

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

COPY

CAUSE NO. 2008-CA-00404

FINICKY PET FOODS, INC.

APPELLANT

VERSUS

CITY OF OCEAN SPRINGS

FILED

APPELLEES

JAN 05 2008

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SUPREME COURT
COURT OF APPEALS**

**REPLY BRIEF OF APPELLANT,
FINICKY PET FOODS, INC.**

Oral Argument is Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel 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 possible disqualification or recusal:

1. Finicky Pet Foods, Inc.
2. City of Ocean Springs, Mississippi
3. Matthew Lott, Esq.
4. James L. Farrior, III, Esq.
5. Honorable Dale Harkey, Jackson County Circuit Court Judge

Respectfully submitted,



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COMES NOW, Appellant, FINICKY PET FOODS, INC., and files this, its
Reply Brief, as follows, to wit;

STATEMENT OF ISSUES

Whether the trial court erred in ruling that Finicky Pet Foods, Inc.'s ("Finicky")
claim was barred by the Mississippi Tort Claims Act one (1) year statute of limitations.

STATEMENT OF THE CASE

1. Nature of the Case

After deciding to move its seafood processing plant from Pascagoula to Ocean
Springs, Finicky obtained the necessary permits from the City of Ocean Springs in
March, May and June of 2002. Relying on the permits, Finicky spent well over Two
Hundred thousand dollars (\$200,000.00) renovating the building and purchasing
equipment for the new site. After public outcry began, in July 2002 the City suspended
the permits and enjoined Finicky from proceeding. On October 15, 2002 the City (board
of aldermen) held a meeting and voted to revoke the permits.

On November 5, 2003 Finicky filed its Notice of Claim pursuant to Section 11-46-15
of the Mississippi Code Annotated, (M.T.C.A.). (C.P. 130) On May 28, 2004 Finicky
filed its Complaint in the Circuit Court of Jackson County, MS. (C.P. 4-16)

On February 15, 2005 Finicky filed its Amended Complaint, specifying that its claim was based on the wrongful and negligent issuance of the permits. (C.P. 95-108) The City answered and filed a second Motion to Dismiss. (C.P. 115)

On May 13, 2005 a hearing was held on the second Motion to Dismiss. (T.R. 11-20)

On July 1, 2005 the trial court entered its Order Granting Motion to Dismiss. (C.P. 130-133) (R.E. 4-7)

In making its ruling the trial court seized on a point not raised by the City. Specifically, the court found that, "The November 6, 2002 approval of the October 15, 2002 minutes occurred at the next meeting (and within thirty (30) days). The signing of the minutes "within [thirty (30) days of the meeting' is a condition precedent for the minutes to date back and become valid 'from and after the date of the [October 15, 2002] meeting.'" See *City of Biloxi v. Cawley*, 278 So. 2d 389, 392 (Miss. 1973). (C.P. 130-133) (R.E. 4-7)

On July 13, 2005 Finicky filed its Motion to Set Aside Judgment. (C.P. 134-136) On February 8, 2008 the Court entered its final Order of Dismissal. (C.P. 140) (R.E. 3) Finicky timely appealed.

SUMMARY OF ARGUMENT

Finicky's Notice of Claim was filed on November 5, 2003, within one year of the discovery of the City's decision on November 6, 2002, to permanently revoke the negligently issued permits. Further, Finicky could not act until the City's decision was made official by entry of same on its minutes. Therefore, the trial court erred in determining that Finicky's claim was time barred and in dismissing same.

ARGUMENT

Appellee raises two (2) main points in its Brief.

1. The timeliness of the filing of the Notice of Claim on November 5, 2003.
(Appellee's brief, page 5) This is also the primary issue raised in Appellant's brief.
2. That Finicky's suit is barred by the doctrine of sovereign immunity. (Appellee's brief, page 9)

1. The timeliness of the filing of the Notice of Claim on November 5, 2003.

The City claims that the operative date for the filing of the Notice of Claim was one year from the October 15, 2002 meeting of the board of Aldermen. The trial court found that the November 6, 2002 signing of the minutes related back to the October 15, 2002 meeting and that Finicky's November 5, 2003 Notice of Claim was time barred. (C.P. 130-133) (R.E. 4-7)

Finicky would respectfully submit that its claim was timely filed since the Notice of Claim was filed on November 5, 2003, within one year of the discovery of the City's decision on November 6, 2002 to revoke the negligently issued permits upon which Finicky bases its lawsuit. Since the decision to revoke the permits was not entered on the minutes until November 6, 2002, Finicky would show that it had no way of knowing about that decision until then.

Any action taken by a board can only be evidenced by its entries on the minutes. Nichols v. Patterson, 678 So. 2d 673, 676-77 (Miss. 1996).

There is no actual record of the action taken by the City which could be discovered or

acted upon until such action was made official by being entered on the minutes.

Finicky's cause of action did not arise until such time as it could have learned about the City's actions, which can only be evidenced by entry of same on its minutes. This discovery rule has been held applicable to the one year time limit set forth in the M.T.C.A. in the past and was recently re-affirmed in Barnes v. Singing River Hosp. Sys., 733 So.2d 199, 204 (Miss.1999). "Thus, where an injury or disease is latent, a determination of when the statute of limitation begins to run focuses not on the time of the negligent act or omission, but on when the plaintiff discovers the injury or disease.

Barnes clearly decided that "...where the one-year statute of limitations applied, the claim was filed properly when it was filed within one year of the discovery of the defendant's negligent conduct". Barnes, at 204.

In Smith v. Braden, 765 So.2d 546 (Miss. 2000), this Court reiterated its earlier holding in *Barnes* incorporating the discovery rule into actions brought under the MTCA.

In an attempt to defeat this argument the City claims, "Here, Finicky representatives were present at the October 15, 2002 meeting and represented by counsel for the matters presented". (Appellee's brief p. 8) Finicky denies this assertion and would show that the record is totally devoid of any indication that it or its representatives were present at the October 15, 2002 meeting.

Therefore, Finicky could not have known about the board of alderman's decision to revoke the negligently issued permits until such time as same was evidenced by entry upon the minutes.

2. Finicky's suit is not barred by the doctrine of sovereign immunity.

Next the City argues that it is not liable for any claim arising out of the issuance of a permit. (Appellee's brief, page 9) This argument raises issues beyond the parameter of the trial court's decision that the suit was time barred and the City did not file a cross-appeal indicating its desire to raise this issue on appeal. Therefore, this issue should not be considered on appeal.

Further, the City's sovereign immunity argument clearly fails in light of the holding in Key Petroleum v. Housing Authority of City of Gulfport, 357 So. 2d 920 (Miss. 1978). As in the case at bar, Key involved a suit against the City of Gulfport for damages incurred by the plaintiff as a result of expenses incurred in reliance on a building permit issued by the City which was later wrongfully revoked. In Key, the Court held, "We know of no law prohibiting the City of Gulfport and its Housing Authority from reimbursing the complainant for its actual expenses incurred in beginning its building project as authorized by the City of Gulfport its in its building permit issued to the Complainant, and for which it paid a \$135 permit fee." Key, at 922. Likewise, Finicky should be able to recover the well over Two-Hundred Thousand dollars (\$200,000.00) it spent on the building in reliance on the permit issued and later wrongfully revoked by the City.

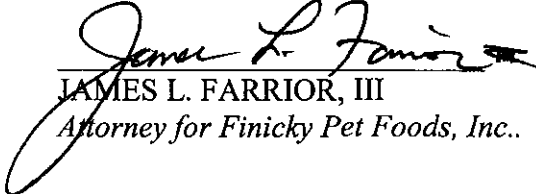
CONCLUSION

Finicky had no way of knowing about the October 15, 2002 decision to revoke the permits until it was entered on the minutes. Actions by a board of aldermen can only be

taken by entry of same on its minutes. The City's decision to revoke the negligently issued permits was not made public or official until November 6, 2002 when it was entered on the board of aldermen's minutes. Finicky's cause of action accrued when it learned about the City's decision when it was ratified by the board on November 6, 2002 by entry of same on its minutes and not at some earlier meeting. Finicky's Notice of Claim, filed on November 5, 2003, was timely.

Therefore, Finicky respectfully submits the trial court erred in dismissing the claim as time barred.

Respectfully submitted this the 5th day of JANUARY, 2008.


JAMES L. FARRIOR, III
Attorney for Finicky Pet Foods, Inc..

CERTIFICATE OF SERVICE

I, James L. Farrior, III, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief to the following persons at their usual mailing addresses:

Honorable Dale Harkey
P.O. Box 998
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SO CERTIFIED, this the 5th day of JANUARY, 2008.


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