

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

ERVIN FUNDERBURG, ET AL

APPELLANTS

VERSUS

CAUSE NO.: 2008-CA-00235

PONTOTOC ELECTRIC POWER ASSOCIATION

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF CALHOUN COUNTY,
MISSISSIPPI; CAUSE NO.: 2005-178**

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

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

- (1) Honorable Andrew K. Howorth, Circuit Court Judge of Calhoun County,
Mississippi;
- (2) Honorable David L. Sanders, Columbus, Mississippi, Mitchell, McNutt & Sams,
Attorney for Defendant/Appellee;
- (3) Honorable Christopher J. Latimer, Columbus, Mississippi, Mitchell, McNutt &
Sams, Attorney for Defendant/Appellee;
- (4) Honorable Jon T. Crump, Tupelo, Mississippi, Shelton & Associates, P.A.,
Attorney for Plaintiffs/Appellants;
- (5) Ervin Funderburg, Plaintiff/Appellant;
- (6) Nancy Funderburg, Plaintiff/Appellant;
- (7) Pam Burt, Plaintiff/Appellant;

(8) Ervin Funderburg, Nancy Funderburg, and Pam Burt, collectively d/b/a Corner Closet, Inc., Plaintiff/Appellant;

(9) Corner Closet, Inc., a dissolved corporation, Plaintiff/Appellant;

(10) Ervin Funderburg, Nancy Funderburg and Pam Burt, collectively d/b/a CC Blouses, Plaintiff/Appellant.

Respectfully submitted, this the 14th day of August, 2008.



JON T. CRUMP, MS Bar #100511
ATTORNEY FOR
PLAINTIFFS/APPELLANTS

TABLE OF CONTENTS

Certificate of Interested Persons.....	i,ii
Table of Contents.....	iii
Table of Cases, Statutes and Other Authorities.....	iv
I. Statement of Issues Presented for Review.....	1
II. Argument.....	1
Issue I. : The Lower Court erred by determining that Plaintiff's second lawsuit was barred by the statute of limitations.....	1
Issue II. The filing of the first lawsuit and the reinstatement of it by Corner Closet tolls the statute of limitations.....	2
III. Conclusion.....	3
IV. Certificate of Service.....	4
V. Certificate of Filing.....	5

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

The Appellants have not cited any additional cases, statutes or other authorities in the Appellant's Reply Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the trial court erred in determining that the statute of limitations barred Plaintiffs' claims brought in the second lawsuit.

ARGUMENT

There is no attempt on the part of Appellants to confuse the issue, the issue is confused enough without any help. Appellants' position is based on simple arguments of fact. First, is that Corner Closet, Inc. became a new entity after its dissolution in 1993 for failing to file the proper paperwork. Second, the purpose of statute of limitations is not subverted by allowing this case to go forward against Pontotoc Electric Power Association with the current list of Plaintiffs.

ISSUE ONE: The Lower Court erred by determining that Plaintiff's second lawsuit was barred by the statute of limitations.

Corner Closet, Inc. was a Mississippi corporation prior to 1993. Upon its dissolution it ceased to exist. The Court has found that Corner Closet, Inc., the dissolved corporation, had no standing to sue. The Court also found that Ervin Funderburg was not the property owner of the property in question, and therefore, had no standing to sue. Appellants state that after 1993 a new entity was born. Without any filing of paperwork or grand statements, Corner Closet, Inc. became a partnership. It is this entity which was damaged by Pontotoc Electric Power Association. It was this entity which was named in the second suit.

It may be erroneous for Corner Closet, Inc. to call itself incorporated; however, that does not mean that Corner Closet, Inc. does not exist as some form of a business

entity, it only means that it operates as a partnership. Appellee's assertion that Corner Closet is "trying to have it both ways" by receiving protections of corporate status but not being bound to file the proper paperwork is erroneous. Corner Closet, Inc. is not claiming protection of corporate status. As a matter of fact, it appeared to be barred from doing so by its dissolution. The only issue is whether the filing of a lawsuit in the name of Corner Closet, Inc. should toll the statute of limitations when Corner Closet is incorrectly identified as a corporation instead of a partnership in the original Complaint. There is no argument to be made that the Corner Closet named was not intended to be the business entity operated by the Funderburg family. Any mistakes were as a matter of form only.

ISSUE TWO: The filing of the first lawsuit and the reinstatement of it by Corner Closet tolls the statute of limitations.

The purpose of the statute of limitations has been to prevent a Plaintiff from sitting on a suit until it would be most advantageous to that person to file that suit regardless of its effect on the Defendant. The Defendant must be notified of any potential claims within three years so that evidence will not have been lost or destroyed and the Defendant will be able to make itself an adequate defense. At its heart, the statute of limitations is a notice statute.

In the instant case, Pontotoc Electric Power Association knew it was being sued for the actions of March 3, 2002, by the filing of the first lawsuit. They knew what property was alleged to have been damaged. They knew how it was alleged to have been damaged. And further, they took up discovery and depositions of the witnesses and evidence which were germane to their defense of the suit. They have not been prejudiced

in any way in their ability to defend the suit by the filing of a new suit which correctly names the Plaintiff party in interest.

CONCLUSION

It is important that citizens of Mississippi have access to the justice system for civil matters. For this reason, the Court has shown a preference to err on the side of allowing people their day in court. Without some showing of prejudice in its ability to defend the suit, Pontotoc Electric Power Association should be made to answer for the allegations against them. For these public policy reasons and the reasons stated in Appellants' first Brief, Appellants respectfully ask that this case be reinstated in the Circuit Court of Calhoun County, Mississippi.

Respectfully submitted, this the 14th day of August, 2008.

ERVIN FUNDERBURG, ET AL

BY: 

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CERTIFICATE OF SERVICE

I, Jon T. Crump, do hereby certify that I have this day mailed, postage prepaid, U.S. Mail, a true and correct copy of the foregoing Reply Brief of Appellants, Ervin Funderburg, et al to:

Honorable Andrew K. Howorth
201 Courthouse
One Courthouse Square
Oxford, MS 38655

David Sanders, Esq.
Christopher J. Latimer, Esq.
Mitchell, McNutt & Sams
P.O. Box 1366
Columbus, MS 39703-1366

SO CERTIFIED, this the 14th day of August, 2008.



JON T. CRUMP

CERTIFICATE OF FILING

The undersigned, an employee of Shelton & Associates, P.A., certifies that on August 14, 2008, she deposited with the U.S. Mail, first class delivery, sufficient postage prepaid, addressed to the Clerk of the Mississippi Supreme Court, the original and three copies of Reply Brief of Appellants, Ervin Funderburg, et al.

Jennifer A. Vandewater