises from a Complaint filed in the Circuit Court of Coahoma County Mississippi by the Winkels against Windsor Windows and Doors, among others. The Winkels were owners of a certain residence located in Clarksdale, Mississippi. (R. 7). The Winkels' property suffered certain damages which were alleged to be caused in part by windows manufactured by Windsor.

Defendant Windsor filed a Motion for Summary Judgment alleging that the Plaintiffs took actual possession of the property on or about March of 1995. (R. 43). Windsor designed, manufactured, marketed, advertised, and sold the windows which were installed in the Winkels' house. (R. 43). Windsor alleged that the complaint against them was filed on or about February 5, 2003. *Id.* In their Motion for Summary Judgment, Windsor alleged that the complaint was barred by MISS. CODE ANN § 15-1-41 which provides a six-year statute of repose. Windsor did not install the windows, but rather manufactured the windows. (R. 44). The Winkels responded to Windsor's Motion for Summary Judgment and alleged that the statute of repose relied upon by Windsor does not apply to manufactures, but only to certain construction industry professionals such as architects and contractors. The Winkels also offered the Affidavit of Ray Walls, the individual who installed the windows, stated that the windows were installed according to the instructions and directions provided by Windsor. (R. 210).

The trial court concluded that the statute of repose barred the Plaintiffs' complaint and granted Windsor's Motion for Summary Judgment. (R. 255). The trial court concluded that Windsor fell within the class of protected entities contemplated by the legislature when the statute was drafted. (R. 256). From that order, the Winkels timely perfected this appeal.

III.

SUMMARY OF ARGUMENT

Defendant Windsor cannot invoke the protection of MISS. CODE ANN § 15-1-41 because it does not apply to manufacturers. McIntyre v. Farrel Corporation, 680 So. 2d 858 (Miss. 1996). Therefore the trial courts order is in conflict with the McIntyre decision.

IV.

ARGUMENT

In granting summary judgment, the trial court relied exclusively upon MISS. CODE ANN § 15-1-41. This statute states impertinent parts:

no action may be brought to recover damages for injury to property, real or personal, or for injury to the persons, arising out of any

deficiency in the design, planning, supervision or observation of construction, or construction of an prudent to real property . . . 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. ...

15-1-41

This court has held that it was the legislature's intent in passing this statute of repose to protect the contractors who actually constructed the real property from suit after six years of written acceptance, but not the manufacturer or supplier of the products. The holding of the trial court completely turns the statute on its head, and would theoretically bar any claim or injury caused by a defective product in real property if the injury occurred more than six years after the completion of the construction. That is not what the legislature had in mind, and this court has clarified this particular point.

The Claim in not Barred by MISS. CODE ANN § 15-1-41

Windsor claims that the action is barred by MISS. CODE ANN § 15-1-41, a statute of repose which only applies to engineers, architects, and contractors. Windsor argues that the statute applies to them, as the manufacturer of the windows. However, their argument fails as a matter of law. Although Windsor cited the case of Wolfe v. Dal-Tile, 876 F. Supp. 116 (S.D. Miss. 1995) in support of their argument that MISS. CODE ANN § 15-1-41 applies to a manufacturer, an examination of this decision reveals otherwise. Instead, that case holds that a supplier of a tile was not entitled to the protection of the statute of repose. The arguments which Windsor makes completely misconstrues the holding of the Wolfe decision. Wolfe lends support that a manufacturer is not entitled to the protection of 15-1-41.

With respect to this statute of repose, the question of who the statute actually applies to was decided by the case of McIntyre v. Farrel Corporation, 680 So.2d 858 (Miss. 1996), which was certified to the Mississippi Supreme Court upon request from the Fifth Circuit. The McIntyre decision clearly states that 15-1-41 only applies to engineers, architects, and contractors. This case

specifically holds that the purpose of the statute is to only protect the above individuals and not the manufactures of products. According to the McIntyre Court, "this Court concludes that the Legislature intended for § 15-1-4 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. This would take Windsor out of the protection of the statute of repose as they are neither the engineers, contractors, nor architects with respect to the windows. In analyzing the legislature's intent in passing the statute, this court in McIntyre stated:

In the view of this Court, the Legislature could not have intended to create an irrational dichotomy between those manufacturers whose products are used as improvements to real estate and those who are not. Such a distinction would serve not only to set differing standards of liability for different products, but also to establish differing standards of liability for identical products based solely upon how they are used by the customer. For example, a manufacturer of a crane would presumably be granted repose protection for a crane which was bolted down and integrated with other machinery at a loading port, but would receive no protection for a crane which was used by a construction company at a variety of locations. Such an arbitrary result can not have been the Legislature's intent in passing § 15-1-41.

The application of § 15-1-41 to mass-manufactured products could lead to very dangerous and undesirable consequences for the citizens of this state. There are countless products which are generally used for a period far in excess of the six-year period set forth in the statute of repose, and such is particularly the case with products which are incorporated into buildings and houses. An interpretation of § 11-1-63 in the manner urged by Farrel would in effect serve as a signal to manufacturers that they need exercise a lesser degree of care with regard to products which will be used as improvements to real property than with regard to other products. The manufacturer of gas or water pipes which are placed in buildings, for example, could specifically manufacture the pipes using cheaper materials which are designed to last a minimum of six years, knowing that it would face a lesser degree of liability or even no liability if said pipes leaked and caused injury to third parties more than six years after the pipes were installed.

In the view of this Court, the bottom line is that the Legislature intended to provide enhanced protection against liability to certain construction industry professionals such as architects and contractors based on the nature of the professions.

Id. at 865

V.


CONCLUSION

In conclusion, the trial court misapplied MISS. CODE ANN § 15-1-41. Windsor is not in the class of individuals or entities that are protected by the statute. In granting summary judgment, the trial court ignored this court's clear pronouncement in McIntyre and for this court to affirm the granting of summary judgment, McIntyre would have to be overruled. Since McIntyre was answered pursuant to certification by the Fifth Circuit, both Mississippi law, and the Fifth Circuit's interpretation of Mississippi law relied upon by the certified question would be reversed. There is no need for such a reversal.

RESPECTFULLY SUBMITTED this the 14th day of January, 2008.

Respectfully submitted,
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By: 

Dana J. Swann 

CERTIFICATE OF SERVICE

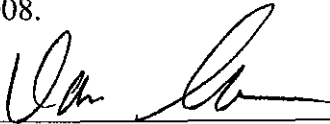
I Dana J. Swan, do hereby certify that I have this day served via U.S. Mail, postage paid, a true and correct copy of the above and foregoing document to the following:

Honorable Albert B. Smith, III
Circuit Court Judge
P.O. Drawer 478
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William O. Luckett, Jr., Esq.
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Hon. C. Kent Haney, Esq.
P.O. Box 206
Clarksdale, MS 38614

THIS, the 14 day of January, 2008.



Dana J. Swan