

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

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

APPELLANTS

VERSUS

NO. 2008-M-00464-SCT

CARL WESTON AND LORRAINE WESTON

APPELLEES

**APPEAL FROM THE CIRCUIT COURT
JACKSON COUNTY, MISSISSIPPI
CASE NO. 2006-00322(1)**

BRIEF OF APPELLANTS

ATTORNEY FOR APPELLANTS

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AND BARRY R. LUTZ, INDIVIDUALLY
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ORAL ARGUMENT IS NOT REQUESTED

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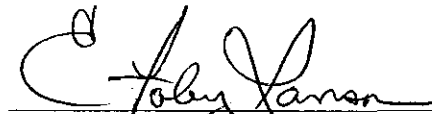
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Lutz Homes Inc. and Barry R. Lutz	-	Appellants
E. Foley Ranson	-	Counsel for Appellants
Carl Weston and Lorraine Weston	-	Appellees
Dustin N. Thomas	-	Counsel for Appellees
Honorable Robert P. Krebs	-	Circuit Court Judge

Dated this the 26 day of September, 2008.

Respectfully submitted,



E. FOLEY RANSON
Attorney for Appellants

IN THE SUPREME COURT OF MISSISSIPPI

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STATEMENT OF THE ISSUES

The only issue before this Court is whether under the specific circumstances of this case that Mississippi Code Annotated Section 73-59-9 (3) should be interpreted to preclude Lutz Homes Inc. from proceeding on its Counterclaim for breach of contract against Appellees, Carl and Lorraine Weston in the Circuit Court of Jackson County.

IN THE SUPREME COURT OF MISSISSIPPI

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STATEMENT OF THE CASE

Appellants would show that on or about June 6, 2005, Lutz Homes entered into a contract with Appellees, Carl and Lorraine Weston, for the construction of a new home. On August 29, 2005, Hurricane Katrina struck the Gulf Coast. This event had an extremely adverse effect on building contractors.

Subsequently a dispute arose and appellees filed a lawsuit against Appellants for breach of contract, wrongful interference with a contractual right and slander of title. Appellees further sought a preliminary injunction to have the construction lien filed by Lutz Homes Inc. terminated.

In support of these claims Appellees alleged that Lutz Homes Inc., by virtue of Mississippi Code Annotated Section 73-59-9 (3), was prohibited from filing a construction lien or maintaining a counterclaim against Appellees.

Appellant Barry R. Lutz has maintained a residential contractors license with the

Mississippi State Board of Contractors since April 14, 1999. In October, 2001, Mr. Lutz incorporated his business under the name Lutz Homes Inc. However, the residential contractors license remained in the name of Barry R. Lutz, Individually.

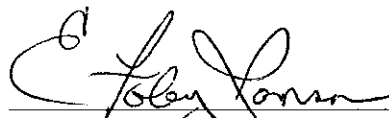
The Mississippi State Board of Contractors authorized a change of name on the license on August 11, 2006 - after the date of the construction contract of June 6, 2005 - from Barry R. Lutz to Lutz Homes Inc.

Appellants 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 from proceeding in their Counterclaim.

The Circuit Court ruled that Lutz Homes Inc. did not have a residential contractors license at the time it entered into the construction contract with Appellees and that MCA Section 73-59-9 (3) operated to bar Lutz Homes Inc. from pursuing any claims against Appellees to enforce the building contract.

Accordingly the Circuit Court dismissed Appellants' Counterclaim.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. Foley Ranson", is written over a horizontal line.

E. FOLEY RANSON
Attorney for Appellants

IN THE SUPREME COURT OF MISSISSIPPI

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SUMMARY OF THE ARGUMENT

Appellant Lutz Homes Inc. on June 6, 2005 entered into a residential building contract with Appellees, Carl and Lorraine Weston. On August 29, 2005, Hurricane Katrina struck the Gulf Coast and created many problems for building contractors.

Subsequently a dispute arose between the parties and appellees on October 26, 2006 filed a lawsuit against the Appellants seeking monetary damages for breach of the construction contract and other related relief.

On December 18, 2006, Appellants filed an Answer and Counterclaim seeking damages for breach of contract.

Appellees alleged that Lutz Homes Inc. did not have a residential contractors license on June 6, 2005 and that by virtue of the provisions of Mississippi Code Annotated Section 73-59-9 (3) that Lutz Homes Inc. was barred from enforcing the contract.

The specific language of this code section is as follows:

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.

Barry R. Lutz, individually, was granted residential contractors license No. R05148 by the Mississippi State Board of Contractors on April 14, 1999.

Mr. Lutz incorporated his business in October, 2001, as Lutz Homes Inc. However, the residential contractors license remained in the name of Barry R. Lutz, individually.

Mr. Lutz was not aware at that time that he could have requested that License No. R05148 be transferred from Barry R. Lutz to Lutz Homes Inc. or even that this action was desirable and/or necessary as a condition to any future attempt to enforce a contract.

When it was brought to his attention, Mr. Lutz made a telephone call to the Mississippi State Board of Contractors and a change of name for License No. R05148 was granted. The name on the license was changed from Barry R. Lutz to Lutz Homes Inc. This change was noted by a memorandum issued by the Mississippi state Board of Contractors on November 2, 2006 - over one (1) year after the date of the construction contract between the parties.

Beginning in April, 2002, Mr. Lutz completed and provided to the Mississippi State Board of Contractors a license renewal form which notified the Board that he had incorporated his construction business as Lutz Homes Inc. He has filed this form each and every year as required to maintain this license.

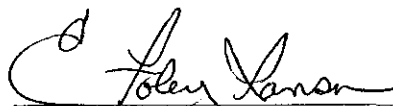
Mr. Lutz was not aware that he needed to request that the name on his license be changed from Barry R. Lutz to Lutz Homes Inc. So, technically speaking, at the time of execution of the construction contract (June 6, 2005) Lutz Homes Inc. did not have a residential builders license.

Appellants have argued that under the specific circumstances of this case, that Section 73-59-9 (3) should not be given a literal interpretation, i.e. Lutz Homes Inc. did not have residential contractors license on June 6, 2005 and therefore cannot bring a counterclaim to enforce its contract with Appellees.

The trial court applied a literal interpretation of the statute and entered a Final Judgment dismissing the counterclaim.

Appellants would submit that this was error and will state in more detail in its Argument the actions taken by Appellant Barry R. Lutz which would justify an interpretation of Section 73-59-9 (3) that would allow Appellants to proceed on their counterclaim.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "E. Foley Ranson", written over a horizontal line.

E. FOLEY RANSON
Attorney for Appellants

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APPELLANTS' ARGUMENT

On or about June 6, 2005, Lutz Homes Inc. entered into a contract with Carl and Lorraine Weston (the Westons) for the construction of a new home. On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast. This catastrophic event had an extremely adverse effect on building contractors due to loss of work crews and subcontractors, shortage of building materials, increased cost for labor and materials and other reasons.

After the storm, a dispute arose which ultimately led to the Westons filing a lawsuit against Appellants for breach of contract, wrongful interference with a contractual right and slander of title. Suit was filed on October 24, 2006 and also sought a preliminary injunction to terminate the construction lien filed by Lutz Homes Inc. (Clerk's Papers at Page 7)

Included in the Westons' Complaint was an allegation that at the time of execution of the contract that Lutz Homes Inc. did not have a residential contractor's license and was,

therefore, barred from using the courts of this state to enforce a contract for residential building.

The Westons' Complaint did not state the statute relied upon for this allegation. But the pertinent statute is Mississippi Code Annotated Section 73-59-9 (3) which states as follows:

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.

Appellants on December 18, 2006, filed an Answer and Counterclaim also seeking damages for breach of contract. (Clerk's Papers at Page 18)

While it is literally correct that on June 6, 2005, Lutz Homes Inc. did not have a residential contractor's license, Appellants believe that the above quoted statute should not, under the specific circumstances of this case, be interpreted in a manner that would bar Lutz Homes Inc. from proceeding on its counterclaim.

On April 14, 1999, Barry R. Lutz obtained from the Mississippi State Board of Contractors (the Board) a residential contractor's license, being License No. R05148.

Mississippi's law, entitled "Residential Builders and Remodelers" is found in Chapter 59 of the Mississippi Code of 1972 under Sections 73-59-1 through 73-59-21. The "penalties" section is found at Section 73-59-9 and the specific subsection we are concerned with is Section 73-59-9 (3), as stated hereinabove. The entirety of Section 73-59-9 is set forth in an addendum at the end of this brief.

Additionally of note is Section 73-59-3 which states that as a prerequisite for obtaining a renewal of a license, each licensed person shall submit certain information to the Board. This is done by completing and submitting (along with a fee) to the Board a form which was called a “Renewal Blank” and later a “Residential Builder or Remodeler Renewal Form”.

Mr. Lutz complied with this requirement and his annual renewal forms are attached in the Appellants’ Record Excerpts at Pages 10-17. (These forms were provided to the trial court and were considered in his ruling, but have not been made a part of the Circuit Court file. They are mentioned in the transcript at Page 5 and at Pages 7-11.)

Mr. Lutz was a sole proprietor when he obtained License No. R05148. On or about October 1, 2001, Mr. Lutz incorporated his business as Lutz Homes Inc. He was the sole incorporator, officer, director and shareholder.

Unknown to Mr. Lutz at that time, he could have applied for a change of name for License No. R05148 and it would have been granted. When he was made aware of this fact — in August, 2006 — Mr. Lutz made a phone call to the Board’s office in Jackson and at his request, the name on License No. R05148 was changed from Barry R. Lutz to Lutz Homes Inc. A copy of the confirming memo issued by the Board on November 2, 2006 is found in Appellants’ Record Excerpts at Page 9.

The license renewal forms submitted annually by Mr. Lutz are significant to this argument because of the information sought and provided thereon.

The renewal forms submitted by Mr. Lutz beginning in April, 2002 and continuing each year, notified the Board that he had changed his business entity to a corporation. The forms contain several questions requesting information about the corporation, all of which were answered.

The renewal form also requires the listing of three projects completed by the licensee. All of the projects listed after 2001 were constructed by Lutz Homes Inc.

This is significant because the Board has the duty to conduct a thorough investigation of all licensees seeking renewal for violations of their rules and regulations and to take appropriate disciplinary action for violations.

Neither Mr. Lutz nor Lutz Homes Inc. were ever notified by the Board that they were in violation of Section 73-59-9. In fact, Section 73-59-9 (1) states:

Any residential builder who undertakes or attempts to undertake the business of residential construction without having a valid license as required by this chapter ... shall be deemed guilty of a misdemeanor...

The obvious purpose of Section 73-59-9 is to protect the citizens of this state from unlicensed, unscrupulous and incompetent contractors. It is a consumer protection law. This previously little known statute has lately gotten much notice because of the many victims of contractor fraud following Hurricane Katrina. Citizens and newspaper editorials are calling for the strengthening of this law.

It would certainly not be fair to place Lutz Homes Inc. and Barry R. Lutz in this infamous category.

Mr. Lutz has taken and passed the Board's examination. He has paid all required fees and completed, signed and filed all required renewal forms. He had never been involved in any litigation over any construction project until after Hurricane Katrina. Until that time he was totally unaware that there was a problem with his contractor's license.

The State agency that is tasked with making and enforcing the rules and regulations for contractors has known since April 2002, that licensee, Barry R. Lutz, was operating and building homes as a corporation. Yet the Board never notified Mr. Lutz that he was doing anything improper or illegal.

It would certainly be reasonable for Mr. Lutz to believe that he was in compliance with all legal requirements for keeping his license. Clearly he was not attempting to circumvent or evade the law.

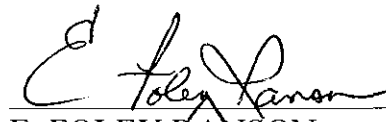
Affirming the dismissal of Appellants' counterclaim would put a double-whammy on them. First, they would have to defend a breach of contract claim with no opportunity to seek enforcement of that same contract for the cost of labor and materials they have incurred.

Second, Appellees will have the opportunity to paint Lutz Homes Inc. with the "unlicensed contractor" brush with all of that appellation's negative connotations before the jury. Surely such an inequitable outcome was not intended with the enactment of Section 79-59-9 (3).

CONCLUSION

Appellants would urge the Court to find that under the circumstances of this case that Section 79-59-9 (3) should not be construed to bar Lutz Homes Inc. from proceeding in its counterclaim in this cause.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "E. Foley Ranson", is written over a horizontal line.

E. FOLEY RANSON
Attorney for Appellants

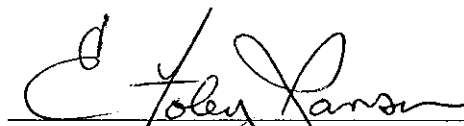
CERTIFICATE OF SERVICE

I, E. FOLEY RANSON, Attorney for Appellants, certify that I have this day served a copy of this Appellants' Brief by United States Mail, postage prepaid on the following persons at these addresses:

Mr. Dustin N. Thomas
Attorney for Appellees
Post Office Drawer 580
Ocean Springs, MS 39566-0580

Honorable Robert P. Krebs
Circuit Court Judge
Post Office box 998
Pascagoula, MS 39568-0998

This the 26 day of September, 2008.



E. FOLEY RANSON
Attorney for Appellants
Post Office Box 848
Ocean Springs, MS 39566
Tel: 228-875-8770
Fax: 228-875-9989

board, upon application, may issue an emergency license to persons who are residents or nonresidents of this state and who may or may not be otherwise licensed residential builders or remodelers. Such emergency license shall remain in force for a period not to exceed ninety (90) days, unless extended for an additional period of ninety (90) days by the board or until a contract to build or remodel entered into during the period of the emergency license has been completed.

Within five (5) days of any applicant beginning work as a residential builder or remodeler under this section, the employer or person contracting with such person shall certify to the board such application without being deemed in violation of this chapter, provided that the board, after notice and hearing, may take disciplinary action or revoke the emergency license upon grounds as otherwise contained in this chapter providing for such disciplinary action or revocation of a residential builder's or remodeler's license.

The fee for an emergency license shall be in an amount not to exceed Fifty Dollars (\$50.00) as determined by the board and shall be due and payable at the time of the issuance of such emergency license.

SOURCES: Laws, 1993, ch. 534, § 4; reenacted, 1995, ch. 431, § 4; reenacted without change, Laws, 2000, ch. 345, § 4, eff from and after July 1, 2000, and shall stand repealed July 1, 2005.

Editor's Note — Laws, 1993, ch. 534, § 13, provided for the repeal of this section effective July 1, 1995. Subsequently, Laws, 1995, ch. 431 § 13, amended Laws, 1993, ch. 534, § 13, so as to delete the language providing for the repeal of the section.

Laws, 1995, ch. 431, § 14, as amended by Laws, 2000, ch. 345, § 14, provides as follows:

"SECTION 14. This act shall take effect and be in force from and after its passage, and shall stand repealed on July 1, 2005."

Cross References — Revocation of license and other disciplinary actions, see § 73-59-13.

§ 73-59-9. Violations in connection with licensing; penalties; builder or remodeler without license may not bring certain actions. [Repealed effective July 1, 2005].

(1) Any residential builder who undertakes or attempts to undertake the business of residential construction without having a valid license as required by this chapter, or who knowingly presents to the board, or files with the board, false information for the purpose of obtaining such license, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than One Hundred Dollars (\$100.00) and not more than Five Thousand Dollars (\$5,000.00) or be imprisoned for not less than thirty (30) nor more than sixty (60) days in the county jail, or both.

(2) Any remodeler who undertakes or attempts to undertake the business of residential improvement without having a valid license as required by this chapter, or who knowingly presents to the board, or files with the board, false information for the purpose of obtaining such license, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than One Hundred

Dollars (\$100.00) and be imprisoned for not less than thirty (30) nor more than sixty (60) days in the county jail, or both.

(3) A resident or nonresident of this state who is licensed as a residential builder or remodeler and who is required to enforce any contract for the sale of real estate shall stand

SOURCES: Laws, 1993, ch. 534, § 4; reenacted, 1995, ch. 431, § 4; reenacted without change, Laws, 2000, ch. 345, § 4, eff from and after July 1, 2000, and shall stand repealed July 1, 2005.

Editor's Note — Laws, 1993, ch. 534, § 13, provided for the repeal of this section effective July 1, 1995. Subsequently, Laws, 1995, ch. 431 § 13, amended Laws, 1993, ch. 534, § 13, so as to delete the language providing for the repeal of the section.

Laws, 1995, ch. 431, § 14, as amended by Laws, 2000, ch. 345, § 14, provides as follows:

"SECTION 14. This act shall take effect and be in force from and after its passage, and shall stand repealed on July 1, 2005."

§ 73-59-11. A. July 1, 2005.

The board shall have the authority to take any action necessary to enforce this chapter:

(a) To conduct an investigation of any person who is licensed or licensed to practice as a residential builder or remodeler and who is required to file with the board a license or license to practice as a residential builder or remodeler.

(b) To obtain a license or license to practice as a residential builder or remodeler for a license or license to practice as a residential builder or remodeler. The board shall have the authority to take any action necessary to enforce this chapter:

(c) To maintain a list of all persons who are licensed or licensed to practice as a residential builder or remodeler and who are required to file with the board a license or license to practice as a residential builder or remodeler.

(d) To prepare a list of all persons who are licensed or licensed to practice as a residential builder or remodeler and who are required to file with the board a license or license to practice as a residential builder or remodeler. The board shall have the authority to take any action necessary to enforce this chapter:

(e) To take any action necessary to enforce this chapter:

(f) To adopt rules and regulations necessary to enforce this chapter.

SOURCES: Laws, 1993, ch. 534, § 4; reenacted, 1995, ch. 431, § 4; reenacted without change, Laws, 2000, ch. 345, § 4, eff from and after July 1, 2000, and shall stand repealed July 1, 2005.

Dollars (\$100.00) and not more than Five Thousand Dollars (\$5,000.00) or be imprisoned for not less than thirty (30) nor more than sixty (60) days in the county jail, or both.

(3) A residential builder or remodeler 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.

SOURCES: Laws, 1993, ch. 534, § 5; reenacted, 1995, ch. 431, § 5; reenacted without change, Laws, 2000, ch. 345, § 5, eff from and after July 1, 2000, and shall stand repealed July 1, 2005.

Editor's Note — Laws, 1993, ch. 534, § 13, provided for the repeal of this section effective July 1, 1995. Subsequently, Laws, 1995, ch. 431 § 13, amended Laws, 1993, ch. 534, § 13, so as to delete the language providing for the repeal of the section.

Laws, 1995, ch. 431, § 14, as amended by Laws, 2000, ch. 345, § 14, provides as follows:

"SECTION 14. This act shall take effect and be in force from and after its passage, and shall stand repealed on July 1, 2005."

§ 73-59-11. Additional duties of board. [Repealed effective July 1, 2005].

The board shall have the following additional duties for the purposes of this chapter:

(a) To conduct thorough investigations of all applicants seeking a license or licensees seeking renewal of their licenses and of all complaints filed with the board concerning the performance of a residential builder.

(b) To obtain information concerning the responsibility of any applicant for a license or of a licensee. Such information may be obtained by investigation, by hearings, or by any other reasonable and lawful means. The board shall keep such information appropriately filed.

(c) To maintain a list of residential builders and remodelers to whom licenses are issued, refused, revoked or suspended, which list shall be available to any interested person.

(d) To prepare annually a complete roster that shows all the names and places of business of the residential builders and remodelers licensed by the board during the preceding year and to forward a copy of the roster to each municipality and county in the state and to file the roster with the Secretary of State.

(e) To take disciplinary actions pursuant to the provisions of Section 73-59-13.

(f) To adopt rules and regulations governing disciplinary actions and the conduct of its hearings and to adopt such other rules and regulations as the board finds necessary for the proper administration of this chapter.

SOURCES: Laws, 1993, ch. 534, § 6; reenacted, 1995, ch. 431, § 6; reenacted and amended, Laws, 2000, ch. 345, § 6, eff from and after July 1, 2000, and shall stand repealed July 1, 2005.