

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

**LUTZ HOMES INC. AND
BARRY R. LUTZ, INDIVIDUALLY**

APPELLANTS

VERSUS

CAUSE NO. 2008-M-00464-SCT

CARL WESTON AND LORRAINE WESTON

APPELLEES


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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Lutz Homes Inc. and Barry R. Lutz
1308 Shelby Lane
Ocean Springs, MS 39564

- Appellants

E. Foley Ranson
Post Office Box 848
Ocean Springs, MS 39566-0848

- Counsel for Appellants

Carl Weston and Lorraine Weston
7042 Redbud Court
Ocean Springs, MS 39564

- Appellees

Dustin N. Thomas
424 Washington Avenue
Post Office Drawer 580
Ocean Springs, MS 39566-0580


- Counsel for Appellees

Honorable Robert P. Krebs
Post Office Box 998
Pascagoula, MS 39568-0998

- Circuit Court Judge

Dated this the 3 day of December, 2008.

Respectfully submitted

A handwritten signature in black ink, appearing to read 'Dustin N. Thomas', written over a horizontal line.

DUSTIN N. THOMAS
Attorney for Appellees

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STATEMENT OF THE CASE

On or about the 6th day of June, 2005, Appellant, LUTZ HOMES INC., entered into a contract with the Appellees CARL WESTON AND LORRAINE WESTON for the construction of a new residence.

On or about the 24th day of April, 2006, Appellant, LUTZ HOMES INC., filed a Notice of Construction Lien with the chancery clerk of Jackson County, Mississippi.

Appellant LUTZ HOMES INC., did not have a residential contractor's license with the Mississippi State Board of Contractors until August of 2006.

Appellant, LUTZ HOMES, INC., was an unlicensed contractor at the time the lien was filed on the 24th day of April of 2006.

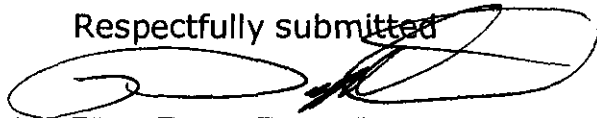
Appellees CARL AND LORRAINE WESTON filed a lawsuit against Appellants LUTZ HOMES INC., AND BARRY R. LUTZ for breach of contract, wrongful interference with a contractual right and slander of title, and further sought a preliminary injunction to have the construction lien filed by Appellant LUTZ HOMES INC., terminated.

Appellants CARL AND LORRAINE WESTON, filed a Motion for Declaratory Judgment in the trial court requesting that the Circuit Court declare whether or not it would construe MCA Section 73-59-9 (3) to prohibit Appellants LUTZ HOMES INC., AND BARRY R. LUTZ from proceeding in their Counterclaim.

The Circuit Court ruled that Appellant LUTZ HOMES INC., did not have a residential contractors license at the time it entered into the construction contract with the APPELLEES CARL AND LORRAINE WESTON and that MCA Section 73-59-9 (3) operated to bar appellant LUTZ HOMES INC., from pursuing any claims against Appellees CARL AND LORRAINE WESTON to enforce the building contract.

The Circuit Court dismissed the Appellants counterclaim.

Respectfully submitted

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DUSTIN N. THOMAS
Attorney for Appellees

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SUMMARY OF THE ARGUMENT

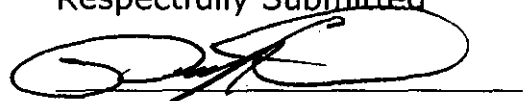
On or about the 6th day of June, 2005, Appellant, LUTZ HOMES INC., entered into a contract with the Appellees CARL WESTON AND LORRAINE WESTON for the construction of a new residence.

On or about the 24th day of April, 2006, Appellant, LUTZ HOMES INC., filed a Notice of Construction Lien with the chancery clerk of Jackson County, Mississippi. (RE 1-2)

Appellant LUTZ HOMES INC., was not a licensed contractor at the time the Appellant LUTZ HOMES INC., filed its Lien, by virtue of § 73-59-9 (3) of the Mississippi Code Annotated, Appellant LUTZ HOMES INC., was not a licensed contractor and was thus barred from enforcing its contract with the Appellees CARL AND LORRAINE WESTON.

The Circuit Court rightfully interpreted the statute and entered a Final Judgment dismissing the counterclaim of the Appellant.

Respectfully Submitted

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DUSTIN N. THOMAS
Attorney for the Appellees

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APPELLEES' ARGUMENT

On or about the 6th day of June, 2005, Appellant, LUTZ HOMES INC., entered into a contract with the Respondents for the construction of a new residence.

On or about the 24th day of April, 2006, Appellant LUTZ HOMES INC filed a Notice of Construction Lien with the chancery clerk of Jackson County, Mississippi. (RE 1-2)

By the Appellant's own repeated admissions, Appellant LUTZ HOMES INC., did not have a residential contractor's license with the Mississippi State Board of Contractors until August of 2006.

Appellant, LUTZ HOMES, INC., an unlicensed contractor at the time the lien was filed, by virtue of MCA § 73-59-9(3), may not file a Construction Lien. Miss Code Ann 73-59-9(3) is clear;

A residential builder or re-modeler who does not have the license provided by this chapter may not bring any action, either at law or in equity, to enforce any contract for residential building or remodeling or to enforce a sales contract.

Appellant has plead that Appellant BARRY R. LUTZ contacted the Mississippi State Board of Contractors to have his contractor's license name changed from BARRY R. LUTZ to LUTZ HOMES INC.

Appellees CARL AND LORRAINE WESTON would show that on page two of Appellant LUTZ HOMES INC., Application for Residential License, dated August 11, 2006, Appellant BARRY R. LUTZ included a handwritten note which reads;

"Dear Board, I would like to cont my current license issued to myself (Barry Lutz) + I would like a new one for my business—Lutz Homes, Inc Thank you!" (RE 4)

Appellant BARRY R. LUTZ did not request a change of name, he requested to maintain his own license, and obtain an entirely new one for Appellant, LUTZ HOMES INC. Acknowledging that Appellant LUTZ HOMES INC, was not a licensed contractor.

"The district court did not err in finding that Libbey was barred from bringing a suit even though he obtained a license subsequent to performing the work." *Libbey v. Ridges*, 113 Fed. Appx. 3; 2004 U.S. App. LEXIS 17046

In rendering its decision in *Libbey v. Ridges*, the 5th Circuit also cite to *Pittman v. Allenberg*, 276 So.2d 678 (Miss 1973);

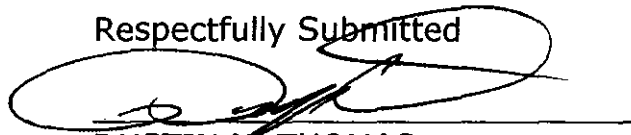
"The Mississippi Supreme Court interpreted the foreign corporations statute to require a license at the time the cause of action accrued to bring a cause of action in its courts. This suggest that § 73-59-9, which is similarly worded requires a license at the time the cause of action accrued as well. Moreover, in 1988 the legislature amended the foreign corporation statue to provide that foreign corporations could not

maintain a suit in Mississippi court, 'until it obtains a certificate of authority.' As section 73-59-9 was approved in 1995 after the above statute was amended, and the legislature did not use the explicit language above to allow contractors to bring suit in a Mississippi court after obtaining a certificate of authority, the legislature must not have intended to provide for that right. The district court did not err in finding that Libbey was barred from bringing a suit even though he obtained a license subsequent to performing the work." *Pittman v. Allenberg*, 276 So.2d 678 (Miss 1973);

CONCLUSION

Appellees CARL AND LORRAINE WESTON, would urge the Court to affirm the holding of the Jackson County Circuit Court that the Appellant LUTZ HOMES INC., was not a licensed contractor at the time it entered into a contract with the Appellees CARL AND LORRAINE WESTON, and is therefore barred from proceeding in its counterclaim in this cause by virtue of § 79-59-9 (3) of the Mississippi Code Annotated.

Respectfully Submitted



DUSTIN N. THOMAS
Attorney for the Appellees

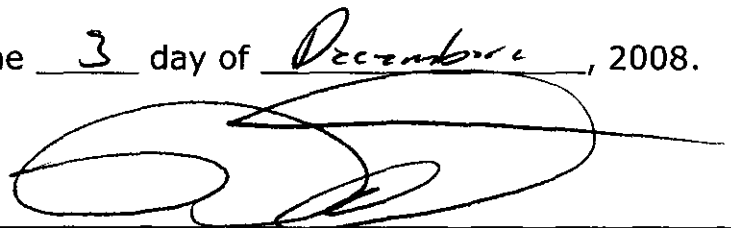
CERTIFICATE

I, DUSTIN N. THOMAS, do hereby certify that I have this day forwarded via mail, first class postage pre-paid, a true and correct copy of the above and foregoing Brief of the Appellees to the usual and regular mailing address of the following:

E. Foley Ranson
Esquire
Post Office Box 848
Ocean Springs, MS 39566-0848

Honorable Robert P. Krebs
Circuit Court Judge
Post Office Box 998
Pascagoula, MS 39568

SO CERTIFIED on this the 3 day of December, 2008.

A handwritten signature in black ink, appearing to read 'Dustin N. Thomas', is written over a horizontal line.

DUSTIN N. THOMAS

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