

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

CAUSE NO. 2008-CA-00404

FINICKY PET FOODS, INC.

APPELLANT

VERSUS

CITY OF OCEAN SPRINGS

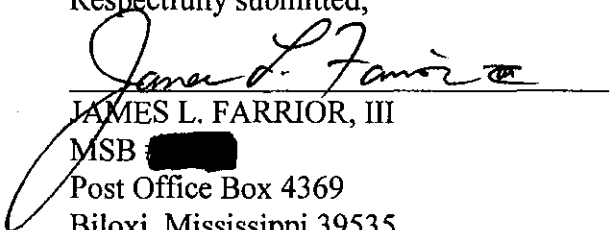
APPELLEES ✓

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
Appeal 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

This matter involves the appeal of a decision by an administrative agency, the
board of aldermen of the City of Ocean Springs, Mississippi (City). Appellant, Finicky
Pet Foods Inc., (Finicky) operated a fish processing plant, primarily producing salt water
bait and cat food, in Pascagoula, Mississippi for approximately 20 years. Around 2002
Finicky decided to relocate its plant to Ocean Springs. The intended new site was to be at
106 Industrial Park Circle, Ocean Springs, Mississippi. The building on the site needed to
be renovated in order to accommodate the business and Finicky obtained the necessary
permits from the City in March, May and June of 2002. Relying on the permits, Finicky
spent well over Two Hundred thousand dollars (\$200,000.00) on renovating the building
and purchasing equipment for the new site. Meanwhile, public outcry from a
neighboring subdivision about potential odor 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 6, 2002, the decision to revoke the permits was entered on the board of aldermen's minutes.

2. Course of the proceedings and statement of facts.

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) The City answered and thereafter, filed a Motion to Dismiss, citing the 10 day time limit set forth in Section 11-51-75 (2004) claiming that the board of aldermen meeting on October 15, 2002 began the 10 day time limit to file an appeal with the Circuit Court. (C.P. 24-25) Finicky responded to the Motion to Dismiss, stating that the City's decision was not final until entered on the minutes in December, 2003. (C.P. 37-51) Finicky was initially incorrect in its belief about the date of the entry of the decision and it was later discovered that the decision was actually entered on the minutes on November 6, 2002. (C.P. 130) (R.E.4)

On November 5th 2004 a hearing was held on the City's Motion to Dismiss. (T.R. 3-11) During the hearing the trial court, *sua sponte*, granted Finicky leave to file an Amended Complaint so as to clarify that the claim was based on the negligent and wrongful issuance of the permits. (T.R. 9)

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)

On July 13, 2005 Finicky filed its Motion to Set Aside Judgment. (C.P. 134-136)

On April 4, 2007 a clerk's motion to dismiss was filed and on April 23, 2007 Finicky filed a Motion to Keep Case Open. (C.P. 137, and 138-139)

On February 8, 2008 the Court entered its final Order of Dismissal. (C.P. 140) (R.E. 3)

On March 5, 2008 Finicky timely filed its Notice of Appeal. (C.P.141-142)

SUMMARY OF THE 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.

STANDARD OF REVIEW

The City filed a motion to dismiss which was granted by the trial court. A motion to dismiss raises issues of law. Reid v. Am. Premier Ins. Co., 814 So.2d 141, 144 (citing Sennett v. United States Fid. & Guar. Co., 757 So.2d 206, 209 (Miss.2000) This Court applies a de novo standard of review when deciding issues of law. The 'application of a statute of limitations is a question of law.' "Jackpot Mississippi Riverboat, Inc. v. Smith, 874 So.2d 959 (¶ 4) (Miss.2004).

ARGUMENT

The trial court's basis for dismissing Finicky's claim for damages was that the claim was time barred by the one (1) year statute of limitations provision that applies to government entities, Section 11-46-11(3)(Supp.2002) (M.T.C.A.). (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. Further, Finicky could not have known that the City was liable for negligently issuing the permits until such time as the City's actions were made official and entered on its minutes. This is true despite the fact that the City held an earlier meeting in October, prior to the actual entry on November 6, 2002, of the board of alderman's decision on its minutes as required by law.

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) and Sweeney v. Preston, 642 So.2d 332 (Miss.1994).

In Barnes, this Court repeated Sweeney's summary of the rationale supporting the application of the discovery rule to latent injury cases, as follows,

“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. Moreover, knowledge that there exists a casual relationship between the negligent act and the injury or disease complained of is essential because “it is well-established that prescription does not run against one who has neither actual nor constructive notice of facts that would entitle him to bring an action.” Barnes, at 204, (quoting Sweeney, 642 So.2d at 334 (quoting Williams v. Kilgore, 618 So.2d 51, 55 (Miss.1992))). Also, Sweeney, references Gentry v. Wallace, 606 So.2d 1117 (Miss.1992), in which this Court held that wrongful death and medical negligence were two separate causes of action, following the logic that “[p]rescription does not begin to run against one who is ignorant of facts that would entitle him to bring an action.” Sweeney, 642 So.2d at 335 (quoting Ayo v. Johns-Manville Sales Corp., 771 F.2d 902 (5th Cir.1985)) Barnes, at 204.

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”. *Id.* In Barnes, 733 So.2d at 205, this Court thoroughly described the history of the discovery rule at common law and its application to a variety of case types, reviewing cases such as Schiro v. Am.Tobacco Co., 611 So.2d 962, 965 (Miss.1992) (discovery rule as a common law exception), Owens-Ill., Inc. v. Edwards,

573 So.2d 704 (Miss.1990) (discovery rule exists in case of negligence or products liability cause of action involving latent disease), Evans v. Boyle Flying Serv., Inc., 680 So.2d 821 (Miss.1996) (holding that a notice of claim period did not begin to run until discovery of the injury), Smith v. Sneed, 638 So.2d 1252 (Miss.1994) (discovery rule applied in legal malpractice actions), Tabor Motor Co. v. Garrard, 233 So.2d 811, 814 (Miss.1970) (discovery rule in statutes of limitations applied to workers' compensation case), and Staheli v. Smith, 548 So.2d 1299 (Miss.1989) (statute of limitations in suit for defamatory material does not begin to run until reasonable discovery of the material). Remaining consistent with the above cases, this Court incorporated a discovery rule in actions brought under the MTCA involving latent injuries. Barnes, 733 So.2d at 205.

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. Given the relatively short one-year statute of limitations, it is particularly important.

In Evans, 680 So.2d at 827, this Court held it was not reasonable to bar a person's cause of action when that person initially had no knowledge that time was running on the statute. The Evans court found it to be an injustice to prevent a person's recovery "on a claim, i.e. an injury for which redress is guaranteed by our Constitution and statutory law, by being barred by a limitation period, in actuality a statute of repose if it were so construed, when they should not have reasonably known that damage had occurred." The Evans holding is similar to and consistent with this Court's earlier statement in Smith v. Sanders, 485 So.2d 1051, 1052-53 (Miss.1986):

In Sarris v. Smith, 782 So.2d 721, 724 (Miss.2001), this Court examined the application of the discovery rule to a wrongful death suit, stating:

"Sweeney stands squarely for the proposition that the statute of limitations can be tolled until a plaintiff gains actual knowledge of the defendant's negligent conduct, even if that knowledge is not gained until years after the death that is the basis for the suit.... The discovery rule should have been applied to toll the statute of limitations, because while Sarris knew that her husband was dead, under the facts of this case, she could not reasonably have known that the death was the result of negligence".

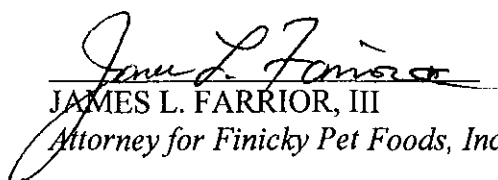
Likewise, Finicky could not have known about the board of alderman's decision to revoke the negligently issued permits until such time as same was evidenced by entry upon the minutes. Further, even if Finicky was aware of the October meeting, it could not act until the decision was made official by its entry upon the November 6, 2002 minutes.

CONCLUSION

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 official until November 6, 2002 when it was entered on the board of aldermen's minutes. Finicky's cause of action accrued when the wrongful conduct occurred by being 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 10th day of OCTOBER, 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 Brief to the following persons to their usual mailing addresses:

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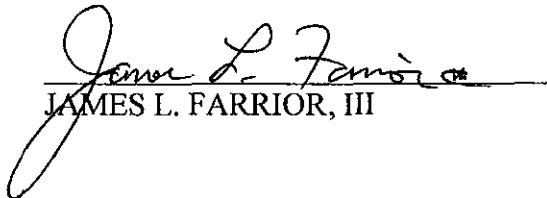
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SO CERTIFIED, this the 10th day of OCTOBER, 2008.


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