

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

**NO. 2008-TS-00832**

**J. CRISS BUILDER, INC. AND  
JANIE CRISS, INDIVIDUALLY**

**APPELLANTS**

**VS.**

**WILLIAM P. WHITE AND  
PATRICIA L. WHITE**

**APPELLEES**

Appeal from the Circuit Court of Madison County, Mississippi

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**REPLY BRIEF OF APPELLANTS**

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**ORAL ARGUMENT NOT REQUESTED**

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## ARGUMENT

### **I. INTRODUCTION**

Appellants and Appellees are in agreement that the most critical issue in this case is proper application of Mississippi Code Annot. § 15-1-41—the statute of repose for injuries resulting from defects in construction. Specifically: When does the six years allowed for filing a suit commence to run? While Appellants have raised other issues which have merit, this case can be disposed of by a ruling that the statute of repose began to run in this case exactly when the statute so states: **after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof.** Appellees agree that if the statute of repose started to run when the subject residence was first occupied by Janie Criss that their suit was filed too late.

Appellees are in agreement with the statement of issues, the statement of the case and the statement of facts submitted by Appellants. Appellees submit that there are additional facts which are relevant in considering this appeal. Appellants generally agree with the additional facts stated by Appellees; however, some of the additional facts set forth by Appellees were disputed by Appellants. These disputed facts relate both to liability and damages and were in effect submitted to the jury which, upon consideration of all of the evidence presented in this case, rendered its verdict.

As for the issue of the improperly granted additur, there is a mathematical discrepancy. This discrepancy gives added support to Appellants' issue that the additur was improper and an abuse of discretion. The judgment entered in this case (R.328) fixed damages at \$30,000.00. The Plaintiffs, Appellees herein, moved for an additur which motion alleges the Plaintiffs/Appellees were entitled

to a verdict in the sum of \$114,222.00 and they prayed for an additur of \$84,222.00. The Court entered its order granting additur or in the alternative a new trial on damages on April 18, 2008. (R. 339) By this order the trial court granted Plaintiffs/Appellees an additur in the sum of \$103,701.82. In their statement of facts, Appellees submit that the additur increased the amount of judgment to \$103,701.82. Based upon the limited record which would reflect the trial court's reasoning and basis for the additur, the trial court increased the judgment to \$133,701.82. As stated in Appellants' brief, the additur is improper and even if Appellants are unsuccessful in their appeal, the additur should be set aside as it is clearly ambiguous, was improper and was an abuse of discretion.

The only way Janie Criss as an individual can be held liable in this case is by a proper piercing of the corporate veil of J. Criss Builder, Inc. As stated in Appellants' brief, Appellees set forth none of the required evidence for such a finding to have been made upon the trial of this case. In their brief, Appellees state: "[t]he trial Court made a finding that Janie Criss, individually, was the builder [of the subject residence]". Brief of Appellees, P. 4

While the trial court did make this finding, in a manner of speaking, it was only in comments made on the record in ruling on the motion for summary judgment. (R. 281-283) Further, the facts set out by the Court in the comments were completely incorrect. (R. 281) No such finding was made at any time during the trial of this case. No jury instruction on this alleged point of law was offered by Appellees nor granted by the trial court and there is no such finding or presumption which applies in this case.

In their brief, Appellees make a strained and tortuous attempt to distinguish this case such that the statute of repose did not expire before the case was filed. Appellees do not dispute that if the statute of repose commenced upon Janie Criss' occupancy of the subject residence, that this Court should reverse and render due to expiration of the statute of repose before the suit was filed. Appellees attempt to confuse and cloud the relevant inquiry by discussing which of the Appellants had or did not have a builder's license. Regardless, the statute of repose still starts to run when the property is first used or occupied, regardless of whether the builder was an individual or her wholly owned corporation and regardless of whether either of them had a builder's license,

## **II. THE TRIAL COURT ERRED IN NOT DISMISSING THIS CASE BASED UPON MISSISSIPPI CODE ANNOTATED § 15-1-41**

In their brief Appellees state:

The crucial question decided by the trial Court and to be reviewed by this Court is a determination as to the date when the statute of repose started to run against the Whites.

Brief of Appellees, P. 5

Appellants are in complete agreement with this statement. Appellants urge this Court to rule in their favor on this issue and determine the remaining issues presented on appeal to be moot.

While *Baldwin v. Holliman*, 913 So.2d 400 (Miss. Ct. App. 2005) provides instructive guidance concerning application of Mississippi Code Annot., § 15-1-41 it is not dispositive in any manner to a determination of the above recited crucial question.

Likewise, *Ferrell v. River City Roofing, Inc., et al*, 912 So.2d 448 (Miss. 2005) is not dispositive of the issue presented in this case. Mr. Ferrell and Appellees rely on an incorrect

interpretation of Mississippi Code Annot. §15-1-41. Ferrell and Appellees urge the Court to misinterpret the following statutory provision:

This limitation **shall not apply** to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time of the defective and unsafe condition of such improvement causes injury. (Emphasis supplied)

It is clear the provision Mr. Ferrell and Appellees rely upon relates to *claims by third parties* against one in possession of the property at the time the injury occurs such as premises liability claims. The provision which Appellees suggest extends the commencement of the statute of repose until when the Whites bought the residence, does not even apply in this case and was not intended to extend the statute of repose. What the recited provision clearly says is that § 15-1-41 does not even apply to claims against one in actual possession and control. In such cases the general statute of limitation, not a statute of repose, would apply.

To reach their conclusion that the statute did not start to run until Janie Criss sold the house to them, Appellees rely upon a hypothesis that: "it was the legislative intent that the statute began to run once the contractor, architect or builder had relinquished access and control to the property." (Brief of Appellees P. 7) No such intent appears in or may be inferred from the statute. The statute clearly states that it starts to run upon written acceptance or actual occupancy. Despite Appellees attempts to draw some distinction between Janie Criss, individually, and J. Criss Builder, Inc., the fact is stipulated that Janie Criss began to occupy the property as her residence in the month of November, 1996, thus triggering commencement of the six year period of repose at issue in this case.

### **III. IDENTITY OF THE CONTRACTOR IS IRRELEVANT**

Appellees have presented a lengthy discussion whereby they attempt to create some relationship between J. Criss Builder, Inc., which did not hold a builders license and Janie Criss who was a licensed builder. Nowhere within §15-1-41 is any reference made to the licensing status of any person, firm or corporation performing or furnishing the design, planning, supervision or construction of improvements to real property.

It is not the responsibility of the state's trial courts to police the legal requirements imposed upon residential builders and remodelers. This task rests upon the shoulders of the State Board of Contractors:

The purpose of Chapter 3, Title 31, Mississippi Code of 1972, is to protect the health, safety and general welfare of all persons dealing with those who are engaged in the vocation of contracting and to afford such persons and effective and practical protection against incompetent, inexperienced, unlawful and fraudulent acts of contractors.

Mississippi Code Annot. §31-3-2

The Board shall have the following powers and responsibilities:

...

- (e) To revoke by order entered on its minutes a certificate of responsibility upon a finding by the Board that a particular contractor is not responsible...
- (f) To adopt rules and regulations setting forth the requirements for certificates of responsibility, the revocation or suspension thereof, and all other matters concerning the same; ...

Mississippi Code Annot. §31-3-13

Pursuant to further legislative authority, the State Board of Contractors has certain disciplinary powers with respect to residential builders and remodelers. Nowhere in the disciplinary

statutes is any reference made to an extension of a statute of repose in the event of an unlicensed builder.

Appellees cite no law in their attempt to draw a meaningful connection between Janie Criss, individually and J. Criss Builder, Inc. Instead, they want this Court to ignore the corporate entity of J. Criss Builder, Inc. and hold Janie Criss, individually responsible for actions of the corporation. The interpretation urged by Appellees is not based upon statute or any previously decided case and this Court should not create any such interrelation upon the facts of this case.

#### **IV. THE TRIAL COURT ERRED IN ITS REFUSAL TO DISMISS THE COMPLAINT AGAINST JANIE CRISS, INDIVIDUALLY**

Appellees make no attempt to bring this case within the requirements imposed by *Gray v. Edgewater Landing Inc.*, 541 So. 2d 1044 (Miss. 1989) nor within those imposed by the recent case of *Rosson v. McFarland*, 962 So. 2d 1279 (Miss. 2007). Instead, Appellees continue in their attempts to have this Court rule differently based upon licensing status in determining whether or not to allow a plaintiff to pierce the corporate veil of a defendant. Appellees state: "The trial Court was correct in denying Janie Criss' motion to dismiss her individually in light of the fact that she was the licensed builder." This statement ignores all established law. There is no reason that Janie Criss as an individual should not have been dismissed from this lawsuit at the various points in time that she requested the trial court to do so.

#### **V. THE ADDITUR WAS CONTRARY TO LAW**

Mathematically, Appellees are in error concerning the additur granted. The jury verdict was \$30,000.00 and an additur of \$103,701.82 was granted for a total verdict of \$133,701.82. The source of the Court's guidance for the amount of the additur is an unsolved mystery. Appellees do not

attempt in any manner to explain this ruling. Instead, they try to support an award of \$114,222.00, further clouding the issue.

It is clear that the trial Court abused its discretion in granting the additur. As recognized by Appellees, the trial Court stated no reason for granting the additur nor for the amount of the additur. Instead, Appellees suggest that such findings were not necessary “in light of the fact that the amount of damages proven by the Whites was never contested or disputed.” (Appellees’ Brief at Page 13.) To the contrary, Appellants contested the nature and amount of the damages by cross-examination of Appellees’ witnesses and presentation of their own witnesses to contradict the damages claimed by Appellees. There were jury issues as to the amount of damages, their reasonableness and necessity, contributory negligence, failure to mitigate and other factors normally considered by a jury. The verdict was rendered based upon all such evidence submitted at trial. An award of \$30,000.00 in this case cannot by any stretch of the imagination be considered unreasonable in amount. It was an abuse of discretion of the trial judge to disturb the proper jury verdict.

Appellees suggest that *Dedeaux v. Pellerin Laundry, Inc.* 947 So. 2d 900 (Miss. 2007) somehow alters the statutory requirement for an additur or remittitur that the trial court “find[] that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of the credible evidence.” Mississippi Code Annot. §11-1-55. *Dedeaux* addresses only procedure in the event of an additur or remittitur, not the substantive requirements for the granting of an adjustment in a jury’s verdict. In this case, Appellants, Appellees and the trial court followed the procedure described in *Dedeaux*. After the trial judge granted the additur in this case Appellants exercised their option to appeal the entire case, including the additur order.

**Dedeaux** does not in any manner alter the requirements for an additur imposed by Mississippi Code Annot. §11-1-55.

### **CONCLUSION**

Appellants urge this Court to correct the error of the trial court in failing to dismiss this case on summary judgment, motion for directed verdict and finally on the post-trial motion for J.N.O.V. Applying the logic utilized by the trial court could extend the time during which a builder could be held liable for construction defects indefinitely. By the trial court's reasoning expressed in the bench ruling on the Appellant's motion for summary judgment, the statute of repose does not start to run when a builder builds and then occupies a structure until the building is sold to a third party. Assume a builder who builds a building for its own use, uses the building for 20 years and then sells the building to a third party. The trial court would have the statute of repose to start to run at the time of sale, thus extending the time for filing suit time for a period of twenty-six (26) years after first use or occupancy. This is contrary to the clear wording of the statute and established interpretations by this Court. This Court should summarily reverse and render the final judgment in favor of Appellees.

Respectfully submitted,

**J. CRISS BUILDER, INC. AND  
JANIE CRISS, INDIVIDUALLY**

BY: 

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**CERTIFICATE OF SERVICE**

I, Paul E. Rogers, do hereby certify that I have this day caused to be served via U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

Honorable Samac S. Richardson  
Madison County Circuit Judge  
P. O. Box 1885  
Brandon, Mississippi 39043

John W. Christopher, Esquire  
P.O. Box 982  
Ridgeland, Mississippi 39158-0982

Stephen S. Smith, Esquire  
1855 Lakeland Dr. Suite R-309  
Jackson, Mississippi 39216

THIS, the 21 day of January, 2009.

  
PAUL E. ROGERS